



Court Law Review

ISSN: 3061-0893

E-ISSN: 3061-0907

Journal homepage <https://courtlawreview-aip.com/>

Research Article

DETERMINING THE ‘SEAT’ OF A COMPANY ACCORDING TO THE PROVISIONS OF PRIVATE INTERNATIONAL LAW – A REAL PROBLEM FOR REAL SEAT THEORY LEGISLATIONS

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ABSTRACT

Background: Article 24(2) of the Brussels Ia Regulation establishes exclusive jurisdiction for disputes regarding the validity or dissolution of companies in the Member State where the company has its ‘seat.’ While the Regulation refers to the private international law of the Member State to determine this seat, this reference creates complexity in legal systems such as Austria, which — like many continental European countries — adheres to the ‘real seat theory’ (Sections 10 and 12 of the Austrian Private International Law Act (IPRG)). A strict application of these private international law rules could imply not only that Austrian companies relocating their actual administration abroad lose their legal status, but also that the Austrian company-law dispute rules cease to apply.

Methods: This article employs a legal-dogmatic analysis to interpret the term ‘private international law’ within the meaning of the Brussels Ia Regulation, examining whether it refers strictly to conflict-of-law rules or extends to civil procedural law. The study analyses the interplay between the Regulation, Austrian IPRG, and CJEU case law (Centros, Überseering,

DOI:

<https://doi.org/10.33327/CLR/3061-0907/2025/1-00011>

Date of submission: 07 Jul 2025

Date of acceptance: 11 Sep 2025

Publication: 31 Mar 2026

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Cartesio, Polbud) to determine whether Section 10 IPRG requires a teleological reduction in cases of corporate relocation.

Results and Conclusions: The analysis reveals that a strict application of Section 10 IPRG strictly to relocation cases would result in the ‘forced dissolution’ of Austrian companies, which is incompatible with modern EU corporate mobility principles. The author argues that Section 10 IPRG must be teleologically reduced to apply only to incoming companies, not those leaving. Consequently, for the purposes of Article 24(2) Brussels Ia Regulation, Austrian courts retain jurisdiction over companies incorporated in Austria even if their actual head office is located abroad. This interpretation prevents ‘cherry-picking’ of jurisdiction and ensures the necessary synchronisation between the applicable company law (*lex societatis*) and international jurisdiction (*lex fori*).

1 INTRODUCTION

Article 24(2) Brussels Ia Regulation establishes exclusive jurisdiction ‘for proceedings which have as their object the validity, nullity or dissolution of a company or legal person or the validity of the decisions of its organs’ for ‘the courts of the Member State in whose territory the company or legal person has its registered office’. When determining the registered office, the court must apply the rules of ‘its private international law’.¹

When interpreting this provision, the first question is whether the Regulation is based on a particularly narrow (purely conflict-of-law) understanding of the term, or whether the reference also covers civil procedural law standards. This may be relevant if the mere application of conflict of laws in certain cases fails to achieve the purpose of the provision, which is to ensure, as far as possible, that in (internal) disputes under company law, the applicable company law (*lex societatis*) and international jurisdiction (*lex fori*) are consistent and to prevent conflicting decisions.² At the same time, the example of

1 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 (Recast) [2012] OJ L 351/1, art 24(2).

2 For this standard purpose, see: Paul Jenard, ‘Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters’ (27 September 1968) [1979] OJ C 59/1; Peter Kindler, ‘Internationales Handels- und Gesellschaftsrecht’ in *Münchener Kommentar zum Bürgerlichen Gesetzbuch BGB: Internationales Privatrecht II, Internationales Wirtschaftsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art 50-253)* (8th edn, CH Beck 2020) vol 13, note 606; Peter Gottwald, ‘Brüssel Ia-VO Art 24’ in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen: §§ 946–1120, EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht* (6th edn, CH Beck 2022) vol 3, note 23f; Vossler, ‘Brüssel Ia-VO Art 24’ in Volkert Vorwerk and Christian Wolf (eds), *BeckOK ZPO* (53rd edn, CH Beck 2024) note 18; Daphne-Ariane Simotta, ‘Art 24 EuGVVO’ in Hans W Fasching and Andreas Konecny (eds), *Kommentar zu den Zivilprozessgesetzen* (3rd edn, MANZ 2018) note 131; Case C-144/10 *Berliner Verkehrsbetriebe (BVG)*,

Article 24(2) of the Brussels Ia Regulation illustrates why the now prevailing view to reduce the application of Section 10 of the Austrian Private International Law Act (IPRG)³ teleologically to cases of relocation (of companies with the status of a non-EEA third country) corresponds to the primary purpose of the real seat theory and avoids results not intended by Article 24(2) of the Brussels Ia Regulation.

2 'PRIVATE INTERNATIONAL LAW' WITHIN THE MEANING OF ARTICLE 24 (2) BRUSSELS IA REGULATION – A SYNONYM FOR 'CONFLICT OF LAWS'?

The wording of Article 24(2) of the Brussels Ia Regulation refers the court to the provisions of 'its private international law' for the determination of the 'seat' to which international jurisdiction is linked. In German usage, this reference appears at first glance to point only to conflict of laws rules,⁴ which determine the applicable company law and—in connection with this—whether foreign companies (and legal entities) retain their legal capacity or foreign status in Germany.⁵ It does not, however, appear to extend to rules of jurisdiction, since the regulations primarily relate to questions of jurisdiction. A reference in Article 24(2) of the Brussels Ia Regulation only to conflict of laws could therefore fall short.

In the case of Austria, when the IPRG was passed in 1978, accession to the EC (and thus the application of Article 24(2) of the Brussels Ia Regulation) was still a distant prospect. The legislator could not have foreseen, when drafting the probably unintentionally undifferentiated wording of Section 10 IPRG, that a broad interpretation of this provision⁶ might later result in Austria losing jurisdiction over companies established under Austrian law merely because their actual principal place of administration is located abroad.

This raises the question whether the reference in the Regulation to the 'private international law' of *the lex fori* really refers 'only' to its conflict of laws rules (in the case of Austria, therefore, to Sections 10 and 12 of the IPRG), or whether it is to be understood more

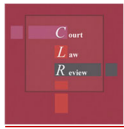
Anstalt des öffentlichen Rechts v JPMorgan Chase Bank NA, Frankfurt Branch [2011] EUECJ (12 May 2011), *ecolex* 2011, 629 [Koller/Slonina] note 41; dissenting opinion Chris Thomale, 'Die Gründungstheorie als versteckte Kollisionsnorm -Höchststrichterliche Fortbildung des internationalen Gesellschaftsrechts anhand von Art 22 Nr 2 EuGVO' (2022) NZG 1290.

3 Bundesgesetz vom 15 Juni 1978 über das internationale Privatrecht (IPR-Gesetz) (IPRG) [1978] BGBl 304/1729.

4 This is particularly evident in the Austrian law designation 'IPRG': Heindler Verschraegen, 'Before § 1 IPRG' in Peter Rummel, Meinhard Lukas and Andreas Geroldinge (eds), *ABGB-Kommentar* (4th edn, Manz 2023) note 1 (as of 1 March 2023, rdb.at).

5 Thomas Ratka, '§ 12' in Manfred Straube, Thomas Ratka and Roman Alexander Rauter (eds), *UGB I* (4th edn, Manz 2018) note 20 mwN (as of 1 July 2018, rdb.at).

6 See also point B.3 below.



broadly and also extends to civil procedure law.⁷ It should be borne in mind that EU secondary law sometimes suffers from the fact that it does not quite accurately reflect the terms used in national law, which can unintentionally lead to an overly narrow (or overly broad) understanding of the terms.⁸

While in German usage the term ‘conflict of laws’ is often used as a synonym for ‘private international law’,⁹ and thus seemingly directs Austrian interpreters to Sections 10 and 12 of the IPRG, English law draws a clearer distinction. In British legal terminology, the term ‘rules of private international law’ also encompasses rules of jurisdiction, whereas ‘conflict of laws’ (as ‘conflict of laws’) refers more narrowly to the determination of the applicable law.

In the United Kingdom, for example, the ‘registered office’ of a company for the purpose of determining its seat in relation to Article 24(2) of the Brussels Ia Regulation (applicable there until 1 January 2021) is regulated in Section 10 of the (civil procedural) ‘*Civil Jurisdiction and Judgments Order*’. It is defined there as follows: ‘*For this purpose [for the purpose of determining the registered office in connection with Article 24 (2) of the Brussels Ia Regulation, author's note], a company has its registered office in the United Kingdom if either: (a) it was incorporated under the law of a part of the United Kingdom; or (b) its central management and control is exercised in the United Kingdom.*’ This must be distinguished from the term ‘conflict of laws’ in British law, which determines the *lex societatis* (i.e. the law applicable to the company) and is based in Great Britain on the theory of incorporation (¹⁰).¹¹

Thus, with regard to other language versions, it can be assumed that the reference to ‘private international law’ is not limited to conflict of laws in the strict sense and could also cover civil procedure law.

In the case of Austria, this would include the jurisdiction rule in Section 75 of the Austrian Jurisdiction Act (JN), which, in accordance with the purpose of Article 24(2) of the Brussels Ia Regulation,¹² would lead to the jurisdiction of the courts at the registered office of the company, even where Austrian companies have their actual head office abroad.¹³

7 See, Andreas Geroldinger, ‘Art 22 EuGVO’ in Alfred Burgstaller and others (eds), *Internationales Zivilprozessrecht* (LexisNexis 2013) note 81.

8 See, for example, Karl Riesenhuber, *Europäische Methodenlehre* (4th edn, De Gruyter 2021) § 10 note 60, using the example of European consumer law.

9 Verschraegen (n 4).

10 On this point, see: Georg Eckert, *Internationales Gesellschaftsrecht* (Manz 2010) 33 ff.

11 See, Peter Stone, ‘Country Report UK’ in Carsten Gerner-Beuerle and others (eds), *The Private International Law of Companies in Europe* (CH Beck, Hart 2019) 747 f, although Stone also describes the reference in the Brussels Ia Regulation as ‘unclear’.

12 Gesetz vom 1 August 1895, über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen (Jurisdiktionsnorm – JN) [1895] RGBI 111, Last updated [2019] BGBl I 61; Regulation (EU) No 1215/2012 (n 1).

13 According to this provision, the place from which the administration is conducted is only decisive ‘in case of doubt’.

3 SOLUTION IN THE CASE OF A MERE REFERENCE TO THE (APPLICABLE) CONFLICT OF LAWS

If one rejects the above interpretation of the term 'private international law', which is also influenced by civil procedure, and limits the reference to conflict of laws, the content of the seat must be determined.

3.1. Austrian conflict of laws: Sections 10, 12 IPRG (real seat theory)

Austrian (company) conflict of laws is based (as is well known) on the 'real seat theory'¹⁴ in Sections 10 and 12 IPRG; According to Section 10 IPRG, the '*personal status of a legal entity or other association of persons or assets that may be the bearer of rights and obligations is determined by the law of the state in which the legal entity has its actual registered office*'. According to the legislators who drafted the IPRG 1978 and according to prevailing opinion, the real seat theory is based on an inherent protective purpose¹⁵: it aims to ensure regulatory sovereignty over domestic matters and thereby guarantee that domestic transactions (primarily company creditors and contractual partners, but also minority shareholders, employees and capital investors) is protected from artificial opting into foreign company law systems by means of the establishment of merely formal foreign companies ('letterbox companies')¹⁶ ('*The real seat theory aims [...] to prevent laxer foreign regulations from undermining domestic company law statutes*').¹⁷ The decisive factor in determining the location of the 'actual head office' – which is sometimes not easy – is the '*expression of an effective, actual connection between a company and a particular state*'.¹⁸ The real seat theory is intended to 'protect the legal system of the state

14 Instead of many, see: Eckert, *Internationales Gesellschaftsrecht* (n 10) 29 ff; Ratka, '§ 12' (n 5) note 10 ff (as of 1 July 2018, rdb.at).

15 See, for example, Thomas Ratka, '§§ 107-114 GmbHG' in Manfred Straube, Thomas Ratka and Roman Alexander Rauter (eds), *Wiener Kommentar zum GmbHG* (Manz 2017) note 20 mwN; Florian Heindler, '§ 10 IPRG' in Peter Rummel, Meinhard Lukas and Andreas Geroldinge (eds), *ABGB-Kommentar* (4th edn, Manz 2023) note 57.

16 See also, Nikolaus Adensamer, *Zur Reichweite des Gründungsstatutes* (Manz 2006) 20; H Behrens and J Hoffmann, 'Einleitung B' in Peter Ulmer, Mathias Habersack and Marc Löbbe (eds), *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG), I: Einleitung, §§ 1 bis 28* (2nd edn, Mohr Siebeck 2012) 21, 29; Susanne Kalss, '§ 254' in Peter Doralt, Christian Nowotny and Susanne Kalss (eds), *AktG Aktiengesetz Kommentar* (3rd edn, Linde 2019) note 37; Karsten Schmidt, 'Sitzverlegungsrichtlinie, Freizügigkeit und Gesellschaftspraxis' (1999) ZGR 23; Rembert Süß, '§ 1' in Rembert Süß and Thomas Wachter (eds), *Handbuch des internationalen GmbH-Rechts* (4th edn, Zerb) note 5.

17 Carsten Thomas Ebenroth and Birgit Bippus, 'Die Sitztheorie als Theorie effektiver Verknüpfungen der Gesellschaft' (1988) 43(14) *JuristenZeitung* 677.

18 *ibid* 679.



that is actually most closely connected to the company, i.e. the state that is most affected by its corporate and business activities'.¹⁹

This 'connection to the facts' is intended in particular to ensure that companies whose centre of activity is in Austria cannot evade Austrian company law, not least because this would make it more difficult to enforce the law.²⁰ In contrast, the *telos* of any restrictions on relocation is hardly specified anywhere.

The Brussels Ia Regulation refers to this conflict-of-law environment in the case of Austria.

3.2. Freedom of establishment as a substantive conflict-of-law rule (‘EU founding theory’)

If, in connection with Article 24(2) of the Brussels Ia Regulation, the Austrian conflict of laws rules described above are applied, it should be noted that, within the EEA, these are superseded by the primary law on freedom of establishment (Articles 49-55 TFEU) by way of ‘precedence of application’ where they conflict with it.²¹ In such cases, Austrian conflict-of-law rules are not applicable law within the meaning of the Regulation and can therefore no longer be used to determine the place of establishment.

Some voices in legal doctrine even classify the freedom of establishment conceptually as a ‘conflict of laws rule’ (and thus as a provision of ‘private international law’), as it produces the same substantive effect: it determines the connecting factor for a company’s articles of association (in this case: the law of formation).²² Whether freedom of establishment is classified as an ‘explicit’ or materially effective (‘hidden’) conflict-of-law rule²³ is not decisive for the fact that, when Article 24(2) of the Brussels Ia Regulation refers to the ‘private international law’ applicable to the court, freedom of establishment

19 Werner F Ebke, ‘Die Sitztheorie im Europarecht’ in Claus-Wilhelm Canaris and others (eds), *50 Jahre Bundesgerichtshof: Festgabe Aus Der Wissenschaft* (CH Beck 2000) 804.

20 Thomas Ratka, ‘Sitztheorie’ in *RDB Keywords* (Manz 2021) (as of 11 October 2021, rdb.at) with further references.

21 See, Christian Zib, ‘§ 12’ in Christian Zib and Markus Dellinger (eds), *UGB Unternehmensgesetzbuch: Großkommentar* (LexisNexis 2013) note 10.

22 See, Heindler, ‘§ 10 IPRG’ (n 15) note 2: ‘The conflict of laws for legal entities in the EEA internal market (...) [is] significantly influenced by the freedom of establishment (Art 49 TFEU) and the relevant case law of the ECJ’; Peter Kindler, ‘Zuständigkeitsfragen beim Binnenstreit einer Auslandsgesellschaft’ (2010) *NZG* 578.

23 On this question, see Thomale (n 2) 1290 ff; Guido A Jestädt, *Niederlassungsfreiheit und Gesellschaftskollisionsrecht* (Nomos 2005) 46 ff, 128 with further references; Ulrich Klinke, ‘Kollisionsnormen und Gemeinschaftsrecht – Zur Architektur des europäischen Vaterhauses’ in Hilmar Krüger and Heinz-Peter Mansel, *Liber amicorum Gerhard Kegel* (CH Beck 2002) 20 ff; Stefan Stork, *Sitzverlegung von Kapitalgesellschaften in der Europäischen Union* (P Lang 2002) 41 ff.

and thus the 'EU incorporation theory' (as stated in the freedom of establishment) must also be taken into account.²⁴

Accordingly, it is correctly argued that, in cases involving the transfer of EEA companies into domestic legislation (i.e. foreign company 'intakes'), the application of Article 24(2) of the Brussels Ia Regulation supersedes freedom of establishment and is therefore not applicable, meaning that the founding state must be taken as the basis.²⁵

The EU 'incorporate theory' applies, as established by the well-known and therefore not further elaborated decisions in Centros, Überseering and Inspire Art.²⁶ Whether the real seat theory also takes precedence over the freedom of establishment in cases of relocation was still denied following the 'Daily Mail'²⁷ and 'Cartesio'²⁸ rulings.²⁹ However, this position is increasingly being called into question in light of recent developments.³⁰

On the one hand, the ECJ has already clarified—first in an aspect of the Cartesio decision and later in Polbud³¹—that restrictions on the relocation of companies must also, in 'exit cases,' be measured against the exceptions to freedom of establishment, at least where a cross-border conversion is sought. On the other hand, since the EU Mobility Directive³² entered into force, a legal framework now exists for cross-border (formal) transfers of registered offices, which also—and in particular—protects the interests of (former) creditors and minority shareholders in the state of departure.³³

24 See, Michael Schillig, 'Die ausschließliche internationale Zuständigkeit für gesellschaftliche Streitigkeiten vor dem Hintergrund der Niederlassungsfreiheit' (2005) IPRax 208; Gottwald, 'Brüssel Ia-VO Art 24' (n 2) note 20.

25 For example, Simotta, 'Art 24 EuGVVO' (n 2) note 131; Eckert, *Internationales Gesellschaftsrecht* (n 10) 466 with further references; Hans G Koppensteiner and Friedrich Rüffler, *GmbH-Gesetz: Kommentar* (3rd edn, LexisNexis 2007) AllgEinl note 21a; Ulrike Frauenberger-Pfeiler, '§ 102' in Manfred Straube, Thomas Ratka and Roman Alexander Rauter (eds), *Wiener Kommentar zum GmbHG* (Manz 2017) note 19. See also, II ZR 28/10 (BGH, 12 July 2011) BGHZ 190, 242.

26 For evidence, see Ratka, '§ 12' (n 5) note 32 (as of 1 July 2018, rdb.at).

27 Case 81/87 *The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* [1998] ECJ (27 September 1988).

28 Case C-210/06 *CARTESIO Oktató és Szolgáltató bt* [2008] ECJ (16 December 2008).

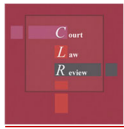
29 See, for example, Maria Doralt, 'Zur Sitzverlegung ins Ausland im Licht von Cartesio' (2009) 4 RdW 255; Georg Eckert, 'Sitzverlegung von Gesellschaften nach der Cartesio-Entscheidung des EuGH' (2009) 3 GesRZ 139.

30 However, following the Centros and Überseering rulings – both of which concerned relocation cases – there was widespread talk in Austria of the end of the real seat theory. See, for example, Kristin Nemeth, 'Das EuGH-Urteil 'Überseering' oder das endgültige Aus der Sitztheorie?' (2003) *Wirtschaftsrechtliche Blätter* 149; Greindl, 'Nochmals: Kapitalgesellschaften ohne Mindestkapital!' (2003) 11 GBU 54.

31 Case C-106/16 *Polbud - Wykonawstwo sp z oo* [2017] ECJ (25 October 2017).

32 Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 Amending Directive (EU) 2017/1132 as Regards Cross-Border Conversions, Mergers and Divisions [2019] OJ L 321/1.

33 See, for example, Martin Winner, 'Die Sitzverlegung' (2023) 5 GesRZ 284.



In this (new) legal environment, it is difficult to argue that Member States may simply ‘dissolve’ (i.e. wind up) their existing companies (in many cases, the registered office and administrative headquarters will already be separate)³⁴ without safeguarding the aforementioned interests or having to observe the exceptions to the freedom of establishment.

In addition, the recent ECJ ruling in *Edil Work 2*³⁵ provides a precedent that also casts doubt on the ‘freedom of establishment resistance’ of restrictions on the exit of companies. In that ruling, the Court declared that it is incompatible with freedom of establishment for a Member State to continue to apply domestic company law provisions to a company (originally) established under domestic law that has been converted into a company of another Member State on the basis of private international law provisions. What is new is that the ECJ also subjected such relocation restrictions to the four-condition test and the exceptions to freedom of establishment.³⁶

This suggests that, in the event of the application of Section 10 of the IPRG (unless this is reduced teleologically³⁷) to cases of departure, Austria would at least have to justify the dissolution (apparently ordered by this) and the change of statutes.³⁸

Austrian ‘restrictions on exiting’ under Section 10 of the IPRG do not actually exist, as this provision must be reduced teleologically to cases of foreign companies moving to Austria.³⁹ However, there is no need to examine whether restrictions on relocation violate the freedom of establishment in this specific context. Even if one adheres to the ‘creature theory’⁴⁰, as interpreted in particular in the ‘Daily Mail’ decision, it must first be examined whether Section 10 IPRG actually orders the withdrawal of Austrian company status for Austrian companies that have relocated. This is because the potential possibility of imposing restrictions on relocation is irrelevant to the question of whether a Member State

34 For a critical view, see Thomas Ratka and Roman Alexander Rauter, ‘Cartesio und das ius vitae necisque des Wegzugsstaates’ (2009) 2 WBL 62.

35 Case C-276/22 *Edil Work 2 Srl and ST Srl v STE Sàrl* [2024] ECJ (25 April 2024); Simon Drobnik, ‘Unvereinbarkeit der Sitztheorie mit der Niederlassungsfreiheit – Entscheidungsbesprechung zu EuGH 25.4.2024, C-276/22’ (2024) GesRZ 181.

36 Case C-276/22, note 38 ff.

37 More on this below.

38 For the view that cases of departure are also covered by the freedom of establishment, see also Jestädt (n 23) 122 ff with further references.

39 See in particular, IPRG (n 3) § 10, para 19, ‘Unlike natural persons, companies are established on the basis of a legal system, in the current state of Community law on the basis of a national legal system. Beyond the respective national legal system that governs their establishment and existence, they have no reality.’

40 See, for example, Peter Kindler, ‘Der reale Niederlassungsbegriff nach dem VALE-Urteil des EuGH’ (2012) EuZW 891; critical Björn Steinrötter, ‘Einheitliche Anknüpfung an den Gründungsort im Internationalen Gesellschaftsrecht – wider die ‘Geschöpf-’ und die ‘Wechselbalgtheorie’ (2012) GPR 119.

actually does so.⁴¹ It is striking that the alleged 'compulsory dissolution' and 'subordination of Austrian companies to foreign statutes' do not seem to occur in Austrian case law: there is not a single known case in which this has been ruled by an Austrian court for companies established under Austrian law.

This is unsurprising as the above-mentioned regulatory purpose of the real seat theory⁴² refers to cases of exiting companies: its aim is to protect domestic commerce from artificial opting-in to foreign legal systems,⁴³ not to protect foreign commerce from companies established under Austrian law.⁴⁴ In addition, dissolving Austrian companies merely because their main administrative activities are conducted abroad—and subjecting them to foreign company law—would not serve these domestic interests.

On the contrary, depriving Austrian companies of their identity and continuity could, depending on their qualification under foreign company law, result in a legal form corresponding to an Austrian 'general partnership' ('Gesellschaft bürgerlichen Rechts').⁴⁵ In many cases, the foreign head office may have existed from the outset, thereby triggering further (unwanted) legal consequences. These would include, first, the personal liability of former shareholders (e.g. the shareholders of a limited liability company or the previous limited partners of a dissolved limited partnership). Second, in the absence of the 'separation principle' applicable to limited partnerships, such 'new shareholders' might, under certain circumstances, gain access to company assets beyond the prohibition on the return of capital contributions ('Einlagenrückgewähr'). This not only contradicts the *telos* of Section 10 IPRG, but also the objectives of Austrian and EU company law in general, which is not to simply classify companies that have moved away as dissolved without first securing the interests of creditors and shareholders in particular.⁴⁶

If domestic conflict-of-law rules—unlike the otherwise highly differentiated cross-border reorganisation procedures—were to dissolve their 'own existing companies' without any conditions, domestic interests, which the real seat theory actually seeks to protect, would effectively be 'run over', thereby rendering the real seat theory itself absurd.

41 Walter Brugger, '§ 107' in Michael Gruber and Friedrich Harrer (eds), *GmbHG: Kommentar* (2nd edn, Linde 2018) note 128; Dietmar Aigner, 'EuGH: Verhinderung des identitätswahrenden Wegzugs durch Sitzverlegung ins EU-Ausland zulässig' (2009) 5 SWI 76; Doralt (n 29) 255; Florian Heindler, '§ 1 IPRG' in Peter Rummel, Meinhard Lukas and Andreas Geroldinge (eds), *ABGB-Kommentar* (4th edn, Manz 2023) note 87.

42 See point A above.

43 See detailed and accurate discussion in Günter H Roth, *Vorgaben der Niederlassungsfreiheit für das Kapitalgesellschaftsrecht* (CH Beck 2010) 31ff; see also Eva Micheler, '§ 254' in Peter Doralt, Christian Nowotny and Susanne Kalss (eds), *AktG Aktiengesetz Kommentar* (3rd edn, Linde 2019) note 20.

44 Günter H Roth, 'Gründungstheorie: Ist der Damm gebrochen?' (1999) ZIP 863.

45 In Germany, for example, a BGB company would be created, albeit with legal capacity and capacity to sue and be sued under certain circumstances; cf. II ZR 158/06 (BGH, 27 October 2008); II ZR 380/00 (BGH, 1 July 2002).

46 See, Eckert, 'Sitzverlegung von Gesellschaften' (n 29) 139.



Given that Germany is often regarded as a prime example of a particularly strict real seat theory state, yet nonetheless permits identity-preserving relocation⁴⁷, it would be inappropriate to interpret Section 10 IPRG more strictly than the ‘Pope’ of the real seat theory (=Germany) himself. Thus, despite the real seat theory (which, however, has not been codified in Germany), the Federal Court of Justice (BGH)⁴⁸ based its decision on the registered office in accordance with the (identical) old version of Article 22(2) of the Brussels I Regulation. According to that provision, a German administrative seat combined with a foreign registered office did not establish jurisdiction.

The Federal Court of Justice justified this (also) on the grounds that linking the provision to the place of incorporation best served the purpose of the provision. In Germany (with a comparable basis in conflict of laws), it is therefore assumed that ‘Centros’, ‘Überseering’ and ‘Inspire Art’⁴⁹ also led to the incorporation theory concerning the connection of Article 24(2) of the Brussels Ia Regulation and that a ‘real economic relationship’ of the company is not relevant.⁵⁰

The prevailing view in Austria holds—by way of teleological reduction—that Section 10 IPRG does not apply to companies established under Austrian law whose head office is located abroad.⁵¹ The Austrian legislature has not ‘made use’ of the possibility, which may

47 Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG) [2008] BGBl I 48/2026. The German real seat theory (based on customary law) was somewhat softened by the MoMiG 2008 with the admission – albeit only in substantive law – of the identity-preserving relocation of German corporations (see, for example, Jessica Schmidt, ‘§ 4a’ in Lutz Michalski and others (eds), *Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbH-Gesetz): GmbHG* (4th edn, CH Beck 2023) note 14) and – for partnerships – with the revised § 706 BGB, which came into force on 1 January 2024: ‘The registered office of the company is the place where its business is actually conducted (administrative headquarters). If the company is entered in the register of companies and the shareholders have agreed on a location in Germany as the registered office (contractual registered office), this location shall be the registered office of the company, notwithstanding sentence 1.’

48 II ZR 28/10 (BGH, 12 July 2011) BGHZ 190, 242.

49 See, Ratka, ‘§ 12’ (n 5) note 32.

50 See, for example, Astrid Stadler and Christian Krüger, ‘EuGVVO Art 24’ in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung: ZPO-Kommentar* (21st edn, Vahlen 2024) note 7 mwN; Kindler, ‘Zuständigkeitsfragen’ (n 22).

51 See, Koppensteiner and Rüffler (n 25) note 18; Martin Karollus, ‘Umstrukturierungen und Sitzverlegungen über die Grenze’ in Eveline Artmann, Friedrich Rüffler and Ulrich Torggler (eds), *Gesellschaftsrecht und IPR* (Manz 2020) 147 ff; Hans G Koppensteiner, *Internationale Unternehmen im deutschen Gesellschaftsrecht* (Nomos 1971) 126 ff; Eckert, *Internationales Gesellschaftsrecht* (n 10) 114 ff; Nikolaus Adensamer, ‘§§ 10, 12 IPRG’ in Heinrich Deinhardstein, Nora Aburumieh and Alexandra Hoffenscher-Summer (eds), *GmbHG* (2nd edn, LexisNexis 2024) note 3; Markus Heidinger and Alexander Schneider, ‘§ 5’ in Peter Jabornegg and Rudolf Strasser (eds), *Aktiengesetz: AktG II* (5th edn, Manz 2018) note 10; dissenting opinion, Heindler, ‘§ 10 IPRG’ (n 15) note 6.

exist in principle according to the 'Daily Mail' and 'Cartesio' decisions, of restricting the relocation of its own companies.⁵²

4 NO 'CHERRY PICKING'! INCONSISTENT APPLICATION OF SECTION 10 IPRG IS NOT POSSIBLE

If one rejects the teleological reduction of Section 10 IPRG to cases of the 'immigration' on non-EEA-companies, as outlined above, and instead seeks to apply this conflict-of-law provision in order to establish foreign jurisdiction for a shareholder dispute involving an Austrian company—by arguing that, in the specific case, the 'seat of the actual head office' is located abroad—then § 10 IPRG cannot be selectively applied. It must not be 'picked out' (in isolation) for the purpose of determining jurisdiction under Article 24(2) of the Brussels Ia Regulation. Rather, it must also be used (as 'applicable conflict of laws') for the determination of the company's articles of association.

In that event, the court would be required to withdraw the Austrian company's legal capacity and identity as an Austrian company, at least where the foreign conflict of laws rules accept the reference in Section 10 IPRG (and thus do not refer back to Austrian law). Logically, foreign company law would then have to be applied to the (dissolved, formerly Austrian) company and the legal 'entity' would need to be reclassified accordingly.⁵³ This follows from the fact that the conflict of laws connection (Sections 10, 12 IPRG) is not a matter of choice for the parties but must be determined by the court 'ex officio'.⁵⁴

In other words, a connection to the foreign administrative headquarters cannot stop halfway; for reasons of legal logic, it must be carried through to its full consequences. Only if the Austrian company is dissolved and 'reassessed' under foreign law does foreign law become 'decisive' within the meaning of Article 24(2) of the Brussels Ia Regulation. This would be the dogmatically consistent 'price to pay' if one wanted to use Article 24(2) of the Brussels Ia Regulation while applying Section 10 IPRG to cases of relocation to a foreign jurisdiction.

These considerations demonstrate that Section 10 IPRG is either fully applicable to cases of departure, or it is not applicable as a result of the teleological reduction advocated by the prevailing opinion, in which case it does not constitute 'applicable' norm of 'private international law' within the meaning of Article 24(2) of the Brussels Ia Regulation.

If, on the other hand, Section 10 IPRG is applied to companies that have moved away merely for the purpose of determining their registered office under Article 24(2) of the

52 Brugger, '§ 107' (n 41) note 128.

53 As expressly and accurately stated by Heindler, '§ 10 IPRG' (n 15) note 90.

54 *ibid*



Brussels Ia Regulation, but is simultaneously ‘reduced’ so as to preserve their identity as Austrian companies for the (then foreign) proceedings, this leads to a result that the Brussels Ia Regulation seeks to avoid⁵⁵: the ‘synchronisation’ between *lex societatis* and *lex fori* would then not be established.⁵⁶

In addition, an aspect of EU law must also be considered. If an Austrian company relocates while retaining its identity (under teleological reduction of Section 10 IPRG), the host EEA country would be required—under the ECJ’s case law on relocation in ‘Centros’, ‘Überseering’ and ‘Inspire Art’—to apply the ‘country of origin principle’⁵⁷ and to recognise the company in accordance with its founding statute.⁵⁸ In terms of conflict of laws, this would entail a referral back to Austrian law. Even if the head office of an Austrian company were located in an EEA country, it would inevitably have to follow the EU founding theory with regard to EEA companies due to the clear ECJ case law on relocation, which would mean that Austrian substantive law would again be applicable in accordance with Section 5 (2) IPRG.⁵⁹ This means that if the legal existence of the Austrian company that has moved away is retained, then an EEA country of destination would have to recognise this under the freedom of establishment⁶⁰ and would not be allowed to apply its own real seat theory. In this case, too, Article 24(2) of the Brussels Ia Regulation would lead to the jurisdiction of Austrian courts for Austrian companies with their head office in another EEA country.

In summary, it is not permissible to ‘cherry-pick’ by invoking Section 10 IPRG to establish foreign jurisdiction under Article 24(2) of the Brussels Ia Regulation—on the basis that the provision refers to the applicability of foreign company law—while at the same time preserving the Austrian company statute and declining to apply foreign company law. In such a scenario, the Austrian company would necessarily have to be dissolved and reassessed under foreign law without retaining its identity. Section 10 IPRG is applicable to an Austrian company that has relocated abroad as ‘private international law’ within the meaning of Article 24(2) of the Brussels Ia Regulation, or it does not apply at all.

55 In addition, the state of incorporation has a public interest in having disputes in companies incorporated under its law decided by ‘its’ courts; cf. Holger Altmeppen and Jan Wilhelm, ‘Gegen die Hysterie um die Niederlassungsfreiheit der Scheinauslandsgesellschaften’ (2004) DB 1087; Case C-372/07 *Nicole Hassett v South Eastern Health Board and Cheryl Doherty v North Western Health Board* [2008] ECJ (2 October 2008) OJ C 301/10.

56 See above (n 2).

57 Ratka, ‘§ 12’ (n 5) note 32.

58 For example, Manfred P. Straube and Thomas Ratka, ‘Das ‘Herkunftslandprinzip’ im EU-Gesellschaftsrecht nach der ‘Überseering’-Entscheidung’ (2003) 2 ÖZW 34; OGH 6 Ob 185/13v, 4 Ob 119/11w.

59 See also Brugger, ‘§ 107’ (n 41) note 122 f; Georg Eckert and Alexander Schopper, ‘§§ 107-114’ in Ulrich Torggler (ed), *GmbH-Gesetz* (Manz 2014) note 16; Adensamer, ‘§§ 10, 12 IPRG’ (n 51) note 39.

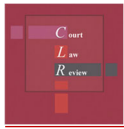
60 Heindler, ‘§ 10 IPRG’ (n 15) note 3.

5 CONCLUSIONS

If Section 10 IPRG were also applied dogmatically to exit-cases and if an Austrian company had its actual head office abroad, this would necessarily lead to the withdrawal of the Austrian company status and thus to the dissolution of the Austrian company. However, if, in accordance with prevailing opinion, Section 10 IPRG is reduced teleologically to cases of immigration on non-EEA companies, then this interpretation must also apply to the application of Article 24(2) of the Brussels Ia Regulation. Since Austrian company law remains the 'applicable law' in this case, the Austrian 'seat' within the meaning of Article 24(2) Brussels Ia Regulation and thus the jurisdiction of Austrian courts remain applicable even if the seat of the actual head office is located abroad.

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Competing interests: The author is a member of the Editorial Board of the *Court Law Review*. To ensure the integrity of the peer review process, the manuscript was handled by an independent editor, and the author was not involved in the decision-making process regarding this article.

Disclaimer: The author declares that the views expressed in this manuscript are his own. While the author serves on the Editorial Board of this journal, this position has not influenced the content or conclusions of this research.

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EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English language editor** – Julie Bold.

ABOUT THIS ARTICLE

Cite this article

Ratka T, 'Determining the 'Seat' of a Company According to the 'Provisions of Private International Law' – A Real Problem for Real Seat Theory Legislations' (2026) 2(1) Court Law Review 1-18 <<https://doi.org/10.33327/CLR/3061-0907/2026/1-00011>> Published Online 31 Mar 2026

DOI: <https://doi.org/10.33327/CLR/3061-0907/2025/1-00011>

Summary: 1. Introduction. – 2. 'Private International Law' Within the Meaning of Article 24 (2) Brussels Ia Regulation – A Synonym For 'Conflict of Laws'? – 3. Solution In the Case of a Mere Reference to The (Applicable) Conflict of Laws. – 3.1. *Austrian conflict of laws: Sections 10, 12 IPRG (real seat theory)*. – 3.2. *Freedom of establishment as a substantive conflict-of-law rule ('EU founding theory')*. – 4. No 'Cherry Picking'! Inconsistent Application of Section 10 IPRG Is Not Possible. – 5. Conclusions.

Keywords: *Corporate mobility, Real seat theory, Teleological reduction, International jurisdiction, Lex societatis.*

DETAILS FOR PUBLICATION

Date of submission: 07 Jul 2025

Date of acceptance: 11 Sep 2025

Publication: 31 Mar 2026

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with minor revisions

Technical tools were used in the editorial process:

Plagiarism Detection: All submissions are screened for originality using **iThenticate**, a plagiarism detection service provided by Turnitin.

Editorial Management: To ensure the integrity of the anonymized peer review process and avoid potential conflicts of interest within the system, the editorial workflow for this submission was managed via independent email communication, distinct from the standard Open Journal Systems (OJS) platform usually employed by the journal.



АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Наукова стаття

ВИЗНАЧЕННЯ «МІСЦЕЗНАХОДЖЕННЯ» КОМПАНІЇ ЗА МІЖНАРОДНИМ ПРИВАТНИМ ПРАВОМ ЯК ВИКЛИК ДЛЯ ЗАКОНОДАВСТВ, ЩО БАЗУЮТЬСЯ НА ТЕОРІЇ РЕАЛЬНОГО МІСЦЕЗНАХОДЖЕННЯ

Томас Ратка

АНОТАЦІЯ

Передумови: Стаття 24(2) Регламенту «Брюссель Іа» встановлює виключну юрисдикцію для розгляду спорів щодо дійсності або припинення компаній у тій державі-члені, де компанія має своє місцезнаходження. Хоча для визначення цього місцезнаходження Регламент відсилає до міжнародного приватного права відповідної держави-члена, це створює складнощі в таких правових системах як австрійська, яка — подібно до багатьох країн континентальної Європи — дотримується теорії реального місцезнаходження (параграфи 10 та 12 Закону Австрії про міжнародне приватне право (IPRG)). Суворе застосування цих норм міжнародного приватного права може означати не лише те, що австрійські компанії, які фактично управляються з-за кордону, втрачають свій правовий статус, але й те, що до них перестають застосовуватися австрійські правила вирішення корпоративних спорів.

Методи: У статті застосовано формально-догматичний аналіз для тлумачення терміну міжнародне приватне право в розумінні Регламенту «Брюссель Іа», зокрема досліджується, чи стосується він виключно колізійних норм, чи поширюється також на цивільне процесуальне право. У дослідженні проаналізовано взаємодію між Регламентом, австрійським IPRG та практикою Суду ЄС (справи Centros, Überseering, Cartesio, Polbud) з метою визначення того, чи потребує параграф 10 IPRG телеологічної редукції у випадках релокації компаній.

Результати та висновки: Аналіз демонструє, що суворе застосування параграфу 10 IPRG до випадків релокації призвело б до «примусової ліквідації» австрійських компаній, що несумісне із сучасними принципами корпоративної мобільності ЄС. Автор стверджує, що параграф 10 IPRG має підлягати телеологічній редукції, щоб застосовуватися лише до компаній, які входять у юрисдикцію, а не тих, що вибувають. Відповідно, для цілей статті 24(2) Регламенту «Брюссель Іа» австрійські суди зберігають юрисдикцію щодо компаній, заснованих в Австрії, навіть якщо їхній фактичний головний офіс знаходиться за кордоном. Таке тлумачення запобігає вибіркового пошуку юрисдикції (cherry-picking) та забезпечує необхідну синхронізацію між застосовним корпоративним правом (lex societatis) та міжнародною підсудністю (lex fori).

Ключові слова. Корпоративна мобільність, теорія осілості, телеологічна редукція, міжнародна юрисдикція, lex societatis.