

At present, there are two contrasting conflict of law theories as regards the recognition of *foreign* legal persons: the 'incorporation' theory and the 'real seat' theory. The 'real seat' theory probably dates back to the middle of the nineteenth century. According to this theory, the law of the country where the company has its 'real' seat (i.e. its management and control centre) is the law applicable to company relationships.

Conceptually speaking, this approach is synonymous with what is commonly referred to as the 'objective proper law' test: those in charge of the company's management are not free to choose the law which governs company law relationships (*lex societatis*). For example, a business undertaking in Germany making use of the legal form of an English private limited company will not be recognized as such. Party autonomy thus being excluded, the legal order to which the company is deemed to be 'most closely connected', or more precisely, the location of the company's 'real seat', has to be identified.

Essential to this theory are the sanctions applicable if the formation requirements of the country where the company has its real seat are not satisfied. Possible consequences are the following: (i) the company as such is no longer considered to be a legal subject, and (ii) its managers are deprived of the most important company benefit, namely restricted liability. At first glance, the identification of a company's real seat may seem a feasible task, and, in fact, in a number of situations this 'real seat' is obvious. However, how should multinational companies (i.e. companies involved with several legal orders) be treated? The generic formula of the 'real seat' does not seem to furnish adequate responses to this phenomenon. Most legal systems adhering to the 'real seat' doctrine tend to consider the 'management and control centre' to be the company's 'real seat'. It is clear, however, that this centre does not necessarily coincide with what is commonly referred to as the company's main business (or exploitation) centre (e.g. production plants).

The 'real seat' theory basically functions as a double-edged sword. It affects both companies incorporated under a foreign system of law but having their real seat on domestic territory, and companies incorporated under domestic law having their management and control office abroad.

Both those categories of company are considered to have failed formation requirements. This rigid principle is often mitigated though, with the help of the private international law escape device of *renvoi* or remission: real seat countries allow companies to have their management and control office abroad, provided that the conflict of law rules of the country where the real seat is situated adhere to the 'incorporation' theory.

The 'real seat' theory has always been predominantly influenced by control policies. However, protagonists of decisive factors that have become obsolete – for example, the law of the place where the company contract was concluded, or the law of the place where shares were issued – were less concerned with the complexity of modern society's cross-border multi-party company relationships than state authorities are today. Nowadays, it is generally assumed that business activities conducted on the territory of the state where the 'foreign' company *de facto* resides should be supervised effectively. Hence, a brief retrospective view is indispensable here, to demonstrate that the 'real seat' theory is more or less rooted in sentiments that deliberately place the emphasis on 'foreigner control'. At the same time, the nationality of natural persons controlling the company was deemed to be of considerable importance. It has been argued, though, that attributing decisive weight to 'nationality' as a means of determining to which legal order the company is most closely connected may turn out to be perilous. *A fortiori* it would be highly controversial under EU law to stress the need to control companies for no other reason than that natural persons in charge of the management of such companies are foreign nationals. Today, control theories of this kind are no longer considered to be adequate tools to find the proper law of the company and such an archaic concept can no longer be tolerated under EU law. It can only be relied on subsidiarily, namely in situations of war.

Despite the flaws, the 'real seat' doctrine has never been seriously at risk. However, given that the 'real seat' theory potentially frustrates cross-border company mobility in 'Europe', the critical observer must be alert as to whether or not the 'real seat' theory is ultimately incompatible with EU law.

### Unjustified enrichment and contract law

Problems arise if a legal system provides for different legal regimes for unwinding contracts. If some of these regimes are contractual in nature whereas others are non-contractual, as often happens to be the case, it is always difficult to integrate them doctrinally with one another. Divergent results are a natural consequence. Risk may be assigned differently and the object of the contract's value may be assessed on different terms: subjectively, in accordance with the contract, where the remedy is contractual 'in nature', or objectively, where a non-contractual claim for unjustified enrichment is concerned. Typically, non-contractual remedies apply only if the contract is void and the contract's nullity may have further consequences for other remedies, such as (contractual) claims for damages. In this respect, it may be decisive whether the contract was void *ex tunc* or only for the future. Yet such divergent results are rarely based on convincing normative considerations; normally, they can only be explained as the result of historical or doctrinal accident. Indeed, the decisions whether a contract is held void *ex nunc* or *ex tunc*, and whether a contract is void or will only be reversed, are mostly of a merely technical nature. Often, such decisions were motivated by considerations that had little to do with the correct assignment of risks. Thus, courts wanted to ensure arbitration clauses or limitations of liability remaining effective even if a contract was reversed or they wished to grant contractual claims for damages despite the fact that the contract was unwound. All this shows that the borderlines between contractual instruments, such as termination for breach of contract, a right to rescind a contract due to mistake, misrepresentation, or duress on the one hand, and non-contractual remedies in the case of the absolute nullity of contracts violating the public order or made by minors on the other hand, are often blurred or arbitrarily drawn. In such situations contractual remedies and non-contractual claims for unjustified enrichment are closely related with one another. Differences between such remedies therefore tend to create a desire, not necessarily for absolutely uniform rules, but for doctrinal adaptation and normative coherence. Yet, as there is hardly one single obviously right answer to the questions of fair assignment of risk, doctrinal controversy is an almost unavoidable consequence.

It is fairly obvious, that the factors invalidating a contract must be decisive also for its unwinding. The just unwinding of a contract depends on contract law policy. In principle, each party has to bear all risks pertaining to the benefit received, because the beneficiary has control over the benefit in question. Of course, there are exceptions to this principle, yet these are likewise based on (typically more specific) contract law policy. Thus, minors and other persons without capacity to contract are protected against the risks of concluding a contract, and where the other side is responsible for the risk in question, it must bear the resulting damage. Here, such policies need not be discussed in more detail. It is more important to realise that the basic principle of unjustified enrichment, namely that liability is limited by the increase in the defendant's assets, runs directly against the basic policy of contract law that each party bears full responsibility to return what it has received from the other party.

### **Non-contractual agreements?**

A number of European codifications acknowledge claims in unjustified enrichment that are based on the fact that one party transferred a benefit to the recipient in order to elicit counter-performance or the conferral of a corresponding benefit from the recipient. Such cases are easily resolved within contract law.

The problematic cases concern disappointed expectations with regard to the future behaviour of the other party, often within close social relations. Typically, one person renders services to an elderly recipient, or improves the recipient's property. Often this is done in consideration of the recipient's promise to be benefited in his or her last will. Such agreements are usually void for a lack of form, and the parties are often perfectly aware of this. Nevertheless, it may be unfair to leave the disappointed party without redress. Similar problems arise in cases where not even an agreement of this kind can be found. Often, the parties have been motivated more by compassion and a sense of moral duty than by rational economic considerations. Nevertheless, there may have been a tacit mutual understanding that the services were not rendered for free, and that some reward would be

received, therefore, from the inheritance. And often there is even no such understanding, but only the hope of being favourably considered in the recipient's last will.

In such cases it is difficult to find out in retrospect what kind of agreement existed between the parties. However, whereas the law may well protect justified reliance on a contractual agreement even if the agreement turns out to be void, it should not create incentives for legacy hunting.

The Institut de droit international defined conciliation as a method for the settlement of international disputes of any nature whereby a Commission set up by the parties, either on a permanent basis or an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by the parties or of affording them, with a view to its settlement, such aid as they may have requested.

Since the Second World War the role of conciliation in bilateral treaties has diminished, although it has not completely vanished, especially in the practice of Switzerland, a major champion of conciliation. The picture presented by multilateral treaties is different, because the inclusion of conciliation, next to other forms of dispute settlement, has almost become a routine matter.

In conciliation proceedings between states, third parties cannot take the initiative on their own. Conciliators can be appointed on the basis of their official function or as individuals in their personal capacity. The usual practice is to establish commissions to which the parties to the dispute nominate one or two of their own nationals and agree on a certain number of impartial and independent nationals of other states in order to provide a neutral majority.

Conciliation is also sometimes described as a combination of inquiry and mediation. The conciliator, who is appointed by agreement between the parties, investigates the facts of the dispute and suggests the terms of a settlement. But conciliation is more formal and less flexible than mediation: if a mediator's proposals are not accepted, he can go on formulating new proposals, whereas a conciliator usually only issues a single report. However, the conciliator usually has discussions with each of the parties behind the scenes, with a view to finding an area of agreement between them, before issuing his report. The parties are not obliged to accept the conciliator's terms of settlement (they are only recommendations), but, apart from that, conciliation often resembles arbitration, particularly when the dispute involves difficult points of law (and is not to be settled *ex aequo et bono*). Moreover, in order to make a good impression on the conciliator, states are forced

to rephrase their case in more moderate language, as they would before an arbitrator. At least the arguments tend to become more reasonable.

Most conciliations are performed with commissions composed of several members, which is the normal arrangement under bilateral or multilateral treaties, but occasionally states may prefer a single conciliator.

Although, in general, the practice of conciliation commissions reflects the same basic functions, namely to examine the dispute and make non-binding recommendations for a possible settlement, there are considerable differences of approach in essential matters, including the degree of the formality of the proceedings. Often the procedures are kept highly flexible in the interests of being able to deal with the specific nature of a given dispute. Confidentiality of proceedings, however, has been a key to success in dealing with governments. If the parties accept the proposals of a conciliation commission after the usual specification of some months for consideration, the commission drafts a *procès-verbal* which records the fact of conciliation and the agreed terms of settlement. If the proposal is not accepted, the work of the commission is at an end and there are no further obligations for the parties. Findings of fact or the legal views of the commission are not to be used by the parties in subsequent arbitral or judicial proceedings, unless they agree.

Mediation and conciliation have both advantages and disadvantages, as compared with the other methods of international dispute settlement. They are both more flexible than arbitration or adjudication, leaving more room for the wishes of the parties and for initiatives of the third party. 'Package deals' can be made more easily. Parties can avoid losing face and prestige by voluntarily accepting (or appearing to do so voluntarily) the proposal of a third party. They remain in control of the outcome. No legal precedent is created for the future. The third party does not have to give reasons and the proceedings can be conducted in secret. The whole matter thus tends to focus on the practical issues.

The disadvantages are also obvious. Conciliation and mediation procedures are difficult to start without the consent of the other side and require the goodwill of the opponent. The contribution to the development of the law is also much more reduced than in the case of arbitration or adjudication, but this is a more abstract systemic consideration. What matters for the parties is primarily the satisfactory settlement of the dispute as such, whether or not the compromise reflects the substantive law.

Following upon this court's decision there were several further applications made in this case. Some of these, if successful, would have meant that a reference would not have been necessary. In the events which ultimately transpired, such a situation has not come about. In addition, further submissions were made on the precise wording of the questions as well as on a question which the defendant sought to have included. After a protracted period of time, the outstanding issues were ultimately finalised in late 2000.

As appears from questions Nos. 1, 2 and 3 the plaintiff seeks to invoke a number of Community measures, which amended the Equal Treatment Directive. He makes the case that pursuant to the provisions of one or more of these measures he is entitled, as a matter of European law, to the production of the contested documents without redaction. This claim is independent from national law and if successful would establish a legal basis for the plaintiffs' access to the said documents. In the absence of the ability to directly apply the provisions of the Directives, national laws should nonetheless be interpreted in light of them under the Marleasing principle.

The fourth question relates to the difference between the adversarial system of justice, as pertains in Ireland and the UK, and the inquisitorial one, which is present in other EU states. In particular, Mr. X draws attention to the general practice in an adversarial system whereby the issues before the Court are defined by the parties and not by a judicial person; whereas he claims that in civil law states, the circumstances are predominantly the opposite. In such contrary situations the role of the Judge in each system may differ. It is suggested that although a Court in the UK may determine the necessity or otherwise of a preliminary reference, in fact it must have the final say in that regard, it should have no role in drafting the questions to be presented. This court rejects that submission as being contrary to the jurisprudence of both the Court of Justice and the national court. Notwithstanding this, it is

still claimed that as a matter of European law the role of the national court in the phrasing of questions for a reference should be different depending on the system of law operating within the national jurisdiction from which the reference is made.

Therefore the issues to be put before the Court of Justice should, as they would be in proceedings before a national court, be determined solely by the parties.

When making a decision on the reference application, the Court, being conscious of the principle enunciated in *Marleasing*, has taken the view that a reference is necessary in order for it to finally decide whether the plaintiff has a right to the contested documents in un-redacted form. Further, it has been informed by both parties that there is no existing decision governing the issue and of its own mind is satisfied that the interpretation of the relevant European legislation is not so clear or obvious that it would be appropriate for the national court to pronounce upon it. Therefore the *acte clair* doctrine does not apply. The Court is thus satisfied that a question of European law requiring clarification arises in this case since it is unclear whether the Directives dealing with Discrimination require greater disclosure of documents than would otherwise be provided for by current domestic provisions. Given that discrimination would not normally be overt, a concern exists that such provisions, the effect of which is to prevent the production of documents which could be of assistance to an applicant claiming discrimination, could render any remedy under a Directive ineffective. Thus, it may be that in the context of preventing discrimination under the Directives, a broader construction might be given to the rules relating to document disclosure where European equality and rights legislation is involved. Recital 8 of Decision 200 of the European Parliament and Council of the European Union should be noted; it reads: "European legislation has significantly raised the level of guaranteed equality and protection against inequalities and discrimination..."; as should recital 4 of directive 980, which may be evidence of a raised bar in relation to the procedural rights to be afforded to applicants in

equality cases. Such an onus as provided for therein extends to procedural matters, which it is suggested should be construed in favour of an applicant. As with the general burden of proof, a higher standard should apply in relation to the protection of the applicant's rights in relation to the production of documents. However, the true position is unclear as a matter of European law, and therefore a reference is required in order for this Court to ultimately come to a conclusion on the disclosure application.