

Nagy on the law of companies and freedom of establishment

Csongor István Nagy (Budapest University of Technology and Economics) has posted **The Personal Law of Companies and the Freedom of Establishment Under EU Law. The Enthronement of the Country-of-Origin Principle and the Establishment of an Unregulated Right of Cross-Border Conversion**, published in the *Hungarian Yearbook of International Law and European Law 2013* on SSRN.

This paper presents, from a critical perspective, the development of the CJEU's case-law on the collision between the personal law of companies and the freedom of establishment with special emphasis on the CJEU's recent judgment in VALE.

It is argued that this ruling treats the incorporation theory as 'the law of the land', putting an end to the explanation that EU law does not establish a connecting factor, the determination of which is a Member State competence, but simply precludes some plights that frustrate the freedom of establishment. Furthermore, the case-law on the personal law of companies is put in the context of the country-of-origin concept as a general and fundamental principle of EU law. It is argued that although the incorporation theory fits better the system of the internal market characterised by free movement rights, as a general proposition, the categorical application of this principle to all fields of private law suppresses conflicts analysis and, as such, is a dubious development. Conflicts problems should receive a conflicts law answer. The oversimplified application of the country-of-origin principle, though certainly warranted in the field of public law, does away with private international law problems without carefully examining and adequately solving them.

Furthermore, it is also argued that in Cartesio and VALE the CJEU seems to have created an unregulated right of cross-border conversion. In Cartesio, the Court established a right of 'departure', i.e. companies have the right to move their seat to another Member State in order to convert into the legal person of the receiving country, while losing their original legal personality. In VALE, the CJEU seems to have established a right of 'arrival', derived from the principle of non-discrimination. However, EU law prescribes only the theoretical possibility of conversion ('departure' and 'arrival'), and leaves the technicalities of this conversion to national law.