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Autor: Benedettelli, Massimo V.

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Responsibility of Corporate and Supervisory Bodies within the European «Market of Company Laws»: Issues of Conflicts of Jurisdictions and Conflicts of Laws

Massimo V. Benedettelli*

I. Foreword: directors' responsibility, conflict of laws and jurisdictions, European integration

1. The functions of company directors' responsibility

Companies are legal fictions which exist only «by virtue of the national legal system which governs their incorporation and operation»[1]; in particular, companies are legal instruments for the collective exercise, in an organized way, of entrepreneurial activities.

As such, companies can act – i. e. can internally take decisions and can externally implement them by entering into contracts or other relationships with third parties – only through decisions and actions of organs, i. e. individuals or collegiate bodies of individuals charged with the task of managing the company's business and/or supervising the company's management (jointly[2], the «company directors»).

The exercise of the powers so granted to company directors is always subject to their compliance with various rules or principles.

The breach of such rules or principles makes the company directors potentially responsible towards different «constituencies», whose interests may be prejudiced or otherwise affected by the relevant corporate action, such as: (i) the company (or the shareholders or partners as a group); (ii) shareholders or

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* Professore ordinario, University of Bari; partner, Freshfields Bruckhaus Deringer, Milan. – This work reproduces, with small changes and the addition of minimal bibliographical notes, a presentation made to the conference on *The Responsibility of Corporate and Supervisory Organs in Europe*, organized by the III European Jurists' Forum, Geneva, 8–9 September 2005. For a deeper analysis of the topics addressed hereunder the reader is referred to the essays of the author mentioned at footnotes 23, 24 and 26.

1 E. C. J., Case C-81/87, *Daily Mail*, [1988] *ECR* 5483, par. 19.

2 Due to the limited scope of this work the responsibility of both managerial bodies *stricto sensu* and supervisory bodies shall be treated jointly.

partners as individuals; (iii) bondholders; (iv) creditors; (v) parties investing within regulated markets in securities issued by the company; (vi) employees of the company; (vii) other groups of stakeholders to whom a State recognizes standing for the safeguard of identified sets of interests (environment, human rights, other areas relevant for the so-called «corporate social responsibility»); (viii) the national community at large.

Responsibility means that sanctions – civil sanctions (liability for damages, termination of employment contract), administrative sanctions, criminal sanctions – and other remedies (removal from the office, specific performance) may be applied against directors who are in breach of the obligations stemming from their position as corporate organs.

The functions of a directors' responsibility regime can be manifold: (a) to guarantee that the relationship between property and management, and, more generally, the organic structure of the relevant company, complies with the «model» of corporate organization set forth by the law applicable to such company; (b) to guarantee that the action of the relevant company in a given market complies with the rules which fix the organization and functioning of such market[3]; (c) to guarantee all the other abovementioned interests, in particular the interests of «weak parties» that enter into contact with the company, or other «public interests» which may be jeopardized by the company's activity. Moreover, the remedy of damages can be invoked against directors: (a) as a preventive or dissuasive tool; and/or (b) in order to reallocate costs and losses resulting from a given act or transaction, and therefore the relevant risks, in a «just» way, i. e. consistently with a certain model of distributive justice.

It is evident that all these interests can be evaluated differently, and all these variables can be combined in different ways, in the regulation that each State gives to the issue of the company directors' responsibility.

2. *Potential conflicts of laws and jurisdictions in the regulation of company directors' responsibility*

Companies, and directors carrying out activities in their name and on their behalf, may enter into contact with the social systems of different States.

As a result, they may become subject to potentially different laws and regulations due to a variety of elements which may work as grounds of jurisdic-

3 For an interesting precedent cf. *Trib. Milano*, 26 May 2005, *Promofinan SpA c. Fondiaria-SAI Spa*, in: Le Società, 2005, p. 1137, holding (in *obiter*) that the directors of a listed company which is the object of a mandatory take-over bid are responsible towards both the shareholders and the market in the event through acts or omissions they cooperate to the breach of rules aimed to protect the market's transparency and efficiency.

tion and/or as connecting factors. Such elements are, among others: the fact that the company is incorporated under the laws of a certain State; the localization of the «seats» of the company (i. e.: its registered seat, if any; its administrative seat; its principal place of business; its branches, agencies, or other forms of secondary establishment; its «centre of main interests» and «establishments», i. e., places of operations where non-transitory activities are carried out); the company's «nationality»; the regulated market, or markets in the event of «multi-listings», where the company's shares or other securities issued by the company are listed; the existence of special types of relationships with companies incorporated under a different law (i. e.: group relationships; cross-participations; mergers, de-mergers and other forms of corporate reorganization); the nationality, the domicile or the habitual residence of the director or of the party raising liability claims against the director; the choice of a certain law to govern the employment relationship between the company and the director or the fact that such relationship is otherwise «closely connected» to another State; the place where an harmful event has occurred or may occur; the place of performance of a contractual obligation.[4]

Indeed, in the «era of globalization» it is not difficult to conceive of a situation in which (a) a company is incorporated under the laws of State A, (b) its shares are listed in two different markets organized respectively under the laws of States B and C, (c) its management is carried out by three directors respectively nationals of States D, E and F and domiciled in States G, H and I, (d) such directors normally meet for taking business decisions in State L, (e) one of such decisions is to launch an hostile take-over of another company, which is incorporated under the laws of State M and whose shares are listed in a market organized under the laws of State N, (f) such take-over contemplates a subsequent merger with target, the shutting-down of plants located in State O, also in order to avoid the application of sanctions due to the breach of State O's environmental laws, and a massive laying off of employees working in State P.

States may provide for a different regulation of issues of directors' responsibility (or other issues the solution of which may be preliminary to the assessment of the breach by a director of his/her duties and obligations). Each State may in fact develop different models of corporate and market organization and may balance in a different way the various interests which, as indicated above, may be affected by any given corporate action.

Even when the substantive regulation adopted by the various legislators is identical, or similar, the fact that courts of different States may be competent

4 Additional grounds of jurisdiction and connecting factors may exist in case insurances covering risks related to directors' liability have been underwritten.

to adjudicate upon issues of directors' responsibility may still have a dramatic impact on the final outcome of the litigation due to a variety of factors, such as: (i) differences in the applicable rules of procedure; (ii) differences in the interpretation of the *lex causae*, particularly when the directors' liability is to be assessed on the basis of «general clauses» or principles («business judgement rule», «duty of loyalty», «duty of care», negligence, bad faith); (iii) interferences between proceedings on the ground of *lis alibi pendens* and «related actions»/connection; (iv) difficulties in obtaining abroad the recognition and enforcement of the judgment.

Then, it is not at all unlikely that conflicts of jurisdictions and conflicts of laws may arise in the area of company directors' responsibility.

3. *The coordination of the legal systems of the member States of the European Union on matters of company directors' responsibility*

Traditionally, each State coordinates through its own rules of private international law («PIL») the regulation that it gives to private matters characterised by «transnational» or «cross-border» elements and the regulation in force in foreign States connected to such matters. As pointed out by the most advanced legal scholarship, PIL rules may reflect different PIL methods, i. e. different goals and different techniques for achieving such coordination.[5]

In the area of company law, the classic goals of PIL («universal harmony of decisions», *proximitè*, procedural efficiency, etc.) are often reinforced, integrated or supplemented by more specific needs, such as those of guaranteeing: (a) *legal certainty* and *predictability* to the economic players; (b) *effectiveness* to certain «models» of corporate organization and market structure; (c) *protection* to substantive interests of categories of «weak parties».

These goals and needs assume quite specific features in the context of the European integration. In fact: (i) one of the main objectives of the European Community («EC») is the establishment and correct functioning of an «internal market» characterized by the free movement of the productive factors in the context of a regular competition among the economic players; (ii) a structural feature of the internal market is its «normative fragmentation», i. e. its submission to different and autonomous sources of law; (iii) this normative fragmentation may often be an obstacle to the operation of the market forces;

5 See Paolo Picone, Les méthodes de coordination entres ordres juridiques en droit international privé, in: Recueil des cours, Vol. 276, 1999, p. 9, and, with specific regard to EC law, Paolo Picone, Diritto internazionale privato comunitario e pluralità dei metodi di coordinamento tra ordinamenti, in: Paolo Picone (ed.), Diritto internazionale privato e diritto comunitario, Padova 2004, p. 485.

in special circumstances, it may rather be an opportunity for achieving higher levels of efficiency; in any case, it is a datum, which stems from the continuing sovereignty of the member States and from the autonomy that they still enjoy in regulating their own social systems; (iv) companies are among the main players within the internal market; (v) the submission of companies to conflicting regulations (including with respect to matters of company directors' responsibility) is then an issue which is relevant for the achievement of the EC objectives.

There can be then no doubt that EC law is, in principle, entitled to intervene in this area. The real problem is to identify the scope and limitations of such intervention.

4. *European Community law influences on the private international law systems of the member States*

It has recently become quite fashionable within the academic circles to talk of an emerging «EC private international law».

Of course, the increasing activism of the Brussels institutions, as well as some remarkable opinions of the European Court of Justice, in the field of conflicts of jurisdictions and conflicts of laws cannot be overlooked. It is submitted, however, that as long as the EC shall have not evolved into *a State*, i. e. into a sovereign entity able to enforce its law through its own judicial and administrative structure, the EC will not be a *forum* in a proper and technical sense, and therefore it will not have its own and autonomous *system* of PIL.

On the contrary, what the EC can certainly do is to *influence* the contents and working of the *national* PIL systems, i. e. the systems that each member State has adopted in the exercise of the normative autonomy that it retains in this field.

The scope of this influence can vary substantially – from the enactment of EC law uniform conflict rules, to the adoption of harmonization measures, to the fixing of mere *principles* of coordination among the member States' PIL systems – and shall depend on that specific equilibrium between «central powers» of the EC and member States' sovereignty that, in any given period of the European integration, and with respect to any specific area of private law, seems to be justified. In particular, these opposing needs must be balanced in light of two fundamental features of the EC «constitution», i. e.: (i) the principles of subsidiarity and proportionality, whereby the EC can «pre-empt» the member States only if and to the extent that this is strictly necessary for the achievement of the objectives of the European integration; and (ii) the principle of the *effet utile*, whereby all powers retained by the member States must be always exercised without jeopardizing, even indirectly, the ultimate aims of EC law.

With specific regard to the coordination of member States' PIL systems in the field of company law (and therefore also with respect to the specific issue of company directors' responsibility), various acts of EC law, already in force or in the process of being adopted, may be relevant, including: Regulation n. 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, replacing the 1968 Brussels Convention («Brussels I»); Regulation n. 1346/2000 on cross-border insolvencies (the «Insolvency Regulation»); Directive 2004/25 on takeover bids (the «Takeovers Directive»); other «company law» Directives adopted pursuant to art. 44(2)(g) of the EC Treaty; the 1980 Convention on the Law Applicable to Contractual Obligations, to be substituted by a forthcoming Regulation («Rome I»); the project for a Regulation on the law applicable to non-contractual obligations («Rome II»).

As argued below, the rules that can be derived from all these sources do not offer, however, a complete and consistent regulation (in general, and in particular for what concerns the preliminary question of characterization of the issue of company directors' responsibility).

II. The preliminary question: characterization of the issue of directors' responsibility

1. Characterization for private international law purposes

Within the PIL tradition, «characterization»[6] is the hermeneutic process whereby the interpreter identifies the conflict-of-law rule applicable to a given class of matters. In a more general sense, one can also call characterization the similar operation which is necessary in order to determine the scope of application of jurisdictional rules which provide for special or exclusive *fora* in connection with given classes of claims.

Customarily, characterization is carried out by the judge *lege fori*, i. e. exclusively by reference to rules or principles of domestic law. It may well be, however, that for various reasons – such as the peculiar PIL method used by

6 *«Qualification», «Qualifikation», «qualificazione»:* as known, the problem has been originally «discovered» by Etienne Bartin (Etudes des droit international privè. La theorie des qualifications en droit international privé, Paris 1899) and by Franz Kahn (GesetzesKollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts, in: Jehrings Jahrbücher, 1891, p. 1), and further explored by Ernst Rabel (Das Problem der Qualifikation, in: RabelsZ, 1931, p. 244). On the impact that EC law may have on issues of characterization, see Roberto Baratta, The Process of Characterization in the EC Conflict of Laws: Suggesting a Flexible Approach, forthcoming, in: Yearbook of Private International Law, 2004, n. 6.

the forum, the fact that the conflict rule to be interpreted results from an international treaty or from acts adopted within an integrated legal system as the EC – the characterization process must be carried out in a different manner.

It goes without saying that the question of characterization is preliminary to any analysis about the coordination of the legal systems of the EC member States in cross-border situations affecting company directors' responsibility. It is only after the question of characterization has been solved, and as a result of its solution, that it becomes possible to identify the applicable conflict rules and thereby to determine the competent judge and the applicable law.

2. *Different possible characterizations of matters of company directors' responsibility*

A comparative analysis of contemporary legal systems shows that the issue of the company directors' responsibility is (or may be) regulated under different, and alternative, perspectives.

First, it can be regulated as a matter of *lex societatis*: this is what most frequently happens, and quite obviously so, since the powers and consequent responsibilities of directors (in particular, vis-à-vis the shareholders of the company, but also vis-à-vis creditors and other third parties if the «veil» of the company's legal personality can be lifted) are one of the essential features of any corporate organization.[7]

Second, it can be regulated as a matter of *lex concursus*: the radical change of the regime applicable to a company when the same enters into a state of insolvency and/or is declared bankrupt, or is submitted to other types of mandatory liquidation or restructuring procedures, often triggers special managerial duties and consequent remedies (mostly actions for damages by the trustee-in-bankruptcy or liquidator), which may apply irrespective of the regulation set forth by the law governing the company.[8]

Third, it can be regulated as a matter of *lex mercati*: the effectiveness of securities laws may be pursued through liability for damages or other sanc-

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7 Cf. for French law *Cass. Civ.*, 1 July 1997, *Africatour*, in: Rev. critique, 1998, p. 292, as well as *Trib. Comm. Montpellier*, 29 May 2002, *SA Air Littoral c. SA SAIR Lines*, unpublished, on file with the author; for English law, *Chancery Division* (L. Collins, J.), 20 December 2001, *Konamaneni v. Rolls Royce Industrial Power (India)*, in: [2002] 1 *W. L. R.* 1269, and *Court of Appeal*, 14 October 2004, *Base Metal Trading v. Shamurin*, in: [2004] *EWCA Civ* 1316; for Italian law, see art. 25, second paragraph, of Law 31 May 1995, n. 218.

8 Cf. for English law the provisions on directors' liability for «wrongful trading» under section 214 of the Insolvency Act 1986.

tions imposed on directors who have breached certain obligations, obligations which apply for the simple fact that shares or other instruments are traded on the relevant regulated market, whatever the law governing the issuing company may be.[9] Indeed, a similar approach can be followed with respect to any other regulation, also of a mandatory nature, which defines its scope of application by reference to a certain market or to another predetermined territorial or social ambit.

Fourth, it can be regulated as a matter of *lex contractus*: directors can also be employees or *mandataires* of the company that they manage and consequently responsibilities (additional to those stemming from the company's *lex societatis* or to those deriving from mandatory rules regulating the activities of the company within the market) may derive from particular obligations undertaken by them in the relevant contract.

Finally, it can be regulated as a matter of *lex commissi delicti*: acts or omissions of a director in the performance of his/her managerial/controlling functions can trigger the commission of a tort, by the director himself/herself or by the company for which he/she is acting; particularly when such tort derives from breaches of criminal or administrative laws, the establishment of a liability regime affecting the individuals who maintained the unlawful behaviour can play an important preventive/dissuasive function.

It is obvious that all these different grounds under which State law may establish a company director's responsibility may reflect themselves in different characterizations for PIL purposes.[10]

In addressing this question, though, one should avoid the recurring mistakes of considering for such purpose as conclusive factors: the «location» of the relevant material rules in one or another law, or other regulatory instrument; the «nature» (contractual or tortuous) of the directors' liability; the type (substantive or procedural) of the relevant legal issue.

For instance, Italian bankruptcy law contains specific provisions on the entitlement of the trustee-in-bankruptcy to sue directors for damages.[11] It is clear, however, that such provisions apply only when the bankrupt is a company incorporated under Italian law, and have the exclusive function of shift-

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9 Cf. for French law *Trib. Paris*, 13 July 1988, *Holophane*, in: Rec. Dalloz, 1989, p. 572, and *Trib. Paris*, 13 January 1998, *Teknecomp*, in: Rev. soc., 1998, p. 572; for Italian law, the provisions of arts. 92, 94–101, 102–103, 113–116 of Legislative Decree 24 February 1998, n. 58 (as interpreted in Massimo V. Benedettelli, «Corporate governance», mercati finanziari e diritto internazionale privato, in: Riv. dir. int. priv. proc., 1998, p. 713) and the judgment by the *Trib. Milano*, 26 May 2005, *Promofinan Spa c. Fondiaria-SAI Spa*, quoted at fn. 3 above.

10 For a decision in which the issue of characterizing the directors' responsibility as a matter of contract law or as a matter of tort law is analyzed at length see *Court of Appeal*, 14 October 2004, *Base Metal Trading v. Shamurin*, quoted at fn. 7 above.

11 Cf. art. 146, second paragraph, of Royal Decree 16 March 1942, n. 267.

ing the *locus standi* for such actions from the shareholders and creditors to the trustee-in-bankruptcy. Similarly, within the U. S. legal system federal securities law can provide for «derivative suits» (i. e., actions brought against directors by a shareholder on behalf of the company for the recovery of damages to the benefit of the company) with respect to wrong-doings such as insider trading or other self-dealing transactions, but the assessment of the corporate prerequisites for bringing such an action (in particular, whether the directors can discontinue the same and the extent by which their discretion can be judicially challenged under the «business judgement rule») are a matter for the relevant (State) company law.[12]

Similarly, the classic distinction coming from the Roman law tradition between liability in tort and liability in contract may be a useful way to synthetically identify the legal regime applicable (on issues such as the allocation of the burden of proof between the claimant and the defendant, statutes of limitation, type of damages that can be recovered, etc.), but is not at all *per se* relevant for the PIL analysis, as demonstrated by the fact that some legal systems treat as contractual, while others as tortuous, those actions for damages against directors that within the same legal systems are deemed to be a matter of company law (rather than contract law or tort law).

As to procedural law issues, it is true that they are normally solved *lege fori*, i. e. by each judge through the application of the forum's law. However, certain procedural requirements may be essential to the implementation of a given substantive law regime, and in such a case the «split» between the *lex causae* and the *lex processi* may result in being unjustified. This may easily happen in the area of company directors' liability, e. g. when issues of *locus standi* for «derivate suits» have to be considered.[13]

It is submitted, then, that the preliminary question of characterization may be better addressed by giving overwhelming consideration to other factors, namely: (a) the goals pursued, as well as the particular PIL method adopted, by the relevant conflict rules in view of the coordination among the member States' legal systems, and (b) the influence that, as indicated above, EC law may exercise on such coordination.

As a matter of fact, the regulatory data that can be found in instruments of EC law are quite «fragmented», and none of them expressly addresses the matter of company directors' responsibility.

First, and *inter alia*, one can refer to art. 22(2) of Brussels I, which provides that controversies in the field of «validity, nullity or winding-up of companies», as well as in the field of «validity of decisions of the company's or-

12 Cf. *Supreme Court, Burks v. Lasker*, 441 U. S. 471, 486 (1979).

13 Similarly, *Chancery Division* (L. Collins, J.), 20 December 2001, *Konamaneni v. Rolls Royce Industrial Power (India)*, quoted at fn. 7 above.

gans» must be brought within the exclusive forum of the courts of the State in territory of which the company has its «seat», such «seat» to be determined by each judge on the basis of its PIL rules. One may wonder whether the latter class of controversies includes also actions filed against directors for the passing of «invalid» decisions, or more in general, actions against them for violation of their fiduciary or other duties.

Arts. 3.1, 3.2, 4, 28, and 25.1, second paragraph, of the Insolvency Regulation, provide, respectively, for: (a) the exclusive jurisdiction of the courts of the State in which the centre of main interests of the debtor is located with respect to the opening of a «principal» (and «universal») insolvency procedure; (b) the exclusive jurisdiction of the courts of the State or States in which the debtor has an establishment with respect to the opening of a «secondary» (and «territorial») procedure; (c) the submission of the insolvency procedures to the law of the State in which each procedure has been opened; (d) the automatic recognition of decisions which derive directly from the procedure or which are strictly connected to the procedure, even if taken by a different judge. One may wonder whether actions brought by a trustee-in-bankruptcy against directors of the insolvent company (in particular, actions for damages) and decisions taken in connection therewith fall within the uniform conflict regime set forth by the Insolvency Regulation, if and to the extent that such actions and decisions are contemplated by the law governing the bankruptcy, or are considered by such law as deriving directly from, or being strictly connected to, the procedure.

Art. 4 of the Takeovers Directive, provides, *inter alia*, that: (a) the authority competent to supervise the bid is (1) that of the member State in which the offeree company has its registered office if that company's securities are admitted to trading on a regulated market in that member State, or (2) if the offeree company's securities are admitted to trading on a regulated market of another member State, the authority of such other member State, or (3) if the offeree company's securities are admitted to trading on regulated markets of more than one member State, the authority of the member State on the regulated market of which the securities were first admitted to trading, or (4) if the offeree company's securities were first admitted to trading on regulated markets of more than one member State, the authority chosen by the offeree company; (b) the authority competent to supervise the bid shall apply the law of its own member State, in particular with regard to issues such as the consideration offered, the information to be given by the offeror, the contents of the offer document and the disclosure of the bid; (c) matters relating to the information to be provided to the employees of the offeree company and matters «relating to company law» – such as the percentage of voting rights which confers control on the offeree company, any derogation from the obligation to launch a bid, the conditions under which the board of the offeree company

may undertake any action which might frustrate the bid – fall within the competence of the authority of the member State in which the offeree company has its registered office; and (d) the authority referred *sub* (c) shall apply its own law. One may wonder whether issues of company directors' responsibility, in particular in connection with the directors' breach of the offeror's disclosure obligations or other provisions adopted in the context of the Directive, and with the enforcement of civil sanctions triggered by such breach, may fall within the scope of the abovementioned coordination rules.

Art. 1.2, lett. (e) and (f) of Rome I state that the uniform PIL regime on the law applicable to contractual obligations set forth by the Convention shall not apply to «questions governed by the laws of companies and other bodies corporate or unincorporate such as the ... internal organization ... of companies and other bodies corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body», as well as to the question «whether ... an organ is able to bind a company or body corporate or unincorporate, to a third party». One may wonder whether this implies an *a priori* and overall exclusion from such regime of all actions relating to company directors' responsibility, even when such responsibility has a purely contractual nature.

Art. 1.2, lett. (d) of Rome II declares that the uniform PIL regime on the law applicable to non-contractual obligations set forth by the (forthcoming) Regulation shall not apply to «the personal liability of officers and members as such for the debts of a company or firm or other body corporate or incorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents», such exclusion being justified in the Explanatory Memorandum attached to the proposal on the ground that such questions «cannot be separated from the law governing companies ... in connection with whose management the question of liability arises». Also in this case one may wonder whether this results into an *a priori* and overall carve-out from the uniform regime of actions relating to company's directors' responsibility, even when such responsibility has a purely tortuous nature.

It is apparent that all these provisions do not offer a consistent framework for solving the preliminary question on how to characterize issues of company directors' responsibility arising with respect to companies incorporated under the laws of a member State or otherwise acting within the internal market. It is then up to the interpreter to try to «organize» such normative data in a more systematic way and to look for more general principles of coordination of the jurisdictions and laws of the member States in this particular field.

It is submitted that a crucial role in this exercise must be played by the «Centros doctrine», i. e. that consistent body of case-law, recently developed

by the E. C. J. in the cases *Centros*[14], *Überseering*[15] and *Inspire Art*[16], which has paved the way to a «market for corporate models» by drawing from arts. 43 and 48 of the EC Treaty the entrepreneurs' right to «use» the company law that better fits their needs.

III. The impact of the «Centros doctrine» on the issue of company directors' responsibility

1. The judgments of the European Court of Justice in the cases Centros, Überseering and Inspire Art

The main holdings of the E. C. J. in the cases *Centros, Überseering* and *Inspire Art* can be summarised as follows: (i) the beneficiaries of the EC freedoms of movement have the right to choose, among the different company laws in force within the member States, that one which they believe to be best suited to conduct entrepreneurial activities within the internal market in an organized and collective form, this right stemming from a primary rule of EC law which has direct effect and therefore being enforceable before national courts[17]; (ii) this right exists also in the peculiar case of a company that carries on its entire business within a member State other than the member State under whose laws it has been incorporated, and which has with the member State of incorporation no other link or connection[18]; (iii) this right is violated whenever a member State does not recognize a company already incorporated under the laws of another member State *together with its full «legal status»*, i. e. not only when a member State denies to the company its very existence or ability to operate within such member State's territory, but also when the member State attempts to modify or integrate that company's *lex so-*

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14 E. C. J., Case C-212/97, *Centros Ltd.*, [1999] *ECR* I-1459.

15 E. C. J., Case C-208/00, *Überseering B. V.*, [2002] *ECR* I-9919.

16 E. C. J., Case C-167/01, *Inspire Art Ltd*, [2003] *ECR* I-10 155. For a recent interesting development, see the conclusions presented to the Court on 7 July 2005 by Advocate General Tizzano in Case C-411/03, *SEVIC Systems AG*, holding that the rules of the German *Umwandlungsgesetz* are inconsistent with arts. 43 and 48 of the EC Treaty to the extent that only mergers between companies incorporated under German law are regulated and not also mergers between German companies and companies incorporated under the laws of another member State (one wonders whether a similar position could be maintained with respect to the provisions of Sect. 427–427 A of the English Companies Act 1985, which establishes a procedure for the «amalgamation» of companies, but limits the benefit of this form of transformation to transactions involving only companies incorporated under the laws of England and Wales).

17 *Centros*, par. 27, 29; *Inspire Art*, par. 96, 138–139.

18 *Centros*, par. 16–17; *Inspire Art*, par. 95.

cietatis by applying rules of its own company law[19]; (iii) member States can limit this right only in exceptional circumstances, if they can allege the existence of an «imperative requirement in the general interest» and the relevant measure satisfies the tests of legitimacy, non-discrimination, necessity and proportionality[20]; (iv) this «rule-of-reason exception» *à la Cassis de Dijon* is to be applied strictly as far as the relevant measure impinges on «rules governing the formation and operation of the company», while the member States enjoy a wider discretion in connection with the application to foreign companies of rules on «the carrying on of certain trades, professions or businesses»[21]; (v) in the event that the EC has enacted uniform rules of company law (e. g., through Directives under art. 44.2(g) of the EC Treaty) and such rules are exhaustive, there is *a priori* no possible justification for any conflicting or additional measure of State law.[22]

It is submitted that these holdings do no reflect – and should not be mistaken with, as it often happens – uniform conflict-of-laws rules *stricto sensu* imposed by a judge-made EC law. Rather, and more consistently with the requirements of «subsidiarity» and «proportionality», they should be considered as grounds for the definition of more general *principles of coordination*[23] among the PIL systems of the various member States, which, as explained in the following paragraph, are (and should remain) autonomous and distinct.

2. *The «Centros doctrine»: a proposal*

In light of the above-mentioned case-law of the E. C. J., the following principles of coordination among the PIL systems of the member States can be derived from art. 43 and 48 of the EC Treaty.[24]

First, the EC guarantees the interest of each member State to autonomously determine the content of its company law, *including for what concerns its scope of application in cross-border situations*. This means that each

19 *Centros*, par. 21; *Überseering*, par. 59, 72, and especially 81 (stressing that the requirement of reincorporation for a company validly existing under the law of another member State, which law determines both its incorporation *and its functioning*, tantamount to an outright negation of the freedom of establishment); *Inspire Art*, par. 99–101.

20 *Centros*, par. 34–38; *Überseering*, par. 92–93; *Inspire Art*, par. 135, 140, 141.

21 *Centros*, par. 26.

22 *Inspire Art*, par. 69–72, 106.

23 On the difference between uniform conflict-of-law rules and principles of coordination of the member States' conflict systems, see Massimo V. Benedettelli, Connecting Factors, Principles of Coordination Between Conflict Systems, Criteria of Applicability: Three Different Notions for a «European Community Private International Law», forthcoming, in: Diritto dell'Unione Europea, 2005.

member State is also free to determine the prerequisites that must be satisfied for incorporating *(lato sensu)* and keeping in force companies governed *by its laws*, including the prerequisites for the applicability *ratione loci* of its company law in situations characterized by «transnational» elements. In so doing member States can adopt the connecting factor that they deem most proper, *including that of the «real seat» of the company*, provided that the relevant conflict-of-laws rule must play only a *unilateral function* (i. e., must serve only the purpose of fixing the limits of application of the forum's law and not also that of declaring the applicability within the forum of a foreign law).

Second, the EC obliges each member State to cooperate with the other member States by recognizing and enforcing within its legal system their company laws. In this context «recognition» and «enforcement» must be interpreted in the widest possible sense, as the giving effect within the forum to the foreign *lex societatis* in its entirety. This means that the forum, far from «bilateralizing» the conflict-of-law rule that it adopts for determining the scope of application of its domestic company law in transnational situations, will have to consider the incorporation of a collective entity in a foreign legal system as a datum, and will have to solve all conflict issues relating to such company by adopting, to the largest possible extent, the «point-of-view» of the legal system of the State of incorporation taken as a whole. This implies, *inter alia*: (i) to read the reference in art. 22(2) of Brussels I to the «seat» of the company as a reference to the State *under the laws of which* the company has been incorporated (rather than to the State of the place where the registered seat or the administrative seat are located), and to submit to the exclusive forum provided for by art. 22(2) *all, and exclusively*, those matters that the State of incorporation considers to be essential for the enforcement of its *lex societatis*, including matters not expressly mentioned by such provision; (ii) to solve questions of characterization – including the question whether a certain matter, having a contractual or a tortuous nature, can fall within the scope of the Rome I and Rome II regimes, respectively – by taking the same position that would be taken by a judge of the State of incorporation; (iii) to determine the law applicable to the relevant company on the basis of the *entire* private international law regulation of the State of incorporation, i. e. applying that regulation on issues such as the *renvoi*, the law applicable to «pre-

24 For a wider analysis of this topic, and a demonstration of the following theses, see Massimo V. Benedettelli, Diritto internazionale privato delle società e ordinamento comunitario, in: Paolo Picone (ed.), Diritto internazionale privato e diritto comunitario, quoted at fn. 5 above, p. 205, and Massimo V. Benedettelli, Brussels I, Rome I and Issues of Company Law, in: Johan Meeusen, Marta Pertegas, Gert Straetmans (ed.), Enforcement of International Contracts in the European Union, Antwerp/Oxford/New York 2004, p. 127 (also published in: Eur. Business Law Rev., 2005, p. 55).

liminary questions», the effects to be granted to peremptory rules of third States, etc.

Third, in the event that the varying content of the companies laws in force within the member States results in one and the same phenomenon of collective enterprise being incorporated *(lato sensu)* or otherwise regulated by the *leges societatis* of more than one member State, then preference must be given to the law which the shareholders, partners or promoters have chosen as law of incorporation.

Fourth, member States other than the member State of incorporation are entitled to adopt measures which integrate or derogate from the foreign *lex societatis*, or which otherwise affect the regulation of the company, but only exceptionally, if they can validly allege the existence of an «imperative requirement in the general interest» and the measure satisfies the «rule-of-reason» test.

Fifth, a member State, other than the State of incorporation, can legitimately regulate activities performed on its market or within its social community by a foreign company. In such a case the burden of arguing and proving that such measure is nevertheless prejudicial to the effectiveness of the *lex societatis* will fall upon the party that objects to the application of the relevant measure; if (and only if) such proof is given, the «host State» will have, once again, to rely on the «mandatory requirements» exception if it wishes to enforce the measure at stake vis-à-vis the foreign company.

Finally, in particular cases, and if justified by the needs of the integration process, EC law can limit the autonomy so retained by the member States and adopt uniform rules which may then fully pre-empt any further regulation by the member States on the relevant matter.

For the purpose of the present analysis it is important to stress the difference, emerging from the fourth and fifth principles above, between regulations affecting the «identity» of a company (U. S. lawyers would say, its «internal affairs») and regulations dealing with the activities carried out by the company, eventually within jurisdictions other than that of their State of incorporation, and to point out that, in the latter case, member States have a wider legitimacy in submitting foreign companies to their powers. This is confirmed by the approach taken by the Community institutions in drafting both the Insolvency Regulation and the Takeovers Directive.

The Insolvency Regulation focuses on the so-called «centre of main interests» of the debtor, which, consistently with the PIL method of the «jurisdictional approach»[25], identifies at once the member State which has jurisdiction

25 On which see extensively Paolo Picone, Il metodo dell'applicazione generalizzata della *lex fori*, in: Paolo Picone, La riforma italiana del diritto internazionale privato, Padova 1998, p. 371.

to conduct bankruptcy proceedings and the State under the law of which such proceedings have to be conducted. Contrary to the position that seems to emerge among the initial commentators and case-law, in my opinion the «centre of main interests» should not be considered a synonym for the «administrative seat», and has little or nothing to do with issues of *lex societatis*.[26] In fact: (i) the «interests» at stake cannot be other than the interests protected or otherwise considered *by the relevant bankruptcy law*; (ii) such interests can vary from State to State, given the different content of domestic bankruptcy laws and can also vary within the same State, given the differences between the various types of bankruptcy proceedings; (iii) the relative «importance» and the «localisation» in the space of such interests will depend in each individual case on the specific activities carried out by the relevant debtor and on the impact that such activities may have thereon. This means that a company, whatever its law of incorporation, is exposed to the risk of being submitted to the bankruptcy laws of other member States if it decides to carry on business in such other member States and the «centre of main interests» criterion is triggered. Actually, the various bankruptcy laws of the member States may lead to a different «localisation» of the «centre of main interests». This may cause positive conflicts of jurisdiction, which the Insolvency Regulation resolves on the basis of a prevention criterion (i. e., by giving precedence to those proceedings which have been initiated first).

Similarly, the Takeovers Directive affirms the exclusive competence of the authority of the member State's regulated market in which the securities the object of the bid are listed (or, in the event of securities listed in a plurality of markets located within the EC, the exclusive competence of the authority of one of those markets, as identified on the basis of pre-determined criteria), and commands the application by such authority of its own law. This means that the action taken by a company when soliciting the capital markets of member States other than that of its State of incorporation triggers *per se* the submission to the rules governing the markets of such other member States, rules which apply, in principle, irrespective of the *lex societatis* governing the relevant company.

Of course, the distinction between matters of «identity» and matters of «activity» of a company is not always clear-cut and the experience shows many «grey areas» of potential overlap between *lex societatis* and *lex mercati/lex concursus*. In the context of the EC such problems will have to be solved by way of acts of harmonization (such as, e. g., the Takeover Direc-

26 For the reasons pointed out in Massimo V. Benedettelli, ‹Centro degli interessi principali› del debitore e *forum shopping* nella disciplina comunitaria delle procedure di insolvenza transfrontaliera, in: Riv. dir. int. priv. proc., 2004, p. 499.

tive[27]), or, in the absence of specific rules, by the interpreter, on the basis of the above-mentioned principles of coordination among the member States' legal systems.

Actually, as indicated in the following paragraphs, such principles make it possible to define different «conflict models» through which the coordination of member States' jurisdictions and laws in the area of company directors' responsibility can be achieved.

3. *Four «conflict models» for the coordination of the jurisdictions and laws of the member States in the area of company directors' responsibility*

By «conflict models» I mean integrated sets of rules (and principles) on jurisdiction, applicable law, recognition and enforcement of judgments and other measures[28], which govern the coordination of the member States' legal systems within the «European legal space».

Within the ambit of company directors' responsibility, four different conflict models seem to be conceivable: (i) the *lex societatis* model; (ii) the *lex mercati* model; (iii) the *lex contractus* model; (iv) the *lex delicti* model.

The *lex societatis* model is grounded on the assumption that the responsibility of company directors' is normally a matter of company law; company laws differ, however, as to scope, conditions, limits of such responsibility and of the remedial actions thereto related, so that some form of coordination is needed. This model commands that within the EC all member States (i. e., their judges, public administrations, public notaries) solve all those issues (including the preliminary question on characterization) always and exclusively on the basis of the regulation provided by one and the same legal system, this being the legal system of the member State under the laws of which shareholders and partners have chosen to incorporate the company. The member State of incorporation will then enjoy exclusive jurisdiction (and will, in

27 As indicated, art. 4 tries in fact to draw a line between matters relating to the bidding procedure and matters of company law: whether the distinction so made is clear and workable is a different issue.

28 Not always courts seem to appreciate the need of considering all these issues in a consistent and coordinated way: cf., for instance, the judgment of the *Trib. Comm. Montpellier*, 29 May 2002, *SA Air Littoral v. SA SAIR Lines*, quoted at fn. 7 above, which acknowledges the jurisdiction of the French courts under art. 5(3) of Brussels I by characterising as a tort matter an action for damages filed against the directors of a Swiss company, but then applies (even ... in an innovative way) substantive rules of Swiss company law (establishing the directors' *«responsabilité sur la confiance decue»*) to adjudicate on the merits of the claim, and this without checking whether such «split» approach is consistent with the French (and/or Swiss) private international law regulation of these kind of cross-border matters.

principle, apply its own law) with regard to actions against directors which are based on the company's *lex societatis*, at least to the extent that the *lex societatis* considers these actions as an essential element of the company's organization, since this triggers the exclusive forum contemplated by art. 22(2) of Brussels I; and decisions taken by the judges of the member State of incorporation will circulate with the EC on the basis of the special regime set forth by arts. 35.1 and 45.1 of Brussels I with respect to exclusive fora.

The *lex mercati* model considers that States have a legitimate interest in regulating the activities carried out by companies, whether national or foreign, within their market. Such regulation normally takes place through the enactment of rules which become applicable whenever the company establishes a «contact» with the particular community whose interests the State intends to protect in the relevant area (insolvency, capital markets, labour, environment). These rules are often mandatory and may contemplate sanctions (including liability for damages) for the company's directors; moreover, States may wish their administrative or judicial authorities to have exclusive powers for the enforcement of such regulations. As demonstrated by the Insolvency Regulation and by the Takeovers Directive, EC law may guarantee the member States' interest in having their market regulations enforced on the basis of a conflict model that tries to achieve the identity between *forum* and *jus* and which distributes the regulatory competence on the basis of uniform, predetermined criteria. These criteria may lead to the acknowledgement of the exclusive competence of one member State only, or may give rise to the concurrence of different jurisdictions (e. g., the different jurisdictions of the different markets in which the company, *ex hypothesis*, is simultaneously active); in the latter case, conflicts of jurisdictions may potentially arise and such conflicts must be solved on the basis of uniform rules.[29] The competent member State will apply its substantive law exclusively, and such law shall constitute also the sole source to be «consulted» for solving questions of characterization. Judgments and other measures issued on these grounds may then be recognized and enforced by all other member States under (or along the lines of) the Brussels I regime.

The *lex contractus* model refers to the circumstance that, as mentioned above, directors can be liable for breaches of their duties vis-à-vis the company, the shareholders or other entities also on purely contractual grounds. Should this be the case, the uniform conflicts regime set out in Rome I and Brussels I shall apply. As to the jurisdiction, in addition to the forum of the

29 E. g., the Insolvency Regulation solves this problem on the basis of a criterion of priority, with respect to the opening of the «principal» procedure, while admits the possible concurrence of various «secondary» procedures, the effects of which are however limited «territorially», such procedures being able to affect only assets of the debtor located in the relevant member State.

domicile of the defendant and to the other fora contemplated by other «general» provisions of Brussels I (including art. 23 on contractual choices of jurisdiction), it will be possible to file claims under the «special» criteria of jurisdiction set out in art. 5(1) with respect to litigation in contractual matters or in arts. 18–20 with respect to litigation relating to individual employment contracts (or in arts. 8–14 with respect to litigation in insurance matters). As to the applicable law, this will be the law chosen by the parties, or, failing such a choice, the law of the State having the closest connection with the contract, subject to the presumption based on the place of habitual residence or central administration of the party rendering the «characteristic performance», as well as to the other rules of Rome I. Judgments and other measures will then circulate within the EC on the basis of the Brussels I regime.

The *lex delicti* model focuses on the fact that the liability of the directors for acts performed or behaviours maintained in the name and on behalf of their company, or otherwise in connection with their function, can result also from the commission of torts or from other provisions which create a responsibility *ex lege*. Uniform EC law rules exist so far only with respect to jurisdiction (Brussels I), but the regime is going to be completed also at a conflict-of-laws level when the Rome II Regulation will be enacted. On jurisdiction, a «special» forum must be added to the forum of the domicile of the defendant and to the other fora contemplated by other «general» provisions of Brussels I, namely the forum contemplated by art. 5(3) which, with respect to tortuous matters, refers to the courts of the place where the «harmful event» has occurred or may occur. On applicable law, the current project of the Rome II Regulation provides for a general conflict rule, which uses as a connecting factor that of the place where the damage arises or is likely to arise, with two exceptions, the first which refers to the law of the country of habitual residence of the claimant and of the defendant, if common, the second which refers to the State with which the non-contractual obligation is more closely connected. As far as judgments and other measures adjudicating on claims in tort are concerned, they are also subject to the regime on recognition and enforcement of Brussels I.

4. *The interplay between the four «conflict models» within the legal system of the European Community*

The four above-mentioned «conflict models» could theoretically enter into play, and «overlap», with respect to the assessment of any given case of company directors' responsibility having cross-border elements, with the consequent risk of positive or negative conflicts of jurisdictions.

This risk is certainly reduced by the «unilateralist» approach which inspires both the *lex societatis* model and the *lex mercati* model (i. e., by the fact

that these models mainly aim to guarantee the full enforcement by each member State of the domestic laws through which situations which are «internal» to such State's community are regulated). Still, it may well happen that the same act or behaviour of a director is considered a potential source of liability as a matter of company law in one member State, as a matter of the law governing a certain market in which the company has been active in another member State, or as a matter of the general law of contract or tort in two other member States in some way connected with the relevant dispute. These different characterizations of the same issue may then lead judges of those member States to come to different conclusions as to the EC-originated «conflict model» that has to be applied in order to identify the competent jurisdiction, the applicable law and the regime on enforceability of foreign judgments or other measures.

It is up to EC law to solve this problem on the basis of the competences that the EC enjoys under arts. 61(c) and 65(b) of the EC Treaty for promoting the «compatibility» of the conflict rules of the member States in view of the establishment of a European «area of freedom, security and justice» and, as far as necessary, to ensure the proper functioning of the internal market. EC law can provide for specific *ad hoc* characterization rules (such as those contained in art. 4.2(e) of the Takeovers Directive); in their absence, however, the interpreter will have to rely on those more general principles of coordination of the conflict systems of the member States which, as indicated, can be derived from the primary rules of the Treaty, from acts of secondary legislation, and from the case-law of the E. C. J.

In this respect, it is submitted that the conflict model to be applied at the outset should be the *lex societatis* model, there being a rebuttable presumption that the regime of company directors' responsibility is an (essential) feature of any corporate organization. As pointed out above, the *Centros* doctrine stresses the importance that, in the context of the creation of internal market and of the safeguard within it of the fundamental freedoms of movement, EC law attributes to the right of the entrepreneurs to chose the company law that they deem preferable, and to the consequent obligation of all member States to fully recognize and enforce such law. It is a fact that in the legal systems of all member States matters of directors' responsibility are normally treated as company law matters, and that this characterization is shared by some material provisions of EC law itself: e. g., by art. 44.2(g) of the EC Treaty, contemplating the harmonization of the safeguards that the member States require to companies for the protection of the interests of their members and other parties (among which one can certainly include the rules on directors' responsibility) and by some Directives adopted on the basis thereof. Moreover, there can be no doubt that the regime applicable to directors in the event of breaches of their duties or obligations is one of the most crucial aspects of

the internal organization of a company, which private parties certainly consider when making comparisons among different corporate models. Of course, it will be up to the relevant *lex societatis* to «confirm» such characterization, i. e. to determine whether, and to what extent, the company directors' act or behaviour at hand in the given case falls within the scope of the *lex societatis*: the *lex societatis* conflict model triggers the need to solve issues of characterization on the basis of the *lex societatis* itself, rather than *lege fori*; and it may happen that the legal system of the State of incorporation of the relevant company submits the consequences of a certain wrong-doing of a company's director to the ordinary regime of contractual or tortuous responsibility, or in any event to a law other than the *lex societatis*.

As to the *lex mercati* model, it can be applied whenever a member State can allege a legitimate interest with respect to the regulation of a certain market. In fact, it is perfectly consistent with the dynamics of an internal market characterized by the co-existence of different, autonomous sources of State law that: (a) a company who decides to be active within member States other than its State of incorporation may be submitted to regulations enacted by such other member States in order to protect various interests that may be jeopardized or affected by the company's activities, and (b) such regulations can also provide for special liability regimes applicable to the acts or behaviours of the company directors. Of course, since such measures of State law may potentially be an obstacle to the free circulation of the productive factors within the internal market, the relevant interest must be legitimate from an EC law point of view; but one can already acknowledge that the protection of creditors (in general, and in particular in the event of a company's insolvency) and the protection of investors (in general, and in particular with respect to investors active within the capital markets) are legitimate State interests.

Also the *lex mercati* model requires the court (or other authority) to check that under the relevant applicable law the issue of directors' responsibility is characterized as a matter for the *lex mercati*. As to the potential contradiction between legal systems that may result in the peculiar case in which both the *lex mercati* and the *lex societatis* consider the same issue of company directors' responsibility to fall within their respective domains, it will have to be solved on the basis of the *«Cassis de Dijon»* rule-of-reason test. It should be noted that such contradiction may be only a potential one: it must be ascertained, in fact, (a) whether EC law «confirms» the characterization made by the member State of the *lex mercati*, since EC law could consider the matter as completely unrelated to the interests allegedly pursued through the relevant directors' liability regime; and (b) whether the contradiction between conflict models is a «true» or «false» one, since it may well be that the working of the two conflict models results in the same regulation, or in regulations which are not inconsistent. If the contradiction is real, EC law will require

that the regulation stemming from the *lex mercati* model is non-discriminatory, necessary with respect to its declared purpose (i. e., it cannot be substituted by means which achieve the same result by being less «intrusive» in the domain of the *lex societatis*), and proportionate (i. e., the «costs» that it causes to the full enforcement of the *lex societatis* do not outweigh the «benefits» that it procures to the achievement of its alleged regulatory purposes). And it will be up to the party challenging the applicability of the *lex mercati* model in favour of the *lex societatis* model to prove that the rule-of-reason test is not met in the circumstances.

The *lex contractus* model and the *lex delicti* model will then have a purely residual function, being applicable only with respect to those cases of directors' responsibility which both the *lex societatis* and the *lex mercati* consider as falling outside their respective domains.