

Augsburger Rechtsstudien

86



Charl Hugo/Thomas M.J. Möllers (eds.)

Transnational Impacts on Law: Perspectives from South Africa and Germany



Nomos



Augsburger Rechtsstudien

Herausgegeben im Auftrag der
Juristischen Fakultät der Universität Augsburg von

Professor Dr. Arnd Koch
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Band 86

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The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN: HB (Nomos) 978-3-8487-4611-8
 ePDF (Nomos) 978-3-8452-8777-5

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: Juta and Company (PTY) 978-1-4851-2604-1

Library of Congress Cataloging-in-Publication Data

Hugo, Charl / Möllers, Thomas M.J.

Transnational impacts on law: perspectives from South Africa and Germany
Charl Hugo / Thomas M.J. Möllers (eds.)

549 p.

Includes bibliographic references and index.

ISBN 978-1-4851-2604-1 (hardcover Juta and Company (PTY))

1st Edition 2017

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Preface

“It happened on 5 March 2001. It was bluebell time in Johannesburg” (freely adapted from Lord Denning, in: *Hinz v Berry* [1970] 2 QB 40 42). On that day, a delegation from four faculties visited the Rand Afrikaans University in Johannesburg for the first time. The merger that led to the founding of the University of Johannesburg had not yet taken place. Under the auspices of Professor Helmut Koopmann (German literature), a cooperation agreement was concluded on the university level. (In 1998, the RAU had conferred an honorary doctorate on Koopmann in recognition of his work.) In 2006, the return visit took place at the University of Augsburg and in November 2008, another delegation travelled to Johannesburg. Once again, several faculties participated, represented on the Augsburg side by Professor Koopmann, Professor Juliane Alders (communication sciences), Professor Martin Middeke (English studies), as well as Professor Thomas MJ Möllers (law) and Vice President Professor Horst Hanusch (economics). In 2008, a partnership agreement was eventually concluded on the university level between the University of Augsburg and the University of Johannesburg. In 2009, Professor Möllers was invited to participate in the Annual Banking Law Update arranged by the Centre for Banking Law of the University of Johannesburg. In 2011, the deans of the Law Faculties of the Universities of Augsburg and Johannesburg signed a “Memorandum of Understanding in respect of Academic Cooperation”. In 2012, Professor Möllers visited South Africa again to speak at the Goethe society in Johannesburg and to visit the University of Stellenbosch. In 2015, he again participated in the Annual Banking Law Update. In 2016, the ongoing cooperation and collaboration between the two Law Faculties eventually led to this publication, *Transnational Impacts on Law: Perspectives from South Africa and Germany*.

Professor Charl Hugo and Professor Thomas MJ Möllers met on numerous occasions during the last 15 years, several times in Stellenbosch, but also in Johannesburg. As emerges strongly from the number of contributions to the publication, this *Transnational Impacts* collaboration is without doubt a high point of the relationship to date. The cooperation of senior and junior researchers as well as the combination of paper and comment from a comparative law perspective present innovations. The parallels that can be detected between Germany and South Africa are impressive: various areas of commercial law (company, banking, insurance, social and labour law) and of public and criminal law led to numerous elucidating findings.

Preface

This volume is the result of our collaborative research. Fittingly, the German-South-African collaboration is also reflected by two publishers Nomos (in Germany) and Juta (in South Africa) joining hands. It is also the intention of both faculties that this should not be a once-off project, and, we are happy to say, planning for a second project focusing mainly on aspects of constitutional and public law, is far advanced.

We would also like to place on record that, in accordance with academic practice in South Africa, the contributions of all South African authors were subjected to a rigorous double blind peer-review process by reviewers who are experts in the fields of the contributions they were called upon to review, and who understand the importance of proper academic ethical standards. Their material recommendations led to the adjustment of the original contributions of the authors and assisted the editors in making editorial decisions. We would like to thank the reviewers for their efforts that have contributed positively towards the original and systematic analyses of the transnational impacts on law contained in this publication. It has been the aim of those involved (authors, editors, reviewers and publishers) to create a work that will contribute meaningfully to post-graduate research in comparative law.

The editors

Prof. Dr. Thomas M.J. Möllers (University of Augsburg) and
Prof Dr Charl Hugo (University of Johannesburg)

October 2017

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Introduction

I

2016, in Europe, was the year of Brexit; in the US, it was the year that saw Donald Trump elected as president; and, in South Africa, it was the year in which the Government (in the wake of the Al Bashir drama described in detail below in Strydom’s contribution) almost broke its bonds with the International Criminal Court. South African universities are also currently attempting to deal with strong demands for the de-colonialization of the curriculum. Debates arising from these events often contain elements of a mentality of keeping out what is not well-known and close to you – what Afrikaners term *laertrek* (a term that originated in the time of the Great Trek when the Trekkers formed a circle of ox-wagons to protect those inside from attack from outside).

It would be a sad day indeed if this type of mentality were to transcend into science – almost unthinkable. Law, however, containing elements or forming part of what Savigny termed the *Volksgeist*, is perhaps more vulnerable than most other disciplines in this regard. In the foreword of Tony Weir’s translation of Franz Wieacker’s seminal *Privatrechtsgeschichte der Neuzeit (A History of Private Law in Europe)* Reinhard Zimmermann points to a time when nationalism had led to “an ever increasing particularisation of law and legal science”. “French professors at French universities”, he states, “have started to write textbooks on French law to be read by French students, German professors at German universities to write textbooks on German law to be read by German students.” Jhering was right when he complained that “science has been reduced to national jurisprudence”.

Happily, however, this “nationalistic isolation of law” is in the process of being reversed. Internationally the harmonisation of law has become the focus point of many institutions that feature in the contributions below. Moreover, despite Brexit, the European Union is a reality, and, so too, the Southern African Development Community. In some areas, perhaps most notably international commerce, resistance to globalisation is in any event almost inconceivable. Moreover, it is suggested that the call for de-colonialization of the curriculum in South Africa, properly regarded, is a call for greater inclusion of African science rather than for the exclusion of foreign science.

It is further noteworthy, against this background, that South African courts are obliged by the Constitution, when interpreting the Bill of Rights,

to consider “international law” and are expressly authorised to consider “foreign law”.

As reflected by the first part of its title, “Transnational impacts on law”, this publication attempts to contribute towards the breaking out from any “nationalistic isolation of law”, and to open up the *laer*. However, as reflected by the second part of the title, “Perspectives from South Africa and Germany”, the focus is specifically on these two countries. From the perspective of the South African contingent this must be seen as recognition of the major impact of German law, in particular, in South Africa. Not only do the two countries share civilian roots (despite the fact that the South African legal system is more accurately described as “mixed”), interesting parallels in their history, and, currently, very similar constitutional values, but, on a practical level Germany has been a prime destination for South African legal scholars over many years. The support by Germany of South African legal academics by means of stipends and scholarships, and especially the Von Humboldt scholarships, has been immense, and has led to highly valued academic friendships and ties. South Africa, too, however, has much to offer to international legal scholarship – especially in the context of breaking out from nationalistic attitudes towards law. The country has produced, over many years, a fine body of internationally recognised legal scholars, who, due to their “mixed” legal background, are able to move more comfortably in both the common-law and civil-law world than many others.

II

The volume starts with the contribution of *Van der Linde* and *Adams* on the movement of companies from their state of origin to a different destination state. The emigration and immigration of companies is, of course, at its very heart, a transnational issue. This issue is of central relevance especially for the European Union, because the seat theory clearly complicates transferring the seat from one member state to another and hence is opposed to the idea of a common market. The foundation theory, however, allows for a transfer without difficulties. Different manifestations of the movement of companies (the transfer of the real and statutory seat) both inbound and outbound are investigated. The authors review the position in the EU, Germany, the SADC and South Africa. They conclude that the SADC, though still in an embryonic phase in this context, will do well to integrate lessons learnt in the EU (which now allows restrictions on the emigration of companies but not on immigration). *Koch*, in commenting on the paper, sketches

the “long journey” in Germany in this regard (associated with the question whether the place of incorporation or real seat should determine the *lex societatis*) which culminated in the recognition of the free immigration of companies in the EU and Germany. He cautions that for the European position to serve as a model for the SADC it needs to be a convincing model and the disparities between the EU and the SADC as regional bodies must not be such as to preclude application of the EU model to the SADC. He suggests further that a supranational corporate form comparable to the *Societas Europaea* (European company) might also be considered for the SADC. Essentially the authors and commentator are in agreement that the globalisation of markets demands the relaxation of barriers in national company law and that lessons from the EU, carefully adapted, may be highly beneficial to the SADC.

The globalisation of markets extends, of course, also to insurance. The papers of *Millard* and *Möllers* provide, respectively, perspectives from South Africa and Germany regarding questions of fairness in advice and intermediary services in the insurance and financial markets industry. Millard sketches the manner in which insurance is, and has been, marketed and distributed in South Africa, starting with the Roman-Dutch background, the law of agency and mandate (governed by the legal principles that the mandatary must act in good faith and with care and skill), subsequent interventions by the legislature by means of the Financial Advisory and Intermediary Services Act 37 of 2002 (which moved from a principles approach towards a plethora of rules), and, finally, recommendations relating to market conduct published by the South African Insurance Regulator (the Financial Services Board) recently under the name of the *Retail Distribution Review (RDR)*. This she compares to the position in German law, which distinguishes between insurance intermediaries and those selling other financial products. Möllers, who in his paper concentrates more on the latter, explains the “overwhelming complexity” of the regulatory environment in this regard in Europe and Germany as it emerges from the *Wertpapierhandelsgesetzbuch (WpHG)*, *Versicherungsvertragsgesetz (VVG)* and, on the European level, the two *Markets in Financial Instruments Directives (MiFID 1 and 2)*, and the *Markets in Financial Instruments Regulation (MiFIR)*. Both authors identify a similar movement from a principles approach to a detailed-rules approach, especially after the 2008 financial crisis. Although both authors recognise that there are shortcomings in the rules-based approach, they are carefully optimistic that it will be beneficial and, if enforced rigorously, ensure a fairer dispensation for the consumers

of financial services. Millard, moreover, points to the fact that the *RDR* recommendations are largely on a par with developments in Germany and the EU.

The financial crisis of 2008 emphasised the need for countries to have an effective and sound corporate rescue framework. Restructuring plays an important role in this context. The impact of restructuring proceedings on executory contracts of the company forms the specific subject-matter of the contribution of *Calitz* and *Lawrenson*. In a comparative analysis of South African and German law the authors indicate that international best practice, as recognised in the UNCITRAL Legislative Guide on Insolvency Law may involve the ability to take advantage of some such contracts (the beneficial ones) and to reject others (the burdensome ones). They indicate that both South Africa and Germany have struggled with similar questions in this regard (inter alia as to the rights of creditors when an executory contract of a debtor company is cancelled, and how ipso facto cancellation clauses should be dealt with). They conclude that the South African legislature can borrow beneficially from the German approach towards executory contracts in some respects – such as the principle that the business rescue practitioner or office holder must choose between being fully bound by the contract or cancelling it. Partial performance should not be an option.

The contribution of *Marxen* and *Hugo* relating to the independence principle that governs autonomous (abstract) instruments of payment and guarantee that are prevalent in international commercial contracts provides evidence of a transnational convergence of law as opposed, perhaps, to a direct impact. They demonstrate that the doctrinal basis of exceptions to the independence principle in South African law is public policy, and that this has, to date, led to the clear recognition of only one exception namely fraud by the beneficiary. In Germany, on the other hand, the doctrinal basis for exceptions to the independence principle has been the absence of good faith in the guise of *Rechtsmissbrauch* derived from paragraph 242 of the *BGB*. This has led to the recognition of a wider group of exceptions to the independence principle. Dicta from two recent cases in South Africa, however, are indicative of support for the absence of good faith (akin to the position in Germany but without reference to it) providing a basis for departing from the independence principle.

There are no less than three contributions from the South African authors dealing with aspects of private international law. *Neels* reflects on the transnational impact of German private international law in South Africa in relation to questions regarding the proprietary consequences of marriage. He concludes that the South African courts appear likely to adopt an approach

at least partially inspired by the provisions of the *Gesetz zur Neuregelung des Internationalen Privatrechts* of 1986. *Fredericks*, in dealing with contractual capacity in German and South African private international law, points out that German law favours the *lex patriae* in this regard, and South African law the *lex domicilii*, *lex loci contractus*, *lex situs* and, possibly the putative objective proper law of the contract. Some transnational impact is evident in German law in so far as the *Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB)* has recognised the so-called *Lizardi* rule (derived from French case law) which, subject to certain exceptions, applies the *lex loci contractus*. Finally, as regards the international private law contributions, *Bouwers* reflects on the inferring of a tacit choice of law in international commercial contracts. He emphasises the importance of the private international law of different countries being in conformity with one another. Regarding tacit choice of law transnational impact is clearly discernible: the Rome I Regulation applicable in the EU (with the single exception of Denmark) requires a “clear demonstration” on the basis of “the terms of the contract” or the “circumstances of the case”. The relevant South African case law, on the other hand, is to the effect that a tacit choice of law will not be “readily implied” but can be inferred on the basis of “the provisions of the contract and the circumstances of the case”. Commenting on the paper of *Bouwers* from a German perspective, *Wurmnest* refers to the fact that the Rome I Regulation does not in this respect allow recourse to the “hypothetical will” of the parties, and, in this sense, changed the German law existing prior to the Rome I Regulation. Regarding the “clear demonstration” requirement he further refers to disputes between commentators arising from the terms used in different European languages for the English “clear demonstration” and opts for the interpretation that “clear demonstration” – the correct criterion, requires more than “demonstrated with reasonable certainty”. Regarding the demonstrators of a tacit choice of law against this background both papers contain a wealth of examples.

Migrant work, of course, is by definition transnational. It is a social phenomenon of the modern world that poses many difficult questions in law. In their contribution from a South African perspective, *Fourie* and *Bowles* explore specifically the labour and social protection of migrant domestic workers. Their analysis takes account of various international instruments applicable to such workers as well as the position within the SADC. It is especially by means of these international instruments that a transnational impact on South African law is discernible. South Africa, for example, has ratified all the so-called core conventions required by the ILO Declaration on Fundamental Principles and Rights at Work. This, however, has not been

enough to provide adequate protection to migrant domestic workers in South Africa. The authors expose the fact that such workers, due inter alia to their precarious immigration status as well as the fact that they often live in the home of their employers, are particularly vulnerable in South Africa (in comparison to Germany and the EU). They point out that while the South African courts are taking progressive steps to improve the legal and social position of these workers, significant and urgent changes in legislation are required. Commenting on this paper from the German perspective, *Benecke* points out that while it cannot be doubted that the typical domestic worker in Germany is indeed well-protected (most are EU citizens and accordingly have an unproblematic immigration status, and they seldom live in the homes of their employers), there is a specific group the members of which are employed to care for elderly or frail people requiring 24 hour on-call assistance. They face a de facto similar vulnerability. This is due to the fact that the combined effect of the German *Arbeitszeitgesetz* (limiting the maximum working hours to 48 per week) and the *Mindestlohngesetz* (imposing a minimum wage of EUR 8.50 per hour; 2017: EUR 8.84) effectively places the legal employment of such persons outside the financial means of most families.

The superior social protection offered by German law features also in the contribution of *Mpedi* and *Nyenti* on social insurance. Writing from the South African perspective they identify the three social security strategies in South Africa namely social insurance, social assistance and social allowance, as well as the plethora of legislation relating to them. They make the telling point that this multiplicity of laws leads to many persons who should be benefiting from them being excluded due to ignorance or an inability to find their way through the maze of legislation. Hence they argue for the systemisation and consolidation of all social-security law in a single more-accessible code, akin to Germany's *Sozialgesetzbuch* (which covers both social assistance and social insurance and is not dominated by the concept of compensation). The financing of social security, as well as adjudication and enforcement in both South Africa and Germany are dealt with, as well as the complications emerging from private schemes existing side-by-side with state schemes. Commenting on the paper from a German perspective, *Gassner* provides an overview of the development of the German social-security legislative framework and concludes that the planned reforms in South Africa may at least find partial inspiration from the long-lasting German experience. He points out, however, that there is a danger of creating a "paternalistic nanny state" if individual choice is unduly restricted – while

acknowledging that the South African quest of protecting a large number of people with limited education may be a more important consideration.

Turning towards criminal law, and more specifically cybercrime, the paper of *De Villiers* provides a comprehensive oversight of the South African common-law background (the crimes of fraud, theft, malicious damage to property and forgery and uttering) and cyber-crime legislation (the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 (RICA), the Electronic Communications and Transactions Act 25 of 2002 (ECT) and the Cybercrimes and Cybersecurity Bill, 2016 (CCB)) in South Africa. He categorises the many different relevant statutory offences into three main groups: the unlawful securing of access and related issues; the expansion of the common-law crimes; and, finally, hate speech and related issues. This is compared with cybercrime in the German *Strafgesetzbuch (StGB)* and the EU's Convention on Cybercrime, 2001. The role of the EU's Area of Freedom and Justice in fighting financial crime is also emphasised. He concludes by pointing out that the common-law background of South African criminal law is significantly closer to that of Germany than that of England or America and that the German codification of these offences shows marked similarities, but also some differences, to those emerging from the CCB. Writing from the German perspective *Kaspar* deals with the difficulty in defining cybercrime, shares some empirical research (indicating that computer fraud, and fraud through access to communication devices, were the most common offences in Germany in 2014), strategic transnational and domestic measures relating to cybersecurity, and, finally, the development of German substantive criminal law relating to cybercrime (which, essentially, took the form of the introduction of new offences into the *StGB* – rather than, as was the case in some respects in South Africa, the adaptation of existing offences). He concludes with the point that this has resulted in a rather disjointed treatment and argues for a coherent and comprehensive new cybercrime act combining the offences, or at least a specific section within the *StGB* dealing with cybercrime.

There is, of course, a strong link between cybercrime and data (or privacy) protection. The latter forms the subject-matter of the contribution by *Watney* and *Cupido*. Their paper contains a comparative synopsis of the law of privacy and personal-information protection with reference to common law, constitutional law, legislation, and international treaty law. The role of privacy policies in relation to the online protection of personal information is also considered. In general terms the authors indicate how the internet, mobile phones and the social media (which are all transnational in nature)

have created significant risks in relation to personal and financial information. The protection of this information against unlawful access has become very important. Hence, South Africa is in the process of implementing privacy legislation (the Protection of Personal Information Act 4 of 2013) based to a significant extent on the EU Data Protection Directive - the EU having taken the lead on an international level in this regard. It accordingly seems likely that the South African courts will look towards EU case law when called upon to interpret this legislation.

In the contribution of *Bilchitz* and *Heleba* the focus shifts to constitutional and administrative law. The authors explore, from a South African perspective, two fundamental concepts in constitutional law namely public participation and reasonableness. They investigate the manner in which the principle of public participation in relation to legislative processes, eviction cases and procedural fairness in administrative law has been developed by the constitutional court and has been linked to reasonableness. They further identify three rationales for, or approaches to, public participation (instrumentalist, dignitarian and relational) in this context. Commenting from a German perspective, *Wollenschläger* identifies a parallel development in Germany where constitutional law has also had a profound influence on administrative law. In his view, however, the salient distinction between reasonableness (as substantive standard for assessing actions of public authorities) and the procedural requirement of public participation may be diluted by some of the approaches identified by *Bilchitz* and *Heleba*. One difference between German and South African administrative law emerging from the respective papers is that in German administrative law substantive requirements (such as reasonableness) has been superordinated over procedural correctness. Hence, an infringement of the right to a hearing, for example, does not necessarily imply, in German law, that the administrative decision is illegal. The potential for further interesting comparative research emerges clearly from the respective papers.

Turning to public international law, *Strydom*, in a thought provoking paper, traces the trends and principles that have emerged from the South African executive and the courts over the past two decades. He points out that despite the post-constitutional (post-1996) openness for international law to co-determine the future content of the law and the country's foreign trade-relations policies, the conduct of the executive in this regard has not been encouraging. On the other hand, the South African courts, when given the opportunity, have contributed much in this regard. This is demonstrated with reference to a number of cases relating to diplomatic protection, South Africa's Rome Statute obligations (including in relation to the recent Al

Bashir case), the national enforcement of decisions of the SADC Tribunal and selected extradition issues. In the process he deals also with the difficult question of the proper role of parliament in treaty-making. Responding from a German perspective *Lorenzmeier* deals also with the role of parliament which is further complicated as a result of Germany being a member of the EU. Regarding treaty-making he makes the point that the executive is bound by constitutional constraints and especially by the human-rights provisions which operate extra-territorially. Human-rights treaties have the status of federal statutory law in Germany. He points out that Germany has similar rules to South Africa as regards immunity and diplomatic protection, but has not as yet had to deal with extradition to the ICC (like South Africa in the Al Bashir case). It is, however, under a statutory obligation to do so if the Court so wishes.

The volume concludes with a demanding, legal philosophical consideration of transconstitutionalism (in the sense of the cross-scaling of constitutions at a regional/international level) and democratic legitimacy as dilemmas of regionalism (the European Union and the Southern African Development Community) in Germany and South Africa by *Lenong*.

III

As mentioned in our preface above, in November 2011 the then deans of the Law Faculties of the Universities of Augsburg and Johannesburg, respectively (Professors *Gassner* and *O'Brien*), signed a “Memorandum of Understanding in respect of Academic Cooperation”. The aim was, inter alia, “to provide for cooperation on academic activities ... that will strengthen mutual understanding, foster friendly cooperation and promote sustainable and productive academic collaboration ... between faculty [and] ... researchers”. The scope was expressed as including “joint research” and “joint publications”. The envisaged activities include “[r]esearch collaboration, including joint research projects in areas of mutual interest”.

South African universities are experiencing a strong drive towards “internationalisation”. Within this context many agreements akin to that between UJ and Uni-Augsburg have been concluded. Unfortunately, however, they too often go no further than a signed document in a filing cabinet. This volume bears testimony to the fact that this one is a working agreement – it is in perfect harmony with the aim, scope and envisaged activities quoted above. It has produced quality research and fostered friendship.

Charl Hugo / Thomas M.J. Möllers

The project received strong financial support from both Universities. From the South African side, many papers were co-authored by a senior and more junior colleague. As such it was a valuable capacity-building exercise that should bear fruit in future. And, while reflecting on the future, a follow-up publication is in the process of being conceived: hopefully we will one day be able to look back on a series, or, if the German is to be preferred, a *Augsburger-Johannesburger-Schriftenreihe*.

The editors

Prof Dr Charl Hugo (University of Johannesburg) and
Prof. Dr. Thomas M.J. Möllers (University of Augsburg)

October 2017

Towards free movement of companies – the European position as a model for the SADC

*Kathleen van der Linde**

*Faadhil Adams***

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I. Introduction

An ever globalising world goes hand in hand with an increase in trade between nations.¹ Regional communities have been founded, throughout the world, with the understanding that the relaxation of trade barriers will increase commerce between them.² In pursuit of an integrated market they regularly look towards the facilitation of the free movement of, among others, goods, services, capital and persons.³ The free movement of companies forms a natural corollary of this initiative. While it can be read into the movement of capital, goods or even services, it is primarily embodied in the freedom of establishment. A person (natural or juristic) will be “estab-

1 See http://www.worldbank.org/depweb/beyond/beyondco/beg_12.pdf; Kathleen van der Linde “Freedom of Establishment and Movement of Companies – Does South Africa Live Up to the Challenge of a Globalised Economy?” 2011 (unpublished) UNISA conference paper.

2 See Southern African Development Community (SADC) http://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf (15-09-2017); East African Community (EAC) http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf (15-09-2017); Association of South East Asian Nations (ASEAN) http://www.asean.org/storage/2016/02/The_ASEAN_Charter.pdf (10-04-2016); European Union (EU) the Treaty on the Functioning of the European Union [TFEU] <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> (15-09-2017).

3 See the SADC treaty (n 2) art 5(2)(d); See the EAC treaty (n 2) art 7(1)(c); ASEAN charter (n 2) art 1(5); the Treaty on the Functioning of the European Union (n 2) title II and IV. All of the charters and treaties of these respective communities identify the movement of goods, persons, capital and services as crucial to the development of the economic community.

lished” in a foreign state when it carries on economic activities of a permanent (stable or continuous) nature in that state.⁴ Freedom of establishment necessarily involves cross-border situations.⁵ A distinction can be made between primary and secondary establishment.⁶ Primary establishment refers to the transfer of a company’s central management and control (its real seat) or its legal seat (registered office) to another state.⁷ Freedom of secondary establishment refers to the ability to conduct permanent economic activities in more than one state. In the case of a company, this could be done through a branch, subsidiary or agency in another state.

Free movement of companies within a regional community implies that the substantive law of the state of origin and the host or destination state must be tested for any barriers to emigration and immigration that do not accord with freedom of establishment. Unless secondary regional legislation or instruments regulate the methods and procedures for emigration and immigration, consideration should also be given to introducing domestic provisions that can give effect to the demands of corporate mobility.

In addition, conflict of law rules might impact on the freedom of establishment if they lead to the non-recognition of a company establishing itself in the host state. The connecting factors used by the home and host countries must be considered in order to determine whether the company will be recognised in the host state and also to ascertain the *lex societatis* (applicable law) of the company once it has moved. The *lex societatis* refers to what can

4 See European Commission *Guide to the case law of the European Court of Justice on Articles 43 et seq. EC Treaty. Freedom of Establishment* 1/1/2001 paras 2.1 and 2.2. In relation to the concept under the EU Treaty, see European Court of Justice Case C-2/74 21.6.1974 *Reyners v Belgium* ECLI:EU:C:1974:68 para 21: “the concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom”. See further Case C-378/10 12.7.2012 *Vale Építési kft* ECLI:EU:C:2012:440 para 34: “the court notes that the concept of establishment within the meaning of the treaty provisions on the freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in the host member state for an indefinite period.”

5 *EC Freedom of Establishment* (n 4) para 2.4.

6 *EC Freedom of Establishment* (n 4) para 3.

7 *EC Freedom of Establishment* (n 4) para 3.1.2 makes reference to the central administration only.

be termed the internal law of the company or the law of the company's formation, life, and liquidation (death).⁸ The *lex societatis* is determined by means of two theories: the incorporation theory and the real seat theory. The incorporation theory states that the law of the place where the company is initially formed (incorporated) constitutes the *lex societatis* of the company, regardless of where the company actually does business or where the actual management of the company is situated.⁹ The real seat theory, on the other

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- 8 Ebke "The real seat doctrine in the conflict of corporate laws" 2002 *The International Lawyer (Int. Lawyer)* 1015 1023. This is in keeping with the definition of the *lex societatis* in many countries throughout the world for instance the Australian Foreign Corporations (Application of Law) Act 1989 which states that any of the following will be referred to the law of the *lex societatis*: the status of a foreign corporation; the membership of a foreign corporation; the shareholders of a foreign corporation having a share capital; the officers of a foreign corporation; the rights and liabilities of the members or officers of a foreign corporation, or the shareholders of a foreign corporation having a share capital, in relation to the corporation; or the existence, nature or extent of any other interest in a foreign corporation; the internal management and proceedings of a foreign corporation or the validity of foreign corporations' dealings otherwise than with outsiders; see further Davies, Bell and Brereton Nygh's *Conflict of Laws in Australia* (2010) 719–724 for a further exposition on the Australian position. The position in the majority of common law countries is based on the English law position and is almost identical with reference to the issues that will be governed by the *lex societatis*. For an exposition of these rules, see Collins (gen ed) *Dicey, Morris and Collins on the Conflict of Laws* (2012) 1527–1557. For a summary of the position in Canada and India, see Setalvad *Conflict of Laws* (2009) 22.3 and 22.4 who identifies the same subjects as falling to the *lex societatis* both in Canada and India. Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) (2008) art 1(2)(f) specifically excludes all of these aspects from its material scope (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN> (15-09-2017)). The Brussels I Regulation leaves all internal issues to the courts of the member state in which the company has its seat. The seat is determined by the private international law rules of the company – Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0044&rid=1> (15-09-2017)).
- 9 This is generally accepted, see Rabel *The Conflict of Laws: A Comparative Study. Volume II: Foreign Corporations: Torts: Contracts in General* (1947) 31; Myszkę-Nowakowska *The Role of Choice of Law in Shaping Free Movement of Companies* (2014) 63; Rammeloo *Companies in Private International Law* (2001) 16; Paschalidis *Freedom of Establishment and Private International Law for Corporations* (2012) 12. From the countries mentioned in this paper the following apply the incorporation theory: the United Kingdom (Collins *et al* (n 8)); the Netherlands (*Uitvoeringswet Europees Vestigingsverdrag* of 25 July 1959, *Staatsblad* 1959, 256 and see Rammeloo (n 9) 98–127); Italy (see the private international

hand, is generally interpreted to mean that the law of the place where the central management of the company is situated would apply as the *lex societatis*.¹⁰ This would be the place from which the company makes its decisions on a day-to-day basis.¹¹

law code of 1995 ch 25 which states: “Companies, associations, foundations and other bodies, both public and private, even though not having the characteristics of an association, shall be governed by the law of the state in whose territory their incorporation was completed.” Nevertheless, Italian law shall apply if the seat of management is in Italy. See further Rammeloo (n 9) 222 for the translated provisions); Hungary (Hungary has converted its connecting factor from the real seat doctrine to the incorporation doctrine. The previous position in Hungary under the private international law code of 1989 at art 18 of the decree law No 13 of 1979 states that: “If a legal person has been lawfully registered in accordance with the laws of several states or if, under the rules applicable in the place where the seat designated in its articles of association is situated, registration is not required, its personal law shall be that applicable in the State of the seat.” This was with the proviso that the real seat and registered seat had to be located in the same place, which is usually a consequence of the real seat doctrine. The position has, however, been amended by law LXI of 2007 which allows the real seat of the company to be situated separately from the registered seat, but allows the company to continue being governed by the law of its place of incorporation. *Contra* Gerner-Beuerle and Schillig “The mysteries of freedom of establishment after Cartesio” 2010 *International and Comparative Law Quarterly (Int'l. Comp LQ)* 313 317–318 where they state that Hungary never subscribed to the real seat theory as “the provisions of the Company Act and the Commercial Register that refer to the real seat restrict the scope of application of Hungarian company law in cases that have a certain connecting factor (the location of the real seat) with another country; they do not determine the applicable law”).

10 See further Myszke-Nowakowska (n 9) 55. In addition to the centre of decision-making and the main place of establishment there are also other variants that could be used in the determination of the real seat. These include the actual place of the general meetings of the shareholders and/or board of directors and the criterion of control (*critere du controle*) which refers to the nationality of the shareholders of the company and imputes the governing law of the place of their nationality.

11 This would be in line with the French interpretation. Traditionally French law appeared to favour the central place of business where it referred to the *lieu d'exploitation* (business centre). The conflict between the *lieu d'exploitation* and the *siège social* (registered seat, which also referred to nationality) was a long-standing source of friction under French law. This position was eventually resolved in favour of a connecting factor that in all essence appears to be the same as the actual centre of administration, see further Rammeloo (n 9) 203–205 in this regard. Also see Garcia-Riestra “The transfer of seat of the European Company v Free establishment case-law” 2004 *European Business Law Review (EBLR)* 1295 1309 where he states that the default position under French law is to look to the registered seat and only if there is an element of fraud, the court will refer to the real

The incorporation theory is widely recognised as being the approach better suited to establishing free movement of companies.¹²

We discuss the meaning and scope of freedom of establishment under three sub-headings: (a) recognition, (b) emigration, and (c) immigration. While emigration and immigration represent sides of the same coin, it is useful to deal separately with the rules imposed by the state of origin (in respect of emigration or outbound transfers) and those imposed by the host or destination state (in respect of immigration or inbound transfers). We consider two types of cross-border transfers: (a) the transfer of a company's real seat or centre of administration (*Verwaltungssitz*) and (b) the transfer of a company's registered office or statutory seat (*Satzungssitz*). Our focus is on the cross-border transfer of the seat and as such the scope of this paper does not extend to other structural changes such as cross-border mergers, divisions or takeovers. We also refrain from dealing with the *Societas Europaea* (SE), a company form subject to European Union (EU) law.¹³ The fact that such companies are ideally positioned to move freely within the EU does not detract from the need to facilitate the movement of companies incorporated under the laws of individual member states.

First, we set out the legal position in the EU based on the Treaty on the Functioning of the European Union (TFEU) and important ECJ decisions on its interpretation of freedom of establishment.¹⁴ We then consider how

seat as the connecting factor. See Ebke (n 5) 1015. When Germany still adhered to the real seat theory (*Sitztheorie*) the connecting factor was definitively stated as the place from which the company was managed or controlled; see further Rammeloo (n 9) 176 for the cases of the Supreme Court of Germany; Drury "The regulation and recognition of foreign corporations: response to the Delaware syndrome" 1998 *Cambridge Law Journal* (*Cambridge L.J.*) 165 175; Erk "The cross-border transfer of seat in European Company Law: a deliberation about the status quo and the fate of the real seat doctrine" 2010 *European Business Law Review* (*EBLR*) 413 416.

12 See Schmidt *Cross-border mergers and divisions: is there a need to legislate?* (2016) 34 ([http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU\(2016\)556960_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU(2016)556960_EN.pdf) (15-09-2017)).

13 Introduced by Council Regulation (EC) No 2157/2001 on the Statute for a European Company.

14 See arts 49 and 54 of the Treaty on the Functioning of the European Union (2012) [TFEU]; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> (15-09-2017). European Court of Justice Case C-81/87 27.9.1988 *The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* ECLI:EU:C:1988:456; Case C-212/97

German company law accommodates freedom of establishment in its various forms. A brief overview of freedom of establishment in the SADC follows. In view of the embryonic development in the SADC, we evaluate how South African company law would measure up to freedom of establishment should this concept be given the same content in the SADC as in the EU. We conclude that the SADC could learn much from the EU experience.

II. Freedom of establishment in the European Union

The free movement of companies can be read into most of the fundamental freedoms of the EU but it is principally based on the freedom of establishment as contained in the following two articles of the TFEU:¹⁵

“Article 49

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.¹⁶

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such

9.3.1999 *Centros Ltd* ECLI:EU:C:1999:126; Case C-208/00 5.11.2002 *Überseering v NCC Nordic Construction Baumanagement GmbH* ECLI:EU:C:2002:632; Case C-167/01 30.9.2003 *Inspire Art Ltd* ECLI:EU:C:2003:512; Case C-411/03 13.12.2005 *Sevic Systems Aktiengesellschaft v Amtsgericht Neuwied* ECLI:EU:C:2005:762; Case C-210/06 16.12.2008 *Cartesio* ECLI:EU:C:2008:723 and *Vale* case (n 4).

15 The fundamental freedoms of the EU are the same as those of other regional communities see n 3 above. These articles of the TFEU are derived from arts 43 and 48 of the Treaty Establishing the European Union (2002) (consolidated version) (commonly referred to as the EC Treaty); <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN> (15-09-2017).

16 This is referred to as secondary establishment. The term subsidiary is often interpreted to mean a legally independent company that is subject to the economic decisions of a parent company. In the context of art 49 the subsidiary is formed in a foreign jurisdiction. Branches and agencies can be interpreted in a different manner. Unlike subsidiaries, branches and agencies are not autonomous legal persons but extensions of their parent body, see further Myszkę-Nowakowska (n 9) 26–27 for a more thorough understanding of the differences between primary and secondary establishment. For examples of case law where the secondary establishment of a branch has been raised, see the *Inspire Art* and *Centros* cases (n 14).

establishment is effected, subject to the provisions of the Chapter relating to capital.”

“Article 54

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.”

1. Recognition of a foreign company in the EU

Recognition refers to the acknowledgement, in a foreign jurisdiction, of the legal personality bestowed on a company. Recognition must always be the first step in any type of free movement, as without it, a company has no legal standing, no ability to contract and does not offer the critical advantage of limited liability to its shareholders.¹⁷ In this sense, according to Rammelloo, recognition can be construed in both a narrow and a broad sense.¹⁸ In the narrow sense recognition refers only to a company being acknowledged as a legal subject, the bearer of rights and duties, which can be involved in transactions in the host state. The issue of recognition at this point does not take cognisance of the law applicable to the company; this would still need to be ascertained.¹⁹ Sequentially speaking, determining the proper law of the company must come after its “recognition”.²⁰ Recognition in the broad sense, on the other hand, “encompasses the ultimate outcome of the process of finding the proper law of the company”,²¹ the determination of the *lex societatis* with all that it entails.²² Recognition, in a narrow sense,

17 See the *Überseering* case (n 14) where the failure by the German court to recognise a Dutch company would have resulted in the loss of legal personality.

18 Rammelloo (n 9) 10.

19 Rammelloo (n 9) 10.

20 Rammelloo (n 9) 10.

21 Rammelloo (n 9) 10.

22 See n 5 above for a comprehensive illustration.

should be regarded as the minimum characteristic necessary for the free movement of companies.²³

The need for cross-border recognition was already considered in 1929 by the League of Nations.²⁴ There have also been various attempts by the European Community to accede to a convention or treaty on mutual recognition. The Hague Conference on Private International Law drafted a convention on the recognition of legal personality in 1956.²⁵ Although it was signed by a number of member states of the Hague Conference, it never entered into force. A treaty on the mutual recognition of companies was drafted by the European Commission during the same period, but it also never came to fruition.²⁶

The struggle for recognition within the EU has with a sense of finality been resolved by the European Court of Justice (ECJ).²⁷ The court has now definitively ruled that a company validly incorporated or formed in accordance with the laws of any EU member state must be recognised by all the other Member States.²⁸ A company formed in accordance with the laws of a Member State would usually have its centre of administration, principal place of business or registered seat within the EU as envisioned in article 54. The recognition conferred by the court in *Überseering* is, however, not all encompassing; it appears to be restricted only to recognition in the narrow sense. This is clear in both paragraphs 94 and 95 of the judgment where the courts states that freedom of establishment requires the recognition of “ legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its state of incorporation”.²⁹ This position may, of course, lead to the application of two different laws to a company: one law dealing with the rights and duties as well as the capacity of a company in line with its place of incorporation and another covering the other aspects forming part of the *lex societatis*.

23 See Rammeloo (n 9) 10, where he states that the recognition of a company as a legal being is now hardly ever contested.

24 Drury (n 11) 181.

25 Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies associations and institutions, available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=36> (15-09-2017).

26 See the 1968 draft treaty on the mutual recognition of companies available at http://aei.pitt.edu/29885/1/P_14_68.pdf (15-09-2017).

27 *Überseering* (n 14) para 94.

28 *Überseering* (n 14) para 94.

29 *Überseering* (n 14) paras 94 and 95.

2. Emigration

a) Transfer of the real seat

In order to understand the ECJ's jurisprudence on the emigration of companies, one must begin with this statement:

“...companies are creatures of the law, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning”.³⁰

One could argue that it is from this statement that the entirety of the jurisprudence restricting emigration is derived. It sets out the so-called European creation theory (*europäische Gründungstheorie*).³¹ At the outset, in the absence of any secondary law, the court placed at the forefront the ability of the member state of incorporation to determine the conditions for the incorporation and continued recognition of companies. These requirements or conditions are sometimes referred to as “connecting factors”, but should not be confused with connecting factors as understood in conflicts law.³² The jurisprudence of the court indicates that a restriction on a company's ability to move will not violate its freedom of establishment. The restriction involved in *Daily Mail* is a clear indication of this. In this case, the restriction on movement stemmed from the United Kingdom (UK) Income and Corporation Taxes Act of 1970, which required a company to obtain permission from the treasury before moving its real seat out of the UK. The implication is that even though the UK subscribed to the incorporation theory,³³ which would in general allow a company to move its central place of administration while retaining its governing law, a restriction contained in its tax law prevented this type of movement. The court does not consider restrictions on outbound transfers as being in conflict with the freedom of establishment, categorically stating that the freedom of establishment conferred by the treaty cannot be construed as giving “a right to a company incorporated

30 *Daily Mail* (n 14) para 19.

31 Bayer and Schmidt “Grenzüberschreitende Sitzverlegung und grenzüberschreitende Restrukturierungen nach MoMiG, Cartesio und Trabrennbahn: Europäischer Rahmen, deutsche lex lata und rechtspolitische Desiderata” 173 (2009) *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (ZHR) 735 739.

32 This is clear from the reference to national legislation which determines “incorporation and functioning”. See also Gerner-Beuerle and Schillig (n 9) 313 316–317.

33 See n 9 above.