CHAPTER 23

Doing Business

I. INTRODUCTION

1. Regulation of Foreign Corporations

"While the state has no authority to impose a burden upon interstate commerce by taxation or otherwise, nevertheless it has authority to provide by legislation the terms and conditions upon which a foreign corporation may engage in intrastate business within its territorial limits, or avail itself of the benefits of its laws and the aid and protection of its courts in the enforcement of contracts relating to such business."\(^1\)

This present American doctrine stands independently of its derivation from the antiquated doctrine of "comity," whereby a state may arbitrarily admit or "exclude" the corporations of sister states, although this connection is still all too vividly in the mind of many legislators and courts. In principle, every state may impose conditions on the exercise of activities in the state.\(^2\) States are expected to hold these conditions within reasonable limits but are not constitutionally bound to do so in the case of intrastate commerce.

In this form, the principle is of universal significance.\(^3\) However, the laws of the world display a variety of policies ranging from the utmost liberalism to prohibitive exactions. On the other hand, there is a common idea, more or less instinctively felt, that the territorial state is entitled to subject foreign organizations to visitation and regulation

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1 Phillips Co. v. Everett (1919) 262 Fed. 341 at 343, citing Baltic Mining Co. v. Massachusetts (1913) 231 U. S. 68, often quoted in cases.
2 See Fletcher, 17 Cyc. Corp. § 8302.
3 Cf. Neumeyer, 2 Int. Verwaltungs R. (1922) 139.
only when the latter have a definite contact with the territory, and that the state's interference may increase proportionately to the degree in which the foreign undertaking merges in the life of the population.

Usually, the minimum contact required for controlling a foreign corporation is either the fact of its reiterated "carrying on of business" in the country or its establishment of a "place of business" or of an agency, terms distinguishable as will be shown but overlapping to some extent. Thus, filing for a license "to do business" in the United States includes the indication of a principal place of business within the state.\(^4\) Further, in Latin-American countries when trading within the national territory requires authorization,\(^5\) usually a local representative must be appointed.\(^6\) Agencies in most cases are probably supposed to be fixed at some place.

The case of a company having its principal establishment of manufacture or trade in the state, although it is incorporated and domiciled in another jurisdiction, is regarded in several systems mentioned earlier as requiring an outright exception to the principle of personal law.\(^7\) Other cases in which intensified control, possibly reaching complete compulsory "domestication," is justifiable, are presented by the outstanding public interest involved in such purposes as banking, financing, insurance, communication, transportation, and other public utilities.

Normally, however, impositions on the business of foreign corporations should never go all the way to veritable "domestication" or reincorporation.

\(^4\) Restatement § 169 comment c No. 3, and illustrations to § 167 Nos. 4 and 11.
\(^5\) E.g., Bolivia: Decree of March 25, 1887, art. 5.
\(^6\) E.g., Bolivia: Law of Nov. 13, 1886, art. 4; Decree of March 25, 1887, art. 2. Guatemala: C. C. (1933) art. 25, cf. 23 in the case of "habitual business."
\(^7\) Italy, Colombia, Nicaragua, Japan, Egypt and others, see supra pp. 46-48.
2. Concept of Doing Business

The concept of carrying on business, as contrasted with isolated acts, is discussed in the United States in regard to three distinctive purposes: qualifying for license statutes—which alone is in question here—jurisdiction, and taxation. Definitions are at some variance but agree in the essential point that a series of acts within the constitutional framework of the corporation must be performed or at least initiated. In the definition by the Uniform Foreign Corporations Act (§ 2, I), sanctioned by the American Bar Association in 1934 but not yet adopted in any state,

"... the term 'doing business' means the transaction by a foreign corporation of some part of its business substantial and continuous in character and not merely casual or occasional."

"Doing business" may or may not be regulated in the statutes of this country with the inclusion of charitable corporations.

The English definition for the purposes of jurisdiction, is simpler. In the words of Lord Herschell, "there is a broad distinction between trading with a country and carrying on a trade within a country." An English lawyer has observed that statutes in the United States do not so limit their field, "because the courts of the various states have employed every pretext to assume jurisdiction over foreign corpo-

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8 See Restatement, New York Annotations § 167 and CHEATHAM, Cases 924, urging with ISAACS, 25 Col. L. Rev. (1925) 1024, that the courts should watch better than they usually did the different significances of the phrase "doing business."

9 This seems to be also the gist of the definition in comment a to Restatement § 167: "Doing business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts."

CORPORATIONS, KINDRED ORGANIZATIONS

However this may be as to jurisdiction, American policy in regulating foreign corporate business is in fact less broad-minded than the English, although much more so than that of most other nations.

More closely approaching the English than the American concepts are the expressions "carrying on business" or a "trade" in Germany (Geschäftsbetrieb, Gewerbebetrieb), "direct exploitation of the object of the charter" in France, and "functioning" in Brazil, "trading (girar)" in Bolivia, et cetera, terms likewise conceived for the purpose of required governmental authorization. Business carried on with the country in the absence of any establishment within it, in theory, does not require a license in these countries.

3. Categories of Business Places

In Great Britain, registration is obligatory for foreign companies having "established a place of business" in the kingdom. This is a comprehensive term, but it requires the company to have some "local habitation of its own." The term "succursale" of French and many other laws, although often used in the narrower meaning of "branch," is prevalently understood to include all places of business where transactions occur, even though the business may be directed in all respects by the principal establishment. A careful Belgian definition declares a "succursale" to be "any dependent establishment (office, bureau, agency, etc.), any accessory center of commercial life, set up in a stable and regular course at a fixed place, where a manager resides and permanently represents

12 British Companies Act, 1948, s. 406; the above mentioned definition was given tentatively by the Lord President in the Scotch case, Lord Advocate v. Huron and Erie Loan & Savings Co. (Feb. 28, 1911) (1911) S. C. 612, 616; accord Cohen, J., in Tovarishestvo Manufactur Liudvig-Rabenek [1944] 1 Ch. 404, 408.
the firm or legal person with authority to engage its liability in contracts."

Another much narrower significance of "branch" (Zweigniederlassung) obtains in German, Austrian, and Swiss administrative rules. There, a branch office presupposes a permanent establishment with separate organization and assets accountable, having the power to conclude transactions independently, although subject to instructions by the central management. Sometimes it is required that the business carried on be of the same kind as that of the head establishment, but on a smaller scale. Hence impositions on branch offices in these countries do not extend to "agencies" or "representatives."

Aware of this proper sense of branch, the broad French scope of succursale is reached in Spanish, Portuguese, and Latin-American provisions by accumulating terms such as "branches, agencies, and representatives of foreign corporations." The meaning is explained by the Colombian laws that speak of "enterprise of a permanent character," and the new Italian text, "secondary seat with permanent agency." In fact, in Latin America, any permanent establishment regularly needs registration, if not authorization.

"Agents" in the language of commercial relations, as distinguished from "representatives," have been described as persons securing business and referring offers to the constituent company, and this meaning has been attributed to

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14 Germany: ROHGE. 401, 17 id. 313; RGZ. 263, 50 id. 429.
17 Colombia: Legislative Decree No. 2 of 1906, art. 1; Law No. 58 of 1931, art. 22; Executive Decree No. 65 of 1941, art. 1.
18 Italy: C. C. (1942) art. 2506.
“agents” as used in the Latin-American laws.\textsuperscript{18} The various legislations may be divided on this point. However, the multifarious duties connected with permanent establishments, seem to have no bearing on independent brokers or distributors, intermediaries between an enterprise and its customers. Nor do they apply to merchants dealing with a foreign corporation on their own account and possibly working for several principals. Thus, these rules refer exclusively to physical or juristic persons that enter into transactions, or at least negotiate, on behalf of foreign corporations. This, at least, is their natural construction and should be presumed, if the contrary is not clearly intended.\textsuperscript{19}

Similarly, the personal law of the foreign corporation has no application to subsidiaries or affiliates (French \textit{filiales}, German \textit{Tochtergesellschaften}) i.e., autonomous corporations or partnerships of any form, created under the territorial law, though economically dependent and often politically assimilated, to foreign, particularly enemy, organizations.

It follows incidentally that among the four main methods open to business management for operating in a foreign country, two do not enter into discussion in the following survey, namely, carrying on foreign activities by an independent distributor and by a juridically independent foreign subsidiary. We have to deal only with the two other procedures of submitting the entire corporation abroad to registration and other duties, or of having this done by a domestic-created subsidiary, organized for the purpose of business in the country.\textsuperscript{20} Big American corporations most frequently use the latter method.

\textsuperscript{18} See Regimen Jurídico 32, 98.
\textsuperscript{19} Cf. \textsc{Neumeyer}, 2 Int. Verwaltungs R. 143, 139 n. 5.
\textsuperscript{20} For all four ways and their advantages and disadvantages, see the excellent symposium, “Legal Problems Affecting American Corporations Doing Business Abroad” (i.e., in Latin America) in 8 Tul. L. Rev. (1934) 550.
II. Survey of Systems

1. Unconditional Admittance

Few countries accord freedom of trade to foreign-created legal persons without authorization either for recognition or for permitting the doing of business. England, however, has upheld its old liberal principle, as have also Switzerland and the Netherlands, joined in 1873 by Belgium. Also Yugoslavia and, in this hemisphere, Argentina, Paraguay, the Dominican Republic, El Salvador, and Venezuela have based their rules on this system, although the first two countries require reciprocity of treatment. Hence, the Swiss and Argentine governments have been able to

22. Switzerland: No impositions have been provided either by the Federation, BG. (July 22, 1887) Clunet 1893, 440, or by the Cantons, see Wieland, 43 Z. Schweiz. R. (N. F.) 225; Sauer-Hall, 50 Bull. Soc. Legisl. Comp. (1921) 228 at 237; BG. (July 12, 1934) 60 BGE. 1225.
23. Hungary: Formerly classified similarly by De Magyary, Clunet 1924, 596.
25. Yugoslavia: C. Com. § 503 par. 1; Eisner, 1 Symmikta Streit 293; see, however, now Eisner, 17 Z. ausl. PR. (1952) at 258; 20 id. 166.
26. Argentina and Paraguay: C. Com. art. 287, as modified and interpreted in Argentina by Argentinian Law No. 8867, of Feb. 6, 1912, art. 1, also applied to a (Czechoslovakian) limited liability partnership, Cám. Com. de la Cap. (Feb. 12, 1926) 19 Jur. Arg. 78. Provisions concerning the required documentation are contained in the Decree of April 17, 1923, creating the "Inspección General de Justicia," art. 7. That no other conditions than these exist, has been stated by Cám. Com. de la Cap. en pleno (Sept. 18, 1940) 22 La Ley 537; C. Com. art. 287 is modified thereby, see Cám. Com. de la Cap. 2a (May 5, 1939) 14 La Ley 708. Hence, Argentina is not really devoted to the theory of authorization, not to speak of the compulsion to nationalization. On the liberal background see Zeballos, Clunet 1906, 604, 611.
29. Venezuela: C. Com. (1919) art. 359 (new 374), 361 (new 376), nationalization being only optional; art. 361, "pueden adquirir la nacionalidad venezolana."
COURT ORGANIZATIONS, KINDRED ORGANIZATIONS

declare, without concluding a treaty, that stock companies of one country after due registration can reciprocally carry on business by agents in the other country. But, registration and publication are additional requisites, and in such countries as Yugoslavia and Venezuela, formalities may impose grave restrictions on the freedom granted in principle.

2. Business Without a Permanent Place

Italy, Portugal, and Rumania, as well as modern Turkey, apparently allow not merely isolated acts, but all transactions short of establishing an agency in the country to be concluded by a foreign company.

3. Business Under Domestic Law

The Spanish Commercial Code of 1885 unconditionally permits all business carried on either from outside or within the country, but, if permanent centers, agencies, or branches are established, all transactions made in the country are subject to the provisions of the Code. This system was initially followed in Colombia, Honduras, Mexico, Nicaragua, and Peru. It is, in reality, an inadequate way of meeting the problem, revealing its dangerous elements when, nevertheless, requirements for doing business have been altered.

a Burckhardt, 3 Bundesrecht 1023, V.


Portugal: C. Com. arts 109, ef. 111.

Rumania: C. Com. (1938) arts. 356, 357; since 1945, the law certainly has been altered.

Turkey: Law of Nov. 30, 1330/1914, art. 12, see Salem, 7 Répert. 250 No. 135.

Spain: C. Com. (1885) art. 15; ef. 21.

Colombia: C. Com. art. 19.

Cuba: C. Com. art. 15; Constitution (1940) arts. 19, 272.

Honduras: C. Com. (1940) arts. 10, 286.

Mexico: Formerly C. Com. art. 15; now Ley General de Sociedades Mercantiles, of July 28, 1934, art. 250; but see for the obstruction to this article by the courts, supra p. 148 n. 101, the literature cited.

Nicaragua: C. Com. arts. 8 and 10.

Peru: C. Com. art. 15; Constitution (1933) art. 17.
added, or, on the other hand, the sweeping subjection to domestic law has been extended still further.

4. Qualifying for Authorization

The continuously alleged power of the states of the United States to "exclude" nondomestic corporations from business is deemed to be restricted by certain provisions in the Federal Constitution: the Commerce Clause, the doctrine of unconstitutional conditions, the Equal Protection and the Due Process Clauses, and also the Full Faith and Credit Clause. If a regulation does not violate the Constitution, its wisdom and equity cannot be challenged. But statutes do not really exclude even alien corporations from business; they only require "licensing," dependent on objective and generally qualifying conditions.

A main characteristic of this system, too obvious even to be noticed by American lawyers but a striking phenomenon for Europeans, lies in the fact that the state statutes specify the conditions for licensing closely enough to make supervision by the courts possible and decisive. That half of the state statutes speak in imperative terms ("shall grant") while the other provisions are permissive, practically makes no difference. When the conditions provided by law are satisfied, authorization is automatically granted. Whether also non-

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To illustrate, Colombia: Law No. 58 of 1931, art. 22 speaks of request for "permit" by the newly created Superintendencia de Sociedades Anónimas, and Decree No. 1984 of 1939, art. 4 emphasizes this request for a permit (called "special" in art. 3). Mexico: C. C. arts. 2736-2738 and Ley General de Sociedades Mercantiles, art. 251 contain only prescriptions of formalities, but the restrictions on foreign corporations carrying on business have been considerably increased.

Peru: Infra n. 131.

Restatement §§ 169-178; Fletcher, 17 Cyc. Corp. VI B, 227, §§ 8386 ff.


State ex rel. Tri-State Telephone and Telegraph Co. v. Holm (1924) 160 Minn. 378, 200 N. W. 296.

Holt, id. 478.

See Lepaulle, Condition des sociétés étrangères (1923) 174ff., 233ff.

Answer to a questionnaire, sent out by Mr. Lepaulle, see id. 179.
profit-seeking corporations need authorization is not well settled in all states; many states seem to “exempt such corporations from regulation altogether or else provide for some special method of regulation.” An express exemption from the duty of registration is provided in some provinces of Canada.

Licensing is not believed to raise difficulties in any state, with the only exception that many states require that the name be not susceptible of confusion with those of domestic corporations, these amounting in New York to some 50,000. This is a problem for companies of other states with an established firm name.

In most Latin-American countries, governmental authorization is required for establishing an “agency” or “representation.” Only occasionally, as in Colombia and Nicaragua, the text of the statutes makes it clear that the permit for establishing a permanent place of business is certain to be granted on the filing of a request and fulfillment of the legal conditions. But the writer is enabled by a statement of Dr. Phanor Eder, based on his experience, to note that in at least half of the Latin-American republics governmental authorization is always granted, if the constitutional documents of the corporation do not contain stipulations contrary to the basic principles of the domestic law.

Policy in this respect is presumed by the draftsmen of the Uniform Foreign Corporations Act, National Conference, Handbook 1934, 306.


British Columbia: Companies Act, Rev. Stat. 1948, c. 58 s. 182 (5).

Colombia: Acto Legislativo Constitucional No. 1 of 1936, art. 6; C. Com. art. 19 read with Law No. 58 of 1931, art. 22 and Executive Decree No. 65 of 1941.

DOING BUSINESS

The text of the Hungarian Commercial Code followed the same principle.\textsuperscript{44}

5. Discretionary Grant of Authorization

The liberality of the licensing system in this country is perceived when contrasted with other legislations.

In various German states, foreign industrial and commercial enterprises have always required trade authorization by the state authorities supervising industry and trade, except where treaties accord reciprocity.\textsuperscript{45} These disadvantages were inspired by suspicions of foreign law more than foreign capital. The recent German Corporation Law of 1937 superimposes the necessity of governmental approbation,\textsuperscript{46} which may be refused without giving reasons, and may be freely revoked.\textsuperscript{47} This is a trend backward to the system prevailing in Austria and some Eastern European legislations, which have simply provided that every foreign business corporation shall be subject to discretionary permission for doing business.\textsuperscript{48}

Most statutes of the Latin-American countries requiring governmental authorization for the establishment of a perma-

\textsuperscript{44} Hungary: C. Com. arts. 210-217.
\textsuperscript{46} Reichsgewerbeordnung § 12 in combination with Prussian Law of June 29, 1914 (carrying on a nonambulatory business).
\textsuperscript{47} Bavaria: Law of February 6, 1868, art. 2 (carrying on business).
\textsuperscript{48} Saxony: Ordinance of Nov. 10, 1899, § 5.
\textsuperscript{46} Aktiengesetz (1937) § 292 (stock companies); Einführungsgesetz to this law, § 27 (limited partnerships, profit associations and co-operatives). On the state agencies on which the authorization depends, see Beitzke, Clunet 1937, 1002.
\textsuperscript{47} Beitzke, Jur. Personen 166.
\textsuperscript{48} Austria: Formerly Imperial Order of Nov. 29, 1865, and Law of March 29, 1873, still valid in Czechoslovakia; now Aktiengesetz (1937) § 292 (stock companies).
\textsuperscript{49} Poland: Law of March 22, 1928, No. 383, on stock companies, art. 4 par. 6; Order of Dec. 20, 1928, No. 919; on a more recent similar provision regarding limited private companies, see 12 Z. ausl. PR. (1939) 867.
\textsuperscript{50} Rumania: C. Com. of 1887, arts. 238, 244; C. Com. of Nov. 10, 1938, branches and agencies may not be established unless reciprocity is guaranteed (art. 355); in the case of joint stock companies and limited partnerships only after authorization by the government (art. 356).

In the East European countries, these provisions are today in effect superseded by the wholesale nationalization and socialization of industry and commerce.
nent business place are drafted in terms that possibly reserve to the governments full power of granting or refusing. What is the “public policy” to which corporate contracts and documents ought not to be contrary in Mexico? Precise terms have been used for this purpose in the older Brazilian prescription that foreign stock corporations and nonprofit associations should file their charters and by-laws for “approval,” in order to enable them to function in Brazil (funcionar no Brasil). The actual provisions are that all organizations pursuing purposes of collective interest, as companies and foundations, follow the laws of the state where they have been established but may not have branches, agencies, or establishments before their constitutive acts have been approved by the Brazilian Government. In a decree of 1891, it was prescribed that the government shall ascertain “whether the company has a proper purpose and whether it is to the advantage of the public; whether its creation is opportune and its success probable; . . . whether the capital is adequate for the company purposes; . . . whether the provisions relating to administration, accounting, dividends, reserve funds, operations, and obligations, protect the interests of the shareholders and of the public.” A recent regulation more briefly provides that the Federal Government, in authorizing a stock corporation may establish “the conditions that it shall deem convenient for the protection of the national interests.” It is controversial whether partnerships lacking corporative articles of association, as they are based only on a contract, are free from this burden.

49 Mexico: Ley General de Sociedades Mercantiles (1934) art. 251, fr. II.
50 Brazil: C. C. art. 20 § 1, as amended by Decree No. 3725, of Jan. 15, 1919; Decree No. 434, of July 4, 1891, art. 47.
51 Brazil: Introductory Law (1942) art. 11 § 1; Decree-Law No. 2627 (sobre as sociedades por ações) of Sept. 26, 1940, art. 64.
52 Brazil: Decree No. 434, of July 4, 1891, art. 52.
53 Decree-Law No. 2627, of Sept. 26, 1940, art. 65 § 1.
54 Beviláqua, 6 Répert. 162-164; on the full controversy see Espinola, 6 Tratado 547.
In Chile, the President of the Republic examines whether the interests of the stockholders and of third persons are protected, and a granted authorization may be revoked if the President “for any reason” estimates that a stock company does not offer the guarantees required for authorization.

6. Domestication

Domestication is a procedure whereby a corporation loses its foreign character and becomes a domestic corporation.

Although none of the above-described methods should be characterized as requiring the conversion of a foreign corporation into a domestic one, certain additional requirements, which are to be mentioned below, may greatly contribute to efface the distinction between authorization and domestication. Is it true, however, that some, if not most, of the Latin-American states demand a veritable “nationalization” as a condition precedent to permitting the carrying on of business? There is a theory to this effect advocated by a few Latin-American authors and apparently supported by the language of some statutes. Thus, Bolivia prescribes that the company should solicit “its legal constitution” at the Ministry of Industry; Brazil that it should submit its own constitutional document for “approbation”; and the Mexican Supreme Court insists on the idea that inscription in the register is indispensable for giving a foreign company “life in Mexico,” such existence including the right to sue, so

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65 Chile: C. Com. art. 468; Decree No. 1521, of May 3, 1938, arts. 47-49; Decree-Law No. 251, of May 22, 1931, arts. 120ff.; cf. on the requirements, Herrera Reyes, Sociedades anónimas (Santiago 1935) 272 § 300.
66 Chile: Decree-Law No. 251, of May 22, 1931, art. 126, while the former Regulation No. 3030, of December 22, 1920, art. 48 required an “important” reason.
67 Most outspoken, Gil Borges, Informe 1, reproduced also by the Peruvian motion to the Eighth Pan-American Conference, Diario 616.
68 Bolivia: Decree of March 25, 1887, art. 5.
69 Brazil: C. C. art. 20.
70 See cases of Amparo Zardaín and Amparo Palmolive, as discussed by Schuster, “The Judicial Status of Non-Registered Foreign Corporations in Latin America-Mexico,” 7 Tul. L. Rev. (1933) 341 at 356ff., ns. 80, 83, 86; 8 id. 563 and supra Chapter 22 p. 146 n. 101.
also the Civil Code of Peru requires foreign juristic persons to register "in order to enjoy personality." Although these expressions have an unfortunate connection with the problems both of standing in court by foreign corporations and of their subjection to domestic laws, reasonably they cannot mean the production of a new juristic personality by compliance with statutes prescribing authorization of doing business or registration.

The opposite theory would involve the queer proposition that a foreign corporation is recognized as a person so long as it has not established an agency in the country but loses its existence by establishing an agency, whether without authorization, or even after obtaining an authorization, since that would be granting a new personality. It would, then, seem more consistent to abandon formally the idea of recognition ipso jure and all the hopes that it once embodied.

Domestication, as facultative and optional rather than the exclusive way to obtain permission for doing business, is much less harmful and may sometimes be a perfectly convenient method. American concerns have been advised to create subsidiaries in this country, specially designed for reincorporation in determined foreign countries.

Within the United States domestication is almost obsolete and seems to exist only in Georgia.

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62 See supra p. 143; infra pp. 216-217 and 199-201.

63 See 2 Restrepo-Hernandez 92 § 1191: "La incorporación no produce una nueva persona jurídica."

64 There was an older Italian opinion of this kind, developed by Fiore, and refuted by Diena, 1 Dir. Com. Int. 245; Cavaglieri, Dir. Int. Com. 261, 262.

65 See the instructive information by Crawford, 11 Tul. L. Rev. (1936) 59.

7. Reciprocity

Reciprocity as a condition for license appears in a few European countries, and underlies the "retaliatory" statutes in the United States putting foreign corporations—especially insurance companies—under the same restrictions and burdens as are imposed by the state of incorporation upon corporations of the enacting state, thus discriminating in favor of domestic corporations. Such provisions, recognized as constitutional, are more frequently applied to taxation but have also been used to deny the benefit of the rule that the corporation may maintain a suit after belated licensing.

III. The Position of Permanent Establishments in Conflicts Law

1. Principle

It is a general doctrine that branch offices, whether in the narrower or broader meaning of the word, have a double nature influencing their treatment in conflicts law.

On the one hand, an establishment forms an organic part of the entire enterprise and, therefore, participates in the personal law of the main organization. To the extent that nationality is ascribed to the legal body, the branch office shares in this.
On the other hand, a branch joins in the life of the country where it is established and, for this reason, to a large extent must obey the territorial law. For the purpose of this law, it is often considered “domiciled” in the country of its location. Transactions between the corporation and its branch are of significance at least in tax and administrative law.

2. Scope of the Personal Law

The personal law will regularly govern the internal organization of a branch office, as for instance the distribution of powers and the administrative relations between the central and the branch offices.

It determines traditionally the name or “firm” of the branch, although convenient additions to the name may be locally prescribed to show the kind of association or the fact that the central management is foreign and where it is situated. Laws are divided on the question whether the foreign-acquired name is to be protected when it is apt to create confusion with a local corporation established before the branch but after the foreign corporate name was made.

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73 See, for instance, Brazil, C. C. art. 35 pars. 3 and 4, as construed by Espinola 8-C Tratado 1406, 1781.


75 Wieland, 43 Z. Schweiz. R. (N. F.) 271; Swiss Fed. Trib. (April 1, 1924) 50 BGE. II 51, 57 (with a point against French war measures) see supra Chapter 19, p. 62 n. III.


77 Denmark: Stock Corporation Law, No. 123, of April 15, 1930, as amended, § 75.

78 Germany: HGB. § 20; Ges.m. b. H. Gesetz § 4; Genossenschaftsgesetz § 3 par. 1; Aktiengesetz § 4.

79 Wieland, 43 Z. Schweiz. R. (N. F.) 271; Swiss Fed. Trib. (April 1, 1924) 50 BGE. II 51, 57 (with a point against French war measures) see supra Chapter 19, p. 62 n. III.

80 Sweden: Stock Companies Act, No. 56, of March 1, 1931, as amended, § 19.

81 Denmark: Stock Corporation Law, No. 123, of April 15, 1930, as amended, § 75.

82 Germany: HGB. § 20; Ges.m. b. H. Gesetz § 4; Genossenschaftsgesetz § 3 par. 1; Aktiengesetz § 4.


84 France: Code Civil, art. 1621; Law of Feb. 1, 1934, of a point against French war measures) see supra Chapter 19, p. 62 n. III.

85 Germany: HGB. § 20; Ges.m. b. H. Gesetz § 4; Genossenschaftsgesetz § 3 par. 1; Aktiengesetz § 4.

86 Sweden: Stock Companies Act, No. 56, of March 1, 1931, as amended, § 19.

87 Germany: HGB. § 20; Ges.m. b. H. Gesetz § 4; Genossenschaftsgesetz § 3 par. 1; Aktiengesetz § 4.


89 France: Code Civil, art. 1621; Law of Feb. 1, 1934, of a point against French war measures) see supra Chapter 19, p. 62 n. III.

90 Germany: HGB. § 20; Ges.m. b. H. Gesetz § 4; Genossenschaftsgesetz § 3 par. 1; Aktiengesetz § 4.

91 Sweden: Stock Companies Act, No. 56, of March 1, 1931, as amended, § 19.
known abroad. In a few jurisdictions, however, these rules are set aside, the territorial rules claiming completely to determine the branch name.

The personal law determines also the liability of the main organization for obligations entered into by the branch, as well as the termination of the branch through dissolution of the main body.

That organization and internal government of the main enterprise in deciding such incidents as the issue and purchase by a corporation of shares of stock, modification of capital, negotiability of share certificates issued out of the state, are beyond the territorial legal domain, may be considered as generally admitted.

Consistent Continental opinion holds in all these respects the same principle to be applicable to branches of unincorporated organizations. The importance of the individual members for the structure of a partnership is appreciated. Nevertheless the corporate attributes of a copartnership also exercise their influence.

3. Territorial Law Governing According to General Conflicts Rules

Natural circumstances justify conflicts rules referring to the territorial laws in the following respects:

(a) In every case of a branch office or other permanent

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77 Cf. German HGB. § 18 par. 2; 42 Jahrh. KG. 160; Liechtenstein: P. G. R. § 1044 par. 3.
78 Laws of Sweden, Denmark, and Norway on registration, § 16, criticized by Neumeyer, 2 Int. Verwaltungs R. 189, 193, but recommended by Wieland, 43 Z. Schweiz. R. (N. F.) 218, 237, cf. 244.
79 Pillet, Personnes Morales § 167.
80 See supra Chapter 20, p. 92.
81 Yet, Ballantine, Corporations § 293 and the same, Cal. Corp. Law 312 § 323, defines the scope of the territorial law in a broader way.
82 See, for instance, Yugoslavia, C. Com. (1937) §§ 104, 165, 504, 507; and in general the citations supra pp. 101ff.
representation of any foreign principal, it is universally agreed that the authority enjoyed by the directors or agents, in contracting with third persons in the country of the establishment, should be determined by the law of the place where the authority is acted upon rather than where it has been granted. A slight difference exists in that in the United States the decisive place is regarded to be that of contracting\textsuperscript{83}—whatever this may mean practically—while in other countries it is assumed to be the place of the establishment itself.\textsuperscript{84}

(b) It is likewise consonant with general considerations of conflicts law that the manager of a branch office should be personally liable to third persons either by collateral or subsidiary liability whenever the law of the country so provides.\textsuperscript{84a}

(c) As a matter of course foreign organizations are subject to the general local administrative provisions concerning bookkeeping and accounting, publication of balance sheets, inspection and information,\textsuperscript{85} labor, taxation, and bankruptcy.\textsuperscript{86} This explains easily the often discussed rules that the issue of shares or bonds within the state by a foreign corporation is subject to the territorial provisions, and that stock exchange regulations include the quotation of foreign stocks.\textsuperscript{87} In the United States, laws regulating the holding or


\textsuperscript{84} Germany: RG. (Dec. 5, 1896) 38 RGZ. 194; (April 3, 1902) 51 RGZ. 147; (Jan. 14, 1910) 66 Seuff. Arch. No. 73; cf. Hupka, Die Vollmacht (1900) 252.

Yugoslavia: C. Com. (1937) § 507.

\textsuperscript{84a} The International Law Association’s proposal (see preceding note) would grant this personal liability only when the company is not bound under its law.

\textsuperscript{85} Gettridge v. State Capital Co. (1933) 129 Cal. App. 86, 18 Pac. (2d) 375; Winter v. Baldwin (1889) 89 Ala. 483, 7 So. 734.

Código Bustamante, art. 250.

Belgium: Consolidated Companies Act (1935) art. 198.

Denmark: Law of April 15, 1930, as amended, §§ 76ff.

Germany: König, Leipzig. Z. 1914, 1417.

Italy: C. C. (1942) art. 2506.

Portugal: C. Com. art. 111.

\textsuperscript{86} E.g., France: Cass. (req.) (June 19, 1908) Clunet 1909, 1094.

Yugoslavia: C. Com. § 508, see Eisner, I Symmikta Streit 296.

\textsuperscript{87} 2 Lyon-Caen et Renault § 1141.
DOING BUSINESS

transfer of shares\textsuperscript{88} and even a local prohibition of partnership with other corporations\textsuperscript{89} have been held applicable.

(d) Qualifications as a merchant, for the purposes of local rules on registration, firm name, and accounting, is determined by the local law.\textsuperscript{90} But when the “commercial” nature of contracts, executed at the main office, is examined for purposes of jurisdiction or other matters, the personal law should be applied.

IV. STATUTORY IMPOSITIONS

1. Service of Process and Jurisdiction

Statutes regularly require foreign corporations and firms desiring to do business, to indicate a fixed place of business and an agent or a principal manager upon whom service of process may be made. This certainly is a fair provision insofar as litigation involves contracts, tort, taxation, or other duties connected with the business conducted by the agency. It is a corresponding good rule that the local courts should refrain from taking jurisdiction beyond the affairs of the establishment\textsuperscript{91} “on a cause which arose wholly outside of the state.”\textsuperscript{92} But there is a tendency to extend further the authority of

\textsuperscript{88} See 2 Beale 782 n. 3.
\textsuperscript{89} 2 Beale 782 n. 4.
\textsuperscript{90} France: 2 Lyon-Caen et Renault § 1127.
Germany: 36 RGZ. 394; OLG. Kassel, Leipzig Z. 1909, 954; Wieland, 1 Handelsr. 619 n. 18; Staub-Bondi, in Staub § 6 n. 3, § 33 n. 4; cf. § 22 n. 4 explaining that, if the personal law agrees, the local German HGB. §§ 22, 30 permits the transfer of a branch with its firm name to another person.
\textsuperscript{91} See, e.g., Italy: Sereni, Rivista 1931, 266.
Colombia: Legislative Decree No. 2 of 1906, art. 2.
Costa Rica: Law No. 10, of Dec. 3, 1929, art. 1 (3) (amending Corporation Law, art. 151) “for the decision of the judicial questions to which the transactions of the branch give rise and in all matters concerning requisites of publicity, . . .”
Guatemala: C. C. (1933) art. 25 (2); Legislative Decree No. 1370, of April 16, 1925, art. 1.
Treaty of Montevideo on Commercial Law (1889) art. 6.
local agents to all matters inclusive of the causes of action arising abroad.

In England, where no establishment of the foreign company exists but there is a representative, his authority to receive a writ of summons without limitation extends to all suits against the company, even though he may manage only a share transfer office, but it has been said that his authority must be proved by the plaintiff, "which is difficult."

The American statutes prescribing the appointment of an agent as a condition precedent to licensing, are divided. In a distinct group, the authority of the required agent is restricted to domestic matters either by an express clause or by implication. Of the remaining statutes uncertain in language, many more possibly may be claimed for this latter

94 GUTTERIDGE, "Le Conflit des lois de compétence judiciaire dans les actions personnelles," 44 Recueil (1933) II, 111 at 129; cf. DICEY 178.
Washington: Laws 1955, c. 143 s. 1.
Iowa: Code (1950) § 494.2.
Rhode Island: Gen. Laws Ann., c. 116 § 65 as construed by cases.
South Carolina: Code (1952) § 12-703.
class; In case a foreign corporation has not appointed an agent or the agent has disappeared or lost his authority, an official of the state—the secretary of state, the auditor, etc—is designated as attorney for the corporation with authority to receive service of process either under a declaration to be made by the corporation or by a statutory provision. The courts, under the guidance of the Supreme Court of the United States, have developed a system varying in the states and apparently still fluid, which the draftsmen of the Uniform Foreign Corporations Act refrained from reproducing in a section, because it would be enormously complicated. One of the particular doctrines is that service on an appointed agent or the official designated as attorney, may be effected in causes arising outside the state, where the corporation has appointed him to this effect, or is deemed to have consented to his authority, especially in the case of a public officer, by having filed for doing business on the ground of a statute unequivocally conferring on him constructive authority, while the corporation is actually doing business at the time suit is brought against it.

In a few jurisdictions, the right to sue a foreign corporation doing business in the state for all causes of action is a privilege of residents. Moreover, a practice has developed that carrying on business in a state adds to the probability that the courts

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of the state will take jurisdiction in cases involving the internal affairs of the corporation where all parties to the controversy are in the state.\textsuperscript{101}

In many other countries, as clearly laid down in the Japanese Code\textsuperscript{102} and particularly in Latin America,\textsuperscript{103} jurisdiction is taken on a broad scale against foreign corporations domiciled in any sense in the state. The parent corporation may thus be exposed to heavy commitments even at home when judgments of the territorial courts are accorded enforcement in the state of charter.\textsuperscript{104} A wholesome reaction sometimes appears under French influence. For instance, an Argentine decision making a branch office in Buenos Aires of a Liverpool shipping line liable for faulty performance of an affreightment by the branch office of the same firm in New York, has been severely criticised on the basis of the French principle that a suit must refer to acts done or obligations created in the jurisdiction of the branch or agency, in order to avoid abusive actions against foreign firms.\textsuperscript{105}

2. Registration

In the great majority of countries, though not in the United States (which has not instituted any special index of foreign corporations), business organizations are recorded in special public registers. Foreign enterprises have in most states

\textsuperscript{101} 2 \textsc{Beale} 891 § 192-7 and cases cited.
\textsuperscript{102} Japan: C. Com. art. 479 par. 2, as construed by the Jap. S. Ct. (February 15, 1905), covers the whole of the company's business, and according to App. Tokyo (July 23, 1920) extends to matters arising abroad. See I C. Com. of Japan Ann. (1931) 405, 406.
\textsuperscript{103} Brazil: Decree-Law No. 2627, of Sept. 26, 1940, art. 67: foreign stock corporations, licensed to do business, are required to have a permanent representative in Brazil, subject to be sued and to receive initial service for the corporation, with full powers to treat and to determine definitely, any matters. The meaning, however, may be restricted to acts and operations on behalf of the company in the country; art. 68 subjects only such operations to the laws of Brazil.
\textsuperscript{104} See \textsc{Crawford}, "The Brazilian Business Corporation," II Tul. L. Rev. (1936) at 63.
to register any agency established in the territory. Germany and Switzerland traditionally require only branch offices in the narrow sense to be registered, a restriction that has been criticised in the interest of the security of commerce. 107 Since 1908, England, which has no general register of commerce, also has required foreign companies having any place of business in the country to register. 108 Canadian provinces have to some extent followed this method. 109

While in England there is a special register for foreign companies, in other countries a problem is presented with respect to the registration of foreign associations, in view of the different registers and regulations for recording domestic associations, such as stock corporations, limited liability partnerships, and ordinary firms.

Generally, the provisions respecting domestic organizations are applied by analogy; 110 the formalities of those in situations most similar to the foreign association are employed. 111 If there is no parallel, the Italian Code prescribes compliance with the most exacting formalities, viz., those imposed on stock corporations. 112 In Germany, it is prescribed policy to require only documentation and facts that can be furnished on the basis of the foreign law; 113 to reconcile both laws, it has also been held that where the general law of the incorporating state limits the liability of directors in a manner

108 Companies Act, 1948, s. 407.
British Columbia: Companies Act, Rev. Stat. 1948, c. 58 s. 182.
Manitoba: Companies Act, Rev. Stat. 1954, c. 43 s. 419 (2).
110 Japan: C. Com. art. 485 par. 2.
111 Switzerland’s Federal Council (June 16, 1902) discussed by STEIGER, 67 ZBJV. (1931) at 324.
112 Italy: C. Com. (1882) art. 230 par. 3; C. C. (1942) art. 2507.
Similarly, Rumania: C. Com. (1938) art. 358.
113 German HGB. § 13 par. 3; see also § 201 par. 5; Aktiengesetz § 37. Cf. Denkschrift zum Entwurf eines HGB. (1888) 26; NEUMEYER, 2 Int. Verwaltungs R. 191 n. 5, 202.
unknown to the law of the forum, these limitations must be recorded to be available against a third party.\textsuperscript{114}

Some legislations, however, have imposed special heavy burdens of documentation upon foreign corporations, and worse, registrars and courts sometimes exaggerate these requirements so as to render compliance extremely cumbersome.\textsuperscript{115}

3. Publications

A number of statutes have prescribed the data to be given in registration and in subsequent notifications regarding the financial status of the association.\textsuperscript{116} This is in line with the recent strong increase of supervisory policy, tending to enlarge the control of the management by the state and the public. But again, the impositions may go too far. Sometimes, an inappropriate curiosity is displayed in inquiring into business done outside of the state. This is another reason for big corporations with a worldwide radius of activity to form subsidiaries with capital funds set apart for the purposes of the branches.\textsuperscript{117}

4. Guarantees

In some countries, the creditors of the branch are protected by such measures as deposits to secure future debts, or a

\textsuperscript{114} KG. (March 8, 1929) IPRspr. 1929 No. 21; RABEL, 3 Z.ausl.PR. 810.

\textsuperscript{115} For example, complaint has been made by GRANT, 8 Tul. L. Rev. (1934) 557 against the requirements connected with the obligatory filing of a general power of attorney in Mexico and Cuba; by EDER, 15 Tul. L. Rev. (1941) 520 at 534 with respect to Panama.

An effort to remedy these difficulties has been initiated by a Pan-American "Protocol on Uniformity of Powers of Attorney Which are to be Utilized Abroad," Washington, February 17, 1940, signed by Bolivia, Brazil, Colombia, El Salvador, Nicaragua, Panama, United States and Venezuela, and ratified by the United States, Brazil and several other states. See 36 Am. J. Int. Law (1942) Supp. 193 and subsequent volumes. The Protocol includes powers executed in the name of a juridical person (art. I s. 3).

\textsuperscript{116} See FICKER, 4 Rechtsvergl. Handwörterbuch 469.

certain part of the capital stock must be held in the country, in Brazil at least two-thirds. Again, establishment of a legally independent affiliate is the usual answer.

5. Application of the Internal Law

As stated above, foreign business associations are quite normally governed by the domestic administrative law with regard to establishments, and by the domestic law of agency as respects the extent of the authority enjoyed by the managers of the establishment. It agrees with the general principles that article 287 of the Argentine Commercial Code subjects the company to the provisions of the Code as regards the registration and publication of the articles of organization and of the authority conferred upon their representatives or agents. On the other hand, the legitimate sphere of domestic law is also observed in the Treaty of Montevideo (art. 5), which limits the territorial prescriptions to "the exercise of the acts comprised in the objective of incorporation."

Only such restricted effect should be inferred when it is required that a resident representative of the company must possess a general power of attorney with full authority to bind the company by his acts. By an analogous reasoning, if the Chilean law provides that not only must a foreign stock company establish a special fund in Chile for the fulfillment of its obligation in the country, but also that the assets of the company are "affected by the Chilean laws,"

118 Brazil: Decree No. 434, of July 4, 1891, art. 47 § 1.
Rumania: C. Com. (1887) art. 245 is probably repealed; such measures have been abolished in other countries, except for insurance and similar companies.
119 To similar effect, Brazil: Decree-Law No. 2627, of Sept. 26, 1940, art. 68 (but see n. 128).
Guatemala: C. C. (1933) art. 25 (4).
Portugal: C. Com. art. 111.
120 Expressly Rumania: C. Com. (1938) art. 355 par. 2 sentence 3.
Costa Rica: Corporation Law, art. 151, amended by Law No. 10, of Dec. 3, 1929, art. 1 (1).
the latter provision reasonably is limited to the assets situated in Chile. 121

In the United States, the Supreme Court has twice had opportunity to deal with the attempt of Missouri to protect resident holders of insurance policies against certain subsequent contracts modifying their policies. The court summarized the arguments of the Missouri court as follows:

"As foreign insurance companies have no right to come into the State and there do business except as the result of a license from the State and as the State exacts as a condition of a license that all foreign insurance companies shall be subject to the laws of the State as if they were domestic corporations, it follows that the limitations of the State law resting upon domestic corporations also rest upon foreign companies and therefore deprive them of any power which a domestic company could not enjoy, thus rendering void or inoperative any provision of their charter or condition in policies issued by them or contracts made by them inconsistent with the Missouri law." 122

This reasoning the Supreme Court rejected:

"And this argument we declared unsound since the 'proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority....'" 123

Some laws, however, extend their realm beyond any such limits. They either establish imperative requirements respecting the structure of licensable organizations, or they seem to subject transactions of licensed organizations to their law of the forum without restriction.

121 To this effect, Herrera Reyes, Sociedades Anónimas (Santiago 1935) 274, 275, commenting on Decree-Law No. 251, of May 20, 1931, art. 123 (c) and (d).
In the first respect, some Latin-American laws employ careless language in subjecting foreign corporations doing business in the country to the internal laws. The authorities of many Latin-American republics, as an American writer explains, show "great reluctance to allow qualification of a foreign corporation which presents, in its charter or by-laws, provisions in conflict with local legislation." Thus, usually, unlimited corporation life is forbidden. Sometimes, some higher proportions for subscription stock and paid-in stock are prescribed, or a fixed percentage of the profits must be allocated to a reserve fund, or the corporation may be dissolved if the capital structure is deteriorated over a fixed percentage.

In the second respect, where a statute sweepingly declares that the relations of the organization to third parties, or even all commercial operations of the branch shall be subject to the laws of the country, the formula raises an issue. If this includes the private law, it may mean that the company and a resident of the state in question are forbidden to con-

124 E.g., Colombia: Law No. 58 of 1931, art. 22 in fine.
125 Grant, 8 Tul. L. Rev. (1934) 556 at 558.
126 Grant, supra n. 125.
127 Grant, supra n. 125.
Denmark: Law on Stock Corporations of April 15, 1930, as amended, § 77.
Brazil: Decree No. 434, of July 4, 1891, art. 47 applied the law of the forum to all "relations, rights and duties between company, creditors, shareholders and every person interested." Art. 68 of Decree-Law No. 2627, of Sept. 26, 1940 seems more modest, see supra n. 119 and Crawford, 16 Tul. L. Rev. (1942) 228 at 237 (last lines), subjecting the companies to the laws and tribunals "as to the acts or operations practised in Brazil." But the Introductory Law of 1942, art. 11 § 1, declares the companies having branches etc. in Brazil obligated to have their constitutive acts approved by the government making themselves subject to the Brazilian laws (ficando sujeitas à lei brasileira). This law and Espinola, 8-C Tratado 1406, 1781, §§ 100, 101, emphasizing this text, fail to explain whether this subjection extends to matters other than those of the Brazilian business places.

129 Probably it does not in Cuba, C. Com. art. 15 ("mercantile operations within Cuban territory") and similar provisions in Honduras, Nicaragua, and Mexico, supra n. 32.
clude their contract in another state under the foreign law, since some codes in fact seem to pretend that the parties may not submit their contract made in the state to any other law. Actually, extensive claims of *lex fori* are raised in several Latin-American laws. Nevertheless, one would think, at least, that the "laws" of the country imposed upon the foreign corporation include this country's own conflicts rules.

Definitely objectionable are unqualified provisions such as in the Turkish law,\(^{130}\) that the company must "submit to all laws and regulations of the country," in Peru that foreign companies are subject, "without any restrictions to the laws of the Republic,"\(^{131}\) or in Ecuador that this applies to all questions arising in or outside of court.\(^{132}\)

On the usual requirements for licensing in this country that the foreign corporation shall be subject to all the restrictions and duties imposed on similar domestic corporations and shall have no other or greater rights, powers, or privileges, it would be repetitious to observe the exaggerations contained in these clauses.\(^{133}\)

In quite a different connection, we have encountered the provision introduced in the Codes of Liechtenstein and Yugoslavia, declaring the permanent agency of a foreign business association, inscribed in the register of commerce, to be legally existent and capable of acting to the same extent as a similar domestic corporation.\(^{134}\) This provision grants

\(^{130}\) Turkey: Law of Nov. 30, 1330/1914, art. 13; cf. Salem, 7 Répért. 250 No. 132.

\(^{131}\) Peru: Constitution (1933) art. 17.


\(^{133}\) Supra pp. 153ff. Special rules for particular classes of corporations may be excepted. For foreign building and loan associations, Colorado, Stat. Ann. (Michie 1935) c. 25 § 42 anomalously provided that "all contracts made with citizens of this state shall be deemed as made under Colorado laws." The provision has become obsolete after the prohibition against foreign loan associations to do business in Colorado (Laws 1939, c. 78) and therefore has not been included in the Revised Code of 1953. Similarly, South Carolina Code (1952) § 12-703, prescribes in general terms: "Contracts with citizens deemed made in State."

\(^{134}\) Liechtenstein: P. G. R. § 236 par. 4.

Yugoslavia: C. Com. § 503 par. 5; see Eisner, 1 Symmikta Streit 296. Supra Chapter 22, p. 152.
security to third parties, particularly in the case of dissolution of the mother corporation.

6. Special Purposes

Territorial law will reasonably take on a broader scope when particular purposes call for intensified control, as in the case of insurance, credit, railroad or other public transportation, or communication or similar business of public significance. Thus, in this country, the regulations regarding domestic corporations have largely been applied to foreign organizations, in such fields as savings and building loans, and full domestication, involving transformation into a domestic corporate entity, has often been required in the case of railroad or generally public services. 135

V. SANCTIONS OF TERRITORIAL IMPOSITIONS

If the duties imposed by the local law are violated, the effect is naturally governed by this law itself, and each provision needs its own construction. However, certain effects on contractual obligations, following the two requirements of licensing and of registration are of peculiar significance.

1. Failure to Obtain Authorization to Do Business

United States. The extensive discussion of the first question in the United States, nourished by an abundance of statutes and cases, has been summarized in a comprehensive note in the Restatement (§ 179). Nevertheless, the matter is too confused to allow more than a survey of the most significant


phases.\footnote{136 Valuable suggestions are contained in the classification by \textit{Lorenzen}, 6 Répért. 370, and in such decisions as \textit{Perkins Mfg. Co. v. Clinton Construction Co.} (1930) 211 Cal. 228, 295 Pac. 1, followed in 75 A. L. R. 439 by a comprehensive annotation. It is regrettable that all surveys are satisfied with indicating cases almost without any regard to the current statutes which have very often been changed (\textit{cf.} the characteristic warning to the reader in 136 A. L. R. 1161, \textit{I in fine}; 23 Am. Jur. (1933) 575 n. 20).} In Williston's judgment, the decisions of the courts, "do not seem generally based on very secure or sound distinctions."\footnote{137 \textit{Williston}, 6 Contracts 5028 § 1771.} The texts of many statutes, particularly the older ones, are of little avail, as they are fragmentary and use such terms as "unlawful," "void," "voidable," "valid" in an unreliable manner. Moreover, many statutes have been changed in recent times, several repeatedly, so as to make previous summaries and annotations antiquated.

The outstanding problem is that of the effect of a contract concluded by a foreign corporation in the state without compliance with the statutory requirements for doing business. Beale distinguishes only two classes of authorities, those holding the contract valid and those that hold it void.\footnote{138 2 \textit{Beale} §§ 179-24-25.} This is misleading, whereas, on the other hand, regard to all particularities of the various regulations has had the opposite defect of obscuring all leading ideas. That there are, in effect, four classes of statutes, may be gathered from the construction given them by the state courts or from their apparent meaning.

It may be noted, at the outset, that there is a common sanction of fine for noncompliance, appearing in the statutes of most states.

(ii) A larger class of statutes is exemplified by the New York statute concerning other than "moneyed corporations," which has been construed by the highest court of New York.


South Carolina: Code (1952) §§ 12-722, 12-737 (only fines provided).


California: General Corp. Law, 1947, § 6801.


Iowa: Code (1950) § 494.9.


Nevada: Comp. Laws (1929) §§ 1843, 1848.


New York: Gen. Corp. Law, § 218 (see infra n. 166).


Pennsylvania: 15 Purdon's Stats. § 2852-1014.


as establishing inability of the corporation to sue upon the contract, as the only penalty for noncompliance.\textsuperscript{141} The contract, therefore, deserves the term of "valid," despite the fact that it is unenforceable by the corporation in the state courts. Two important consequences have been drawn. First, the party dealing with the corporation is bound to the contract in a perfectly normal manner. He is unable to avoid the contract on other grounds than those of the ordinary law of contracts; there is no failure of consideration on the part of the corporation, until the corporation refuses performance.\textsuperscript{142} Second, the corporation itself is able to sue on the contract in the courts of other states and in the federal courts, except those sitting in the state of noncompliance itself.\textsuperscript{143} Before abolition, under the doctrine of \textit{Erie RR. Co. v. Tompkins} (1938) of the latter restriction on the statutory sanction, this was the more significant, as no state has the power to exclude by statute the right of a party to remove a suit to the federal courts.\textsuperscript{144}

Under this approach, it may be asked: What extraterritorial effect will result from a judgment of the state of noncompliance, dismissing the action of a foreign corporation on the ground of the failure to qualify? Although the problem apparently never has been raised,\textsuperscript{145} it would seem that such judgment would not have the effect of \textit{res judicata}.

\textsuperscript{141} See 2 \textsc{Beale} 855 quoting Gray, J., in Neuchatel Asphalte Co. v. Mayor of New York (1898) 155 N. Y. 373, 49 N. E. 1043; cf. Fritts v. Palmer (1889) 132 U. S. 282.


\textsuperscript{145} Incapacity to sue is generally considered a bar to come into court as contrasted with the elements of the cause of action which give the right to relief in court. See 6 Cycl. of Fed. Procedure (ed. 2, 1943) 148 § 2100.
DOING BUSINESS

(iii) A third group is characterized by much more severity.\textsuperscript{146} The corporation is deprived not only of the right to be a party in the courts of the state in question but of its rights under the contract. It follows, on the one hand, that the other party is given in effect the option of suing on the contract or cancelling it. On the other hand, the corporation is prevented from suing in other than the state courts. For whether the statute maintains or prohibits with annulling effect transactions of a nonqualifying corporation, it is recognized in the sister states; hence, if the statute appears to treat the contract as void or voidable,\textsuperscript{147} other jurisdictions recognize its effect accordingly.

While usually the contract is called "void" and might be better denoted as "voidable" in these jurisdictions,\textsuperscript{148} yet either term is inadequate.

(iv) Finally, there may be states in which the unlawful contract is entirely "void," meaning that no action is granted either party in any court.\textsuperscript{149}


\textsuperscript{148} See for Michigan, Bishop v. Hannan Real Estate Exchange (1934) 267 Mich. 575, 255 N. W. 599; see Martin Bros. v. Nettleton (1926) 138 Wash. 102, 244 Pac. 386 (dictum: the "penalty" by the statute of Oregon measures the remedy of the individual who deals with the corporation not complying with the statute.)

\textsuperscript{149} Arizona: Code Ann. (1955) § 10-482, as construed in Eastlick v. Haywood (1928) 33 Ariz. 242, 263 Pac. 936: "It is probable that no action of a party dealing with a foreign corporation which failed to comply . . . , can give the transaction validity."
These "penalties," if radically executed, may cause considerable hardship. In most of the jurisdictions involved, this has been well noticed, and important mitigations have been introduced. Always, however, at least a few states insist on a radical sanction. Thus, for instance, it is fair that a corporation should be allowed to make contracts preliminary to starting business, such as the purchase of equipment, supplies, and raw materials, appointment of agents or acquisition of a business. While a distinct trend to exempt such preparatory transactions from the ban is developing, it is far from a complete victory.  

The main relief for foreign corporations that have failed to qualify, is furnished by the proviso, now widely prevailing, that the corporation is prevented from suing only "until" it complies with the requirements. Yet in a few states, belonging to classes (ii) and (iii), this validating and retroactive effect of compliance subsequent to the prohibited contract is expressly denied. Generally contracts made outside the state may be sued upon. Yet the excellent Pennsylvania Annotations to the Restatement think that the disability in this state includes any contractual claim wherever it arose. The courts are inclined, moreover, to grant suits for injuries to property, even though there is connection with unauthorized business, as where the corporation has assigned goods to an agent for


In Idaho, Code (1947) § 30-506, belated filing was allowed only once within three months after the provision came into force. Cf. Williston, 6 Contracts § 1772 n. 2.

152 Leverett v. Garland (1921) 206 Ala. 556, 90 So. 343; 2 Beale 836 n. 4, 858 n. 5.

153 Restatement, Pennsylvania Annotations 78 § 178.
sale on commission;\textsuperscript{154} but a few statutes deny claims sounding in tort as well as in contract.\textsuperscript{155} It is also ordinarily, though not without exception, assumed that claims may be based on the ownership of property or possession, including acquisitions of title, not immediately connected with doing business.\textsuperscript{156}

Obviously, therefore, prohibitions of "all court actions"\textsuperscript{157} ought to be understood with restrictions, although, in an opinion of the Attorney General of Louisiana, "any action in the courts of the state" is declared precluded, even to a foreign corporation solely engaged in interstate business, unless the corporation has qualified to do business and all taxes due have been paid.\textsuperscript{158}

If we try, after all this, to ascertain the exact position of a noncomplying corporation having wholly or partly performed its own contractual obligations, when the other party refuses performance and restitution, the situation seems to be as follows:

If the contract is valid under the violated statute but the corporation may not sue in the state courts for enforcement of the other party's duty, it may, nevertheless, even in these courts claim restitution on the ground of failure of consideration, with any of the normal remedies.

Where the contract is "void," we do not find any secure doctrine. Only a handful of cases belonging to two or three jurisdictions illustrate the situation.

Several Michigan decisions have the merit of establishing

\textsuperscript{154} See 2 Beale 857; Note, 136 A. L. R. (1942) 1160.


\textsuperscript{156} See 2 Beale 856 § 179.23; Restatement § 179 note; Note, 136 A. L. R. (1942) 1160.


\textsuperscript{158} Louisiana: Opinions of the Attorney General 1936-38, 125.
with clear foundation the right of a noncomplying corporation to revindicate ownership of a movable which it has retained unconditionally\(^{159}\) or under a conditional sale.\(^{160}\) They recognize that, if a contract is void because the plaintiff had no authorization, it does not follow that it must forfeit its property to the defendant.\(^{161}\) This answers the argument, expressed for instance in Tennessee, that the Singer Manufacturing Co. could not be allowed to recover a machine sold conditionally on default of the buyer in payment, because "to allow it would be to enforce the contract . . . and to put a premium on its violation of law."\(^{162}\) But a federal court in Minnesota correctly adds that also an agreement of absolute sale is equally void "so that there is no contract and the title has never passed from the corporation to the buyer."\(^{163}\) Hence, actions of detinue or replevin as well as trover for conversion,\(^{164}\) and cross bills at the suit of the other party are available. Where a bill was brought to set aside foreclosure proceedings and cancel a mortgage on the ground that the defendant was a foreign corporation unlicensed in Michigan, the bill was dismissed. The plaintiff could not equitably rescind the contract and fail to tender the amount due.\(^{165}\)

In the New York case establishing the principle that the contract is valid, Cullen, C. J., in a remarkable concurrent opinion added that, even if the contract were considered void, until a foreign corporation refuses to fulfill, the buyer would

\(^{159}\) Klatt v. Wayne C. Judge (1920) 212 Mich. 590.
\(^{162}\) Singer Mfg. Co. v. Draper (1899) 103 Tenn. 262.
\(^{163}\) Dunlop v. Mercer (1907) 156 Fed. 545.
\(^{164}\) Lu-Mi-Nus Signs Co. v. Regent Theatre Co. (1930) 250 Mich. 535.
\(^{165}\) Windisch v. Mortgage Security Corp. of America (1931) 254 Mich. 492, 236 N. W. 880.
not be entitled to recover back the money paid under the contract, good or bad.\textsuperscript{168}

In a Missouri case a cross bill for assumpsit for money had and received was granted to an Arkansas corporation, to recover a large sum advanced for lumber which the plaintiff did not deliver. The federal court said:

"Every principle of justice and fair dealing requires that it should pay back this money to defendant..... One cannot make a shield of a void contract to rob an associate."\textsuperscript{167}

Should this not be true when the corporation has furnished material and work, and the compensation is refused? The question has come up repeatedly in Alabama and has been consistently negatived by rejecting any action of quasi-contract.\textsuperscript{168} The federal court, following the view of the Supreme Court of Alabama, resumes the position:

"The fact that the statutory prohibition is directed against the performance as well as the making of the contract is convincing that no action can be maintained upon the implied contract or upon a \textit{quantum meruit}."\textsuperscript{169}

Yet, the Alabama Supreme Court itself, as early as 1911, confessed:

"Viewed solely from the standpoint of the individuals concerned, the apparent result of this conclusion is, it must

\textsuperscript{166} Mahar v. Harrington Park Villa Sites (1912), \textit{supra} n. 141, 204 N. Y. 231, at 237, 97 N. E. at 587.

The New York court constantly supports also the wholesome analogous doctrine that failure to procure an occupational or business license, excepting an express statutory provision, is not deemed to make a contract void. Denying recovery would be "a ruling wholly out of proportion to the requirement of public policy." John E. Rosasco Creameries v. Cohen \textit{et al.} (1937) 276 N. Y. 274, 11 N. E. (2d) 908; cf. Annotation, 118 A. L. R. 646.


\textsuperscript{168} Leading case, Dudley v. Collier (1888) 87 Ala. 431, 6 So. 304; \textit{accord}, Alabama Western R. Co. v. Talley-Bates Construction Co. (1909) 162 Ala. 396, 402, 50 So. 341, and see the three following notes.

be conceded, abhorrent to the judicial conscience.\footnote{170}

The same court repeated this regret in refusing to enter into examination of a case where a bank building had been furnished with marble trimmings and other fixtures and installations on disputed oral orders for changes.\footnote{171} This disregards the fact that “implied contract” is only a manner of speech, while the undue enrichment results from the invalidity of the contract and not from the contract.

This radical view seems not to have been expressed in any other jurisdiction, but neither is such an action known to have been brought anywhere except in Alabama.\footnote{172} Could it be that counsel are still unfamiliar with the remedies against undue enrichment?

If in a state of class (ii), prohibiting the corporation from suing but without invalidating the contract, the other party elects to sue on the contract, the corporation has the right of defense, which means that it may claim any right arising out of the contract, but in some statutes even this is prohibited.\footnote{173} Finally, if the contract has been executed on both sides, invalidity may not be further claimed.\footnote{174}

In a number of statutes it is stated that the directors, officers, or other persons acting on behalf of the corporation, contrary to the licensing provisions, are personally liable,

\begin{itemize}
\item \footnote{170} American Amusement Co. v. East Lake Chutes Co. (1911) 174 Ala. 526, 56 So. 961 (improvement of an immovable).
\item \footnote{171} George M. Muller Mfg. Co. v. First National Bank of Dothan (1912) 176 Ala. 229, 57 So. 762.
\item \footnote{172} Amos Bridge's Sons, Inc. v. State of New York (1921) 188 App. Div. 500, 231 N. Y. 532, sometimes cited in this connection, rejects an action for damages for delay having increased the costs of building a state street. The parties disputed whose fault the delay was. In this case, at least, the work employer was not enriched and the action could correctly be qualified as based on the contract.
\item \footnote{173} Iowa: Code (1950) § 494.9 (2 Annotations 775 but see also 774 for notes on the same case).
\item Nevada: Comp. Laws (1929) § 1843.
\item \footnote{174} See 2 BEALE 862; FLETCHER 17 Cyc. Corp. §§ 8527, 8531, ns. 44, 45.
\end{itemize}
if more than one, jointly and severally;\textsuperscript{175} in another group, they are punishable as for a misdemeanor.\textsuperscript{176} Most statutes are silent on the point. It seems settled that whether or not the contract is valid in regard to the corporation, the agents may not be sued except where the statutes so provide.\textsuperscript{177}

Complicated situations arise, if contracts made lawfully in one state are to be performed in another where the corporation has not qualified for doing business. The Restatement has attempted to reach a uniform solution.\textsuperscript{178}

On many problems, however, the courts are divided. In particular, on the important topics of estoppel and recovery of chattels sold on conditional sale, the prevailing liberal trend encounters more substantial opposition.

Public policy was the ground of objection to the recognition of a foreign statute in one Illinois case. The court held that an Illinois corporation, contracting in another state in good faith and partly executing the contract, had a good cause of action in the forum and could not be turned away because the action could not be maintained in the other state.\textsuperscript{179}

Other countries. In Austria it has been discussed whether a foreign insurance company, not admitted to do business in the country, may sue,\textsuperscript{180} and the general question is doubtful.


\textsuperscript{177} Hunter W. Finch & Co. v. Zenith Furnace Co. (1910) 245 Ill. 586 at 594, 92 N. E. 521 at 524, aff'd, 146 Ill. App. 257.

\textsuperscript{178} See Karvalsky v. Becker (1940) 217 Ind. 524, 29 N. E. (2d) 560.

\textsuperscript{179} Restatement § 180; cf. the divided cases of Restatement, Michigan Annotations § 180.

\textsuperscript{180} Denied by OGH. (July 2, 1903) GIU. NF. 2398, 13 Z.int.R. 463. Contra: the Appeal Court, see WALKER 204; PISKO cited by WIELAND, 43 Z.Schweiz.R. (N. F.) at 227 who seems to approve for all of Central Europe.
whether persons not admitted by administrative license can validly engage in contracts.\textsuperscript{181} The liberal view has been maintained in Czechoslovakia\textsuperscript{182} and Prussia.\textsuperscript{188}

The German law on stock corporations of 1937 prescribing licensing of business seems not to impede either recognition of the foreign corporation’s personality or the efficacy of contracts concluded without compliance. In all cases, the state agencies may stop unauthorized carrying on of business.\textsuperscript{184}

A recent Syrian statute makes the enjoyment of legal personality contingent on the prescribed registry.\textsuperscript{184a}

In Latin-American jurisdictions, noncompliance is commonly stated as a ground for individual and collective liability of the persons who conclude a contract on behalf of the corporation.\textsuperscript{185} Whether this is an indication that the company itself cannot be sued,\textsuperscript{186} seems doubtful. For in a few statutes it is expressly declared that both may be sued.\textsuperscript{187} On the right to sue, the doubts seem to be analogous to those experienced in the United States.

\textsuperscript{181} For invalidity OGH. (May 8, 1912) GIU. NF. 5910; (May 20, 1913) GIU. NF. 6453. Contra: OGH. (June 5, 1901) GIU. NF. 1449 and Walker 206.

\textsuperscript{182} S. Ct. Nos. 2863, 3609, 5820, 6409, cited by Laufke, 7 Répert. 186 No. 59.

\textsuperscript{183} Prussia: Law of June 22, 1861, Preuss. Ges. Samml. 1861, 441 § 18 (1) has sanctions in the law of January 17, 1845, Preuss. Ges. Samml. 1845, 41 at 75, §§ 176, 177, 189 not including the nullity of transactions. More severe are the special laws regarding insurance. In the case of a domestic insurance company doing unauthorized business in another German state, voidness of the policy has been recognized under § 134 BGB. by OLG. Hamburg (May 23, 1907) Leipz. Z. 1908, 249.

\textsuperscript{184} Beitzke, Jur. Personen 166.

\textsuperscript{184a} Law on commercial companies and establishments founded abroad of March 3, 1952, art. 6.

\textsuperscript{185} Expressly foreseen in Guatemala, C. C. (1933) art. 26; Legislative Decree No. 1370, of April 16, 1925, art. 2.

\textsuperscript{186} Regimen Jurídico 34ff., 100ff.

\textsuperscript{187} The models were the Italian C. Com. art. 231, and the Portuguese C. Com. art. 112.

Brazil: C. Com. art. 301 par. 3 (action against all members of a non-registered company).

Chile: C. Com. art. 468 par. 2, followed by:

Ecuador: C. Com. art. 326.

Guatemala: C. Com. (1942) art. 418.

DOING BUSINESS

Appraisal. The fact that a foreign corporation intrudes into a jurisdiction without having obtained permission to enter, should certainly not excuse it from any liability that it would incur if doing lawful business there. For this reason, rules are wrong that deny all effect to transactions made in the state. But, on the other hand, no better solution is reached by giving an option to the other party either to enforce the contract or to hide behind its invalidity. Such privilege will naturally be exercised according to how the business venture inherent in the contract turns out. But a legally riskless gamble should not be included in a statutory provision intended to serve the public interest.

This one-sided justice, however, is much restricted in most jurisdictions of the United States, inasmuch as the corporation may sue on the contract by belatedly qualifying for doing business. Also other restrictions to the provision denying the right to sue have been recognized. Nevertheless, it happens sometimes in this country and seemingly much more often abroad that the other party may retain values received on execution of the contract as pure enrichment. This principle is of a rather doubtful morality. Noncompliance with general statutory impositions should not grant other private parties free speculation nor unearned gains. In addition, the deprivation of contractual rights, though not an unconstitutional impairment, is essentially a punishment executed without the guaranty of regular criminal investigation and judgment, which, in contrast to normal penalties, is enforceable in third states.188 Moreover, when a case is on the border line between

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188 See Allegheny Co. v. Allen (1903) 69 N. J. Law 270, 55 Atl. 724. In a particular case, the Supreme Court of Indiana has felt the necessity of justifying why it could apply the statute of West Virginia making officers of a foreign, noncomplying insurance company personally liable on the contract: "It is a penalty designed primarily to provide a private remedy to a person injured by a wrongful act," Karvalsky v. Becker (1940) 217 Ind. 524, 29 N. E. (2d) 560. However, this could not be said with respect to an unreciprocated suit of the third party. See furthermore, supra n. 147.
“carrying on” business and “isolated” acts,\(^{189}\) too much depends upon the answer when the validity of the contract is also at stake.

The Uniform Foreign Corporations Act, in a comparatively moderate proposal, reduces all penalties for doing unlawful business to fines supposed to be severe and a stay of any action instituted by the corporation until license is procured or a year has expired after the stay.\(^{190}\) The commissioners were afraid that, if the foreign corporation had no property in the jurisdiction, the fine could not be enforced. But a successful suit would produce just the desired assets in the state. Administrative regulations should consistently refrain from interfering with private law and civil procedure. Of course, in most foreign countries, acceptance of the principle of the draft would present an enormous progress.

2. Failure to Register

Prevailinglly, the provisions that prescribe registration of foreign corporations have the same effect as those applying to domestic corporations. Most have merely “declaratory” effect, i.e., they are destined to make public the existence, conditions, and purpose of recognized organizations. The personality of foreign corporations, however, is not dependent either on compliance with the duty of filing or on the favorable decision of the registrar.\(^{191}\) Hence, in countries such

\(^{189}\) That in many cases this border line may be difficult to trace, is confirmed by the considerations of the Bar Commissioners stating that “it must be borne in mind that frequently the question as to whether or not a foreign corporation is doing business in a state and thus as to whether or not it must secure a license, is a question involving fine distinctions and one which is not so readily answerable. A foreign corporation may, therefore, violate the act by doing business without a license and yet be innocent of any willful intention to do wrong. For this reason the provisions for penalty must be flexible.” National Conference of Commissioners, Handbook 1934, 328.

\(^{190}\) Id. §§ 25-27 and comment 328-330.

\(^{191}\) HACHENBURG in 3 Düringer-Hachenburg (1934) 553 n. 31.
as England, Germany, Czechoslovakia, Yugoslavia and Switzerland, contracts concluded by an unregistered but existing foreign company, whether domestic or foreign, are valid. Penalties, of course, are pronounced; the evidentiary value of the company’s books may be impaired, and the place of business may be threatened by closure. Third persons who without fault ignore nonregistered facts are protected by the more elaborate legislations. The agents may be declared collaterally liable for all debts incurred by them on behalf of the company, although this is rejected in some countries, since under this system the corporation itself is answerable. In Italy the problem has been extensively discussed on the basis of the Commercial Code of 1882, practically speaking, with the result that the only effect of nonregistration of a foreign corporation, having an agency or succursal in the country, was the liability, personal, joint and several, of the agents in addition to that of the corporation. In the case of a French partnership, a juristic person, it was declared operating in Italy de facto and the partners to be liable without restriction.


194 Expressly so Japan: C. Com. art. 484. Cf. Guatemala: Legislative Decree No. 1370, of April 16, 1925, art. 2 (for failure to appoint a representative).

195 Germany: HGB. § 15, Aktiengesetz § 34.

196 For Latin America, see supra n. 187.

197 E.g., Czechoslovakia, S. Ct. (May 5, 1934) supra n. 192.


This system has also been adopted in Argentina and Venezuela.\textsuperscript{200}

However some regulations are more severe. For instance, in Belgium the sanctions applicable to domestic as well as to those foreign corporations having a succursal or other business place in the country, are differentiated in various cases, and include the right by third parties to oppose being sued on a contract if the constitutive documents or the yearly balance are not published.\textsuperscript{201} Colombia declares void all acts executed without complying with the prescribed formalities.\textsuperscript{202} The Japanese Commercial Code said that "a third person may deny the existence" of a nonregistered branch office as he may in the case of a nonregistered Japanese corporation.\textsuperscript{203}

There is, however, much ingenuity deployed in the various laws. In Panama, for instance, the Commercial Code punishes noncompliance with the duty of registration by a penalty in money and the loss of the rights to exercise commercial privileges and to file documents for evidence; the stock cor-

\textsuperscript{200} Argentina: C. Com. art. 288 states only the personal liability of the agents; C. C. art. 36 declares authorized acts by agents of (any) corporation binding on the corporation.


\textsuperscript{202} Colombia: Legislative Decree No. 2 of 1906, art. 6.

\textsuperscript{203} Ecuador: Companies Law of Oct. 15, 1909, art. 14 for insurance companies in addition to pecuniary penalty.

\textsuperscript{203} Japan: Formerly C. Com. art. 257. The defect, however, is cured by subsequent registration, Japan, S. Ct. (April 27, 1928) 1 C. Com. of Japan Ann. 410 case 167.

Under the recent amendment, only a judicial closure of the business office is possible, C. Com. art. 484.
poration law provides that nonregistered companies cannot sue and also incur penalties up to 5,000 dollars.\textsuperscript{204}

Finally, as has been seen earlier, registration is sometimes considered a condition precedent to recognition of the company’s personality or, if this exaggerated manner of speech is avoided, to the lawfulness of business done in the state.

A similar variety of views obtains with regard to the failure correctly to appoint a representative.

\section*{IV. TREATIES}

\subsection*{I. Existing Treaties}

The two Latin-American multipartite, and the numerous bipartite treaties throughout the world, concerning establishment, commerce, or tax burdens, regularly provide for reciprocal treatment of corporations in decoratively styled clauses. However, the result is somewhat inadequate.

(a) \textit{Commercial clause.} The usual clause guaranteeing the carrying on of business runs substantially as in the Treaty between the United States and Poland of 1931, declaring that the right of corporations and associations of either Power to establish themselves within its territories, establish branch offices, and fulfill their functions therein, shall depend upon and be governed solely by the consent of such Party as expressed in its national, state, or provincial laws and regulations.\textsuperscript{205}

(b) \textit{Special clauses.} Essentially more substance is contained in a unique clause of the Treaty between France and Germany of 1934, prescribing that authorization for doing business cannot be refused for the reasons of contravention against the internal laws.\textsuperscript{206}

\textsuperscript{204} Panama: C. Com. (1916) art. 296; Stock Corporation Law No. 32, of Feb. 26, 1927, art. 91.

\textsuperscript{205} United States-Poland Treaty, of June 15, 1931, art. 11, U. S. Treaty Series No. 862, 139 L. of N. Treaty Series (1933) 397 at 407.

\textsuperscript{206} Art. 2 par. 5, RGBl. 1934 II 423: The high contracting parties agree, however, not to hinder by the means of foregoing authorization, the establishment of com-
Another special clause in the Treaty between Germany and the Soviet Union of 1925 states that an enterprise may not be impeded in the regular course of its business by laws, decrees, or other measures by authorities.\textsuperscript{207}

(c) \textit{Most-favored-nation clause}. Such provisions are considered to extend to all countries enjoying the rights of the most favored nation especially for the purposes of foreign organizations of the kind in question. Thus, the privileges conceded by Germany to France and Russia have been recognized in Germany also in favor of the United States on the ground of such a clause providing for reciprocity in the treaty between the United States and Germany.\textsuperscript{208}

Whether the usual \textit{general} stipulation guaranteeing the right of the most favored nation, covers the treatment of legal persons, is an old controversial problem. Prevailing opinion denies it.\textsuperscript{209} But more recently special clauses have been added for this purpose. Thus, the United States has concluded treaties with detailed stipulations declaring the right of most favored nations as including the right to organize, control, participate in limited liability and other corporations and associations, for pecuniary profit or otherwise, or similarly to the same effect.\textsuperscript{210}
(d) **Clause of reciprocity.** The traditional provision for reciprocity of treatment has significance, for instance, in Poland and Germany, while in most countries, as we have seen, licensing is not dependent on reciprocity. Beyond that, the clauses leave everything to the pleasure of the "laws and regulations" of each state. Nevertheless, such clauses stand unaltered in the Treaties of Montevideo\(^{211}\) and Habana.\(^{212}\)

2. Draft Proposals

Real progress has been sought through the efforts of numerous international congresses and committees, from the Paris Congress (1880) on stock companies to the Draft of the Experts of the League of Nations (1928) on juristic persons,\(^{213}\) and the Draft on the recognition of foreign organizations of the Seventh Hague Conference (1951). But, from one of the latter drafts, the preliminary draft of the Economic Committee of the League of Nations on the treatment of foreigners (1929),\(^ {214}\) it appears that an embarrassing struggle is going on between this endeavor and the deference to "the laws and regulations" of the territory in which activities are exercised. The draft subjects the doing of business to pre-

with Turkish Republic (Oct. 28, 1931) art. 1, U. S. Treaty Series No. 859, 138
L. of N. Treaty Series (1933) 345 at 347;
with Poland (June 15, 1931) art. 11, U. S. Treaty Series No. 862, 139 L. & N.
Treaty Series (1933) 397 at 407;
with Greece (Nov. 21, 1936) art. 1, U. S. Treaty Series No. 930, 183 L. of N.
Treaty Series (1937) 169 at 170;
with El Salvador (Feb. 22, 1926) art. 13, U. S. Treaty Series No. 827, 134 L. of N.
Treaty Series (1932) 207 at 209.

\(^{211}\) Treaty of Montevideo on International Commercial Terrestrial Law (1940) art. 8 par. 2.
\(^{212}\) Código Bustamante, arts. 32-34.
\(^{213}\) See the history of recent efforts in Hudson, 7 Int. Legislation 355.
\(^{214}\) League of Nations Publ., C.36.M.21.1929.II., p. 16; C.97.M.23.1930.II.; Revue 1930, 236. Cf. Kuhn, Am. J. Int. Law 1930, 570. Opposition was raised from several states, and the full conference of 47 states has not discussed the committee draft.
liminary and revocable authorization, with no remedy against arbitrary refusal but the right of retaliation. But if authorization is once given, the proposal is that it should not be revoked except for infringement of the laws and regulations of the country.

VII. Conclusions

1. The view expressed in old as well as recent American decisions as a natural conception that a state may exclude corporations created in other states from doing business in the forum, is just one of several theories of the past. For a time, it was also widely believed that, by natural justice, the toleration of foreign corporations depended on formally assured reciprocity of treatment. Some Latin-American authors maintain that the theoretically equal position conceded to foreigners implies their complete subjection to all domestic laws. Such theories have been but a poor screen for economic and social, if not mere power, policies. The requirement of governmental authorization or treaty privilege has been established either as a means for the government to bolster its power of domination or bargaining, or in the belief that national autarchy was needed, or that a firm protection of the national resources and labor was necessary. On the other hand, the theory of freely admitting foreign juristic persons has derived from credence in the usefulness of the capitalistic system and of the broadest exchange of goods and services. The methods of thinking have alternated in the periods of modern industrialism and have contended with each other in most countries. It would seem, at last, that the real problem, the contrast of interests, has made itself acutely felt, particularly in the historic relation between the highly equipped corporations of the United States and Latin-American countries rich in raw materials and labor, but wanting capital and skilled management. There may have occurred errors and
abuses on both sides, and there exists also a natural opposition of interests. But if we hear in this country the industrial leaders profess that the times of colonial exploitation have gone forever, that it is an American interest to raise foreign wages and help foreign production and that investing countries should send their capital as private capital rather than as an arm of nationalized economic aggression, the clash of real interests would seem easily dissolvable.

2. We have found recognition of foreign corporations made dependent in some jurisdictions on reciprocity, in others on general or special authorization or on registration requiring sometimes very exacting documentation. The right to sue in a state court is characteristically included in the effects thus conditioned. (Chapter 22). Even though foreign organizations may be recognized with some effects, their permission to do business, in a number of states, is granted only according to the pleasure of the government. In not a few states, they are subjected to an unlimited amount of domestic law, with respect either to their constitution or to their affairs out of the state, or to both. If the statutory requirements concerning authorization of business or registration of the company’s place of business, its agents, balances, and often many other items, are not observed, contracts made in the state may be declared void, or the other party may enjoy the option, according to his advantage, of regarding the contract as valid or invalid, and frequently the right to sue on the contract may be denied to the company. (Chapter 23).

The harshness of legislative requirements in certain parts of the world is surpassed by vexatious bureaucratic procedures, abuses, and the necessity of personal connections, if not bribery. Of one state, Panama, which might have been expected to understand the need of peaceful collaboration, an

215 See, for instance, Eric Johnston, “America’s World Chance,” in Reader’s Digest, June 1945, 5.
excellent author has recently collected a long list of difficulties wantonly created for foreign corporations, such as the obscure definition of business requiring registration, exaggerated requirements for registration of powers of the prescribed general agent and for the proof of corporate existence, potential danger that nonregistered companies that have no business place or habitual business are not allowed to sue in the courts, taxation policies deliberately intended to close the country to capital unless it submits to complete domination, and so forth. 216

Some hostility, with uncertainty as to the law, has also appeared in this country. A complaint of uncertainty has been raised, for instance, with respect to the nature of the refusal to allow suit, in the Pennsylvania Annotations to the Restatement. 217 A New York attorney once wrote in Clunet’s Journal for the information of European readers that the difficulties of security for costs, of standing in court, and of acquiring immovables in New York made it inopportune for a foreign corporation to do business there otherwise than by creating a local affiliate. 218

3. In view of the various circumstances of countries as well as of corporate purposes, a uniform regulation may not be possible or even desirable. However, an average pattern of normal relations can well be envisaged. If a state has no reason for intensified control such as is justified over public utilities, finance and insurance enterprises, it should cooperate with the world and limit its supervision to the really necessary measures. Corporations created in one country, particularly if their central management is also located there, should be fully recognized, without petty obstacles, throughout the world as persons capable of acting in transactions and law

216 EDER, 15 Tul. L. Rev. (1941) 521. With respect to powers of attorney, see supra n. 115.
217 Restatement, Pennsylvania Annotations 77.
218 LOEB, Clunet 1910, 96.
suits. Normative regulation may be imposed on the habitual business of a foreign corporation rather than on the corporation itself. If qualifying to do business is made relatively easy as in the United States, due to the professional services of special companies for the filing of applications, and to the moderate fees imposed by the states, this method of control is not objectionable. Also, a foreign organization entering the life of a national economy by deploying commercial or industrial activities, has naturally to obey the local laws and decrees destined to govern such activities. They include fiscal, jurisdictional, and administrative laws, and above all the laws concerning health, labor, and social security, but exclude the legal provisions concerning the creation and internal organization of corporations. Nor should domestic private law without qualification be extended to all contracts made in the state; what law governs these is to be determined by conflicts rules following entirely different lines of policy.

Legitimate interests of a state are involved in safeguarding the interests of its citizens dealing with foreign enterprises that have an establishment in the state. It is a perfectly sound policy to require that the legal capacity of a foreign organization permitted to carry on business in the territory and its locally pertinent economic situation be made recognizable to the individuals coming in contact with it either as employees or as third parties. Acts of publication for this purpose are prescribed almost everywhere, sometimes not sufficiently but more often with exaggeration. The proper effect of registration is well expressed in an Italian decision. Although a foreign corporation may be dissolved by appropriate proceedings at its seat, this dissolution cannot be opposed to a third party in the country, unless it has been publicized according to the domestic law. But it is crude, almost barbaric

CORPORATIONS, KINDRED ORGANIZATIONS

law, under any circumstances, to refuse foreign legal persons
access to the courts or to deny the validity of their contracts.

A borderline problem is raised by the statute of New
York imposing liability on the officers, directors, and stock-
holders of a foreign stock corporation transacting business in
the state, among other things, for unauthorized dividends
and unlawful loans to stockholders. Not only is jurisdiction
taken, but the liability is authoritatively construed as an
offense against the New York prescriptions rather than
against those of the charter law. This protection of creditors
exceeds the normal scope of domestic law as traced in the
Restatement. It may be regarded, however, as a control
measure defendable in the biggest financial center of the world,
which would not be justifiable everywhere. Whether
rules in the interest of creditors extend to foreign corpora-
tions, such as those prohibiting purchase of their own stock
out of the capital, seems an unsettled question also in New
York.

That domestic share- or bond holders should be protected
by special measures, only because the company does business
in the state, goes certainly too far. Nor does acquisition of
securities by local investors need any particular legal favor.
German judges deciding on the registration of foreign com-

220 Stock Corporation Law of 1939, § 114, derived from the Law of 1890, c. 564 § 60, as added by L. of 1897, c. 384 § 4.
221 German-American Coffee Co. v. Diehl (1915) 216 N. Y. 57, 109 N. E. 875.
222 Restatement, New York Annotations 157 § 188. The courts of New York emphasize this exception to the law of the state of incorporation which is applied
whenever the statutes do not expressly extend their domain to foreign corporations. Exceptions are provided in addition to § 114 of the Stock Corporation Law by
§ 222 of the General Corporation Law, but not with respect to §§ 71-73 of the Stock
v. Tuttman (1945) 59 F. Supp. 858, 862 (stockholders' liability to laborers, ser-
vants, and employees).
222a The general rule submitting such acts to the law of incorporation is enacted
223 The question was left undecided in Hayman v. Morris (S. Ct., N. Y. County,
panies have conveniently investigated into the amount of the capital stock and its sufficiency for a minimum standard of trustworthiness for creditors, but have refrained from any regard for the organization and the rights and interests of shareholders.\textsuperscript{224}

Finally, no objection can be made to the exaction by certain states of a reasonable compensation from foreign enterprises which they admit, as an additional burden on capital profit leaving the country. From this angle, discriminatory taxation can be vindicated, while overtaxation in order to lower the competitive strength of foreign capital is a measure of economic warfare rather than a policy of neighbors.

That these are the basic lines of a satisfactory compromise must have been felt in many quarters. It is the more regrettable that not one of all the positive enactments is entirely commendable, and that, to my knowledge, not much has been done even in legal and economic science to develop the particulars. The elaboration of a comprehensive model statute for foreign organizations would be a worthy object of international endeavor.

\textsuperscript{224} HACHENBURG in Düringer-Hachenburg (1934) § 201, ns. 40-46.