CHAPTER 19

The Personal Law of Business Corporations

IN LOCALIZING the personal law of legal persons, the two chief rival systems may be termed the incorporation principle, pointing to the law of the state of incorporation as such, and the central office principle, which needs explanation.

I. LAW OF THE STATE OF INCORPORATION

Anglo-American law. In all common law countries, a corporation lives under the law under which it has been created or "incorporated," the law from which, in Westlake's expression, it "derives its existence." The English cases, the oldest of which dates from 1724, have always followed this theory. The particular historic or rational causes for this rule are not known, although it originated upon the current background of pedantic axioms now antiquated. In any event, the rule appears to have been accepted as self-evident. It is not astonishing that common law lawyers should think so, since even some Continental writers, educated under the opposite system, have advocated the Anglo-American principle as the logical outgrowth of the act of constituting a corporation.

In fact, the proposition that the legal entity of an association as a body separate from the members must be based

1 Dicey 544; 1 Wharton 238 § 105a.
2 Westlake 367.
3 Dutch West India Co. v. Henriques Van Moses (1724), 1 Strange 612; Foote 162 and in Clunet 1882, 465 at 473, n. 2.
4 See infra p. 66 n. 129.
upon the law of a particular state, is obvious under any possible theory. But this is not the point. The problem is whether the conflicts rule should be satisfied with the formal creation of a corporation in some state. The Anglo-American rule is satisfied; the fact of incorporation alone suffices. Thus, the English Companies Acts are held inapplicable to companies registered abroad, and the personal law of a company “depends not upon the place at which its center of administrative business is situated, but upon the place at which it is registered.” And very distinctly the firmly settled American rule refuses to take account of the place where the activities of an association occur. As the Restatement puts it:

“§ 152. Without regard to the place of the activities of an association or to the domicile of its members, incorporation may take place in any state . . .

“§ 154. The fact of incorporation by one state will be recognized in every other state.”

This conception ought to be examined in terms of considerations of convenience rather than of logic.

Other countries. The law of the state of incorporation is said to be applied in the Soviet Union. It is apparently contemplated also in the language of the recent legislation of Peru (1936) and Brazil (1942), referring to the law of the state where the corporation has been “constituted,” and in a few other Latin-American legislations. The corresponding

5 See Young 182, 205.
6 Young 205 comment on Attorney General v. The Jewish Colonization Ass’n (1900) 2 Q. B. 556, C.A.; [1901] K. B. 123.
7 Thus, in absence of a proper source, with feeble support in a former instruction, Makarov, 35 Recueil (1931) I 473 at 524ff. and Précis 225; Rabbinowitsch, 1 Bl.IPR. 212; but see also Stoupinitsky, Revue 1927, 418 at 442.
Brazil: Introd. Law (1942) art. 11 par. 1; cf. Irigoyen, Consultas de la Comisión de Reforma 14 (but see infra p. 35).
9 Cuba: C. Com. art. 151; C. C. art. 37.
Guatemala: C. C. (1933) art. 20.
text of the Montevideo Treaty on Civil Law\textsuperscript{10} actually was changed in 1940 so as to refer to the law of the domicil of the association.

The \textit{Código Bustamante} (art. 17) refers to this "nationality of origin" of associations, but not to determine the law applicable to them (art. 33), including a set of rules inexplicable to all commentators.\textsuperscript{11}

II. Law of the Place of Central Control

1. Countries

In most civil law countries, the personal law of a private law corporation is that of the state in which it has its center or "domicil," French "\textit{siège social}," German "\textit{Geschäftssitz}" (seat).

This system has been followed by:

Austria: Ges.m.b.H. Ges. (Act on Limited Partnerships) of March 6, 1906, § 107 and common opinion, see Walker 147; Ehrenzweig-Krainz § 82 n. 4.

Belgium: Lois coordonnées sur les sociétés commerciales (Consolidated Companies Act, 1873) art. 172; revised (1935) art. 196; Belgo-German Mixed Arb. Trib., 3 Recueil des décisions 573.

Bulgaria: Act of Limited Partnerships, of May 8, 1924, art. 127.

Denmark: S. Ct. (Nov. 8, 1917); (March 8, 1922) see 6 Répert. 217 No. 29.

Uruguay perhaps likewise: C. C. (1914) Tít. Fin., art. 2394: "where a legal person has been recognized as such," as amended November 25, 1941.

\textsuperscript{10} Art. 4 par. 1. The official report in Republica Argentina, Congreso Sud-american 146 shows some disagreement with this change.

\textsuperscript{11} Código Bustamante, art. 34 refers the civil capacity of civil, commercial, or industrial companies to the respective stipulations of the contract of association. Cf. art. 18 and see the criticism by Gil Borges, reproduced in the motion made by the Delegation of Peru, Diario de Sesiones, Octava Conferencia Internacional Americana, Lima, 1938, 118. See, moreover, art. 32, which was not contained in the draft of De Bustamante, and has been sharply censured in 2 PONTES DE MIRANDA 448.
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France: Cass. (civ.) (June 20, 1870) S. 1870.I.373; Cass. (req.) (March 29, 1898) S. 1901.I.70. Associations are specially discussed by 2 Arminjon § 199.


Greece: Decisions up to 1934: 2 Streit-Vallindas 79 n. 9; for 1935-1937, Note in Clunet 1938, 613.

Hungary: C. Com. arts. 210, 211; Act on Limited Partnership, § 106 (implicit).


Montenegro: C.C. art. 787.

The Netherlands: General opinion based on Rv. art. 4 (2) (3); Rb. Rotterdam (Oct. 25, 1916) N.J. (1917) 270; and others; Medan (Dec. 4, 1925) 124, Indisch Tijdsch. 242. See also Kosters 659; Mulder 198. Contra for lex fori, only one decision, Rb. Amsterdam (Dec. 19, 1924) W.II346, N.J. (1925) 1065.

Poland: Int. Priv. Law, art. 1 No. 3; Interlocal Priv. Law, art. 3 No. 3.

Rumania: C. Com. (1938) art. 353.


Switzerland: C. C. art. 56; BG. (Dec. 8-14, 1904) 31 BGE. I 418, 466, 473; (April 1, 1924) 50 BGE. II 511, Clunet 1924, 785; (May 23, 1928) 54 BGE. II 257, 271; Federal Council, Message of August 20,

12 Decision in the special case of “Gothaer Gewerkschaften” does not justify the objections raised by some writers to the general rule, see MELCHIOR 466; RAAPE 154.
1919 introducing the revised draft of the Code of Obligations, BBl. 1919 V 720.

Turkey: Law of Nov. 30, 1330/1914, art. 1, cf. 7 Répert, 250 No. 127.


China: Int. Priv. Law, art. 3.


Japan: C. C. art. 50; C. Com. arts. 44 and 258, on which see Chapter 19 at n. 63 (better opinion).

Argentina: C. C. arts. 6 and 7, cf. art. 34; see 3 Vico § 81; Zeballos, Clunet 1906, 604; C. Com. art. 286.

Brazil: Thus far prevailing opinion, see Carvalho de Mendonça, 4 Trat. Dir. Com. § 1513, cf. Espinola, 8-C Tratado 1777 § 100.

Colombia: Código Judicial, art. 272; see Caicedo § 71.

Honduras: Foreigners' Law, Decree No. 31 of Feb. 4, 1926, art. 4.


Venezuela: C. Com. (1919) art. 359 (new 334), at least with respect to Venezuelan corporations, see Crawford, 12 Tul. L. Rev. (1938) 219.

Treaty of Montevideo on Commercial Law (1889) art. 5; on Com. Terr. Law (1940) art. 8 par. 1; on Civil Law (1940) art. 4 par. 1.

Also, numerous bilateral treaties assuring the establishment of nationals of one contracting state in the territory of the other party have adopted the same principle. It is natural that civil law countries should do so among each other,¹³ but rather

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strange that they do not do it in every treaty. On the other hand, it is remarkable that even the United States, Great Britain, and the Soviet Union in some of their treaties, especially in recent times, have employed the usual European formula, running for instance in the treaty of the United States with Germany as follows:

"Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws,

par. 1, 114 L. of N. Treaty Series (1931) 360 at 363, 131 British and Foreign State Papers (1929) Part II, 194 at 197; Germany: see the list of treaties in MELCHIOR 476 n. 2.

14 E.g., Germany with Italy (Oct. 31, 1925) art. 8, par. 1, 52 L. of N. Treaty Series (1926) 179 at 185 and 311 at 315, 124 British and Foreign State Papers (1926) Part II, 629 at 631; Germany with Sweden (May 14, 1926) art. 5, par. 1, 51 L. of N. Treaty Series (1926) 99 at 103 and 145 at 147, 124 British and Foreign State Papers (1926) Part II, 741 at 743.

Similarly, Swiss treaties up to 1892, see SCHNITZER, Handelsr. 81 who thinks it was done under the influence of the fiction theory.


16 United States with Germany (Dec. 8, 1923) art. 12, par. 1, U. S. Treaty Series No. 725, 52 L. of N. Treaty Series (1926) 133 at 141; with Hungary (June 24, 1925) art. 9, U. S. Treaty Series No. 748, 58 L. of N. Treaty Series (1926) 111 at 117; with Honduras (Dec. 7, 1927) art. 13, par. 1, U. S. Treaty Series No. 764, 87 L. of N. Treaty Series (1929) 421 at 430; with Austria (June 19, 1928) art. 10, par. 1, U. S. Treaty Series No. 838, 118 L. of N. Treaty Series (1931) 241 at 250; with Poland (June 15, 1931) art. 11, par. 1, U. S. Treaty Series No. 862, 139 L. of N. Treaty Series (1933) 397 at 407; Great Britain with Germany (Dec. 2, 1924) art. 16, par. 1, 43 L. of N. Treaty Series (1926) 89 at 98, 119 British and Foreign State Papers (1924) 369 at 374; South African Union with Germany (Sept. 1, 1928) art. 15, par. 1, 95 L. of N. Treaty Series (1929) 289 at 297, 128 British and Foreign State Papers (1928) Part I, 473 at 478. The German text of both treaties translates "established" and "gevestigd" (Dutch) by "errichtet." Thus, the British side would accept the continental principle and the German side the British principle; but the German translation is incorrect, as 1 FRANKENSTEIN 484 n. 183 shows. U.S.S.R. with Italy (Feb. 7, 1924) art. 9, 120 British and Foreign State Papers (1924) 659 at 662; with Germany (Oct. 12, 1925) art. 16, par. 1, 53 L. of N. Treaty Series (1926) 85 at 97, 122 British and Foreign State Papers (1925) 707 at 714; with Norway (Dec. 15, 1925) art. 5, 47 L. of N. Treaty Series (1926) 9 at 15, 122 British and Foreign State Papers (1925) 992 at 994.
National, State, or Provincial, of either High Contracting Party and maintain a central office within the territories thereof . . ."

To the same effect, international arbitrations involving the United States,\textsuperscript{17} proposals of the Institute of International Law (1891, 1929, 1933),\textsuperscript{18} of the subcommittee of experts for the League of Nations\textsuperscript{19} (1927), and treaties for avoiding double taxation\textsuperscript{20} can be cited. Only in the draft of the committee, reporting to the Diplomatic Conference on the Treatment of Foreigners, in Paris, 1929, has the Anglo-American view been maintained by adding to the usual formula that, in the case of countries to the laws of which the concept of a seat of a company is unknown, the condition established on this point will not be applicable.

Certain subtle divergences among these texts are negligible. They clarify the subject on one point which will be examined immediately. None of them has taken the cases of renvoi into consideration. (See infra p. 50.)

2. Significance of the Principle

In fact, corporations usually have their central office in the country where they obtain incorporation, but not necessarily so, and in the United States often not. A corporation consti-

\textsuperscript{17} United States with Peru (1869) Affaire Ruden et Cie. (partnership consisting of Mr. Ruden, an American citizen, and Mr. J. P. Escobar, citizen of New Granada) see LAPRADELLE-POLITIS, 2 Recueil des arbitrages internationaux (1856-1872) 589.

United States with Chile (1901), case of Henry Chauncey, société en commandite in Valparaiso, see MOORE, 3 Digest 802.

\textsuperscript{18} Annuaire 1929 II 147, Meeting in New York, 1929, proposed regulation, art. 1.

\textsuperscript{19} Art. 1 (Am. J. Int. Law 1928, Supp. 204) concerning the "nationality of commercial corporations," including the personal law.

\textsuperscript{20} The British-Swiss Treaty against double taxation, of October 17, 1931, art. 3, 131 L. of N. Treaty Series (1933) 245 considers a company as having domicil in the forum, if the management and control of the business is in the forum. "Control" has been explained in an exchange of notes (id. 264) to mean effective management and the real center.
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...itted in Delaware with headquarters in Amsterdam will be considered subject to Dutch law on the whole European Continent, and therefore on principle as nonexistent. The true point of difference between the two systems is not that under the one incorporation is sufficient, and in the other the situation of the main office would suffice to determine the personal law. The statutes do not define the Continental system so correctly as do the treaties providing that a corporation must be organized or constituted in one of the two countries and have its central office (seat, domicil) in the country where it is constituted. The requirement of domicil is additional to that of incorporation and does not by any means replace it. Hence, the Continental rule is no more than a variant of the common law rule and could well be adopted in the treaties of any state.

While this essence of the rule has often been misunderstood, especially in the English literature and by German writers too, the policy behind the rule also has not always been appreciated. The most important viewpoint from which to consider the rule is that of a state that does not want an organization to establish its principal office in its territory and yet derive its existence and legal character from a foreign state. Thus, in the oldest decision of the German Supreme Court on this matter, a company incorporated in the state of Washington, United States, for the purpose of exploiting Mexican mines, but which was controlled by a board of directors in Hamburg, Germany, was denied recognition as an American legal entity; having failed to fulfill the German requirements for incorporation, it was treated as a German noncorporate association. When a domestic company transfers

21 Not only capacity, in contrast to formation and dissolution, as Westlake-Bentwich (ed. 6) 368 believe.

22 RG. (March 31, 1904) DJZ. 1904, 555, cf. infra p. 100. Von Steiger, 67 ZBJV. (1931) 307 reports the case of a joint stock company, incorporated in Kenya, East Africa, under British law, but administered in Paris, France. In Kenya, there was only a representation and the technical management. This corporation would be recognized neither under the French nor any other Continental conflicts rule.
its domicil to a foreign country, it loses its personality.伍
Whatever the policy of the country may be in regard to capital interests, cartels, minority and small stockholders, plural votes, and the like, organizations established with headquarters in the country have to comply. French lawyers particularly insist on the necessity of preventing evasion of imperative requisites and prescriptions. In contrast to the recognition of the law of the incorporating state "without regard to the place of the activities of an association" (Restatement § 152), the state of the central office is considered the most vitally interested.

Then again, the state where incorporation is obtained, may not want its law to be used for organizations intending to maintain their real existence abroad. Switzerland once cancelled the registration of numerous French-controlled companies, incorporated but only nominally established in Geneva.伍 Belgian courts proceed likewise.

3. Concept of Central Office

For a time, eminent French authors conceived the most significant place for localizing a business corporation to be the place at which it discharges its functions, viz., carries on its manufacturing, trading, or other activities indicated in the charter. Where the main part of such technical work is done—the siège d'exploitation—there they regarded the corporation as centered.

23 RG. (June 5, 1882) 7 RGZ. 68.
24 Advices by the Swiss Federal Department of Justice and Police to the canton of Geneva, see BURCKHARDT, 3 Bundesrecht 1022 III.
26 Notably 2 Lyon-Caen et Renault §§ 1167ff.; THALLER, Annales de Droit Commercial, 1890 II 257; WEISS, 2 Traité 481.
To the same effect see the English case Keynsham Blue Lias Lime Co. v. Baker (1863) 33 L. J. Exch. 41.
Contra: See as to France, ARMINJON, 2 Précis § 188, as to England, YOUNG 194.
This concept, in fact, is of some relevance for taxation and certain other phases of the legal position of corporations. With respect to conflicts law, however, this theory has been generally rejected. Even though the Belgian Companies Law has made the "principal establishment" the test, a literal interpretation has been long since abandoned. Also, in the systems under which the center of exploitation suffices to subject a company to the domestic law (infra pp. 46ff.), the seat of an organization is identified with its chief executive office.

The office where the central management and control are exercised is regarded as the brain of an enterprise. "It is there that its personality manifests itself, for it is there that its organs operate, directing its operations and controlling its policy," thus Young reproduces the Continental conception. The legally important decision on commercial contracts is commonly concentrated there. In addition, factories or premises may be dispersed in several countries and no main working place discernible, whereas every corporation is supposed to have its headquarters at a single place. The law of this place, therefore, is unanimously held decisive.

However, the place must be ascertained. Normally, stockholders and directors hold their regular meetings in the same town, where also the head executives have their offices, books and archives are kept, transactions with customers are negoti-

27 However, in France jurisdiction for bankruptcy proceedings is taken at the central office of the management, not at that of exploitation (advocated by THALLER, Traité élémentaire de droit commercial (ed. 7, 1925) § 1738 and others, cf. VALENCI, 8 Répert. 328). See on the question Cass. (req.) (July 31, 1905) S.1906.1.270; id. (Nov. 26, 1906) S.1909.1.393. 28 Belgium: Consolidated Companies Laws, of 1873, art. 129; of 1935, art. 197; POULLET § 225; Novelles Belges, 3 D. Com. 682 § 5248. 29 YOUNG 149. 30 Belgium: Trib. civ. Bruxelles (Nov. 14, 1911) Revue 1913, 178; Trib. com. Gent (May 4, 1914) Clunet 1917, 1087; and (Feb. 26, 1923) cited by POULLET § 264. Denmark: BORUM and MEYER, 6 Répert. 217 No. 30. France: Cass. (civ.) (June 20, 1870) S.1870.1.373; (March 29, 1898)
ated, and the principal business is managed. But these activities may fail to be assembled. Where the management is centered is then considered a question of fact-finding by an evaluation of many circumstances. As a last resort in the prevailing opinion, the place where the directors usually meet is the most important, as their decisions are of direct effect, while others hold that the general meetings of stockholders are more significant, since they instruct the board. Preferably individual solutions should not be prejudiced by any such rigid criteria. They need an examination of symptoms, similar to that used in America and England for determining the “domicil” or “residence” of a corporation for purposes of jurisdiction or taxation. For example, the Cesena Sulphur Co. was incorporated in England to exploit sulphur mines in Sicily. The managing directors, the main books, the accounting and two-thirds of the stockholders were in Italy, but since the meetings of the board of directors and the general stock-

D.1899.1.595; S.1901.1.70, Clunet 1898, 756; (July 6, 1914) Clunet 1916, 1296; (Dec. 24, 1928) Gaz. Pal. 1929.1.124; see also Houpin et Bosvieux, 3 Traité des sociétés (ed. 6, 1929) § 2124.

Germany: BGB. § 24: “Unless it is otherwise provided, the place where the administration of a corporation is carried on is deemed to be its seat.” Same for foundations BGB. § 80 and for jurisdiction ZPO. § 17.


Switzerland: BG. (Dec. 14, 1904) 31 BGE. I 418, 471.

In opposition to this method, 2 Arminjon § 190 objects to conferring upon the courts the power of discretionally determining the center of a company. However, Arminjon’s own theory (“Nationalité des personnes morales,” Revue 1902, 381; 2 Précis § 191) is obscure and seems not very different (see 2 Précis, ed. 2, 483 n. 2). The French doctrine is generally unstable because of the endless fear of fraude.

See Percrou, Note, D.1910.2.41; Cuq, Nationalité des sociétés (1921) 63; Leven, De la nationalité des sociétés (thèse Paris 1899) 58; Houpin et Bosvieux, 3 Traité des sociétés § 2205.

Código Bustamante, arts. 18, 19; Pillet, Personnes Morales § 94; for Spain, see Trias de Bes, Estudios 381. For location of a corporation within the state, 1 Beale 240.

Farnsworth, The Residence and Domicil of Corporations (1939) 248, 274.
holder meetings took place in London—not because of the English incorporation—residence within the meaning of the Income Tax Acts was held to be in England.\[35\]

Conscious of the possible divergencies in determining the place of central control, the Geneva subcommittee proposals of 1929 leave the legal definition to the "municipal law under which the company was formed and its seat established."\[38\]

4. Real Existence of the Central Office

It may happen that the central establishment of an organization is actually situated in a country other than that designated by the constitutional documents. The act of incorporation need not necessarily be void, for this reason alone, under the law of either country. But it is common opinion that the personal law is conferred upon the organization only by the state of the actual chief office: the *siège social* must be real, not fictitious.\[37\] The indication of a central place in the charter or by-laws furnishes but prima facie evidence.\[38\]

This is also the distinct doctrine of the German courts and leading writers\[39\] in conflicts law, as well as with respect to tax liability,\[40\] although in other matters such as jurisdiction of courts\[41\] and administrative agencies\[42\] the "seat" nominally

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36 Am. J. Int. Law 1928, Supp. 204 art. 3 par. 1.
37 Recognized in all international resolutions cited *supra sub* (b). For the prevailing Italian doctrine see V. TEDESCHI, Del domicilio (1936) 350.
38 Swiss BG. (July 22, 1889) 15 BGE. 570 No. 79; COSTE-FLORET, 1 Revue générale de droit commercial (1938) 577 at 586.
39 RG. (June 29, 1911) 77 RGZ. 19; RGR. Kom. n. 4 before § 21; § 22 n. 4; STAUDINGER-RIEZLER, 1 Kommentar § 24; WIELAND, 2 Handelsr. 79. *Contra:* a small minority of writers who claim 99 RGZ. 217 as authority.
40 Tax Procedure (*Reichsabgabenordnung*) § 52, see the commentary by BECKER, Die Reichsabgabenordnung (ed. 7, 1930) 188 § 2.
41 Germany: ZPO. § 17.
42 BGB. §§ 22, 23, 25.
indicated in the articles of incorporation may be determinative.\textsuperscript{48}

The French courts have strangely extended the scope of this idea. They, too, naturally disregard a fictitious domicil and look to the actual \textit{siège social}.\textsuperscript{44} For example, the “Boston Blacking and Co.,” constituted and established in East Cambridge, Massachusetts, operated from 1912 a branch in Montmagny, France, but in 1923 converted the branch into a French \textit{société anonyme}, “Boston Blacking et Cie.,” whereupon the mother corporation ceased to pay taxes imposed on foreign business. The courts found nothing factually changed in the carrying on of the business and declared the conversion to be simulated, i.e., fictitious, the American corporation having remained the owner of the business as before.\textsuperscript{45} But the courts include the case where central office has been “fraudulently” pretended to exist abroad in order to “evade” the French law of corporation,\textsuperscript{46} or in order to create “privileges for certain shareholders.”\textsuperscript{47} In such instances, it is immaterial whether the organization seriously means to have its seat abroad. The “Moulin Rouge Attraction Inc., Ltd.” was incorporated in London for the purpose of carrying on a famous amusement place in Paris. It was established that there was nothing in London except rented premises, while the entire administration was in Paris and all negotiations for the promotion had been contracted and the capital raised in France. The promoters and the first manager were punished for not having complied with the formalities required for French incorporation.\textsuperscript{48} In other cases, associations have even been

\textsuperscript{43} For particulars, see the commentaries to § 24 of the BGB., and WIELAND, \textit{1 Handelsr.} 172; \textit{2 id.} 78 n. 7.
\textsuperscript{44} Cass. (req.) (Nov. 21, 1889) Clunet 1889, 850; for other decisions, see \textit{2 Arminjon} § 188; recently Cass. (req.) (July 17, 1935) S.1936.1.41.
\textsuperscript{45} Cass. (civ.) (June 29, 1937) Clunet 1938, 67, 7 Giur. Comp. DIP. § 105.
\textsuperscript{46} Cass. (req.) (Dec. 22, 1896) S.1897.1.84, D. 1897.1.159, Clunet 1897, 364; Cour Paris (March 27, 1907) Clunet 1907, 768; for other decisions see \textit{Survile} 722 n. 2; \textit{Ligeropoulos} and \textit{Aulagnon}, \textit{8 Répert.} No. 97.
\textsuperscript{47} See \textit{Lerебо̀рс-Пежонниèры} 195 § 163.
\textsuperscript{48} Trib. corr. Seine (July 2, 1912) D.1913.2.165, Clunet 1913, 1273.
treated as nonexistent. The courts conducting such investigations inquire into the reasonableness of foreign incorporation. In the case of a company organized to exploit mines in Canada, having its administrative center in France, it was held innocuous that the enterprise was incorporated abroad, after a certain merger of companies, because this facilitated its business. Also the fact that, instead of a company organized under the laws of a Canadian province, an English type was chosen, was approved on account of the interest in preferring the more common British legislation.49

In one form or another, the statement that the real, not some nominal or artificial, domicil determines the applicable law, occurs in many statutes and court decisions.50 To unify the formulation of the Continental principle, the subcommittee draft of the League of Nations for an international treaty on commercial companies (1929) provides, in article 3, that the contracting parties are free “to regard a seat as fictitious and artificial if its connection with the territory . . . is fraudulent and intended to evade imperative provisions of the applicable law or if the real and effective seat is not situated in the country where the company has been formed.” Yet the concession made thereby to the French doctrine of fraude is questionable. While a “simulated” domicil is no domicil at


50 E.g., Denmark: see 6 Répert. 217.

Egypt: Trib. Mixtes, see ARMINJON, Revue 1908, 772, 865; KEBEDGY, id. 1914, 396; App. Mixte d'Alexandrie, Clunet 1930, 767.

Japan: C. Com. art. 258; see comment in 1 C. Com. of Japan Ann. 412.

Switzerland: Fed. Council (Jan. 20, 1875) BBl. 1876 II 2; Eidgen. Amt für das Handelsregister (Nov. 4, 1928) 28 SJZ. 328, 5 Z. ausl. PR. (1931) 722.

But Liechtenstein, P.G.R. art. 233 allows holding companies with a purely nominal office in the country to receive juristic personality; this is just one of the tricks of this code to attract rich foreign holding companies.

Apparently dissenting, Yugoslavian C. Com. of 1937, art. 501 par. 1, see EISNER, 1 Symmikta Streit (1939) 290.
all, a "fraudulent seat" that is not simulated is real and serious. Whether an association incorporated in a country in which its real headquarters but no other activity is located, is valid, ought to be decided according to the law of this very country, if the principle of central establishment obtains. All that the "evaded" country may reasonably do, is to treat the corporation as foreign and react appropriately against its carrying on business. The French doctrine of fraud, therefore, has deserved criticism in theory as well as in practice, because it introduces a high degree of insecurity into conflicts law. In the great majority of countries, the American view is shared that "it is no fraud or evasion of the laws of a state for its citizens, intending to act only in their own state to form themselves into a corporation under the laws of another state."  

III. Exceptions  

1. To the Law of Incorporation  

While as a rule, for the purpose of the incorporation principle, the place where a corporation is intended to operate lacks importance, there are exceptions well deserving notice. One is the case where a state makes it possible for a corporation to be created with the power to do business exclusively outside the state. Such corporations have been held devoid of legal existence, because a state cannot "spawn corporations and send them forth into other states to be nurtured and do business there," when it will not allow them to operate within its own boundaries.  

51 Arminjon, Revue Dr. Int. (Bruxelles) (1902) 408 and id. 1927, 393; Beitzke, Jurr. Personen 69; and especially Travers, Recueil 1930 III 67, 70, 78. Vaughn Williams and Chruuschachi, 49 Law Q. Rev. (1933) 348 observe moreover: "It is surely paradoxical that a country should impose its nationality by way of punishment for fraud." Quite so! But this is not a necessary incident of the law of the central office, and the repudiation of the French theory of fraud does not "drive" us "back" to the law of incorporation.  

52 2 Beale 775 § 167.4.  

53 Land Grant R. & T. Co. v. Coffey County (1870) 6 Kan. 149, 153; see Ballantine, Corporations 854 n. 16; 2 Beale § 167.4.
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By analogous reasoning, the privileges of interstate commerce have been safeguarded against misuse. A corporation chartered in West Virginia but conducting all its contracting and manufacturing operations in Illinois where also all its property was located, was regarded as doing exclusively intra-state business.54

The California courts have occasionally argued that, if a corporation does all its business and has all its property in that state, domestic law should be applied rather than that of the state of creation, and they have assumed the situs of the stock of a company to be in the forum for the purposes of an action for issue of shares.55

In this connection, we may mention also the usury cases in which courts have refused to recognize an agreement that the law of the corporation's domicile—of the state of incorporation—should govern a contract, if its principal place of business is in another state.56

2. To the Law of the Central Office

An Italian commercial provision,57 followed by some other codes,58 provided that a foreign-created business corporation

54 Hump Hairpin Co. v. Emmerson (1922) 258 U. S. 290.
55 Wait v. Kern River Mining, Milling & Dev. Co. (1909) 157 Cal. 16, 106 Pac. 98. That in analogous cases some courts are more inclined to take jurisdiction on internal affairs of a corporation, contrary to the rule infra Chapter 20 n. 53, is another fact.

The American Department of State may refrain from intervening for American-incorporated companies, if all shareholders and the entire business are in the country against which steps should be taken, see 2 HYDE 903.

56 Stoddard v. Thomas (1915) 60 Pa. Super. Ct. 177 (loan by a corporation actually doing business in the District of Columbia, the customer being a resident of Pennsylvania, and the law of Virginia being referred to); Brierley v. Commercial Credit Co. (1929) 43 F. (2d) 724 (promise of credit in Maryland to a firm in Pennsylvania, by a firm doing actual business in Baltimore (Md.), the law of Delaware being agreed upon); U. S. Building and Loan Ass'n v. Lanzarotti (1929) 47 Ida. 287, 274 Pac. 630.

57 Italy: C. Com. of 1882, art. 230 par. 4; VIVANTE, 2 Trattato di diritto commerciale § 820; DIENA, i Dir. Com. Int. 341; FEDOZZI 71; CAVAGLIERI, Dir. Int. Com. 158.

58 Portugal: C. Com. (1885) art. 110.
was subject to Italian law, if both its “seat” and its “principal object” were in Italy. This restricted the significance of the central office. Italian law seemed not to apply to a foreign incorporated business enterprise even though the central administration was in Italy, unless the technical activity was centered there. On the other hand, a corporation created in Italy and having its control center there, was always regarded as governed by Italian law, irrespective of the place of manufacturing or trading.

The Argentine Commercial Code, followed by Honduras, probably the Mexican laws, and finally the Romanian and Italian amended texts declare the internal law always applicable, if either the head office (and the general

Rumania: C. Com. (1887) art. 239.
On Argentina’s provisions framed on the basis of the Portuguese code, see next note.

59 Argentina: C. Com. art. 286; ALCORTA, 3 Der. Int. Priv. 154; Cám. 2a App. Córdoba (Nov. 11, 1938) 22 La Ley 126. The restrictive interpretation by ZEBALLOS, Clunet 1906, 613 is overruled.
For example, the “Société du Port de Rosario,” subject matter of the decision of the French Cass. (civ.) (July 9, 1930) D.1931.I.14, S.1931.124, would certainly be held in Argentina to be a national company. It was created in France but deployed all its activity as to works, exploitation, and revenues in the Argentine port Rosario, according to a governmental concession. From the French point of view, the Court of Cassation stated that the gold clause stipulated in the bonds of the corporation was to be considered as an international contract, not subject to the French currency laws, but did not declare the company to be Argentine, as VOELKEL, 14 Tul. L. Rev. (1940) at 45 n. 13 assumes.

60 Honduras: C. Com. (1940) art. 286.
Nicaragua: C. Com. art. 339.
Paraguay: C. Com. art. 286, all these textually following Argentina.
Panama: C. C. art. 82: “associations” having their principal object in Panama are subject to the local law as to the form, validity, and registration of their acts of association; C. Com. (1916) art. 11.
Venezuela: C. Com. (1919) art. 359 (new 334); PÉRES, “Sociedades extranjeras”, 25 Revista Der. Jur. y Ciencias Soc. (1936) 50, thinks that the corresponding article 359 of the former code refers to partnerships only and that foreign corporations with their principal establishment in Venezuela are only “domiciled” there.

61 See SCHUSTER, 7 Tul. L. Rev. (1933) at 376, quoting JORGE VERA ESTAÑOE, 382.

62 Italy: C. C. (1942) art. 2505. What, furthermore, does the new art. 2509 C. C. mean? It says: companies constituted in the territory of the state, even though the object of their activity is abroad, are subject to Italian law. Are they recognized without having their seat in the state, thus adding the principle
meetings of the shareholders, adds Argentina), or the principal establishment, or chief object, is situated in the state. Thus, the principle is no longer restrictive when it operates in favor of the law of the forum, but it remains so in reference to foreign law.

A similar provision of the Japanese Commercial Code (article 258) runs as follows:

"A company which establishes its principal office in Japan or the chief object of which is to engage in commercial business in Japan shall, even though formed in a foreign country, comply with the same provisions as a company formed in Japan."

This rule has been explained as intending "to forestall any attempt to establish a fictitious permanent establishment in a foreign country in order to evade the application of Japanese laws."

Also the Treaty of Commerce between Great Britain and Turkey of 1930 in which the seat principle was adopted has been corrected in the final protocol to the effect that foreign companies concentrating their principal operations on Turkish territory, must obtain "Turkish nationality" in order to do so.

For minor political reasons, finally, the German Civil Code declares an exception to its principles, viz., it permits special charters for associations domiciled abroad. This has been

of incorporation to the other grounds for claiming domestic character? Art. 2328, No. 2, in fact, requires a stock corporation only to indicate its seat without mentioning that it should be in the state.

Rumania: C. Com. (1938) art. 354.
63 Cf. YAMADA, 6 Répert. 540 No. 61.
Similarly, Liechtenstein: P. G. R. art. 233.
64 1 C. Com. of Japan Ann. 412 n. 1, see Tokyo District Court (Sept. 10, 1918) id. n. 2.
applied to German school, church, and relief organizations. It is fully admitted in Germany that this provision pertains to the municipal law rather than to conflicts law and that no extraterritorial effect is expected.\textsuperscript{67}

The same should be assumed in regard to provisions of the more recent Italian type which subject foreign-created corporations to all domestic rules for the only reason that their center of exploitation is in the country. Such a rule, perhaps justifiable in itself, lacks reciprocity. A state that regards a corporation as domestic because it has its seat there, should not characterize likewise as domestic one whose seat is abroad. These pretensions recall the artful combinations of principles that are used to extend the domain of territorial law to individuals.

While these unprincipled provisions are frequently confused with the imposition of domestic law upon foreign corporations carrying on business in the country, they seem to have a deeper and more involved bearing. What consequences the Italian courts\textsuperscript{68} attach to the modified text of their law are not yet known.

An exception would have to be stated also if the statement of a few French writers were actually law, that a corporation by its charter may fix its “seat” in a country in which it does not have its central administration whenever serious interests warrant this choice\textsuperscript{69} This, however, seems to refer, at most, to some phases of administrative law.

\textsuperscript{67} RAAPPE 129, 132 VI.


\textsuperscript{69} DEMOGUE, Note in S.1908.2.177; PERCEROU, Note in D.1910.2.41 and in Annales de Droit Commercial 1926, 5 n. 11 SURVILLE 724; SOLUS, Note, S.1933.2.49; LEREBOURS-PIGEONNIÈRE 195. Cf. KESSLER, 3 Z.ausl.PR. (1929) 766; GUTZWILLER, 12 Mitteilungen dt. Ges. Völker R. (1933) 182; BEITZKE, Jur. Personen 89.
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IV. Renvoi

Important modifications, not so much of principle as of its results, follow from renvoi. The "Eskimo Pie Co." was incorporated in Delaware and, by American standards, recognized in Kentucky where the main establishment was located. For this reason the German Reichsgericht, too, recognized the incorporation.\(^70\) We should assume that whenever incorporation and main office are situated in different states both of which follow the principle of incorporation, the legal personality is to be recognized in any country of the opposite system, provided that renvoi is not rejected.

But the converse is true, too. If an anonymous company is formed in France with control actually centered in Brazil, French and Brazilian courts agree in applying Brazilian law to the problems of the existence and capacity of the organization. Failure to create a company in Brazil causes nullity or nonexistence in both countries. There is no reason why an American court should insist on qualifying such company as a valid French entity. The principle of incorporation furnishes the convenient answer, if it is considered that the incorporation has been ineffective in France and missing in Brazil.

V. Transfer of Central Administration to Another Country

1. Law of Central Control

The most critical aspect of the system based upon the central management rather than upon the mere fact of incorporation, develops when it is desired to transfer the main office from the state of incorporation to another state.\(^71\) Such

\(^70\) RG. (June 3, 1927) 117 RGZ. 215; cf. Raafe 131 § 6.

\(^71\) For literature see Wieland, 43 Z. Schweiz. R. (N. F.) 268; Perroud, Clunet 1926, 561; Hamel, 2 Z. ausl. PR. (1928) 1002; Beitze, Jur. Personen § 19; 2 Streit-Vallindas 88. On the controversy respecting the effects on nationality, see Cavaglieri, Dir. Int. Com. 233 and authors cited; Código Busto- mante, art. 20 par. 1.
happening logically should destroy the legal entity; at the new place a new one would have to be built up. This, however, makes necessary winding up of the corporation, difficult legal operations and huge losses, taxes, and charges in both countries, so as to render the undertaking an arduous affair. For the purpose of saving all that, may the charter be modified? And may an incorporated association do so, without losing its capacity or even being automatically dissolved?

These and kindred questions have been the topic of abundant controversy from the viewpoint of the country from which the corporation emigrates. Prevailing French doctrine allows the stockholders to decide in an extraordinary general meeting by unanimous resolution to transfer the siège social abroad, without dissolving the juristic person.\(^ \text{72} \) It is doubtful whether a clause in the by-laws, which has become regular in France, permitting the board of directors to change the seat, is a valid delegation of power,\(^ \text{73} \) particularly if the seat should be transferred to a foreign country. To the opposite effect, in the dominant German opinion a decision of the corporate organs to transfer the seat to a foreign country, automatically causes the dissolution and liquidation of the corporation.\(^ \text{74} \) In Switzerland\(^ \text{75} \) and elsewhere\(^ \text{76} \) the problem is unsolved.


\(^ \text{73} \) For nullity, Cour Paris (Nov. 27, 1931) Gaz. Pal. 1932.1.189 and Coste-Floret, \textit{id.} 591.

\(^ \text{74} \) German RG. (June 5, 1882) 7 RGZ. 68, 70; RG. (June 29, 1923) 107 RGZ. 94; Staub-Pinner in 2 Staub 787 § 292 n. 20; Flechttheim in 3 Dürringer-Hachenburg I 283 § 182 n. 45. Mining corporations by transfer enter into liquidation, 88 RGZ. 53.


Italy: Anzilotti 124; Cavaglieri, Dir. Int. Com. § 22.

\(^ \text{75} \) See Stauffer, 7 Gmüh art. 14 No. 106; Siegwart, in 5 Zürcher Kommentar zum Schweiz. ZGB. Einleitung No. 365.
Some countries, on the other hand, into which an existing foreign-constituted company wants to move have shown readiness to receive it without change of personality. Some decrees of Brazil have provided that an anonymous stock company which transfers its seat to Brazil and obtains governmental authorization to carry on business is considered a national. In recent times, this method has been used by states seeking to attract large holding companies. Normal principles are set aside. Even Swiss legislation, generally a model of correctness in international relations, has allowed foreign stock corporations to register as Swiss anonymous stock companies with central offices there, on special authorization by the Federal Council under greatly facilitated conditions of incorporation. The entity petitioning has to prove that it is a legally constituted stock company under the law of its foreign headquarters. This means that it must have existed and not have been dissolved at the time of its reincorporation and transfer of its domicile, notwithstanding the fact that this may cause dissolution in the home state.

A number of small states went much further, making great concessions as respects incorporation fees and current taxation.

It would appear that if the personal law of the corporation prohibits exportation of the management without dissolution and winding up, or requires a unanimous decision or a governmental authorization (as Liechtenstein does for its own

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76 E.g., Belgium: Novelles Belges, 3 D. Com. No. 5214 denies the possibility of transfer without destroying personality; but most lawyers follow the French literature.

77 Brazil: Cf. BEVILAQUA 223; CARVALHO DE MENDONÇA, 3 Trat. Dir. Com. § 624 (c). Companies authorized to do business in Brazil may transfer their seat to Brazil according to Decree-Law No. 2267 of Sept. 26, 1940, art. 71.


79 Same code, art. 14 par. 2.

80 E.g., Liechtenstein, P.G.R. art. 234: the seat may be transferred to Liechtenstein, on authorization by the court, without dissolution abroad and without bringing business or administration into the country.
corporations), consistency demands that these provisions should be respected in other countries. Yet, it seems that nobody cares for such application of the personal law. A company, thus, may be dead in its former state and continue to live in another state, although the same principle of the place of central control governs in both states.

Finally, the occupation of various countries by the enemy during the second World War has brought new necessities. Noteworthy are the emergency decrees of the governments in exile of the Netherlands, Belgium, and Luxemburg.\(^{81}\) In particular the Belgian decree-laws allowed a business company to transfer its _siège social_ to a foreign country without losing its nationality; they further provided that such transfers may be effected by a simple decision of the administrative organ of the company, i.e., by a majority vote of a general meeting of the stockholders or of the board of administration.\(^{82}\) By virtue of the first provision, the personal law of the company is upheld and the company is treated by the Belgian courts and authorities as a national. This obviates the requirement that the central control should be exercised in Belgium. It is not demanded that a new place of control be established at any place of business abroad. Since, on the other hand, the existence of an actual central office is of no importance in the United States, a Belgian corporation or partnership having taken refuge in this country, without being reincorporated, is to be considered a foreign organization, subject to Belgian law. Of course, a Belgian corporation whose domicil had been moved to New York, by resolution of the board of directors in June 1940, was considered entitled to sue in court as a resident.\(^{83}\)

\(^{81}\) The dates are recorded by Domke, Trading with the Enemy in World War II (1943) 172, cf. id. 345; Hanna, "Nationality and War Claims," 45 Col. L. Rev. (1945) 301, 340.

\(^{82}\) Belgian Decree-Law of February 2, 1940, with the other decree-laws repealed by art. 8 of the Decree-Law of February 19, 1942, Moniteur Belge (London, March 31, 1942) 174, 182.

\(^{83}\) Chemacid S. A. v. Ferrotar Corporation (D.C. S. D. N. Y. 1943) 51 F.
Contrary provisions of the charter or by-laws concerning the domicil of the company were repealed, as provided also in a Swiss emergency decree allowing juristic persons to change domicil within the country. The Dutch decree made the transfer of domicil from the mother country to another country a matter of governmental decision.

2. Law of Incorporation

Continental writers usually believe that at common law, in a system based merely upon incorporation, no difficulty can arise if the central office is removed from the country of incorporation to another country. English authors have confirmed this view and seem to rejoice over this proof of superiority.

Now, it is quite true that, since the place of the headquarters is immaterial, it may be transferred at will. The Egyptian Delta Land & Investment Company, Limited, incorporated in London in 1904, could be from 1907 on "controlled, managed, directed, and carried on entirely in Cairo," released from its English liability for income tax without losing its personality. This cannot be done under the principle connecting a juristic person with a state by its place of control, and the case certainly contrasts with that of the Tramways d'Alexandrie, a stock company incorporated and domiciled...


86 See e.g., Geiler, 12 Mitteilungen dt. Ges. Völker R. (1933) 180.
87 Vaughan Williams and ChruSSachi, 49 Law Q. Rev. (1933) at 346.
88 [1929] 2 Q. B. 556; [1901] 1 K. B. 123; C. A. per Smith, M. R., at 130: "The fact that there was a council of administration which carried on the business of the company outside of England does not render the company any less an English company and subject to English law." Gasque v. Inland Revenue Commissioners [1940] 2 K. B. 80.
in Brussels whose annulment was sought in the Belgian courts because more of its management was carried on in Egypt than the by-laws justified; the existence of the company was only saved by the argument in the lower tribunal that the stockholders had not unanimously decided to transfer the siège social, and in the court of appeal by the reasoning that the facts did not establish such transfer.  

Where, however, it is desired to change the personal law, for instance, in order to escape a feared revolutionary legislation, or to change "nationality," in order to establish the right to diplomatic protection or to alter the basis for taxation (otherwise than for English income tax in the opinion of the House of Lords), Anglo-American conceptions do not open any way for maintaining the entity and avoiding winding up. Since, by the old orthodox idea, a corporation can have no legal existence outside the incorporating state, it "has no domicil in the jurisdiction which created it, and as a consequence it has not a domicil anywhere else"; it cannot migrate to another sovereignty. In theory, there does not even seem to exist any doubt that a corporation is unable to change its personal law, or "quasi nationality," without winding up and new creation, although in practice ingenious ways may be found to transfer an undertaking to a newly created foreign company. The question is entirely different from that of change of nationality by a continued corporation in the

90 Mr. Justice Holmes in Bergner & Engel Brewing Co. v. Dreyfus (1898) 172 Mass. 154, 158, 51 N. E. 531, 532; 1 BEALE 228 § 41.1: "It can never acquire any other domicil."
91 20 C. J. S. 12, Corporations § 1788 n. 24.
92 In In re Aramayo Francke Mines, Ltd. [1917] 1 Ch. 451-C. A., Clunet 1919, 1126, a mining company incorporated in England but carrying on business in Bolivia, with a majority of Bolivian stockholders, attempted to avoid the English war income taxes by a scheme described as follows: a new company was created in Geneva, Switzerland, to which the assets and the undertaking were to be transferred "upon the basis of an exchange of shares of equal values and the assumption by the Swiss company of the liabilities and engage-
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case where the territory of its domicil is ceded to or annexed by another power.  

VI. Theory of Control

The two dominant theories determining the status of corporations agree in disregarding any qualification of the directors or members of the association as well as the places where the capital funds are sought or supplied. For example, where all members of a company founded in Chile are United States citizens, the company is not regarded a citizen for the purposes of federal jurisdiction on the ground of diverse citizenship. In the words of Mr. Justice Stone:

“For almost a century, in ascertaining whether there is the requisite diversity of citizenship to confer jurisdiction on the federal courts, we have looked to the domicile of the corporation, not that of its individual stockholders, as controlling.”

Also in England before the first World War, it was a commonplace that nationality of a company, whatever it may signify, is independent of the nationality of the participants.
The same attitude was emphasized by neutral nations during
the war of 1914-1918, for instance by the government of
Brazil when declaring neutrality in 1915.\(^{98}\)

*War seizures and restrictions.* During the first World War,
however, English courts, headed by the House of Lords,\(^{99}\)
defined enemy corporations by a new concept which soon was
emulated in the war legislation of many belligerent countries,
and finally was sanctioned in the provisions of the Peace
Treaties of 1919 dealing with liquidation of enemy prop-
erty.\(^{100}\) The essential element of the innovation was that a
corporation was considered to have enemy character, if it was
“controlled” by enemies, that is, was under the dominating
or prevailing influence of physical or juristic persons who
themselves were qualified as enemy aliens. The United
States stayed distinctly aloof from this encroachment upon
the traditional theory.\(^{101}\)

*Mixed arbitral tribunals.* The courts instituted in conform-
ity with the Peace Treaties had to apply the aforementioned
provisions based on the new control theory. They had, more-
over, to deal judicially with prewar debts submitted to


\(^{99}\) Continental Tyre Co. v. Daimler [1916] 2 A. C. 307, in matters of
trading with the enemy. The notions established in the decision were in reality
new. The Hamborn [1919] 2 A. C. 993 (extending the rule to a Dutch
company and liability to condemnation in prize). See PARRY, “The Trading with
the Enemy Act and the Definition of an Enemy,” 4 Modern L. Rev. (1941)
161, 167; MENDELSOHN BARTHOLDY, “Der Kriegsbegriff des Englischen
Rechts,” 8 Rheinische Z. f. Zivil- und Prozessrecht 357; cf. GARNER, 1 Inter-
national Law and the World War (1920) 217. It was much noticed, moreover,
that the Lords spoke of the concept of enemy, and not of that of nationality,
see VAUGHAN WILLIAMS and CHRUSCHACHI, 49 Law Q. Rev. (1933) 338.

\(^{100}\) Treaties of Versailles (with Germany) art. 297 (b); of St. Germain
(with Austria) art. 249 (b); of Neuilly (with Bulgaria) art. 177; of Trianon
Vertrages über die Liquidation und Beschlagnahme deutschen Privatvermögens
im Auslande (1927) in 6 LESKE-LOEWENFELD II 90.

\(^{101}\) The Trading with the Enemy Act, 40 Stat. I 411, § 2; in introducing the
Bill to Congress, the Attorney General of the United States said, “We have
specifically abstained in the bill from attempting to go behind the corporate
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With the usual confusion of problems, the attempt was made to transfer the criterion of control to the application of these two articles. It was a point of great practical importance. Incidentally to the procedure of clearing, Germany was liable as guarantor for prewar debts of a German company on a fixed high exchange rate. It was contended that the guaranty extended to an English incorporated company controlled by Germans and liquidated by England. After an initial period of divided opinions, the various mixed arbitral tribunals commonly acknowledged that, under the peace provisions not expressly resorting to the device of control, nationality was to be construed in accordance with the familiar devices of in-


On the sharp rejection of the control theory in Switzerland see SAUSER HALL, 50 Bul. Soc. Législ. Comp. (1921) 237 n. 4.

The Franco-German Mixed Arb. Trib. went to the most advanced applications of the "control" theory in the much discussed decisions, Société du Chemin de Fer de Damas-Hamah v. Cie. du Chemin de Fer de Bagdad (Aug. 31, 1921) 1 Recueil trib. arb. mixtes 401, Clunet 1923, 595; Soc. An. du Charbonnage Frédéric-Henri v. État Allemand (Sept. 30, 1921) 1 Recueil trib. arb. mixtes 422, Clunet 1923, 600; and other cases. See VAUGHAN WILLIAMS and CHRUSCHACHI, 49 Law Q. Rev. (1933) 340.
corporation or head office, without regard to the nationality of the shareholders or directors.\textsuperscript{103}

Postwar controversy in France. The excitement stirred up by this dispute and the memory of the war emergency law in France, resulted in a tendency to adopt control as the general criterion of "nationality," including for the purposes of choice of law. A corporation should, in every respect, be ascribed to the country whose nationals exercise preponderant influence on the business administration.\textsuperscript{104} Niboyet, the leader of this movement, proposed an appropriate system.\textsuperscript{105} When a committee of bondholders of a Rumanian corporation, in order to sue the corporation in France, formed an association in Paris in accordance with the French law of 1901 on associations, the Tribunal de la Seine held that the association could not sue, because the members were not Frenchmen. This decision is recognized as absurd.\textsuperscript{106}


\textsuperscript{104}App. Colmar (Oct. 29, 1925) S.1927.2.33 (on cautio iudicatum so/oi) and (Feb. 28, 1923) Revue juridique d'Alsace et de Lorraine 1923, 438 (on valorization) concerned matters of foreigners' condition, but were styled and cited in a general way.

\textsuperscript{105}Niboyet in many utterances, see especially Manuel No. 304 and Revue Crit. 1934, 114.

\textsuperscript{106}Trib. Seine (April 30, 1932) S.1932.2.174 (as of April 20, 1932) Gaz. Pal. 1932.2.217; see criticism by STEFANI and ANDRIOLI, 2 Giur. Comp. DIP. (1933) 22 No. 10.
Once more, the administrative authorities and the courts returned to the previous views. As early as 1926, the French Minister of Justice stated that it was “now generally assumed that the nationality of a company is determined by the place of its true and effective center, viz., the place where its administration is actually managed and centralized.”

The bilateral international treaties of establishment were reassumed on the old footing.

These discussions, nevertheless, were not forgotten. With the new war approaching, French measures of precaution against foreign-domiciled corporations extended to a wide range of foreign-controlled organizations domiciled in France. Conflicts law was directly affected by a French decree of April 12, 1939, declaring that foreign associations with non-profit purposes required recognition by decree, and that the term, foreign, includes “groups presenting the characteristics of an association that have their siège social abroad, or groups having their center in France, are in fact directed by foreigners, or have either foreign managers or at least twenty-five per cent foreign members.”

With this exception, it can be stated that in the field of conflicts law the control theory was completely rejected by all countries. As a matter of fact, the theory has proved time and again impracticable and unjust in reference to subsidiary corporations and otherwise. Even its discriminatory application against enemy property has inspired many crude solu-


110 See Sauser-Hall, Les Traités de Paix et les droits des neutres (1924) 117; R. Fuchs, op. cit. supra, n. 100 and cited authors. See also Vaughan Williams and Chrussachi, 49 Law Q. Rev. (1933) 347: “It is inconceivable
tions, as for instance in the case of companies incorporated and administered in neutral countries, which were forcibly liqui­dated in an Allied country to the detriment of the neutral members. The virtual agreement reached between the wars in all formerly belligerent countries, is remarkable. During the present conflagration, of course, practically all belligerent countries have enlarged the concept of enemy for the purpose of trading with the enemy prohibitions, freezing and sequestration of enemy assets, and in this connection have combined all three theories of incorporation, seat, and control so that each one of these criteria stigmatizes a corporation as enemy.

In economic warfare, the economic connections cannot be disregarded.

Likewise, although not fitted for determining the personal law, the theory of control could reasonably be employed so as to entitle only French-dominated companies to enjoy compensation for war damages in France. It was a sign of continued confusion that this decision was hailed by the advocates of the control theory as a "turning point" in the development of the concept of foreign incorporation.

Questionable, however, were decisions of the French Court of Cassation denying protection to so-called "commercial property," i.e., the rights arising out of a long-time lease of business premises under the Law of June 30, 1926, to French firms controlled by the American corporations, Remington and Singer.
Finally, although diplomatic protection, with discretionary consideration of all elements, may be granted to nationals interested in a corporation,\textsuperscript{116} intervention on behalf of a corporation as being controlled by nationals is opposed by a strong opinion.\textsuperscript{117}

In conclusion, the criterion of control is entirely inconvenient for determining the personal law, although it may be suitable for discriminating in exceptional administrative measures against certain groups of companies. But to advocate this test generally for all purposes excepting conflicts law, as the Peruvian Delegation has proposed to the Pan-American Union,\textsuperscript{118} is a very doubtful generalization.

VII. RATIONALE

The characteristic of the Anglo-American principle has appeared to consist in the recognition of the law of any state of incorporation, whereas the opposing principle recognizes the law only of that state where a corporation has been created and is domiciled in fact. The conceptual difference between the two systems would be somewhat lessened if the dogma that the domicil is necessarily in the state of incorporation, were to be taken seriously in Anglo-American law. Although this idea has never been employed in selecting the personal law, it does concern private international law that, by another traditional rule, meetings of the members of a corporation can be held only in the state of incorporation, a rule adopted

\textsuperscript{116} See \textsc{Borchard}, Annuaire 1931, I 297-313; \textsc{De Visscher} in Revue Dr. Int. (Bruxelles) (1936) 481.

\textsuperscript{117} Cf. as to Latin America, \textit{supra} pp. 24-27.

\textsuperscript{118} Octava Conferencia, Lima 1938, Diario de Sesiones, Projecto at p. 618 arts. 3-5. The motion was developed upon the Commission of Jurists, see \textit{id.} 1039.
in the Restatement (§ 163), "unless otherwise provided by the law of the state of incorporation." The New York Annotations to the Restatement recall the former rigid Ormsby Rule,\(^{119}\) whereby neither shareholders nor directors were allowed to make binding acts outside of the jurisdiction. It would be no great step from this to a rule prescribing that unless the "seat" is situated within the state, incorporation is refused. This is a natural feature of the continental system,\(^{120}\) but would easily be reconciled with the Anglo-American principles.

However, the contrast of principles is felt in three practical differences:

(a) In the first instance, the common law principle leaves the promoters of a corporation free to choose any country for creating the legal person, and any other country for controlling the administration. The opinions evidently are radically divided on the desirability of this freedom, which is refused in the Continental system. Before the first World War, English business used the corporation law of the Isle of Guernsey, which use was regarded so improper that it was abolished by a clause of the Companies Act of 1929.\(^{121}\) In this country Delaware for a time became a Mecca for corporations, more recently sharing its popularity with New York, New Jersey, and certain other states. Delaware is still famous for the elaborate care with which the law is currently kept in line with newly occurring needs, and for the special experience of the judiciary. Boards of directors in Delaware companies find their interest in efficient management better safe-


\(^{120}\) E.g., Germany: Aktiengesetz, Jan. 30, 1937, § 5.

Switzerland: See SCHNITZER, Handelsr. 80.


\(^{121}\) Companies Act, 1929, s. 353 subjects those companies to English law.
guarded from interference by small groups of outsiders, which does not necessarily mean undue disregard of various minority interests. The opinions of the experts, however, are strongly divided. There are a good many lawyers in this country who think that a corporation should be created at the place of its principal activity and not be entitled to seek out a law thought more favorable with regard to powers, liabilities, audits, or publicity. Also, in states having modern corporation laws, such as Michigan, the opinion prevails that foreign incorporation for domestic enterprises should be sought only if special reasons make it advisable, such as exceptional needs not satisfied by certain provisions on preferred stock. Considerations of taxation seem no longer to exercise a controlling influence on the choice of the charter state. As mentioned above, the tendency is even stronger to recognize a rival claim of the state of the actual management to control all intangibles and revenues.\(^{122}\) The traditional principle, thus, is weakened, and its competition with other ideas promotes confusion.

No such doubts exist with regard to the competition of Liechtenstein, Luxemburg, Monaco, and Panama in offering lowest bids for holding companies. They, indeed, provoke the thought of "corporation Renos."

(b) Second, the Continental principle makes it very difficult to transfer a corporation as an existing legal person to another country. Since this weakness can easily be remedied by legislation, the point is insufficient for a decisive criticism. It is entirely impossible, on the other hand, to change the personal law of a company incorporated in England or in the United States.

(c) Third, the principle of incorporation causes puzzling problems in the case where an association is incorporating in several states. The original doctrine concerning the effect of

\(^{122}\) Supra Chapter 18 p. 29.
multiple incorporation was loaded with inconveniences,123 "defying the common understanding of the business world."124 Some improvement was effected by recognizing that the legal person created and re-created is the same; the corresponding conclusions were reached, for instance, that the creation of shares is governed by the law of the first incorporation.125 But a more radical reform would be desirable, and in fact Henderson has urged that the law of the state of incorporation where the headquarters are situated be adopted for all manifestations of an identical corporation.126

This suggestion, fostering a link between the two principles, would seem highly significant. But thus far, the international situation is quite similar to that in regard to the two great principles respecting status. Such eminent experts as Young in England and Henderson in the United States have regretted the common law principle as it stands;127 more recently the following words were exchanged in a meeting of the International Law Association:

"Mr. Wyndham A. Bewes: The nationality of a company registered in England is a fiction invented by English law, the nationality itself to start with being a related fiction. If you want to go to the realities of things, the existence of a living company, you have to go where that company is administered. I think our law is wrong and I should like to see it changed.

"Mr. President: I thank Mr. Wyndham Bewes. It is one of the very rare occasions upon which I have heard an eminent English lawyer say that the law of England is wrong."128

Nevertheless, a minority of Continental writers advocate

123 Foley, "Incorporation, Multiple Incorporation and the Conflict of Laws," 42 Harv. L. Rev. (1929) 516.
124 Henderson 193, cf. 69.
125 Restatement §§ 203, 205.
126 Henderson 191 ff.
127 Young 161, 167, 207; Henderson ibid.
just the Anglo-American principle! The majority of lawyers on both sides seem perfectly satisfied with the wisdom of their respective principles.

Again, international attempts at unification have failed. This was also the fate of the notable draft of a uniform state law concerning foreign corporations (1934).

The simple measure suggested above of prescribing in the local requirements for incorporation, that the central office should be in the state, would leave the conflicts law intact and could be followed by those states which have no ambition to create corporations for foreign consumption. There should be no doubt in theory that this is the soundest solution. Likewise in theory, it would seem obvious that the Continental conflicts principle is the true equivalent to the common law principle with respect to individuals, and that this domiciliary rule has as much to recommend it for corporations as it has for individuals. In a federation, the nation-wide activities of a private legal person should be supervised and guaranteed by a federal organ. This is true for intrastate as well as for interstate activity, but, as things stand, the states are thoroughly disinclined to cede one of their last important powers, and the corporations cannot afford to have their

129 France: PILLET, Personnes Morales § 137; WEISS, 2 Traité 392.

129 France:


130 Germany:

131 Italy: ANZILOTTI, 6 Rivista (1912) 109, 113.

131 Italy:

132 Switzerland: VON STEICER, ZBJV. 1931, 306 (but without such criticism in his address, Schweizerische Vereinigung für internationales Recht No. 27, p. 28).

132 Switzerland:

133 See the characteristic opposition of views, on the one hand, of D'AMELIO, Clunet 1917, 1227, and on the other, of VAUGHAN WILLIAMS and CHRUSCHACHI, 49 Law Q. Rev. (1933) 343, 347, 348 who accuse the “seat” principle of “inconceivable” pretension and “glaring inconsistencies.”


134 The Sixth Hague Conference (1928) found no time for the problem.

134 The Sixth Hague Conference:

135 Uniform Foreign Corporation Act, in Handbook of the National Conference of Commissioners on Uniform State Laws (1934) 286.
vast bureaucratic duties increased by additional federal impositions. Thus, in this country, the main problem lies in other considerations, the most important of which is concerned with the right of doing business, which will be discussed at a later place in this book.