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# A European Nevada?*

SUMMARY: 1. The "Delaware effect" in the EU. - 2. State competition for incorporations: from no competition to market segmentation. - 3 What kind of law? The duplicity of the concept of "laxity", with regard to a "liability-free" jurisdiction. – 4.1. State competition in a low-liability segment. The importance of non-enforcement. – 4.2. States' incentives to compete. – 4.3. Possible drawbacks for local businesses. – 5. Mainly, but perhaps not just, a matter of mid-stream reincorporation. – 6. The other states' reaction.

## *1. The "Delaware effect" in the EU.*

Ever since the beginning of the European Community, the possibility (or, rather, in the most common perspective, the *risk* or actually the fear) that there would be a "Delaware effect" in European company law was widespread and clear.

Although generically described as such, various possible phenomena went under this label. In the first place – in which case it also went under the "level playing field" narrative – it was believed that companies regulated by "laxer" states would have an undue advantage when carrying out business in other member States under the freedom of establishment or under the freedom to provide services. Companies organised under some kind of "laxer" law of their "true" home member state – the state in which not only they were organised, but also carried out most of their business – would have an unfair advantage over host-member-State companies when operating cross border either under the

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freedom to provide services regime or under the freedom to establish branches[1]. This view is clearly and purely protectionist, insofar as it singles out one kind of competitive advantage (company law of the home member state) and seeks to discriminate on the basis of this, whereas it does not with regard to other possible advantages connected with being regulated by a "better" home State.

In the second place, the "Delaware effect" label included the risk of regulatory arbitrage[2] by European companies, once it was accepted – sometimes *obtorto collo* – that mutual recognition is the law of the land[3]. The fear was that, once given the possibility to organise under the law of whatever State of choice, companies would flee "stricter" States in order to avoid some undesirable features of their home States, such as – typically – rules mandating employee participation (co-determination), rules deemed to protect creditors and mandatory provisions on financial structure and corporate governance.

In the third place, the label can apply (more correctly) to the idea of one member state starting to compete for incorporation, thus actively trying

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[1] Jan Wouters, *European Company Law:* Quo Vadis?, 37 Comm. Mkt. Law Rev., 257 (2000), 269-270; Martin Gelter, *Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law* (February 13, 2015), forthcoming in FERNANDA NICOLA; BILL DAVIES, EU LAW STORIES, Cambridge University Press 2015; Fordham Law Legal Studies Research Paper No. 2564765; ECGI Law Working Paper No. 287/2015, available at SSRN: http://ssrn.com/abstract=2564765, 7-8.

[2] It should be noticed that, albeit the distinction between regulatory arbitrage and regulatory competition is well established in English language literature, not so in some Italian literature, where the two concepts are sometimes made to overlap. *See*, e.g., Massimo Miola, *Lo statuto di Società europea nel diritto societario comunitario: dall'armonizzazione alla concorrenza tra ordinamenti*, 2001 Rivista delle società 323, 339, note 43 (on the basis of the reasoning that regulatory arbitrage implies competition, potentially at least, among states); Vincenzo Di Cataldo, *Alla ricerca di una maggiore concorrenza tra le imprese europee. Armonizzazione delle regole e concorrenza tra ordinamenti: due strumenti da combinare*, 2015 Rivista delle società 375, 384-386 (who actually questions the issue of whether "(corporate) law matters", as does Federico Pernazza, *La mobilità delle società in Europa da Daily Mail a Fiat Chrysler Automobiles*, 2015 Diritto del commercio internazionale 439, 476 and 478); compare Luca Enriques, *Silence is Golden: The European Company as a Catalyst for Company Law Arbitrage*, 4 J. Corp. L. Stud. 77 (2004), 78, note 11; Andrea Perrone, *Dalla libertà di stabilimento alla competizione fra gli ordinamenti*? *Riflessioni sul «caso Centros»*, 2001 Rivista delle società 1292. For a recent and broad account of the issues surrounding competition for incorporations *see* Marcel Kahan, *The State of State Competition for Incorporations* (August 2014), ECGI Law Working Paper No. 263/2014; NYU Law and Economics Research Paper No. 14-19, available at SSRN: http://ssrn.com/abstract=2474658.

[3] ANDREW JOHNSTON, EC REGULATION OF CORPORATE GOVERNANCE, Cambridge University Press, Cambridge, 2009, 126; Gelter, (nt. 1).

to lure companies and businesses of other States to organise under the law of their State.

As is well known, the second and third cases became possible only in the past two decades. With a series of decisions, starting in 1999 with the *Centros* case[4], and then in subsequent years[5], the Court of Justice made it compulsory for member states to recognise companies incorporated following the rules of another member state, even when the company is headquartered and only carries out its activity in the "host" member state, effectively superseding choice-of-law criteria that could frustrate the freedom of establishment such as the real seat doctrine, at least to the extent it was applied to foreign companies (*Überseering* case)[6] and explicitly stating that any restrictive measure should comply with the "*Gebhard* test", *i*.e. be applied in a non-discriminatory manner, be justified by imperative requirements in the general interest, be suitable to attain the objective pursued and not go beyond what is necessary[7]. The test should be applied

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[4] Court of Justice, 9 March 1999, case C-212/97, Centros Ltd. c. Erhvervs- og Selskabsstyrelsen.

[5] For a discussion of the Court's decisions see, e.g., FEDERICO MARIA MUCCIARELLI, TRASFERIMENTO DELLA SEDE ALL'ESTERO E ARBITRAGGI NORMATIVI, Giuffrè, Milan, 2010, 88-108; JOHNSTON, (nt. 3), 152-165; Gelter, (nt. 1), 4-29; John Armour, Wolf-Georg Ringe, *European Company Law 1999-2010: Renaissance and Crisis* (December 14, 2010), ECGI Law Working Paper No. 175/2011; Oxford Legal Studies Research Paper No. 63/2010, available at SSRN: http://ssrn.com/abstract=1691688, 6-16.

Before Centros, the Court had already announced its new line of cases with the *Segers* case (1986), which was, however, widely ignored, or even consciously downplayed, by authors (Court of Justice, 10 July 1986, case n. 79/85, Segers c. Bestuur Bedrijfsvereniging Voor Bank- en Verzekeringswezen; *see* Harald Halbhuber, *National doctrinal structures and European Company Law*, 38 Common Market Law Rev. 1385 (2001), at 1387-1389. The year after *Segers*, the Court issued a new decision, which was read in the sense that the Court considered the Treaty freedoms compatible with the "real seat" doctrine, which enabled states to apply the law of the state where the company had its "real seat", usually considering such the place where the company was headquartered or carried out its main operations (but, as the *Überseering* case showed, other criteria were also applied): see Court of Justice, 27 September 1988, case 81/87, The Queen c. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc (*see*, on its reception as compared to that of *Segers*, Gelter, (nt. 1), 13-17.).

[6] Court of Justice, November 5, 2002, case C-208/00, Überseering BV c. Nordic Construction Company Baumanagement GmbH. According to the Court, the "real seat" doctrine, even if qualified as a matter of (non-harmonized) private international law, could never lead to question the legal status of a company duly formed under another member state's law. On the real seat doctrine and its variants see Massimo Benedettelli, *Profili di diritto internazionale privato ed europeo delle società* (destinato al Commentario Abbadessa-Portale), 2015 Rivista di diritto societario 35, 49-50.

[7] On the *Gebhard* test with reference to freedom of establishment of companies see MUCCIARELLI, (nt. 5) 88-90.

also to measures aimed at addressing "pseudo foreign" companies (*Inspire Art*)[8].

The Court then addressed the issue of freedom of establishment with a decision on the merger of companies of different nationalities, stating that such mergers should be treated (and hence allowed) at the same conditions applicable to mergers of domestic companies (*Sevic*)[9].

In a subsequent decision, the Court clarified its position on freedom of establishment stating that the law of the state under which the company is formed can also establish the conditions under which that law remains applicable (*Cartesio*)[10].

Finally, with two more recent decisions, the Court stepped in to ban "exit taxes", i.e. the immediate taxation of unrealised capital gains in case of seat transfer (*National Grid Indus*)[11] and then forbade any form of discrimination of the "host" (where the company is incoming) member state in case of seat transfer or "international transformation" (*Vale*)[12].

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[8] Court of Justice, 30 September 2003, case n. 167/01, Kamer van Koophandel en Fabrieken voor Amsterdam c. Inspire Art Ltd.

[9] Court of Justice (Grand Chamber), 13 December 2005, case n. C-411/03, SEVIC Systems AG.

[10] Court of Justice (Grand Chamber), 16 December 2008, case n. 210/06, Cartesio Oktató és Szolgáltató BT; see also the comment by Vittoria Petronella, *The Cross-Border Transfer of the Seat after Cartesio and the Non-Portable Nationality of the Company,* 2010 EBLR 245.

[11] Court of Justice (Grand Chamber), 29 November 29, 2011, case C-371/10, National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam. The judgment is far from unambiguous. On the one hand side, the Court deems that immediate taxation of capital gains is incompatible with the freedom of establishment set by the Treaty but, this time as an *obiter dictum*, repeats the principle set out in *Daily Mail* that the matter of the conditions to be met to transfer abroad the seat of the company is left to domestic law (which could forbid it and, hence, impose the liquidation of the company, in order to transfer the seat, with the inevitable consequence of the taxation of the [realised] capital gains). *See* Carla De Pietro, *Exit tax societaria e le garanzie della proporzionalità: una questione rimessa agli Stati membri*, 2010 Rassegna tributaria 1357; Katerina Pantazatou, National Grid Indus*: The First Case on Companies' Exit Taxation*, 2012 EBLR 945, 963-966; Reinout Kok, *Exit Taxes for Companies in the European Union after National Grid Indus*, 2012/4 EC Tax Review 200. On the subsequent developments *see* Steven Peeters*, Exit Taxation on Capital Gains in the European Union: A Necessary Consequence of Corporate Relocations?*, 2013/4 ECFR 507 (in particular 513-515: «it is noteworthy that Member States may prohibit a cross-border relocation, but may not impose fiscal requirements (which are less restrictive) on the occasion of a permitted relocation»).

[12] Court of Justice, July 12, 2012, case C-378/10, Vale Epitesi; see the note by S. Stephan Rammeloo, *Freedom of Establishment: Cross-border Transfer of Company "Seat" – The Last Piece of the Puzzle?*, 19 Maastricht Journal of Eur. and Comparative Law 563 (2012).

While regulatory arbitrage is actually a current feature of European company law, which was recently exploited also at very high levels[13], state competition for incorporations is, indeed, not at all such, if not in the very bland version of defensive regulatory competition, which cannot easily be distinguished from a more general convergence in business law across jurisdictions[14].

The paper argues that, although no European state is likely to compete for all and any incorporations, the possibility that one state steps in to attract incorporations for one specific segment of the market for incorporations should not be ruled out altogether. In particular, a state could seek to attract companies that are looking for a very protective legal environment for their directors, officers and shareholders, similarly to what happened with Nevada in the US.

Taking into consideration the fact that enforcement is as important as substantive law, if not more, the paper considers the possibility that, instead of modifying the law on the books, which may not be politically feasible, states could rather capitalise on the *in*efficiency of their judiciary; in this they may be actually helped by the European rules on civil jurisdiction.

The fact that no investment is necessary also changes the perspective on incentives of states to compete: a very small incentive is needed, if the costs are negligible.

Finally, the paper takes into account possible drawbacks of such a competition and the reaction other states could have.

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[13] The case of Fiat Chrysler Automobiles is a case in point: in order to take advantage of some features unavailable in Italian law, and in particular multiple voting shares, FCA transferred its seat (via a merger) to the Netherlands. Italy "reacted" introducing multiple-voting shares, probably both as a form of defensive competition and because it was planning the sale of significant stakes in major and strategic companies, in which the state had a controlling stake. *See* Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat* (March 5, 2015), Bocconi Legal Studies Research Paper No. 2574236; Penn State Law Research Paper No. 3-2015; ECGI Law Working Paper No. 288/2015 and Pernazza, (nt. 2), 450-456 and 478 (whose account of the Fiat Chrysler migration downplays the role of corporate law).

[14] The most notable example is perhaps what happened with legal capital of private limited companies or limited liabilities companies: *see* Marco Becht, Colin Mayer, Hannes F. Wagner, *Where Do Firms Incorporate? Deregulation and the Cost of Entry*, 14 Journ. Corp. Fin. 241 (2008); see a recent account of the status quo by Antonio Cappiello, *Costi di costituzione e caratteristiche delle s.r.l. a capitale minimo e s.r.l. semplificate in alcuni paesi U.E.*, Consiglio Nazionale del Notariato, 2013.

*2. State competition for incorporations: from no competition to market segmentation.*

In 2002, Bebchuk and Hamdani could write that «the premise that states vigorously compete for incorporations is widely shared in the corporate literature»[15]. Ten or fifteen years ago it was a dogma that states compete to attract incorporations. This vision was contended in a series of articles, starting in 2002 and 2003, arguing that states have no adequate incentive to compete[16], there are unsurpassable economic constraints of an effective competition to Delaware's pre-eminence[17], and the only real competitor to Delaware is the federal government[18]. Ever since, the academic consensus has been very different: almost no one believes any more in states actively competing at all[19].

This vision seems even more compelling in the EU, where European law effectively forbids states, other than the state where capital is actually raised and in any case with some limits, to charge franchise or registration taxes going beyond what is necessary to cover expenses[20]. Dammann built his whole construction on the possibility that states *could* charge taxes, hypothesizing that there could be a change in such law – which is not likely at all[21]. In his article on the unlikelihood that a European Delaware would develop, Enriques also used the argument that no state has any incentive to compete, given that there are no franchise taxes in Europe; in all cases, even

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[15] Lucian Arye Bebchuk; Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 Yale L.J. 553 (2002), at 561.

[16] Marcel Kahan; Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 Stan. L. Rev. 679 (2002-2003).

[17] Bebchuk, Hamdani, (nt. 15); Lucian Arye Bebchuk, Alma Cohen and Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?,* 90 Cal. L. Rev. 1775 (2002)

[18] Mark J Roe, *Delaware's Competition*, 117 Harv. L. Rev. 588 (2003)

[19] *See* Kahan, (nt. 2), 23-32.

[20] *See* originally Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, according to which: "[t]ransactions subject to capital duty shall only be taxable in the Member State in whose territory the effective centre of management of a capital company is situated at the time when such transactions take place" (Art. 2(1)); such tax is capped (Art. 7); the amended, consolidated version is now Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital, which basically aims at abolishing any kind of tax on the raising of capital (*see* Recital 5 and Art. 7 and 8(2)) and, in any case, caps it a 1% (Art. 8(4)) and, as before, only allows the state where the effective centre of management is (Art. 10).

[21] Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 Yale J. Int'l L. 477 (2004), 521, 524.

if a state *wanted* to compete, it would face many other significant constraints[22].

This view is yet more forceful for closely held corporations and other entities, such as limited liability companies, on which this paper will focus. LLCs and other forms of close corporations are usually small and states stand to gain even less than from publicly traded companies from attracting incorporations[23].

However, this complete shift of the paradigm is perhaps unwarranted and, although there is probably no space either for a full-fledged competition for incorporations nor for an all-round European Delaware, one should not completely rule out the possibility that some states would act to attract incorporations. Even in the US, where Delaware dominates the market, there have been recent attempts to enter the market for incorporations: such are the move of North Dakota in 2007, albeit overambitious, doomed to failure[24], and failed[25], and the quite successful move of Nevada in 2001 to attract out-of-state incorporations[26].

One can, however, assume that this is highly unlikely, especially in the EU. No state started off in the competition after Centros, although history teaches that the first mover's advantage is great[27]. At the top of the "foreign limited" fever, England clearly refused to accept the role of the incorporation state of Europe, by not easing compliance costs, which drove many foreign limited companies to cease their English experience[28].

The same conclusion is perhaps not so obvious if one looks at competition with the perspective to compete in a specific market segment[29]. What could happen is that states could seek to attract one specific segment

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[22] Luca Enriques, *EC Company Law and the Fears of a European Delaware*, 15 Eur. Bus. L. Rev. 1259 (2004) (focusing only on listed companies); Perrone, (nt. 2), 1304-1305

[23] See Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 Wash. U. L. Q. 365 (1992), 376-377; Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. Rev. 189, (2011) 194 and 256 (who notes that there are few incentive to compete for LLC, given that – for example – Delaware only charges a flat rate of $ 250 per year).

[24] Stephen M. Bainbridge, Why the North Dakota Publicly Traded Corporations Act Will Fail, 84 N.D. L. Rev. 1043 (2008)

[25] Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 Va. L. Rev. 935 (2012), 971-972.

[26] Barzuza, (nt. 25); Bruce H. Kobayashi; Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 Seattle U. L. Rev. 1165 (2011-2012).

[27] Ehud Kamar, *Beyond Competition for Incorporations*, 94 Geo. L.J. 1725 (2005-2006), 1765.

[28] Wolf-Georg Ringe, *Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition*, 2013 ECFR 230, 262-263.

[29] See Kahan, Kamar, (nt. 16), 717.

of the market, e.g. those companies that are looking for protection for directors, offices and shareholders, or to escape from one or more specific features of a national law.

This is precisely what happened in Nevada. Nevada offers a law that limits significantly liability risk for directors and officers.

In the first place, as compared to Delaware, which enables opting out of the duty of care under § 102(b)(7), in Nevada the no-liability for duty of care is the default rule. One could see this as trivial, given that opting out of the duty of care is a standard practice for US corporations, incorporated both in Delaware[30] and in other states[31]. More importantly, however, the no-liability rule for breach of duty of care also applies to *officers*, while in Delaware it does not[32],.

In the second place, as far as duty of loyalty is concerned, while in Delaware directors and officers may be held liable for breach of duty of loyalty, for acting not in good faith, for improper personal benefits and for intentional misconduct and fraud, or a knowing violation of law, in Nevada you need «both a breach of the duty of loyalty *and* intentional misconduct, fraud or a knowing violation of law» to assert liability[33].

To be sure, it is highly improbable that any European state – even the smallest ones – would be willing to explicitly change its law (inevitably by means of a statute) in order to follow on Nevada's footsteps[34]; this may even require derogating to general principles of law, as it would in Italy[35]. It would probably be politically unfeasible, also because the gains would be low, although perhaps not insignificant. Nevada was able to go down this

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[30] Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. Pa. J. Bus. L. 675, 691-693 (2008-2009); Christopher A. Yeager, *At Least Somewhat Exaggerated: How Reports of the Death of Delaware's Duty of Care Don't Tell the Whole Story*, 103 Geo. L.J. 1387 (2014-2015), 1391-1392

[31] Lawrence A. Hamermesh, *Why I Do Not Teach Van Gorkom*, 34 Ga. L. Rev. 477 (1999-2000), 489-491.

[32] Barzuza, (nt. 25), 950-951; Kobayashi, Ribstein, (nt. 26), 1171-1172.

[33] Barzuza, (nt. 25), 950-951.

[34] According to the *Study on Directors' Duties and Liability prepared for the European Commission DG Markt* (by Carsten Gerner-Beuerle, Philipp Paech and Edmund Philipp Schuster), 2013, LSE Enterprise, London, 74-107, substantive rules seem very similar across Europe, and nothing comparable either to the § 102(b)(7) option under Delaware law nor to Nevada's default can be found. More synthetically, see also, by two of the same authors, Carsten Gerner-Beuerle; Edmund Philipp Schuster, *The Evolving Structure of Directors' Duties in Europe*, 15 EBOR 191 (2014), at 200-203.

[35] According to Art. 1229 Civil Code, it is not possible to exclude by contract liability for intentional misconduct and gross negligence.

road because it has a long tradition of tolerance and stood to gain from incorporation taxes, which cannot happen in the EU.

It is commonly understood that the scope of company law in the EU is broader than that of the US. In the US, company law almost only refers to the relationship among managers, directors and shareholders (including relationships between controlling and minority shareholders). In contrast, in the EU some aspects of company law include protection of creditors and employees[36]. This gives rise to issues of opportunistic behaviour in reincorporations that may be more intense in Europe than in the US. However, from the perspective of possible competition via some form of market segmentation, the fact that the scope of company law in Europe is not only broader than that in the US, but also different from state to state, and so "law products" are not properly comparable, becomes a factor *in favour* of competition, rather than a factor that discourages it[37].

*3 What kind of law? The duplicity of the concept of "laxity", with regard to a "liability-free" jurisdiction.*

Rules making it easier for directors and officers to escape liability can be looked at in different ways. The first perspective is that they give undue or excessive protection to directors and officers and are, therefore, just the product of the agency problem between directors and shareholders. The issue of inefficient reincorporations has been studied also beyond reincorporations to Nevada, and it has been argued that directors have various ways to circumvent shareholders or induce them to vote in favour of reincorporations, for example by bundling "good" and "bad" charter amendments[38]. Barzuza, for example, found evidence of the fact that firms reincorporating in Nevada were "high-agency-cost" companies because they tended to restate financial statements more often that average[39]. On the other hand, it was argued that moving to Nevada could be explained

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[36] Federico Maria Mucciarelli, *The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU*, 20 Tul. J. Int'l & Comp. L. 421 (2011-2012), esp. 454-458.

[37] *See* Perrone, (nt. 2), 1304 (of the opposite opinion that the absence of comparability may hinder competition).

[38] Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv. L. Rev. 1435 (1992), 1475 (see also, in more general terms on charter amendments, Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 Harv. L. Rev. 1820 (1989)).

[39] Barzuza, (nt. 25), 988-992.

because, by opting out of all but extreme forms of malfeasance by directors and officers, firms save on litigation costs. This result is also coherent with the fact that firms moving to Nevada tend to be smaller, thus more vulnerable to litigation costs[40]. In both cases, authors were concerned with publicly traded companies and shareholder/director relationships – obviously, given the scope of US corporate law – and relationships between majority and minority shareholders.

Similar arguments, including their ambivalence, can be made for unlisted companies, too, focusing on the agency relationship between majority and minority shareholders (which exists in any company with a controlling shareholder) and in the one between shareholders and creditors, insofar as also creditors are affected by a change in company law. In defence of a higher liability threshold one could argue that jurisdictions affording an effective protection to minority shareholders and creditors may, in some circumstances, be affording a *too effective* protection, such that directors are hindered in their actions by the risk of liability. There are also other kinds of rules from which an entrepreneur may want to escape from, beyond substantive rules on liabilities or rules on standing to sue (such as rules on derivative suits, which, for closely held companies, are usually immaterial, because minority shareholders will normally have standing). For example, rules on access to company documents and accounts, which, in Italy, are very liberal in limited liability companies: any shareholder, irrespective of the size of his stake, can access any kind of company document (Art. 2476 Civil Code). Criminal rules or rules on disqualification can be another reason why directors and controlling shareholder may want to escape from

[40] Kobayashi, Ribstein, (nt. 26); Ofer Eldar; Lorenzo Magnolfi, *Regulatory Competition and the Market for Corporate Law* (November 14, 2015), Yale Law & Economics Research Paper No. 528; available at SSRN: http://ssrn.com/abstract=2685969.

one jurisdiction[41]; and this may not always be inefficient, if criminal liability is disproportionately afflictive[42].

Other aims are more unambiguously unworthy. For example, the aim of protecting shareholders' assets from their personal creditors (often referred to as "debtor protection"), by making shares of a company a virtually unreachable asset. Nevada (and other states) caters to this need by establishing that, with respect to shares, the most the creditor can obtain against his debtor is a "charging order", by which the creditor obtains any revenue of the company but cannot foreclose on the shares[43] (a similar rule

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[41] Director disqualification, including recognition of director disqualification orders, has been, and is, a relevant topic in various European-level initiatives in company and insolvency law in the past years. *See*, e.g., the *Report of the Reflection Group On the future of EU Company Law*, 2011, 34-35 (§ 2.8.3) and Art. 22(6) of the Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies (COM/2014/0212 final - 2014/0120 (COD)). In insolvency law, the issue is now being addressed by the Group of experts on restructuring and insolvency law assisting the European Commission (JUST - DG Justice and Consumers); *see* also the *UNCITRAL Legislative Guide on Insolvency Law. Part four: Directors' obligations in the period approaching insolvency*, United Nations, New York, 2013, 22-24.

[42] Drawing another example from Italy, delay in filing for insolvency, just knowingly (not intentionally) is punished with up to two years of imprisonment (Art. 217(1), n. 4, Bankruptcy Act). It should be noticed that seldom does any director actually go to jail for such a crime, or even for much more serious economic crimes, due to the inefficiency of the Italian criminal court system; even when someone is convicted, parole is the norm and there are many ways offenders avoid actually serving in prison. This makes criminal law in Italy very harsh on occasional offenders, such as professionals, who suffer the stigma and the cost of the trial, but easy on real crooks, who will basically never face any jail time if not for really egregious cases.

[43] *See* Bruce H. Kobayashi; Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. Ill. L. Rev. 91 (2011), 106-107; Bruce H. Kobayashi; Larry E. Ribstein, *Law as Product and Byproduct*, 9 J.L. Econ. & Pol'y 521 (2012-2013), 551.

*See* the relevant rules in Nevada Revised Statutes, Chapter 78 – Private corporations:

> § 78.746 Action against stockholder by judgment creditor; limitations.
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> 1. On application to a court of competent jurisdiction by any judgment creditor of a stockholder, the court may charge the stockholder's stock with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the stockholder's stock.
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> 2. Subject to the provisions of NRS 78.747, this section:
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> (a) Provides the exclusive remedy by which a judgment creditor of a stockholder or an assignee of a stockholder may satisfy a judgment out of the stock of the judgment debtor. No other remedy, including, without limitation, foreclosure on the stockholder's stock or a court order for directions, accounts and inquiries that the debtor or stockholder might have made, is available to the judgment creditor attempting to satisfy the judgment out of the judgment

applies in Italian law to partnerships – *società in nome collettivo* – in which partners, however, are jointly and severally liable for the partnership's debts, so this is not a proper alternative to a company)[44].

This extreme affirmative asset partitioning may not make any efficiency, or equitable, sense when the shareholder is only one and even more when the law allows for corporations to hold non-business assets.

*4.1. State competition in a low-liability segment. The importance of non-enforcement.*

Nevada's legislators were wary of attracting "scoundrels" and "sleazeballs"[45]. It may, indeed, be true that explicitly taking care of people aiming at escaping liability is politically infeasible. However, there is a big difference between adopting a statute that explicitly protects corporate tortfeasors and subtly suggesting to tortfeasors that incorporating in that state is a good idea.

It should also be considered that the assumption underlying the idea that states are unwilling to compete is that the benefits are modest as compared to costs: states themselves should take active steps to compete and they should offer some attractive feature to attract incorporations; such features, such as judicial infrastructure, may be complex and costly to set up and maintain[46].

It is now widely recognised that Delaware has a competitive edge (and a dominant position) because it offers not only good law, but also competent, specialised and efficient judges; there are network and learning effects connected to being incorporated in Delaware; and lawyers and parties are familiar with Delaware law. These characteristics are assets that

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debtor's interest in the corporation, and no other remedy may be ordered by a court.

[…]

3. As used in this section, "rights of an assignee" means the rights to receive the share of the distributions or dividends paid by the corporation to which the judgment debtor would otherwise be entitled. The term does not include the rights to participate in the management of the business or affairs of the corporation or to become a director of the corporation.

[44] Arts. 2270 and 2304 Civil Code. When the term of the partnership expires, the creditor can also force liquidation of the partner's interest.

[45] Barzuza, (nt. 25), 941.

[46] However, the cost is perhaps overestimated, at least according to Delaware's budget for the Court of chancery: *see* Kahan, Kamar, (nt. 16), 725-726 (discussing modest economic entry barriers).

are difficult and lengthy to replicate, and no state has enough incentives to engage in a race. For example, setting up a specialised court may prove politically or legally complex; possible competitors will always lag behind in creating network effect, because these tend to increase with the increase in size of the network itself[47].

Basically, law cannot be measured only on the books, but also based on its enforcement; hence the importance of infrastructure. If Delaware is inimitable because of its infrastructure, we must now invert the perspective and ask ourselves whether there are any states that are inimitable due to their *lack* of enforcement. We would then find some good candidates for our competition[48].

About a decade ago, in the wake of the Centros decision, it was argued that States could more effectively compete by "unbundling" substantive law from adjudication and consign adjudication to arbitration[49]. Besides the issues of arbitration in general and in company law litigation (for example, with respect to aggregation of claims and other collective redress systems)[50], this unbundling may make sense and has been, in a certain way, experimented in other contexts of what has been called "regulatory dualism" experiences[51].

The point here, however – and to the opposite –, is that what could make a state a low-liability state and, hence, give it a competitive edge over other states is precisely the "bundle" of standard laws (if it is politically unfeasible to adopt statutes on the Nevada model) and slow and inefficient courts.

In this bundled product, states are helped by the Brussels I-bis Regulation[52], whose Art. 24(2) provides for the exclusive jurisdiction of the

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[47] Manesh, (nt. 23), 211-212; see also Kahan, Kamar, (nt. 16), 742-743.

[48] See Dammann, (nt. 21), 492 ff. on the fact that the need of litigating abroad may be perceived as a "burden" due to various factors, among other the very different timeliness of different jurisdictions (498-499)

[49] Christian Kirchner; Richard W. Painter; Wulf A. Kaal, Regulatory *Competition in EU Corporate Law after Inspire Art: Unbundling Delaware's Product for Europe,* 2005/2 ECFR 159.

[50] See recently, for example, Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052 (2015), available at SSRN: http://ssrn.com/abstract=2534481. The literature on the subject matter is vast and a heated debate was recently sparked by the American Express case (cited in the article above).

[51] See, e.g., Ronald J. Gilson; Henry Hansmann; Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 Stan. L. Rev. 475 (2010-2011).

[52] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The regulation is a consolidated and amended version of the

«courts of a Member State», «regardless of the domicile of the parties: … in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat». It should be noticed that, although Art. 24(2) states that «[i]n order to determine that seat, the court shall apply its rules of private international law», the interpretation of what such "seat" is, is not matter of unfettered private international law, but must be reconciled with the Centros line of cases, which stresses the importance of the choice of law made by the members of the company[53]. If there are any more doubts, the state wanting to compete putting its inefficient justice on the line could modify, rather than substantive company law, its private international law provisions on companies; it is unlikely that clarifying what "seat" means under Art. 24(2) of the regulation could spark serious political opposition.

Also, Art. 24(2) expressly disregards the otherwise concurrent criterion of the domicile of parties; hence, Art. 63, concerning where a company is deemed to be domiciled, which could foster "real seat" interpretations of Art. 24(2), does not apply[54]. To be true, the Court of Justice takes a narrow approach to Art. 24(2); this has been criticised, however, on the basis of the correct remark that the aim of the provision is to connect substantive law with its proper forum[55].

May it just be noticed that the worthiness of private ordering to this effect has recently been appreciated by the Delaware courts[56] and, later on, legislature[57], when they have confirmed the legality of forum selection

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more famous Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (see Art. 22 of that directive).

[53] Benedettelli, (nt. 6), [33].

[54] Art. 63(1) states that, « [f]or the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business. …»

[55] Benedettelli, (nt. 6), [33].

[56] *See* Anne M. Tucker, *The Short Road Home to Delaware: Boilermakers Local 154 Retirement Fund v. Chevron,* 7 J. Bus. Entrepreneurship & L. 467 (2013-2014).

[57] See e.g. J.B. Jacobs, *DGCL Amendments Endorse Forum Selection Clauses and Prohibit Fee-Shifting,* Harvard Law School Forum on Corporate Governance and Financial Regulation, June 17, 2015, http://corpgov.law.harvard.edu/2015/06/17/new-dgcl-amendments-endorse-forum-selection-clauses-and-prohibit-fee-shifting/).

The provision is now § 115 of Del. GCL:

clauses concentrating all litigation on Delaware companies in Delaware courts. Although these moves can be looked at as an effort to preserve the value of Delaware's "package" of substantive law and enforcement[58] that was threatened by multijurisdictional litigation[59], there are sound reasons, even more so in a context of very different legal traditions and structures as is Europe, to bind substantive law to adjudication. Substantive rules may (and should) be thought in the context of adjudication; so, for example, nominally strict bright-line rules, perhaps with burden shifting, may prove *too* harsh if courts are very efficient, the social norm is slanted towards honesty and plaintiffs have ample discovery powers, but may set a correct standard of enforcement if courts are slow and inefficient, there is no social (nor legal) sanction against lies, and no access to inside information is available to plaintiffs[60].

*4.2. States' incentives to compete.*

The fact that states would be capitalizing on their inefficiencies, on the other hand, changes incentives of the states to compete, because there is nothing, or very little, on the "cost" side in the cost/benefit analysis.

The two main reasons why states are said to compete are incorporations taxes and additional business for professionals in the field of incorporations, registered agents, lawyers, accountants, tax advisors and

> Forum selection provisions. The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Internal corporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.

[58] Marco Ventoruzzo, *Regulatory Competition and Freedom of Contract in U.S. Corporate Law*, paper presented at the International Conference of the "Rivista Delle Società" in Venice, Italy, November 12 and 13, 2015.

[59] John Armour, Bernard Black, Brian Cheffins, *Is Delaware Losing Its Cases?* 9 Journal of Empirical Legal Studies, 605 (2012).

[60] The latter was, until about end of the Nineties, the case of Italy in suits by trustees in bankruptcy against directors for damages caused by the late filing for bankruptcy or for continuing trading notwithstanding the loss of capital: the trustee could seek damages equal to the entire amount of debts not covered by the estate. This view was later overturned, in favour or a more causal-oriented approach to the determination of damages, but the criterion still resurfaces in some circumstances (*see* Court of Cassation, en banc, May 15, 2015, No. 9100, for a comprehensive reconstruction of the issue).

the like. As said above, we can rule out the tax incentive, due to legal constraints that are definitely unlikely to change.

Business for professionals is a controversial incentive. Some believe that it is an excellent excuse to attract incorporations[61], although – as regards choosing Delaware – the advantage is limited, because corporate lawyers all around the US are trained in Delaware law[62], which is actually one of the reasons why they suggest Delaware as a place to incorporate[63]. In the European context, a similar argument was used, in future projection, referring to legal advice for listed companies, who tend to be clients of international law firms, which have no specific incentive to lobby for the states to compete[64]. Others have argued, instead, that in the European context there would be a great incentive for local lawyers, because they would stand to gain as counsel for the clients without being open to any immediate competition, given the very high costs of training in a completely different jurisdiction[65].

On another note, the fact that companies would have to hire local counsel not only for clerical paperwork but for proper representation could be a big hindrance to place-of-business lawyers and accountants to suggest reincorporating in the low-liability state, given that they would stand to possibly lose some business for the client[66]. The company, however, will continue to need legal services both in their state of incorporation (mainly for litigation) and in the state where it is headquartered. Possibly, there may be some duplicative work (and, thus, higher legal and similar expenses), but this would come as a price to pay to escape liability[67]. Also, one should consider the possibility that the original lawyers may share in some of the

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[61] Dammann (nt. 21), 523; Simon Deakin, *Regulatory Competition versus Harmonization in European Company Law*, in REGULATORY COMPETITION IN EUROPEAN COMPANY LAW: COMPARATIVE PERSPECTIVES (Daniel C. Esty & Damien Geradin eds., 2001), 190, 205-206.

[62] See Kahan, Kamar, (nt. 16), 696-697, who, however, notice that Delaware lawyers can count on some additional revenue from companies incorporated in their state, in the range of $ 165 to 227 million in 2001.

[63] Robert Daines, *The Incorporation Choices of IPO Firms,* 77 N.Y.U. L. Rev. 1559, 1611 (2002); Brian J. Broughman; Darian M. Ibrahim, *Delaware's Familiarity*, 52 San Diego L. Rev. 273 (2015)

[64] Enriques, (nt. 22), 1264.

[65] Dammann, (nt. 21), 506.

[66] Dammann, (nt. 21), 506.

[67] *See* also Michal Barzuza, *Self-Selection and Heterogeneity in Firms' Choice of Corporate Law*, 16 Theoretical Inq. L. 295 (2015), for the claim that the main determinant of Nevada choice is managers' preference for legal protection when their home state (which is the preferred option) is not a viable venue. The argument could be adapted to small companies in Europe substituting owners, or controlling shareholders, to managers.

profits of the lawyers of the state of incorporation, e.g. by opening offices in association with local lawyers. There is no serious risk for either ones to be outplaced by each other, because of the very specific knowledge needed to advise on the laws of different European states.

I would be satisfied to argue that the possibility of more work for local lawyers may be enough to trigger competition, *given that* there are no significant (visible) costs to be borne to attract incorporations.

There may be, indeed, some costs arising from attracting incorporations (and related litigation). Two points should be made in this regard.

First, in spite of the fact that the discussion here is about small companies, even small company cases tend to be worth more than the average claim. Hence, the marginal cost of handling the case by state courts – which is subsidised by the state – may be offset, at least in part, by court fees[68]. It should be noticed that there is no European law constraint on court fees and raising court fees could actually be a move in enhancing the states "law product", because it advantages defendants (as are usually companies) at the expense – at least, the immediate expense – of plaintiffs[69].

Second, attracting incorporations and ensuing litigation may be an expendable point in political discourse because the gains are visible (court fees, more business for local lawyers), whereas the costs (the marginal costs of more units of litigation) are not easily quantified and detected. It could also be popular with judges, who would gain the prestige of company-law

[68] In Italy, for example, any case in company law worth more than euro 520,000 requires payment of a court fee of euro 3,372, plus another euro 1,686 if one also seeks seizure or injunctive relief. Any director liability case will induce defendants to call in court their insurers, hence paying each another court fee of the same amount. In the case an action is brought to void or annul a company decision, the plaintiff should be prepared to pay the same amount various times, because the company may re-issue the same decision, thus forcing multiple cases to be file.

In England, court fees are in the region of 5% of the claim, capped at £ 10,000 when the claim is worth £ 200,000 or more: see HM Courts & Tribunals Service, Civil and Family Court Fees from 6 April 2015 EX50 - Civil and Family Court Fees - High Court and County Court (04.15), available on Justice.gov.uk.

See also https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do for reference to court fees of other European countries (which are usually, however, difficult to ascertain for the layman).

[69] Martin Gelter, *Why do Shareholder Derivative Suits Remain Rare in Continental Europe?*, 37 Brook. J. Int'l L. 843 (2012), downplays court fees as a factor hindering derivative actions but recognises that this may be a «plausible» factor in some cases (869). Here suffice to say that it may be yet another factor making it more burdensome for plaintiffs to attack the company or its directors and officers.

cases, without this interfering at all – as the Italian experience recounts – with speeding up justice.

Finally, for companies other than small family businesses, states could try and attract incorporations to lure companies to establish their "real seat" in a fiscal sense: the domicile, usually the place of incorporation or the place where highest-level corporate decisions are taken[70]. For example, the OECD *Model convention with respect to taxes on income and on capital*, Art. 4(3), refers to «the State in which its place of effective management is situated» to identify the principal state of taxation in case a company is considered a resident of different states); Italian law defines "resident" companies as companies having their statutory seat or place of management or principal place of business in the State[71].

*4.3. Possible drawbacks for local businesses.*

Having slow courts is a big problem for the economy, but it is not an easily solved problem[72]. What I argued above is not that states would *want* to keep justice slow in order to attract incorporations, of course, but that states may want to make the most of their inefficiency.

A different issue would arise, instead, if the path chosen by the state is of actively entering the market segment of low-liability companies with a dedicated effort to enact lax substantive laws. Local entrepreneurs choosing, as is usual, their home jurisdiction to incorporate would be unable to distinguish themselves from crooks of all over Europe[73].

The fact that substantive laws only provide for default protection would not ease the issue, because the social recognisability of companies would suffer from the "lax" base-model. Rather, the law could provide for a specific type of "lax" company. Anyone wanting to incorporate in the state *without* looking for undue protection would incorporate under a

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[70] See Enriques, (nt. 2), 80-81

[71] See Art. 73(3), Decree of the President of the Republic of December 12, 1986, No. 917, Consolidated Act on Income Taxes (Testo unico delle imposte sui redditi): «Ai fini delle imposte sui redditi si considerano residenti le società e gli enti che per la maggior parte del periodo di imposta hanno la sede legale o la sede dell'amministrazione o l'oggetto principale nel territorio dello Stato».

[72] See, for example, the Doing Business Report Series of the World Bank (http://www.doingbusiness.org/reports), classifying and ranking countries on the basis of ease of doing business, which also factors in the efficiency of civil justice; or Giuliana Palumbo, Giulia Giupponi, Luca Nunziata, Juan Mora-Sanguinetti, *Judicial performance and determinants: a cross-country perspective*, OECD Economic Policy Papers, 2013.

[73] *See* Ringe, (nt. 28), 260 (reputation costs of the use of a foreign entity; in the case in the text, it is vice-versa).

different form. Special rules should make it difficult (e.g. with supermajority or majority-of-minority requirements, for the protection of shareholders, or notice to creditors) to transform the "standard" company to a "low-liability" company, in order to avoid "bait and switch" behaviours with minority shareholder and creditors within the state – exactly the same ones which could happen through reincorporation.

*5. Mainly, but perhaps not just, a matter of mid-stream reincorporation.*

Is there a problem with liability-free jurisdictions and liability-free directors and shareholders? Minority shareholders of a company incorporated in a "standard" jurisdiction negotiate adequate protections (they may introduce in then charter more stringent liability rules, provide for supermajority provisions, etc.). As far as creditors are concerned, one could argue that, if creditors know that the company they are dealing with is incorporated under a very lax law, they will have to take this aspect into account when entering into the transaction. This, of course, leaves out, in the first place, non-adjusting creditors, such as tort creditors and, especially, statutory creditors such as the state for taxes and public bodies entrusted with social security for compulsory contributions, and may warrant some sort of "federal" intervention which, in the EU, mainly takes the form of directives. On the other hand, there are means of collaboration among states (for example for tax reasons) and there are instruments that should make it easier for creditors to recover also from foreign companies. Of course, there are information and transaction costs which may make freedom of establishment in itself suboptimal; we have to take into account that this is, however, the law as it is was forged by the ECG.

Midstream reincorporation, on the other hand, multiplies enormously the potential for opportunistic behaviour[74]. One could argue that shareholders and creditors of closely-held companies can fend for themselves and negotiate adequate provisions in the articles of incorporation or in the debt covenants, as the case may be. It should be noticed that the directive 2005/56/EC on cross-border mergers, already mentioned above, obliges state to afford protection to creditors in the same way as it does for domestic mergers, whereas states only have the *option* to

[74] Bebchuk, *Federalism* (nt. 38); Luca Enriques; Martin Gelter, *Regulatory Competition in European Company Law and Creditor Protection*, 7 EBOR 417 (2006); Mucciarelli, (nt. 35), 458-467.

«adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger» (Art. 4(2)).

Negotiating adequate provisions may not always be the case. Shareholders could have not anticipated the possibility of seat transfer or could find themselves for the first time in such circumstances due to supervening events.

Lack of anticipation may not be the case under Italian law, given that seat transfer has always been expressly taken into account by the law in order to grant appraisal rights to the unwilling shareholder. This could happen, instead, for example in real-seat jurisdictions for incorporations happened before Centros or the subsequent years, when probably the risk of reincorporations had not settled yet. One should also not disregard the fact that entrepreneurs choosing low-cost entities such as LLCs should not be expected to hire specialist counsel and, until midstream incorporation has become a widespread risk, boilerplate clauses may not capture, and prevent, such possibility.

Or, shareholders may have inherited their shares, rather than bought them: cases in which the entrepreneur has not planned his succession or has failed to do so effectively may become cases in which, due to fragmentation of shareholdings among the heirs, protections devised in the certificate of incorporation (such as supermajority requirements) may not be effective any more. Given the social and economic relevance the aspect of succession in business has gained, at least in ageing economies as Italy, it would be a mistake to disregard this issue as trivial.

As regards creditors, the risk posed by midstream reincorporation for creditors is, indeed, certainly greater. Leaving aside non-adjusting creditors and information and transaction costs for smaller creditors, such as trade creditors, and leaving aside also "weaker" creditors, such as employees or suppliers with only one or very few customers, also sophisticated, adjusting creditors may not be immune from reincorporations.

Creditors may protect themselves with covenants, which may be more effective than rights available under domestic laws implementing directive 2005/56/EC (or specific laws tackling direct transfer of the seat) but the problem is that, in case the covenant is breached, multijurisdictional litigation will almost inevitably ensue; so, exactly what the covenant wanted to avoid happens nonetheless. Once the company "flees" abroad, even if breaching a covenant, it will almost certainly be necessary,

notwithstanding any forum selection clause in the contract, to sue also in the state of incorporation, given the rules under Regulation Brussels I-bis.

Even more opportunistic potential is involved in reincorporation decisions taken to protect the owners of the firm from their personal creditors. Shifting from a state which allows foreclosure on shares to one which only allows a charging order, or to a state which allows bearer shares, may radically affect the ability of personal creditors to pursue their credit.

*6. The other states' reaction.*

The risk of lowering the standard of law in the US is federal intervention[75], which, in the form of harmonisation, is indeed a far weaker threat in the EU. Rather, the rogue state could fear other states' reactions. (It is beyond the scope of this paper, which does not intend to discuss insolvent companies, to deal with the issue of possible reincorporation of insolvent companies and its relationship with COMI-shifting[76]).

States could devise hindrances to reincorporations abroad, but it would be extremely difficult, as a matter of law, to distinguish the transfer of the seat to one place or to the other one. As mentioned above, the Court of Justice seems to leave space for states to prohibit companies incorporated under their laws to reincorporate abroad[77]. However, it would certainly be discriminatory and a violation of the Treaty freedoms to forbid the transfer of the seat to one specific jurisdiction.

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[75] Bebchuk, *Federalism* (nt. 38); Roe, (nt. 18); and see recently the case of fee-shifting bylaws: Jill E. Fisch, *The New Governance: 2015 Pomerantz Lecture* (December 23, 2015), U. of Penn, Inst for Law & Econ Research Paper No. 16-1, available at SSRN: http://ssrn.com/abstract=2710861 (forthcoming 81 Brook. L. Rev.), 46; J. Robert Brown, *The Future Direction of Delaware Law (Including a Brief Exegesis on Fee Shifting Bylaws)* (April 30, 2015), 92 Denv. U. L. Rev. Online, No. 49, 2015; U. Denver Legal Studies Research Paper No. 15-17. Available at SSRN: http://ssrn.com/abstract=2601101).

[76] On which *see* Horst Eidenmuller, Abuse of Law in the Context of European Insolvency Law, 2009 ECFR 1; Rolef J. de Weijs, Martijn S. Breeman, *Comi-migration: Use or Abuse of European Insolvency Law?*, 2014 ECFR 495; Dario Latella, *The "COMI" Concept in the Revision of the European Insolvency Regulation*, 2014 ECFR 479; see now Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. The Regulation now explicitly states that there is no presumption that the COMI is where the registered office is located if the transfer of the office has occurred less than three months before the filing for insolvency (Art. 3(1), second par.: «In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings»).

[77] See *National Grid Indus* in connection with *Daily Mail*, nt. 11 above.

Similar, albeit lesser, perplexities can be raised on rules that exclude possibility of seat transfer under certain circumstances: for example, when the company is insolvent, in a fashion similar to what the Proposal for European Private Company provided for[78], given that this kind of provision tends to be unable to discriminate "good" and "bad" motives for reincorporation or seat transfer.

The same would be for reincorporation via a cross-border merger: states can restrict cross-border mergers only to the extent they restrict domestic ones[79], which would be an overreaching measure just to avoid a potentially opportunistic reincorporation abroad.

States could react by applying some kind of protective measure, which should comply with the *Gebhard* test. It is not easy to imagine what kind of measure this could be. Could the law state that, for any operation carried out or decided within its territory, one specific standard of care or loyalty applies? This seems unlikely in general terms but also seems disproportionate, using one of the terms of the test.

As regards personal creditors of shareholders, the application of any measure deemed to protect "domestic" creditors would clash with the fact that the interest in a foreign company is an "asset" regulated by the law of the company and it would be extremely difficult to superimpose one set of laws on another one to this effect. Suppose, for example, that the law of the company's seat only allows for a charging order on the shares of a company, while the law of the creditor also allows foreclosure. Even if the creditor obtains foreclosure on those shares, and shares are forcibly sold or assigned, the buyer or assignee would nonetheless need the cooperation of the company to exercise the rights connected to the shares.

If the company had reincorporated in the low-liability state, the only protection for personal creditors of the shareholder could rather come from fraudulent conveyance law, with the difficulty of applying such laws to the

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[78] See the (now withdrawn) Proposal for a Council Regulation on the statute for a European private company (COM/2008/0396 final), which had a similar take the transfer of the seat of insolvent companies. After stating that «[t]he registered office of an SPE may be transferred to another Member State in accordance with this Chapter» (Art. 35(1)), it clarified that «Paragraph 1 shall not apply to SPEs against which proceedings for winding-up, liquidation, insolvency or suspension of payments have been brought, or in respect of which preventive measures have been taken by the competent authorities to avoid the opening of such proceedings» (Art. 35(2)).

[79] See Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, Art. 4(1)(a): «cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States».

"modification" of shares from shares of a company subject to one law to shares of a company subject to another law[80].

A more significant possibility is the "relabelling" of company law rules as insolvency[81], labour, or tort law, so to make them applied with regard not to the place of incorporation, but with reference to other connecting factors, such as the COMI for insolvency rules, the place where business is carried out and workers employed or the place where damage was made for other rules.

There are various issues with "insolvencification", however[82], and it is probably even more difficult to make a case for other sets of rules, if they interfere with the inner governance of the company.

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[80] Italian courts are very liberal when construing which acts can be of prejudice for creditors, so – for example – allow for actions referring to the sale of real estate also for fair consideration, on the assumption that also a "qualitative" modification of the debtor's estate is relevant for creditors (i.e. money is easier to hide and make unavailable to creditors) (the principle is settled; see, e.g., Court of Cassation, December 12th, 2012, No. 26151). Courts also allow actions when goods are paid into a company and thus "transformed" into a partnership interest or into shares of a company (*see*, e.g., Court of Cassation, October 22nd, 2013, No. 23891). The case in the text is, however, different, because it would imply "deconstructing", albeit in a fashion limited to the claiming creditor, the reincorporation: the company should be deemed, for purposes of the avoidance of the act, as the "old" company.

[81] Enriques, Gelter, (nt. 74), 449-452.

[82] Enriques, Gelter, (nt. 74), 449-452.