

The Scope of the Personal Law of Corporations

THE personal law governs all matters relating to a corporation's existence, its functions as defined by its constitution, its organization, liabilities, and termination, as well as connected matters.¹ It accompanies the legal entity from birth to death.

1. Existence and Legal Character

The personal law determines whether there is a corporation. The forum will rely on this law for affirmation or negation of its existence.² A perfected incorporation—in any state, or in the state of central control—is recognized irrespective of facts that would be considered omissions or defects in the process of incorporation and causes for dissolution under the domestic law of the forum.³ Conversely, an association not enjoying legal personality in the place of attempted

¹ Formulations to the same effect: RG. (May 27, 1910) 73 RGZ. 366, 367 (capacity of having and exercising rights, constitution, administration, contract of association and its modifications); Código Bustamante, art. 248 (constitution, function, and responsibility of the organs). Cf. the draft rules of the International Company Law Committee of the International Law Association, Report of the 47th Conference 1956, pp. 371 ff.

² Restatement § 155 (1) and (2) implicitly.

England: *Henriques v. General Privileged Dutch Co.* (1728) *Ld. Raym.* 1532, 1535; *The National Bank of St. Charles v. De Bernales* (1825) 1 C. & P. 569.

United States: *First Title and Securities Co. v. U. S. Gypsum Co.* (1931) 211 Iowa 1019, 233 N. W. 137.

Examples:

Belgium: App. Bruxelles (Feb. 29, 1896) *Pasicrisie* 1896.2.365.

France: Trib. civ. Seine (July 2, 1896) *Clunet* 1899, 575.

The Netherlands: *Hof Amsterdam* (May 7, 1900) *W.* 7488; *Rb. Rotterdam* (June 5, 1913) *W.* 9549; *Rb. Amsterdam* (May 29, 1914) *W.* 9683, and see *KOSTERS* 675.

³ Restatement § 155 comment b.

creation, is not considered anywhere an incorporated body.⁴

Illustration. The Committee of Underwriters of Hamburg brought an action in Paris. The French Supreme Court held that the plaintiff, a legal person under the law of Hamburg, and not a stock corporation,⁵ was able to sue.⁶

The requirements for validity of corporations established in the state where a corporation is alleged to have been created, must be fulfilled. It may be that an act of the legislative or executive branch of the government is necessary (Soviet Union, Czechoslovakia, Poland), as was universally required in former times.⁷ Ordinarily, however, general statutes establish the conditions under which an association may gain personality by creation through private persons for private purposes. The provisions vary with respect to every particular of the formalities, such as the documents embodying the declaration of the promoters (articles, certificate or memorandum of association or incorporation, or charter and by-laws, in Europe ordinarily one document, the "statute") and the records and advertisements necessary for public association. There is also diversity on the minimum number of members needed, the subscriptions or payments to be made, the verification of noncash contributions, and similar matters. The law of incorporation controls which provisions are conditions precedent and which mandatory, and which kind of invalidity follows an omission or mistake.⁸ This law must be wholly satisfied.⁹

⁴ Restatement § 155 comment b; *Dickey v. Southwestern Surety Ins. Co.* (1915) 119 Ark. 12, 173 S. W. 398; *Sinnott v. Hanan* (1915) 214 N. Y. 454, 108 N. E. 858.

⁵ Otherwise the court would have denied recognition on the ground discussed *infra*, Chapter 22, pp. 131-141.

⁶ Cass. (civ.) (July 12, 1893) *Clunet* 1893, 1204.

⁷ App. Colmar (March 31, 1908) *Clunet* 1910, 613 (authorization required in Luxembourg).

⁸ England: *In re The Imperial Anglo-German Bank* (1872) 26 L. T. N. S. 229; *cf. Young* 178 n. 4.

⁹ Restatement § 155 (2).

Whether agreements by which the promoters engage themselves to bring a corporation into existence form an integral part of the proceedings needed for incorporation, is determined by the personal law. If they are not so considered, the law of contract governs.¹⁰ Assuredly contracts concluded between the promoters and the members of a finance or guarantee syndicate or agreements between these persons and the bankers are not covered by the personal law.¹¹

While the validity of the creating act is thus subjected to the law of the incorporating state, it has been objected that, unless it is validly constituted, a legal person cannot have a personal law; to determine under this personal law whether the constitution is valid, would mean a vicious circle.¹² But it is simply reasonable that the same law should govern the acts by which an association assumes personality, acquires capacity and an organization, as well as the discharge of its functions. The overworked argument of a *circulus inextricabilis* is once more deceptive.

Objections on the ground of public policy to technical particulars of the foreign requirements for incorporation are very seldom raised. Examples may be found in jurisdictions where one-man companies are abhorred.¹³

In connection with this conception, it is an important and universally settled rule that the subscribers (in the broadest meaning) to the stock of a company are liable according to the personal law of the corporation.¹⁴ To support this rule,

¹⁰ RG. (March 4, 1930) IPRspr. 1931 No. 11 (*Vorgründungsvertrag*), Swiss BG., 35 BGE. II 231, 36 *id.* II 387.

¹¹ 2 ARMINJON (ed. 2) 464 n. 1 § 181, but the parties are presumed to have submitted their contract to that same law, cf. RG. (Oct. 29, 1938) 159 RGZ. 33, 45.

¹² 2 ARMINJON (ed. 2) § 183.

¹³ Belgium: Cass. (Jan. 5, 1911) *Revue pratique des sociétés* (1911) 185; *Revue pratique du notariat* (1911) 279 (a company cannot exist with only one member).

The Netherlands: Kg. Amsterdam (May 5 and 11, 1916) W. 9978 and 10003.

¹⁴ United States: *Crofoot v. Thatcher* (1899) 19 Utah 212, 57 Pac. 171; *Trent Import Co. v. Wheelwright* (1912) 118 Md. 249, 84 Atl. 543 (illegal stock subscription); *May v. Roberts* (1930) 133 Ore. 643, 286 Pac. 546, 549; *Collins v. Morgan Grain Co.* (1926) 16 F. (2d) 253, 255.

it is usually argued in Europe that the subscribers tacitly submit themselves to the law governing the future corporation.¹⁵ This argument, in fact, covers also those subscriptions which are not an essential prerequisite of the constitution. In the United States, the same result, i.e., that the action against the subscribers is determined by the law of the state of incorporation, is reached by the construction that the subscriber's offer is deemed to have been accepted by the corporation as soon as formed.¹⁶

For the formalities of the contract of association, if the contract is executed in a state other than where its commercial domicile is to be, i.e., where incorporation is to be sought, the revised text of the Treaty of Montevideo refers to the law of the place of contracting.¹⁷ But this is true only to the extent to which the law of the state of incorporation refers to the local law by the rule *locus regit actum*.

2. Capacity (Powers)

The main idea involved in this topic is simple enough to be recorded at this juncture:

A corporation, if recognized, enjoys the powers conferred upon it by its charter or by the legislation of the incorpo-

Austria: OGH. (Dec. 29, 1930) 12 SZ. 956 No. 315, 6 Z.ausl.PR. (1932) 972 (Swiss law determines principal, interest, and time limitation).

France: Trib. com. Seine (May 11, 1887) Clunet 1889, 670 (Belgian law); Trib. com. Seine (June 25, 1891) Clunet 1893, 893 (Luxemburg law); Cour Paris (Aug. 4, 1893) Clunet 1893, 1226 (the buyer of a foreign share cannot invoke the French provision that shares must amount at least to 500 francs); Trib. com. Seine (March 17, 1896) Clunet 1897, 1043 (Belgian law determining prescription for the subscriber).

Germany: OLG. München (July 17, 1928) IPRspr. 1929 No. 23 (English law).

The Netherlands: Kg. Amsterdam (Dec. 11, 1916) N. J. (1917) 8.

Switzerland: BG. (Oct. 15, 1915) 41 BGE. II 588 (Swiss law on rescission, based, however, on a special argument).

¹⁵ Belgium: Trib. com. Bruxelles (Dec. 31, 1907) Clunet 1908, 1231.

France: Trib. com. Seine (June 17, 1907) Clunet 1908, 170.

Germany: Common opinion, see KESSLER, 3 Z.ausl.PR. (1929) 768 No. 1.

¹⁶ Athol Music Hall Co. v. Carey (1876) 116 Mass. 471; for other cases see WARREN, Cases on Corporations (1928) 175.

¹⁷ Draft of Treaty on Commercial Terrestrial Law (1940) art. 26 § 2, cf. art. 7.

rating state. This latter, the "general law" of the corporation, cannot be disregarded, unless it intends to amplify or diminish the powers of corporations or a class of them only within the territory of the state. Exceptions may be raised to the powers of a foreign corporation on the grounds of public policy, but this should not be done without the strongest reasons.

The principle includes the ability of a corporation to have rights and liabilities and to be heir or legatee,¹⁸ as well as the capacity to exercise rights (capacity of enjoyment).

If consistency be observed, the personal law of the state of incorporation governs the name or firm of the entity.¹⁹ Thus the German Reichsgericht protected an abbreviated name "Kwatta" under Dutch law (according to the Paris Treaty for the Protection of Commercial Property of 1883),²⁰ and the name "Eskimo Pie Co.," following the law of Delaware.²¹

In the European opinion, there is no doubt that the scope of this personal law embraces the right to sue and to be a party to a law suit.²² This is also one of the oldest rules of

¹⁸ See, for instance, Cour Paris (June 21, 1935) *Clunet* 1936, 884; Trib. com. Seine (Nov. 14, 1936) *Clunet* 1938, 307; *Revue Crit.* 1938, 57; Austrian law for existence and capacity to be a legatee of the Society for the Assistance to Frenchmen in Austria.

¹⁹ France: App. Douai (Nov. 18, 1904) *D.1905.2.175*; Cass. (req.) (Dec. 26, 1905) *D.1906.1.252*.

Argentina: *Cám. Fed. de la Cap.* (June 16, 1944) 34 *La Ley* 1024.

²⁰ RG. (Sept. 26, 1924) 109 *RGZ.* 213.

²¹ RG. (June 3, 1927) 117 *RGZ.* 217.

²² France: Cour Paris (July 20, 1936) *Clunet* 1937, 516 with the instructive distinction that the foreign corporation may sue by virtue of its capacity under article 15 of the Civil Code, but that jurisdiction is given only within the limits defined by French Code of Civ. Proc., art. 59.

Germany: STEIN-JONAS-SCHÖNKE, ZPO § 50 (ed. 1953) VI.

Italy: Former C. Com. (1882) arts. 230-232 have been considered to cover the whole field of capacity to be a party and, by the prevailing opinion, even where a foreign business corporation has failed to comply with the conditions for doing business in the Kingdom. See below pp. 143ff., 147.

The Netherlands: Doctrine firmly settled by H.R. (March 23, 1866) *W.* 2781; see also Hof den Bosch (May 26, 1891) *W.* 6129 (corporation in liquidation); KOSTERS 689; Rb. Dordrecht, (Jan. 12, 1927) *W.* 11625, 37 *Z.int.R.* (1927) 447, I VAN HASSELT 327 (expressly declaring that reciprocity is not required for recognition); Rb. Haag (March 27, 1936) *W.* 1937, 665 (company constituted in Bern, Switzerland); Hof den Bosch (Feb. 9, 1937) *W.* 1937, 992. There is, however, a

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England, going back to the cases of 1724 and 1825,²³ and certainly is the true rule in this country, despite Beale's assertion that the whole problem of who may sue and be sued is procedural.²⁴

In contrast to the capacity to be a party, the competence of certain individuals to appear in court on behalf of a corporation which is a party, may be influenced by the procedural law of the forum. This problem cannot be expounded here. American courts seem accustomed to follow consistently the *lex fori*.

What law determines the status of a corporation as a merchant, important under most civil law legislations? Opinions are divided. The personal law is applied by logical consequence in Germany, Italy, the Netherlands, and Switzerland,²⁵ and has been prescribed in an elaborate manner in

great controversy about foreign (French, Belgian) provisions denying the right of a corporation to appear in its own name; the majority of decisions regard these provisions procedural and therefore not applicable in the Dutch forum, see VAN HASSELT 3.

Scotland: *Edinburgh and Glasgow Bank v. Ewan* (1852) 14 Ct. Sess. (2nd. ser.) 547.

Sweden: MALMAR, 7 Répert. 141 No. 149.

Switzerland: BG. (Sept. 16, 1909) 35 BGE. II 458; App. Zürich (May 2, 1938) 38 Bl.f.Zürch.Rspr. (1939) 190 n. 85: "capacity of being sued for attachment is a branch of the capacity of being a party, and this is a branch of the capacity of having rights," concerning a "curatorium of administration for the estate of the late princes, H-O, etc."

²³ Right to sue: *Dutch West India Co. v. Henriques* (1724) 1 Strange 612, *aff'd* (1728) 2 Ld. Raym. 1532, (1730) *id.* 1535; *The National Bank of St. Charles v. De Bernales* (1825) 1 C. & P. 569, Ry. & M. 190.

Liability to be sued: *Newby v. Van Oppen and The Colt's Patent Firearms Mfg. Co.* (1872) 7 Q.B. 293.

²⁴ 3 BEALE § 588.1 and 2. See *infra* pp. 143ff., 147.

²⁵ Germany: M. WOLFF, IPR. 113.

Italy: App. Roma (March 3, 1932) *Foro Ital.* 1932 I 1173; Cass. (April 29, 1933) *Foro Ital.* 1933 I 1160; Cass. Roma (March 24, 1938) *Giur. Ital.* 1938 I, 1, 651 (an Italian company for dealing with rural land in Argentina is commercial and therefore subject to bankruptcy, though its activity is not considered commercial under Argentine C. Com. art. 8). This decision is correct without regard to "qualification according to *lex fori*," as claimed by a note in *Clunet* 1939, 185.

The Netherlands: Rb. Almelo (Oct. 30, 1901) W. 7736.

Poland: Int. Priv. Law, art. 2; Interlocal Priv. Law, art. 4 (center of enterprise).

Switzerland: VON STEIGER, 67 ZBJV. (1931) 313; cf. CAVAGLIERI, *Dir. Int. Com.* (1936) 160-173.

the *Código Bustamante*.²⁶ French courts and writers, however, advocate the law of the forum.²⁷

By an exception universally adopted, the capacity of a corporation to commit tort is governed by the law of the place of the alleged tortious act, if the forum does not insist on its own policy.²⁸

More detailed attention will be given below (Chapter 22) to the problems arising when contracts exceeding the powers either of the corporation or its representatives, are concluded on behalf of a foreign corporation.

3. Internal Organization

The problems regarding the organization of the internal life of the corporate body²⁹ include in the first place *acquisition and termination of membership*.³⁰ In a fraternal benefit organization, the charter and by-laws determine also who is eligible to be a beneficiary.³¹

Certificates. Membership may depend on the holding of a certificate. Whether it does, and to what extent—whether

²⁶ Código Bustamante, art. 248. See also 2 LYON-CAEN et RENAULT II 950 § 1127.

²⁷ ARMINJON, 2 Précis (ed. 1) 384 § 179.

Similarly, NUSSBAUM, D. IPR. 190, 194.

Mexico: C. Com. art. 3 (3).

Institute of International Law, 35 Annuaire (1929) II 164-167 seems to combine both principles in a singular way.

²⁸ Restatement § 166 comment b.

France: Cass. (crim.) (Aug. 8, 1873) Clunet 1875, 22; Trib. corr. Seine (March 13, 1903) Clunet 1903, 831; *id.* (July 27, 1910) Clunet 1911, 234.

Germany: OLG. Nürnberg (Jan. 4, 1934) IPRspr. 1934 No. 26; RAAPE 137; NUSSBAUM, D. IPR. 191 (n. 6) § 42; in other opinions: 2 ZITELMANN 129; SCHNITZER, Handelsr. 115; but Liechtenstein, P.G.R. art. 235 (3) requires the minimum liability established by the law of the forum.

²⁹ Canada Southern R. Co. v. Gebhard (1883) 109 U. S. 527.

³⁰ United States: Restatement § 182; Baker v. Baker, Eccles & Co. (1917) 242 U. S. 394 as construed by CHEATHAM, Cases 704.

France: Cour Paris (May 12, 1881) Clunet 1882, 317; Trib. com. Seine (May 28, 1896) Clunet 1896, 874.

Germany: RG. (May 25, 1928) JW. 1928, 2013; RG. (March 10, 1934) 88 Seuff. Arch. (1934) 193, IPRspr. 1934 No. 11; OLG. Celle (Nov. 11, 1951) IPRspr. 1950-51 No. 12b.

Switzerland: BG. (July 9, 1913) 39 BGE. II 426.

³¹ See 2 BEALE 1212 n. 1.

for instance actual or potential membership rights are conferred upon any holder of a share certificate—is determined by the law of the state of incorporation. If this state is one in which the conception of the common law prevails, shares are not transferable except by registration on the company's books, and any certificates of stock issued have merely evidentiary value. This system has been maintained in many existing American and Canadian statutes on stock transfer, although these allow the companies incorporated in the state to issue certificates that are indorsable in blank and transferable by delivery. Acquisition of the certificate as a tangible thing (under the law applicable thereto) confers ownership in the corporeal certificate and in addition conveys title to the share of stock as between assignor and assignee,³² but membership is acquired only by subsequent registration. Under English law, however, and according to the Uniform Stock Transfer Act (adopted or substantially equalled in all states), registered certificates, indorsed in blank or accompanied by separate instrument of transfer or assignment, bill of sale, et cetera, embody the rights of the certificate owner to demand registration as the owner of membership upon the books of the corporation. "Title to a certificate and to the share represented thereby can be transferred only by delivery of the instrument."³³ The share, hence, may be said to be materially, although not formally, merged with the certificate. Finally, the prevailing Continental type reaches the same goal by the complete merger of share and certificate in bearer shares.³⁴

It follows that the certificate in all cases is transferred according to the law governing tangible things, viz., as is often asserted, by the law of the situs, but more precisely,

³² *Williams v. Colonial Bank* (1888) 38 Ch. D. 388; GOODRICH §§ 160-163 n. 125.

³³ Uniform Stock Transfer Act, § 1, 6 U. L. A. (1922).

³⁴ I BEALE § 104.1; German RG. (March 10, 1934) IPRspr. 1934 No. 11. Another opinion seems to be expressed by M. WOLFF, IPR. 118.

by the law of the place where the certificate is delivered.³⁵ In contrast thereto, the personal law of the corporation determines, whether consent of other members, or that of the corporation, or whether recording in the books, is required to entitle the transferee to the rights of a shareholder as against the corporation, its other members, the state, and other third independent parties, to relieve the transferor from liability to the corporation, and related questions. For example, if the ownership of the certificate, embodying a share of an English private limited company, according to Swiss law is validly transferred to a Swiss bank, the rights of the acquirer are nevertheless subject to the transfer restrictions of English law.³⁶

In an analogous way, in case of inheritance, the last personal law of the deceased will decide to whom the assets devolve, but whether one who thus acquires shares holds an effective title in relation to the corporation, is exclusively determined by the law of charter.³⁷

Seizures. The application of the law of the corporation to the transfer of shares includes seizures of all kinds.³⁸ In the main, this has been recognized in all those cases where shares or certificates have been confiscated.^{38a} In particular, the Alien Property Custodians in this country,³⁹ in Canada,⁴⁰

³⁵ United States: *Direction der Disconto-Gesellschaft v. United States Steel Corp.* (1925) 267 U. S. 22; See Note, 15 Cal. L. Rev. (1927) 145, 149, 150.

³⁶ See VON STEIGER, 67 ZBJV. (1931) 320.

³⁷ The comment b to Restatement § 182 is probably in accord.

³⁸ RABEL, "Situs Problems in Enemy Property Measures," 11 Law and Cont. Prob. (1945) 118, 133. As an illustration, see:

The Netherlands: Rb. Rotterdam (Sept. 11, 1922) W. 10960: certificates representing German shares in an English corporation were in England and on seizure by the English trustee of enemy property transferred on the books. The Dutch court recognized the seizure according to the applicable English law.

^{38a} The same rule seems to apply to escheat of stock, *Standard Oil Co. v. New Jersey* (1950) 341 U.S. 428.

³⁹ *Miller v. Kaliwerke Aschersleben Aktiengesellschaft* (C. C. A. 2d 1922) 283 Fed. 746; *United Cigarette Machine Co. v. Canadian Pacific R. Co.* (C. C. A. 2d 1926) 12 F. (2d) 634.

⁴⁰ *Spitz v. Secretary of State of Canada* [1939] 2 D. L. R. 546, Exch. C.

and in South Africa⁴¹ have been upheld when they vested in themselves enemy registered shares by mere notification to the central office of the company, despite circulation of the respective certificates in neutral countries, because the company law involved was based on the common law principle. Under the same rule, after World War II, conflicting claims to securities seized as enemy assets outside the state of incorporation were settled in favor of the latter.^{41a} On the other hand, the perceptive analysis of the principles underlying the Uniform Stock Transfer Act as adopted in New Jersey, by Judge Learned Hand, and in the Supreme Court of the United States, by Mr. Justice Holmes, recognized seizure by the English Public Trustee, of stock of the United States Steel Corporation, indorsed in blank and deposited in a bank in London for the account of German banks.⁴² The holding of such a certificate rather than the registration upon the books of the corporation procures membership. This, the *Disconto-Gesellschaft* case, should have authority for courts everywhere. By its recognition of the mobilization of the membership embodied in the certificate, the decision relates the problem to the use of financial markets and the importance of commercial reliance, the very considerations that originated the institution of certificates to bearer. One question only has been intentionally left open by this and other cases: whether the public policy of the state of incorporation overriding its own stock transfer law, may abridge the rights of bona fide holders of true bearer shares. Such an extension of war measures has not been excluded. However, thus far, no unequivocal case in which bona fide neutral acquirers of bearer shares have been divested, has occurred here or in England.

⁴¹ *Randfontein Estates Gold Mining Co. v. Custodian of Enemy Property* (1923) S. A. L. R. App. D. 576.

^{41a} Agreement between the United States, Canada, and the Netherlands relating to the Resolution of Conflicting Claims to German Enemy Assets of Dec. 5, 1947, 18 U. S. Dept. of State Bulletin (1948) p. 6, art. 1.

⁴² *Disconto-Gesellschaft v. U. S. Steel Corp* (1925) 267 U. S. 22.

A similar classification is due to the *rights and liabilities pertaining to the members*.⁴³ The Restatement enumerates as subject to the law of incorporation:

The right of a shareholder to participate in the administration of the affairs of the corporation, in the division of profits and in the distribution of assets on dissolution and his rights on the issuance of new shares (§ 183); the right to vote, to receive dividends, etc. (comment a, *ibid.*); the right to object to corporate activities (comment b, *ibid.*).

The question whether the trustee (for the purpose of voting) will be allowed to vote the shares (§ 184).

The existence and extent of the liability of a shareholder for assessments or contribution to the corporation for the payment of debts of the corporation (§ 185).

For illustration, a certificate issued by the National City Bank of New York on "our American share" giving title to shares of a European corporation, is governed, as regards validity and content, by New York law, and with respect to the deposit of the original European shares by the proper law applicable thereto; but in all other respects the law of the incorporating state controls.⁴⁴

Members are subject to assessments made in conformity to the charter, by-laws, and statutory provisions of the law of incorporation, "although they are not made parties to the proceeding for levying it."⁴⁵

⁴³ United States: Hudson River Pulp Co. v. Warner (1900) 99 Fed. 187, 39 U.S. C. C. A. 452; O'Brien v. Chicago R. Co. (1868) 53 Barb. (N.Y.) 568, 36 How. Pr. 24 (spurious stock); Ernest v. Elmira Municipal Improvement Co. (1898) 24 N. Y. Misc. 583, 54 N. Y. Supp. 116 (right against unlawful issue of preferred stock); Nashua Savings Bank v. Anglo-American etc. Co. (1903) 189 U. S. 221.

England: Spiller v. Turner (1897) 1 Ch. D. 911, cf. YOUNG 186.

Canada: Pickles v. China Mutual Ins. Co.; China Mutual Ins. Co. v. Smith (1913) 47 S. C. R. 429, 10 D. L. R. (1913) 323, conf'ng, 46 N. S. R. 7, 3 D. L. R. 766 (Supreme Court of Nova Scotia 1912).

Belgium: App. Bruxelles (Jan. 13, 1928) Jur. Com. Brux. 1928, 42 (preferred stock of a Belgian company is not valorized, according to Belgian law).

Switzerland: BG. (April 1, 1924) 50 BGE. II 57, 58.

⁴⁴ See FLECHTHEIM, 3 Z. ausl. PR. (1929) 118.

⁴⁵ Mr. Chief Justice Stone in Pink v. A. A. Highway Express Inc. (1941) 314 U. S. 201, 207; Warner v. Delbridge & Cameron (1896) 110 Mich. 590, 68

The same law of incorporation determines how directors are nominated and what position they hold; how and at what place the directors or committees shall meet;⁴⁶ all questions of internal management;⁴⁷ the method of distribution of profits and appropriation of earned surplus to reserves; accounting; whether a corporation is permitted to acquire its own stock,⁴⁸ et cetera.

Matters of internal organization, however, are not only reserved to the law of the charter, but regularly also to the jurisdiction of the courts of the state of incorporation.

Jurisdiction. "The English court will not interfere in the internal disputes of foreign corporations with domestic issues as between the members"⁴⁹—a maxim not consistently respected.⁵⁰ In the United States, it has been declared that, in the absence of an office for the transfer of shares, a foreign corporation may not be sued for the issuance, transfer, or cancellation of shares;⁵¹ generally, courts exercise discretion in assuming jurisdiction; it is a question of policy and convenience, not of right.⁵² It is thought, however, that considerations of convenience, efficiency, and justice point to the court of the domicile of the corporation for settlement

N. W. 283: "Every person who deals with it (the foreign corporation) everywhere and particularly one who becomes a member of the corporation, is bound to take notice of the provisions which had been made in its charter, and subjects himself to such laws of the government of its situs as affect the powers and obligations of the corporation."

⁴⁶ Restatement § 164.

⁴⁷ *San Remo Copper Min. Co. v. Moneuse* (1912) 149 App. Div. (N.Y.) 26, 113 N. Y. Supp. 509, reversing (1911) 132 N. Y. Supp. 570.

⁴⁸ *Tolman v. New Mexico & Dakota Mica Co.* (1885) 4 Dak. 4, 22 N. W. 505.

⁴⁹ *Sudlow v. Dutch Rhenish R. Co.* (1855) 21 Beav. 43, per Romilly.

⁵⁰ DICEY, (ed. 5) Rule 139, n. d seems to indicate less consistency than in the American courts, without such doubts DICEY (—M. MANN) rule 78 (2), n. 50.

⁵¹ Restatement §§ 192, 193; cf. *Hopkins v. Great Western Fuse Co.* (1941) 343 Pa. 438, 22 Atl. (2d) 717; *Sternfeld v. Toxaway Tanning Co.* (1942) 290 N. Y. 294, 49 N. E. (2d) 145.

⁵² Restatement, Scope Note to Topic 5, 279; Notes, 18 A. L. R. 1376, 1383; 32 A. L. R. 1353, 1355; 29 Col. L. Rev. (1929) 968; 27 Mich. L. Rev. (1929) 336.

of the issues presented.⁵³ Analogous rules existing elsewhere are in part even stricter and more comprehensive.⁵⁴

4. External Relations

The personal law of the corporation controls the rights and liabilities of the corporation and of the members toward third persons, such as creditors and debtors.⁵⁵ In particular, it covers the powers of the corporation⁵⁶ and the liability of promoters, directors,^{56a} advisory board,⁵⁷ and shareholders.⁵⁸ For instance, where a British incorporated limited company carried on business in California, in which state the constitution and the civil code of the time declared the shareholders of a corporation liable for the debts of the corporation, the English Court of Appeals correctly denied the action.⁵⁹

Liability of stockholders in the United States. In this

⁵³ See Notes, 33 Col. L. Rev. (1933) 492; 89 A. L. R. 736; 17 Bost. U. L. Rev. (1937) 878. See the vigorous dissent of Fuld, J., in *Long Park Inc. v. Trenton-New Brunswick Theaters Co.* (1948) 297 N. Y. 174, 179. An exception has been mentioned *supra* Chapter 19 n. 53.

⁵⁴ E.g., Belgium: Law on Competence, of March 25, 1876, art. 44 gives exclusive jurisdiction to the court at the place of the principal establishment, over disputes between the administrators and members. The constitutional documents may change this rule however. See *Novelles Belges*, 3 D. Com. 349 § 2217.

France: C. Civ. Proc., art. 59, see comment by GLASSON, TISSIER et MOREL, 2 *Traité théorique et pratique de procédure civile* (ed. 3, 1926) § 360.

Germany: ZPO. § 22, Aktiengesetz §§ 199 par. 3, 216 par. 4; Genossenschaftsgesetz § 51, Gesellschaft mit beschränkter Haftung Gesetz § 75.

⁵⁵ *Canada Southern R. Co. v. Gebhard* (1883) 109 U. S. 527; a person dealing with a foreign corporation submits himself to the regulation of the foreign state discharging the corporation from liability.

⁵⁶ See discussion *infra* pp. 158ff.

^{56a} However, in French bankruptcy of foreign company, liability of president and administrators is determined by French law, App. Douai (Dec. 1, 1955) *Revue Crit.* 1956, 490; App. Paris (Oct. 31, 1957) *Revue Crit.* 1958, 345.

⁵⁷ Restatement § 187.

⁵⁸ Restatement §§ 187, 190, cf. *Leyner Engineering Works v. Kempner* (C. C. S. D. Tex. 1908) 163 Fed. 605. On the special subject of limitation of the liability of stockholders, see the notes in 113 A. L. R. 510 and 143 A. L. R. 1442.

Personal liability of shareholders of a defectively incorporated Arkansas corporation under Arkansas law is not enforced in Tennessee because of its penal character, *Paper Products Co. v. Doggrell* (1953) 195 Tenn. 581, 261 S.W. (2d) 127; *Doggrell v. Great Southern Box Co., Inc.*, of Mississippi (1953) 208 F. (2d) 310, reversing its former opinion, 206 F. (2d) 127.

England: *General Steam Navigation Co. v. Guillou* (1843) 11 M. & W. 877; *Bateman v. Service* (P. C. 1881) 6 App. Cas. 386, per Sir R. Couch, 388.

Canada: *Allen v. Standard Trust Co.* (1920) 57 D. L. R. 105 (Man. App.); for other cases see 3 JOHNSON 453.

⁵⁹ *Risdon I. & L. Works v. Furness* [1906] 1 K. B. 49.

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country, however, the problem has been singularly confused. The provisions of California just mentioned established proportionate liability of stockholders to be applied also to stockholders of foreign corporations,⁶⁰ a unique and extravagant rule that fortunately was repealed in 1931.⁶¹ But the not so infrequent provisions imposing some subsidiary liability upon shareholders, such as in particular on those of banking, guaranty, investment, insurance, or similar corporations⁶² have been extended to the members of organizations of other states under qualified circumstances interesting to note.

(i) While the Supreme Court of the United States in several cases has compelled state courts to give effect to the statutory liability of members under the law of organization,⁶³ it once approved a judgment declaring a stockholder subject to the liability statute of the state whose resident he is.⁶⁴ Against this emphasis on the power of the domiciliary state, it should be noted with all due respect that the accidental domicile of an individual should not interfere with the structure of a capital organization recognized under our basic principles for common interest. Otherwise, local liability rules ought to be applied also when they are more favorable to the stockholder than the rules governing the corporation.

In fact, when a citizen of New Jersey was sued on his individual additional liability as a stockholder of a banking corporation of Florida, the New Jersey court dismissed the

⁶⁰ Cal. Constitution, former § 3, art. XII; C. C., former § 322.

⁶¹ Cal. Stat. (1931) p. 444; C. C. §§ 322-325a; cf. BALLANTINE, *Cal. Corp. Law*, 4 § 3: "This form of liability was unique and operated as a deterrent to the investment of capital here."

⁶² E.g., see Kentucky: Rev. Stat. (1955) s. 287. 360 (banking); Maine: Rev. Stat. (1954) c. 53 § 121.

⁶³ *Converse v. Hamilton* (1912) 224 U. S. 243; *Supreme Council of the Royal Arcanum v. Green* (1915) 237 U. S. 531; *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357. Accordingly, *Groesbeck v. Beaupre* (1940) 307 Ill. App. 215, 30 N. E. (2d) 531.

⁶⁴ *Pinney v. Nelson* (1901) 183 U. S. 144; followed by Restatement § 191 comment a.

action with reference to a local statute.⁶⁵ A naive annotation tried to justify this decision constitutionally by the argument that the claim was not based on a judgment but on a statutory liability.⁶⁶ These seem to be isolated aberrations.

(ii) Although the stockholder was not a resident and the corporation was foreign, he was held subject to the liability statute of the state where the corporation concluded a contract. The courts assumed an agreement of the stockholder with the third party whereby he was deemed to have submitted to the statute of the place of contracting, either when the charter of the corporation expressly authorized doing business in that state or even when the charter failed to specify the states in which business may be conducted.⁶⁷ These fictitious constructions were aptly refuted in the case of *Thomas v. Matthiessen*⁶⁸ by the Federal Courts of New York, Judge Ward of the Circuit Court of Appeals declaring that under the theories rejected "corporate stock is liable to become in this country an uncertain and even dangerous asset." The Supreme Court, however, although approving of this reasoning, found factually that the New York stockholders of a New York corporation had agreed to liability under the law of Arizona, because by the charter the corporation was specially organized to do business in Arizona and California.⁶⁹

We may in fact, as explained before, set aside the case

⁶⁵ *Cochrane v. Morris* (1931) 10 N. J. Misc. 82, 157 Atl. 652. The statute involved was held unconstitutional by the U. S. Supreme Court in *Broderick v. Rosner* (1935) 294 U. S. 629, but is still on the books (N. J. Stat. Ann., 1937, s. 14:7-11).

⁶⁶ 57 N. J. L. J. (1934) 261.

⁶⁷ See the California cases cited in Restatement California Annotations § 191. Other cases and argumentations on the same lines in Notes, 23 Harv. L. Rev. (1910) 37, 12 Col. L. Rev. (1912) 450, 27 Harv. L. Rev. (1914) 575. This strange argument has been shared by YOUNG and by STEVENS 729 n. 182.

The Restatement § 191, trying to reduce the scope of the local law, still applies it when "(b) the shareholder has personally taken part in doing the act or causing it to be done, or (c) has notice that the corporation was formed to do business there."

⁶⁸ (C. C. D. N. Y. 1909) 170 Fed. 362; (1911) 192 Fed. 495.

⁶⁹ (1913) 232 U. S. 221.

where a business organization is intended to operate exclusively, or at least principally, in a state other than that of incorporation; this, however, should be done, if at all, only under some theory of evasion that is to be based, not on the behavior or domicile of any particular stockholder, but on the contrast between the corporate purposes and the selection of the state in which to incorporate. In *Peck v. Noee*, the corporation was organized to do business in California only, and its organizers and officers were California residents.⁷⁰ In this case, probably with stronger facts than in that of *Thomas v. Matthiessen*, the local law might have had a claim.⁷¹ All other arguments against the exclusive application of the law of the charter are evidently induced by mistaken application of the conflicts rule that a principal is bound to the construction given to his authority by the law of the state where the agent acts upon it. In our case, no such construction can alter the fact that the stockholders have agreed only to a charter limiting their liability to their share in the stock, and hence have given approval to business carried on in whatever place, only at the risk of the corporation and not otherwise. To reason as though individual stockholders or all stockholders by allowing business abroad have waived the limitation of their liability, is gratuitous.

On the other hand, the exclusive application of the law of the charter is entirely desirable in the interest of certainty and equity, even if more reliable expressions for exception could be found than in the helpless formulation of the Restatement (*supra* note 67).

Borderline problems. Special attention will be given later to the authority of the principal representatives of a corporation contracting with third persons. There is no doubt, however, on principle that the personal law of the entity

⁷⁰ *Peck v. Noee* (1908) 154 Cal. 351, 97 Pac. 865.

⁷¹ Cf. STUMBERG 373.

controls.⁷² Only the borderline between this and other conflicts rules causes some difficulties. In particular, the territorial law of the country where a foreign corporation does business is likely to claim consideration of its own rules. Application of the law governing the contract may further complicate the problem. Young in his excellent monograph, trying to find a just delimitation, proposed that only those rules and enactments which relate to the permanent character and constitution of a juristic person, or to the relations of its members *inter se* and toward the juristic person itself, should be regarded as part of its personal law having extraterritorial effect; no enactment made to protect the interests of third parties should be included.⁷³ This is not a suitable proposition, because the law of the incorporating state, too, generally has rules protecting third parties which ought to be applied and because the local law is also entitled to regulate business conducted in its territory in respects not concerning the interest of third parties but the public interest.

5. Modification and End

The law of the state of incorporation determines:

Alteration of the charter or by-laws, e.g., increase or decrease of the capital stock;⁷⁴ annulment of the charter;⁷⁵ its

⁷² United States: 2 BEALE 758 § 165.1.

England: *Banco de Bilbao v. Antonio Rey y Zardoya*, K. B. (1937), "not published" in England, Clunet 1938, 602; *aff'd*, 2 All E. R. [1938] 253-C. A.: revocation of powers of employees under Spanish Constitution and C. Com. art. 21.

Brazil: Sup. Trib. Fed. (Sept. 2, 1908) 107 O Direito 215.

France: App. Douai (April 28, 1897) D.1899.2.195.

Germany: KG. (March 8, 1929) IPRspr. 1929 No. 21.

The Netherlands: H. R. (Jan. 12, 1933) W. 12626; charter of Belgian *comptoir* determines agent's power to conclude a cartel with Dutch and German companies.

⁷³ YOUNG 185. If he says: "A state cannot exercise its legislative powers over the subjects of other states, even to protect them," he adds a new "cannot" to those well criticized by himself.

⁷⁴ Austria: OGH. (Dec. 29, 1930) 12 Aml. S. No. 315.

France: Trib. com. Seine (June 5, 1875) Clunet 1876, 363.

Germany: RG. (May 27, 1910) 76 RGZ. 366, 20 Z.int.R. 408 (Dutch law applied, art. 289 par. 3 of the German HGB. declared inapplicable).

⁷⁵ See *supra* ns. 2ff.

expiration by lapse of time;⁷⁶ transformation;^{76a} merger;^{76b} dissolution,⁷⁷ whether voluntary or forced,⁷⁸ its method and cause;⁷⁹ in states recognizing the extraterritorial effect of foreign adjudications in bankruptcy,⁸⁰ the effect of such adjudication on the existence and representation of the corporation;⁸¹ and its continuation after a certificate of dissolution for purposes of winding up or actions of debt.⁸²

If the state of incorporation does not provide for a suit in the corporate name after dissolution, an American rule provides that where the corporation was doing business or had property in another state, it may be kept alive by the statutes of this latter state for the purpose of suing or being sued, and that the effect on the winding up of the business or on the property existing in that state will be recognized in third states.⁸³ This rule deserves universal application, although on the Continent statutes on dissolution generally do prescribe continuation for the purpose and duration of winding up, if

⁷⁶ *Sturges v. Vanderbilt* (1878) 73 N. Y. 384.

^{76a} Portuguese Trib. Supr. (Nov. 30, 1956) 75 Rev. Trib. (1957) 73.

^{76b} *Natl. Bank of Greece and Athens S.A. v. Metliss* [1957] 3 All E.R. 608 (H.L.). However, a retroactive discharge of contractual liabilities of the merged company is disregarded if English law is proper law of the contract, *Adams v. Natl. Bank of Greece and Athens S.A.* [1958] 2 All E.R. 3 (Q.B.).

⁷⁷ *United States: Relfe v. Rundle* (1880) 103 U. S. 222: right of appointed state official against shareholder; approved for England by Dicey.

England: *Banque Internationale de Commerce de Petrograd v. Goukassow* [1923] 2 K. B. 682 at 691.

France: App. Chambéry (Dec. 1, 1866) S.1867.2.182; App. Paris (June 15, 1937) Clunet 1937, 812 (jurisdiction denied).

Germany: RG. (May 20, 1930) 129 RGZ. 98; OLG. Frankfurt (Nov. 1, 1907) 16 ROLG. 100; OLG. Köln (June 20, 1913) Rhein. Arch. 119.

The Netherlands: Rb. Amsterdam (April 22, 1910) W. 9159; (Jan. 26, 1923) W. 11054; Rb. Maastricht (June 25, 1931) W. 12366 (powers of liquidators).

Switzerland: 51 BGE. II 264, 14 Praxis 371; Bern, ZBJV. (1907) 555.

⁷⁸ *Belgo-German Mixed Arb. Trib., Bender Eregli v. Stinnes*, 5 Recueil trib. arb. mixtes 751.

⁷⁹ *Sinnott v. Hanan* (1913) 156 App. Div. (N. Y.) 323, 141 N. Y. Supp. 505.

⁸⁰ See NADELMANN, "The Recognition of American Arrangements Abroad," 90 U. of Pa. L. Rev. (1942) 780, 789.

⁸¹ England: (As to movables) principle of *Solomons v. Ross* (1764) 1 H. Bl. 131 (n); see CHESHIRE 490.

Germany: RG. (Jan. 5, 1937) 153 RGZ. 200, 8 Giur. Comp. DIP. (1942) 9.

⁸² Restatement § 158 comment c; *O'Reilly, Skelly & Fogarty Co. v. Greene* (1896) 40 N. Y. Supp. 360, *aff'd*, 41 N. Y. Supp. 1056; *Sinnott v. Hanan* (1915) 214 N. Y. 454, 108 N. E. 858.

Germany: OLG. Frankfurt (Feb. 21, 1933) IPRspr. 1933 No. 4, applying § 105 n. 8 of the New York Stock Corporation Law.

⁸³ Restatement § 158 comment d; *Rodgers v. The Adriatic Fire Ins. Co.* (1895) 148 N. Y. 34, 42 N. E. 515, 516; *People v. Mercantile Credit Co.* (1901) 65 App. Div. (N. Y.) 306, 309, 72 N. Y. Supp. 858.

the formal dissolution is not deferred until this moment. Thus, where an English company had been dissolved without satisfying the claim of a certain creditor who sued for payment out of German immovables recorded in the land register in the name of the company, the German court found it impossible directly to apply the English rules; it considered the company as continuing for the purpose of the suit.⁸⁴ The fiction, of course, does not refer to any business done after the dissolution.⁸⁵ No such statute was available in the case of Soviet nationalization, which will be mentioned below; hence, the House of Lords had to decide whether a dissolved Russian company could sue for debt in England, which was granted by the narrow margin of three votes against two.⁸⁶

As a jurisdictional effect, it is generally held that the court of the corporation's domicil has exclusive power to dissolve as well as to annul the legal person.⁸⁷ Perfectly distinguishable is the jurisdiction exercised in any state where business is carried on to wind up dissolved foreign corporations or partnerships.⁸⁸ In England, a technical doubt whether winding up may follow dissolution in an order contrary to common law,

⁸⁴ OLG. Frankfurt (Nov. 1, 1907) 16 ROLG. 100. The Reichsgericht declared that no such proceeding would be granted in the mere interest of the shareholders, RG. (May 20, 1930) 129 RGZ. 98, 107. See German HGB. § 302.

⁸⁵ Cour Paris (July 6, 1935) Clunet 1936, 916. This was disregarded in *Gibbs and Sons v. La Société Industrielle et Commerciale des Métaux* (1890) 25 Q. B. D. 399, criticized by YOUNG 181.

⁸⁶ *Russian & English Bank v. Baring Bros. & Co., Ltd.* [1936] A. C. 405.

⁸⁷ United States: Restatement New York Annotations § 157 n. 2; 2 BEALE 742 § 157.2; *Barclay v. Talman* (1842) 4 Edw. Ch. 128.

France: Trib. civ. Seine (Jan. 8, 1912) Revue 1912, 402, cf. 2 ARMINJON (ed. 1) § 183. *Contra*: PILLET, *Personnes Morales* § 172.

Belgium: Trib. Liège (July 23, 1891) Clunet 1893, 1243; cf. 3 ROLIN §§ 1264, 1284.

Switzerland: Bezirksgericht Horgen (Jan. 20, 1956) 54 SJZ. (1958) 21.

⁸⁸ England: WESTLAKE § 132; DICEY 485; *In re Comm. Bank of India* (1868) 6 Eq. 517; *In re Matheson Bros. Ltd.* (1884) 27 Ch. D. 225; *In re Commercial Bank of South Australia* (1886) 33 Ch. D. 173, 174; *In re Mercantile Bank of Australia* (1892) 2 Ch. D. 204, *Dairen Kisen Kabushiki Kaisha v. Shiang Kee* [1941] A. C. 373 (P. C.). See Companies Act, 1929, § 338 (1): this rule requires only a "place of business," not an "established place of business" in England, Cohen, J., *In re Tovarishstvo Manufactur Liudvig-Rabenek* [1944] 1 Ch. 404, 408. The corresponding s. 399 (5) (a) of the Companies Act, 1948, has been interpreted as requiring

was resolved by an express provision of the Companies Law.⁸⁹

When in 1901 France dissolved all religious congregations that had not obtained authorization, the Fathers of Chartreux were correctly recognized in Switzerland as an association because they had transferred their domicil and recreated their legal form in other countries.⁹⁰ The *Frères des écoles chrétiennes* should have been recognized also in France, insofar as they had mother houses in other countries.⁹¹ The dissolved French congregations themselves could not be recognized in any country except on the ground of public policy; this seems not to have occurred. Also, the dissolution of the Bank of Ethiopia by the Italian Government has been recognized elsewhere.⁹²

Soviet nationalization. On a large scale, the problems of dissolution and winding up have been discussed in the many cases arising out of the Soviet Decree of December 14, 1917, pronouncing the nationalization of Russian companies.⁹³ The first impulse everywhere was to deny the Soviet Decree recognition. This was done by some courts on the ground that the Soviet Union had not received recognition by the

only the transacting of business in England, *Banque des Marchands de Moscou v. Kindersley* [1951] Ch. 112, 125 (C. A.); *In re Azoff-Don Commercial Bank* [1954] Ch. 316, 329.

United States: *Lowe v. Pressed Metal Co.* (1916) 91 Conn. 91, 99 Atl. 1; N. Y. Civil Practice Act, s. 977-b.

Rumania: C. Com. (1938) art. 360 (6).

⁸⁹ Companies Act, 1929, s. 338 (2), now Companies Act, 1948, s. 400. This provision does not, by itself, prescribe more stringent requirements for jurisdiction of an English court than s. 399 (5) (a). See preceding note, *Banque des Marchands de Moscou v. Kindersley* [1951] Ch. 112, 128 (C. A.).

⁹⁰ Switzerland: 32 BGE. I 157; 39 BGE. II 651.

⁹¹ See PILLET, *Personnes Morales* § 293 against a decision of Trib. corr. Seine.

⁹² *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] Ch. D. 513, 3 All E. R. 8, Clunet 1938, 105.

⁹³ CONNICK, 34 Yale L. J. (1925) 499, NEBOLSINE, "The Recovery of the Foreign Assets of Nationalized Russian Corporations," 39 Yale L. J. (1930) 1130; GOELDIN DE TIEFENAU, *L'existence à l'étranger des sociétés russes* (1928); MAKAROV, note 8 Giur. Comp. DIP. (1938) 177-185; SEIDL-HOHENVELDERN, *Internationales Konfiskations- und Enteignungsrecht* (1952) Ch. 5, p. 105-131; M. MANN, "The Dissolved Foreign Corporation," 18 Modern L. Rev. (1955) 8-32.

government of the forum.⁹⁴ But in this country, Cardozo, J., in the New York Court of Appeals refuted this specious argument at a time when the American Government had not yet recognized the Soviet Government *de jure*.⁹⁵ This accords with the decisions of the Federal Tribunal of Switzerland, which had not recognized the Soviets until 1946.⁹⁶ Recognition of a government has nothing to do with the existence of a private person. Other courts held that the Soviet provisions were not really meant to dissolve the corporation⁹⁷ or to extend beyond Russian frontiers⁹⁸—both inexact assumptions.⁹⁹ Most appealing was the frank statement that the confiscatory character of the decrees offended the public policy of the forum.¹⁰⁰ Numerous French judgments up to 1928 declared more precisely that, while the title validly passed within

⁹⁴ United States: *Fred S. James & Co. v. Second Russian Ins. Co.* (App. Div. N. Y. 1924) 203 N. Y. Supp. 232, 146 N. E. 369; *Joint Stock Co. of Volgakama etc. v. National City Bank* (App. Div. N. Y. 1924) 206 N. Y. Supp. 476.

England: *Russian Bank of Foreign Trade v. Excess Ins. Co.* [1919] K. B. 39, 35 T. L. R. 42. *The Eastern Carrying Ins. Co. v. Nat'l Benefits Life & Prop. Ins. Co., Ltd.* (1919) 35 T. L. R. 292.

⁹⁵ *Sokoloff v. Nat'l City Bank of New York* (1924) 239 N. Y. 158, 165, 145 N. E. 917, 918; Note, *CONNICK*, 34 Yale L. J. (1925) 499; *cf.* Lehman, J., opinion in *Dougherty v. Equitable Life Assurance Society* (1934) 266 N. Y. 71, 109.

⁹⁶ Switzerland: 50 BGE. II 511; 51 *id.* II 263; 55 *id.* I 289, *Clunet* 1930, 1164.

⁹⁷ England: House of Lords in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* [1925] A. C. 112; 40 T. L. R. 837, the first case after the British recognition of the Soviet Government; followed by numerous others, see *WORTLEY*, 14 *Brit. Year Book Int. Law* (1933) 4, 5.

Germany: KG. (March 31, 1925) JW. 1925, 1300, *Clunet* 1925, 1057.

⁹⁸ England: *Employer's Liability Assurance Corp. v. Sedgwick, Collins & Co.* [1927] A. C. 95; *The Jupiter* [1927] P. 250, 253; *Woronin, Luetscheg & Cheshire v. Frederick Huth & Co.* (K. B. 1928) *Clunet* 1928, 756, 758.

⁹⁹ *MAKAROV*, Précis 219; opinion of Schoendorf stated by the KG. (Oct. 25, 1927) JW. 1928, 1232, IPRspr. 1928 No. 14.

¹⁰⁰ France: Trib. com. Marseilles (April 23, 1925) *Clunet* 1925, 391; App. Bordeaux (Jan. 2, 1928) and Cour Paris (June 13, 1928) S.1928.2.161; *cf.* *НИБОВЕТ*, *Clunet* 1929, 115; App. Aix (Dec. 23, 1925) *Clunet* 1926, 667.

The Netherlands: Rb. Haag (March 9, 1933) W. 12589, *VAN HASSELT* 335. The former director was considered representative in view of the impossibility of holding a general meeting of shareholders.

In Germany, this opinion could not be maintained, in view of the Treaty of Rapallo of April 16, 1922, art. 2, whereby Germany recognized the Soviet legislation, see RG. (May 20, 1930) 129 RGZ. 98.

Russia, it was contrary to French public policy, that by socialization the legal existence of the enterprises should be destroyed within France.¹⁰¹ This opinion was shared by the New York courts and expressed as late as 1934.¹⁰² On this basis, the capacity of the nationalized corporation to appear in court was affirmed,¹⁰³ provided that directors suing in the name of the corporation showed authorization from its stockholders.¹⁰⁴

The matter has become obsolete, however, in this country, inasmuch as the Soviet Government on the occasion of its recognition *de jure* by the so-called Litvinoff agreement, has assigned to the United States Government any claims it may have had to property within the territory of the United States.¹⁰⁵ The Court of Appeals of New York nevertheless held a local branch of a Czarist Russian insurance company existent, the strong state control over insurance business warranting a distinct personality of the branch despite the disappearance of the mother company.¹⁰⁶ But the Supreme Court of the United States has overruled this construction and all other objections to the extraterritorial effect of the Soviet confiscatory decrees.¹⁰⁷ The theory of the Court, which identifies governmental recognition of the Soviet Government with binding recognition of the nationalization decrees, is a

¹⁰¹ Trib. com. Seine (Jan. 16, 1922) Clunet 1923, 539; (April 26, 1922) Clunet 1923, 933; (March 23, 1925) Clunet 1927, 352; (April 12, 1926) Clunet 1927, 357; Trib. com. Seine (Oct. 1, 1926) Clunet 1927, 359.

¹⁰² Salimoff & Co. v. Standard Oil Co. of New York (1933) 262 N. Y. 220, 186 N. E. 679, Note, 33 Col. L. Rev. (1933) 750; Vladikavkazsky R. Co. v. New York Trust Co. (1934) 263 N. Y. 369, 189 N. E. 456, Note, 34 Col. L. Rev. (1934) 962. See the survey by Lehman, J., opinion in Dougherty v. Equitable Life Assurance Society (1934) 266 N. Y. 71 at 106.

¹⁰³ James & Co. v. Second Russian Ins. Co. (1925) 239 N. Y. 248, 146 N. E. 369; Russian Reinsurance Co. v. Stoddard (1925) 211 App. Div. 132, 207 N. Y. Supp. 574.

¹⁰⁴ Banque Internationale v. Nat'l City Bank of New York (1929) 133 N. Y. Misc. 527, 233 N. Y. Supp. 255.

¹⁰⁵ See 28 Am. J. Int. Law (1934) Supp. 10; State of Russia v. Nat'l City Bank of New York (1934) 69 F. (2d) 44.

¹⁰⁶ Moscow Fire Ins. Co. v. Bank of New York & Trust Co. (1939) 280 N. Y. 286, 20 N. E. (2d) 758, *aff'd* (1940) 309 U. S. 624.

¹⁰⁷ U. S. v. Pink (1942) 315 U. S. 203.

regrettable deviation from well-settled principles of international law.¹⁰⁸

In Europe, where litigation was more frequent, all objections finally vanished; the personal law has won full victory. The power of a state to establish a legal person susceptible of being recognized everywhere implies a power to terminate it with extraterritorial effect. Hence, the courts accepted the proposition that the Russian corporations had ended.¹⁰⁹

What then happens to the assets left by a former Russian corporation in another country? Unanimously, the courts hold that the confiscatory effect of the Soviet legislation cannot reach assets situated abroad. One reason adduced is that such confiscation violates a stringent policy of the forum.¹¹⁰ A more convincing argument regards the character of the fiscal privilege claimed by the Soviet Government as necessarily limited to the territory under its sovereignty.¹¹¹ While there is some old divergence of opinion about the legal character of a right of inheritance that a state ascribes to itself, the Soviet State had evidently exercised the right of a state to occupy

¹⁰⁸ BORCHARD, "Extra-territorial Confiscations," 36 Am. J. Int. Law (1942) 275; JESSUP, "The Litvinov Assignment and the Pink Case," *id.* 282, 285; Note, 51 Yale L. J. (1942) 848; LAUTERPACHT, Annual Digest 1938-1942 (1942) 141, 150.

¹⁰⁹ England: Lazard Bros. & Co. v. Midland Bank, Ltd. [1932] 1 K. B. 617, *aff'd*, House of Lords [1933] A. C. 289, Clunet 1934, 159; *In re* Russian Bank for Foreign Trade [1933] 1 Ch. 745, Clunet 1934, 445.

Belgium: App. Bruxelles (July 11, 1936) Revue Crit. 1937, 121.

France: Cour Paris (June 13, 1928) Revue 1929, 93; and (July 22, 1929) Clunet 1929, 1095 expressly reversing its stand of May 17, 1927, Clunet 1928, 131. Cass. (req.) (July 29, 1929) D. H. 1929, 457, Clunet 1930, 680 Revue 1931, 342; Trib. com. Seine (Jan. 20, 1936) Revue Crit. 1937, 117; Trib. com. Seine (Jan. 15, 1934) Revue Crit. 1935, 468 and Cour Paris (July 15, 1935) Revue Crit. 1936, 158 (bank accounts necessarily stopped at the date of nationalization).

Germany: KG. (Oct. 25, 1927) JW. 1928, 1232, IPRspr. 1928 No. 14, and especially RG. (May 20, 1930) 129 RGZ. 98, JW. 1931, 141, IPRspr. 1930 No. 9; RG. (July 11, 1934) JW. 1934, 2845, IPRspr. 1934 No. 12, Clunet 1935, 164; 6 Giur. Comp. DIP. § 245.

Poland: S. Ct. (Dec. 4, 1929) Clunet 1931, 770.

Switzerland: Despite nonrecognition of the Soviet Government, see *supra* n. 96.

¹¹⁰ Swiss BG. (July 13, 1925) 51 BGE. II 259, 264; App. Paris (June 13, 1928) Clunet 1929, 119. See also MAKAROV, Précis 220.

¹¹¹ Hamilton v. Accessory Transit Co. (N. Y. 1857) 26 Barb. 46; The Jupiter [1927] P. 122, 250.

ownerless property (*bona vacantia*), a right internationally confined to assets within the territory of the state. Whatever the intention of the Soviet Government may have been, another state is entitled, on its own soil, to deal with the assets according to its own conceptions.

Generally, on the request of a national creditor or stockholder, an administrator was appointed by a competent court.¹¹² Business managed by local agents of the defunct corporations was liquidated.¹¹³ In New York, branches of Russian insurance companies have been liquidated under the Insurance Law.¹¹⁴

Are shareholders, however, able to join in a suit to continue the former corporation? While this was held impossible in Germany,¹¹⁵ the device of a *de facto* company has been used in France and Belgium,¹¹⁶ if there were common assets to be administered in the country.¹¹⁷ Officers of the former company may be considered administrators.¹¹⁸ The nationalized corporation is liable to be sued for the debts of the old firm at least those to creditors who are nationals of the forum.¹¹⁹

¹¹² France: Cour Paris (Oct. 31, 1935) Clunet 1936, 337.

Germany: BGB, § 1913.

Switzerland: BG. (Oct. 26, 1929) 55 BGE. I 289, Clunet 1930, 1164.

For England, recommended by WORTLEY, 14 Brit. Year Book Int. Law (1933) 8; Latvia, Laws of April 17, 1925 and Sept. 16, 1927, and Poland, Decree-Law of March 22, 1928, cf. Polish S. Ct. (Dec. 4, 1929) Clunet 1931, 770 expressly prescribed liquidation, while Estonia, Decree of Oct. 27, 1920 provided for compulsory domestication of branches of Russian stock corporations.

¹¹³ Great Britain: Companies Act, 1929, § 338 (2); 1948, s.400.

United States: N. Y. Civil Practice Act, s.977-b.

¹¹⁴ Matter of People (Russian Reinsurance Co.) (1931) 255 N. Y. 415, 175 N. E. 114.

¹¹⁵ RG. (May 20, 1930), 129 RGZ. 98.

¹¹⁶ App. Bruxelles (July 11, 1938) 41 Bull. Inst. Int. (1939) 273 No. 10934; Trib. comm. Seine (June 29, 1932) Clunet 1934, 662; cf. BAUDOUIN, Contribution à l'étude de la société de fait (1931).

¹¹⁷ In absence of such property, jurisdiction has been denied; see Cour Paris (June 15, 1937) Clunet 1937, 812.

¹¹⁸ Trib. com. Seine (June 17, 1934) Clunet 1935, 117.

¹¹⁹ Cour Paris (March 29, 1938) Deutsche Bank v. Ass'n des Porteurs etc., Clunet 1938, 1017; *id.* (April 12, 1938) Deutsche Bank v. Banque Internationale de Petrograd, Nouv. Revue 1938, 617.

Again, when uncertain situations are apt to arise, winding up or bankruptcy (*liquidation judiciaire*) may be ordered at any moment at the request of shareholders or creditors, respectively.¹²⁰ In this case, any theory of universality being excluded by the disappearance of the Russian legal entity, every country conducts separate proceedings, although a receiver may be appointed at a place where refugee directors and shareholders control the business *de facto*.¹²¹

After World War II, these principles have been followed to determine the effects of the nationalizations in Eastern Europe.¹²² Under the special circumstances of German interzonal law, seat transfers to the Western zones secured identity with and continuance of the company;¹²³ but even without such indication of an intent to stay in business the existence of a company was asserted if only some unexpropriated asset of it was situated in Western Germany.¹²⁴

¹²⁰ France: See the decisions of Trib. com. Seine of 1934 to 1936, reported in Clunet 1935, 125; Revue Crit. 1935, 491; 1937, 117. Assets distributed according to French law, also to Russian stockholders, Cass. (March 2, 1955) Clunet 1956, 150.

Belgium: Trib. com. Liège (March 25, 1938) 41 Bull. Inst. Int. (1939) 273 No. 10933: the company continues to function in Belgium but must be dissolved at the request of any stockholder to satisfy first the non-Russian creditors, and after them the non-Russian shareholders. Difficulties arising from the territorial limits of liquidators appointed in France are illustrated in App. Bruxelles (July 11, 1938) summarized in 41 Bull. Inst. Int. (1939) 273 No. 10934; Swedish H.D. (Oct. 19, 1945) 15 Z. ausl. PR. (1949/50) 501.

England: Even at the instance of foreign creditors, *In re Azoff-Don Commercial Bank* [1954] Ch. 315, 333.

¹²¹ App. Bruxelles (July 11, 1936) Revue Crit. 1937, 121.

¹²² United States: *A/S Merilaid & Co. v. Chase National Bank* (1947) 71 N.Y.S. (2d) 377 (seat transfer of Estonian corporation to Sweden recognized); *Talmon v. Societatea Romana Tentru Industria de Bumbac* (1954) 132 N.Y.S. (2d) 776 (liquidation of Rumanian company under N. Y. Civil Practice Act. s. 977-b).

Belgium: Cour Bruxelles (June 25, 1947) Clunet 1950, 864, 882 (liquidation of Lithuanian company).

Austria: OGH. (July 9, 1948) 21 SZ. (1946/48) No. 114 (execution by Austrian curator of Czech company); OGH. (May 31, 1951, June 3, 1953) 24 SZ. (1951) No. 156, 26 SZ. (1953) No. 145 (Austrian assets of Czechoslovakian, Yugoslavian partnership liable for preconfiscatory debt as against Austrian creditor); LG. Wien (March 3, 1951) Clunet 1953, 164 (appointment of curator on request of shareholders of Hungarian corporation).

¹²³ See IZRspr. 1945-53, Nos. 75-109; Cf. also *supra* ch. 19, n.80a.

¹²⁴ OLG. Bamberg (Jan. 30, 1948) IZPspr. 1945-53 No. 75; OLG. Frankfurt (Dec. 21, 1953) NJW. 1954, 644, IZRspr. 1945-53 No. 83b. cf. SERICK, 20 Z. ausl. PR. (1955) pp. 86ff.