Real Seat in Retreat

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By the time you read this editorial it will be a known and no doubt highly debated fact who has won the battle for the European championship on the soccer field. At the time of writing it was hard to say who would win: France without Zinadine Zidane, Italy without 'Pipo' Inzaghi, the Netherlands without Johan Cruijff, or England without a team? Or would Germany (without Jürgen Klinsmann) once again take off with gold?

What we do know, almost for certain, is that Germany has lost the European battle in the field of private international law for companies. The *Überseering* award of the European Court of Justice was such a serious blow that it made the German judicial authorities thoroughly rethink the whole matter. Germany now definitely seems to have let go of the real seat in favour of the seat of incorporation. In his country report in this ECL issue Christoph Teichmann, analyzing a law proposal that introduces a switch-over to the incorporation theory, speaks of *'little less than a revolution in German international company law.'* Should the law proposal be passed in Parliament and come into force, then at last Germany will treat and recognize companies incorporated in one of its fellow EU Member States equally as it has treated and recognized companies incorporated in the US since 2004 on the basis of a German-American Friendship Treaty. So much for European loyalty.

Another sign of the ongoing retreat of the real seat has been given by Mr Poiares Maduro, Advocate General with the European Court of Justice, in his opinion in the so-called *Cartesio* case, dated 22 May 2008. This case is essentially about the compatibility of the real seat theory with the freedom of establishment flowing from Articles 43 and 48 EC. *Überseering, Inspire Art* and finally *Sevic* have taught us that a company, validly incorporated under the laws of an EU Member State, must be treated by another host EU Member State on an equal footing with one of its own national corporate vehicles when it comes to inter alia registration, recognition as a party in legal proceedings, disclosure and performing legal acts such as mergers and split offs. Discrimination of an 'inbound' company is considered a violation of the freedom of establishment. But what about an 'outbound' company? Is national Hungarian law that prohibits a company, incorporated in accordance with the laws of Hungary, to transfer its headquarters to another EU Member State on pain of being dissolved ex lege and, consequently, losing its right to be registered in the Hungarian commercial register, compatible with Community law? The Advocate General thinks not. But how then does he handle earlier ECJ rulings like *Daily Mail* and *General Trust*? Is it not concluded from these rulings that setting the conditions for (non-)existence of a *national* company is purely a matter of national law and thus falls outside the scope of the EC Treaty provisions on freedom of establishment? The Advocate General takes a very subtle road between the Scylla of Member States' autonomy to pick their own connecting factors when it comes to 'life and death' of national corporate vehicles and the Charibdis of the EU principle of freedom of establishment. First he notices that the case law of the ECJ in this respect has developed since said rulings and that *'the Court's approach has become more refined'*. This is of course a brilliant first step as it will be difficult for the ECJ to deny that its approach has indeed become more refined over the past years. Then the Advocate General argues that the *'underlying logic'* of *Daily Mail* is often not correctly presented. He strongly focuses on the effect that a Member State's regulatory actions may have on the possibility for companies to exercise freedom of establishment in real life. The fact that the ECJ in *Daily Mail* ruled that *'the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies under the legislation of the first Member State'* does not mean that a Member State, in the Advocate General's words, has a *carte blanche* under the Treaty *'to impose a "death sentence" on a company constituted under its laws just because it had decided to exercise the freedom of establishment.'* Surely, a Member State may, within the limits of the rule of reason, set certain conditions on the transfer of a company's operational headquarters abroad, but an outright prohibition like the Hungarian regulation is not compatible with Community law.

Mr Poiares Maduro's opinion is a fine example of how the task of an Advocate General with the ECJ must be performed. Sometimes it is necessary to set a course with reference to earlier case law, even where one might doubt whether such course has been as crystal clear for the Court itself. Returning to the soccer field; on second thought I guess Portugal has a fair chance to become European Champion 2008!