Light companies – corporate mobility

Speech given

by

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Good morning,
Ladies and Gentlemen, dear colleagues, my learned friends,

When I accepted, over the telephone, the Arbeitsgemeinschaft`s offer to speak to this honourable audience about the English private company limited by shares, I left it, perhaps negligently, to the organisers to determine and circulate the heading for my modest contribution.

On reading the final programme of this conference I started to scratch my head – what are light companies? Did I miss something important at law school? I had heard of legal or quasi-legal terms like light taxation, light work, light cargo, light industry, light vessel, and, last but not least, light punishment – but light company?

Perhaps light was intended to carry a non-legal meaning as, for example, in expressions like “a light and cheerful approach”, or “as light as a feather”, or, even better, “a bit light in the head”, a beautiful English understatement to describe someone regarded to be either tipsy, dizzy or plain crazy.

No, nothing of all of this really seems to fit a company. I therefore decided to make use of one of the major tools of a lawyer, i.e. to interpret or construe “light” in its context. Here I was immediately successful: with the word “mobility” at the end of the description of my subject or topic, its unknown author surely had in mind a meaning for “light” as in “easy to move”. The topic, therefore, turns out to be a play with words, a pleonasm, a doubling of – almost – the same thing: corporate mobility requires companies that can easily be moved.

Assuming that you do not expect a German and English lawyer to give you a lecture on Latvian or Maltese company law, I decided to talk about the English limited, perhaps in comparison with a German GmbH, their distinctive features and their respective mobility.

But: are EU-companies really as mobile as my tropic suggests? How many French companies have you seen setting sail to cross the channel towards England, perhaps in imitation of William the Conquerors` daring expedition in 1066? Is England really the jurisdiction that warmly welcomes foreign companies? Is it the country that allows its own companies to move abroad with the same warm smile?

Why is it that there are – in statistical terms – practically only English companies that cross the channel?

Well, actually they don't. A few important facts to remember:

1. Corporate mobility is largely an EU phenomenon, allowing a company from EU-country one to operate and register a subsidiary in anyone of the other 24 EU countries. That allows for many hundred possible cross-border permutations.

2. EU law does not allow a company from EU-country one to register its statutory seat in another EU-country while, at the same time, de-registering from its initial commercial register. That, if permissible, would be true mobility. Instead, foreign EU-companies are treated much like foreign individuals, i. e. they are not enjoying the full scope of domestic rights in the host country, but rather a limited selection of such rights. And they suffer in a similar way from discrimination, the irrational tool of the prejudiced or uneducated or uninformed.

3. Companies from non-EU-countries, when moving their seat of business to Germany, are still running foul of the old "Sitztheorie", a narrow minded, anti-global approach developed outside statutory law by professorial theorists of the German private international law or conflict of corporate laws and, sadly, supported by the Federal Supreme Civil Court. This

theory turns a foreign corporation into an association with unlimited joint and several liability for all its members – what a welcome!

4. There are a few exceptions: First in line is the treaty of 29 October 1954 between the United Sates of America and the Federal Republic of Germany, at that time not yet having attained full sovereignty.

   The two countries allowed their companies to freely operate in the respective host country. In 1954, that meant free room for maneuver for the likes of General Electric, Coca Cola etc.; and there was little reciprocity with Germany still on its knees.

5. I dare to predict that the Sitztheorie is going to collapse soon altogether, stopping to breathe under the weight of European judicial, contractual and legislative developments. And the WTO will eventually finish it off. We will then have a comparative lawyer's paradise; we will, I believe, have close to 400.000 possible cross-border permutations. Those who have ever physically been in the office of a company registrar can easily imagine the horror that such a scenario must trigger in the widened eyes of a Rechtspfleger (judicial officer or registrar).

6. In all likelihood, such horrors will not need to be experienced. Certain facts and remedies will help:

   a) As mentioned earlier, we are presently observing no more than a relatively small influx of English private companies limited by shares. Approximately 30.000 English limiteds are presently operating via a registered branch office in Germany; that is still not much compared to approximately 850.000 German GmbHs.

b) National states can still make it hard for companies to leave their home jurisdiction, primarily by erecting tax barriers. This is, however, under attack by the European Court of Justice.

c) The English Department of Trade and Industry will, I suspect, eventually increase the financial burden on such companies that operate mainly outside the UK: such companies are nobody's darling, neither in Germany, nor in England; in England they cause a lot of administrative costs without creating a UK-tax-stream.

d) The best way to protect our German registrar from unwelcome "interference" is by taking 5 simple legislative measures:

   aa) remove the requirement for a minimum capitalization altogether (see England and France),

   bb) require all companies to state their capital on their stationary (see France),

   cc) introduce bi-lingual commercial registry entries (German and English, see Switzerland and Holland),

   dd) introduce full corporate transparency along the English model including modern directors` disqualification rules,

   ee) link all German commercial registries both nationally & internationally, thereby providing international transparency and at the same time weeding out the bad guys among the directors.

The combined strength of the German and English systems of incorporation and registration will Germany make a very attractive place to invest, looking purely from a corporate point of view.

7. As you have seen, corporate mobility is still a relatively minor phenomenon, restricted largely to the EU and there to a stream of English limited companies sending subsidiaries to Germany. England is the home of the present world business language, its corporate system does not require serious capitalization, it is legally mature and widespread over the globe, either directly in other commonwealth countries or indirectly via the USA and other Anglo-Saxon jurisdictions. Given the fact that the Angles and Saxons are Germanic tribes, and in the knowledge that a substantial portion of blood in the veins of the British monarchy is of German princely origin, we need not feel left out altogether. After all, it was German jurisprudence that created the concept of a limited liability company. These factors, operating in combination, largely explain the attraction that English limiteds create in foreign shareholder's eyes with little money to spend.

8. The existing restrictions to free movement of companies as indicated before, not to speak of an almost complete lack of tax harmonisation inside and outside the EU, are <u>one</u> side of the mobility coin. The other side are the difficulties to <u>operate</u> a foreign company's subsidiary at home, in particular an English limited company. It is important to understand that an English limited is by a long shot not the same as a German GmbH. They are neither siblings nor cousins; they can't even interbreed (except when they mate by way of cross border merger: after the act, one of the two will die, much like the male spider that is eaten up by his female lover). They are, in all clarity, very different. What they have in common is that they both are designed to protect their shareholders against unlimited liability. That's it. And even there they differ!

9. That provides me effortlessly with an opportunity to explain to you some of the mayor general differences between an English “limited” and a German “Beschränkte”.

    a) It starts with the language. Ordering a cup of tea in England is not the same as corresponding with the Companies` House. Moreover, English legal term cannot easily be translated into German, because the “legal concepts” or “Rechtsfiguren” are so very different. For example: The „Geschäftsführer als Organ der Gesellschaft” is not the same as „the director as the shareholders` trustee” or Treunehmer: Sorgfaltspflichten, duties of care, are not the same as Treuepflichten, fiduciary duties. I am sure we will hear more on this topic from my learned friend Dr. Volker Triebel later today.

    b) English law is still very much judge-made law. Without an understanding of its rôle and function the various companies` acts cannot be fully understood.

    c) Contracts concluded between shareholders or members are subject to English rules of interpretation: they differ widely from the German ones; in England the litteral meaning of words and phrases plays a dominant rôle, an English judge is very careful to add or supplement any words (plain meaning rule).

    d) An English codification is, by definition, incomplete. On the one hand it presupposes a lot of judge-made law, on the other hand English codifications are largely a mirror-picture of former judicial decisions. Therefore, the English lawyer expects from an English

statute judicial flexibility, not German formal statutory discipline. Accordingly, English company law provides for many so-called default rules, or, in German legal terminology, “nachgiebiges Recht”.

e) In no other civil law area was Europe more active than in company law. However, no effort from Brussels could substantially after the distinct individual character of an English company and its applicable law. The two national entities were moved closer towards each other, but they still cannot interbreed. Two good examples: Germany has two-tier company boards, England only one unified board; Germany knows of workers` co-determination schemes, England does not.

10. Apart from these more general, systematic differences between German and English law I would like to point out a few more topical differences between an English Limited and a German Beschränkte. Given the little time that is left – being the last speaker in this group, my colleagues, when talking about aggressive corporate behaviour, seem to have inadvertently applied the “squeeze out” rule against me by using a more than general portion of our joint time – I will restrict myself to a few features where the corporate differences between the English limited and the German Beschränkte are particularly obvious.

a) Germany, a country with a federal structure, has many dozens of local commercial registers, the scene for daily petty battles between notaries and registrars. Such battles that can take a long time since, at least up till now, a registrar`s correspondence is typed by a civil service writing service that truly takes its time. In England, there is one Companies House which operates fully

online. The registrar conducts a plausibility control that seems to function no worse than the German legal battleground.

b) Forming a company in Germany is, in theory, neither substantially more expensive nor substantially more difficult than in England, but a formation certainly takes more time than in England where an intelligent applicant can form his or her own company online within a few days without involving a notary who, more often than not, slows down the formation as much as the above mentioned writing service, especially when a notarization requires the presence of a number of people.

c) Most German notaries use their own “run of the mill” corporate constitutions, leading to a plethora of different constitutional rules; in England, in statistical terms, most people make use of statutory model articles of association.

d) Where individual flexibility is required, English law is superior to German law, both in general and in particular with respect to capitalization, i. e. the introduction of different classes of shareholding.

e) The English company secretary, a kind of private corporate notary, largely secures the holding up-to-date of various registers and other books and the regular information of the Companies` House. This flow of information to the Companies` House is supervised and enforced with the help of a well organized online system. In Germany, however, whilst such duties of information exist as well, they are rarely and certainly not systematically enforced.

f) The business seat of a company secretary is usually the same as the registered office of a company. The registered office is where the books of the companies are kept for inspection, and where creditors can service statements of claim and other correspondence. In Germany, companies, by changing registers, can make it harder for creditors to pursue their claims. And the company files are not open to unrestricted inspection to everyone.

g) While Germany demands a minimum capitalization of 25.000 €, a capitalization of 1 Penny is sufficient in England. That makes obsolete the complex German statutory and judicial network for the protection of the minimum capital. However, once an English company is noticeably capitalized, it is harder to get the money out: a reduction of capital requires a Court`s consent, and a distribution of profits can only take place after setting off the losses of the previous years against the gross profits.

h) The systems of personal liability, be it of directors or shareholders, are quite different in Germany and England. In England there is no duty to file for insolvency after a three weeks` grace period. In essence, the duties of an English director start earlier than those of a German Geschäftsführer: under the rules of wrongful trading a director is personally liable if he enters into a contract when he knew or ought to have known that he cannot pay. With respect to the shareholders, a director is liable under the strict rules of a trusteeship. When fraud is involved, directors and shareholders, like anywhere in the world, are liable. When trading, the fraudster is liable under the rules of fraudulent trading which, when an English limited operates in Germany, excludes the applicability of a claim under section 823 II BGB in connection with 263 StGB. However, there is liability where an English

company, operating in Germany, violates public law, and where no specific English claim is available.

11. Where English and Germany companies do not differ at all is when it comes to corporate mobility: German Beschränkte can as easily travel to England as English limiteds can travel to Germany, in the sense defined above. But who in his right mind would want to introduce a complex animal like the Beschränkte into an English legal and business environment where the main principles of rule making are practicality and simplicity?

12. As you have seen, an English limited company is neither a GmbH in an English suit nor particularly easy to understand and handle. It does not really travel abroad, but is allowed to send out its ambassadors to establish foreign subsidiaries. In this sense it is not light at all. We are miles, i.e. many years away from free corporate mobility in the proper sense of the wording. But the English company limited by shares has helped us to better understand many of the difficulties that we face, and which, in my opinion, we can master when “light” or “easy to move” companies go abroad.

Thank you for your attention.

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