

**Session of Warsaw – 1965**

**Companies in Private International Law**

*(Twenty-eighth Commission, Rapporteur : Mr Georges von Hecke)*

*(The French text is authoritative. The English text is a translation.)*

*The Institute of International Law,*

*Taking up* this subject already dealt with at its Sessions at Hamburg (1891) and New York (1929) and taking into account the work recently done by the Conference on Private International Law at The Hague and by the International Law Association ;

*Desiring* to make a contribution towards overcoming the controversy which exists at the present time with regard to the connecting factor determining the law governing companies ;

*Taking into account* the interest of the international community in intensifying international economic relations by enabling companies to deploy their activities in States other than the State the law of which governs the company, and to do so directly and exclusively under that law ;

*Being of the opinion* that in order to give due consideration to this interest it is necessary to trace the limitations which States should observe in the exercise of their power to apply the provisions of their own legislation to foreign companies especially those provisions enacted with the purpose of protecting municipal creditors of foreign companies or of ensuring equal opportunities of competition between foreign companies and companies governed by the municipal law ;

*Recommends* to all States to adopt the following rules in order to resolve the conflicts of law with regard to companies formed under a municipal law :

**First Article**

A company is governed by the law under which it has been incorporated.

## **Article 2**

Any company established in accordance with the law mentioned in the First Article will be recognized in all other States as a corporate person.

## **Article 3**

If a company's actual seat is situated outside the territory in which the law of its incorporation is in force and if the principal business activities of the company take place outside that territory, the recognition of the company as a corporate person may be refused if its constitution is not in accordance with the law of the place where it has its actual seat.

## **Article 4**

If a company's actual seat is situated outside the territory in which the law of its incorporation is in force and if the company has no real connection with that territory, the recognition of the company as a corporate person may be refused if its constitution is not in accordance with the law of the place where it has its actual seat.

The real connection must be established by facts other than the mere indication of a registered office, and may in particular consist of a place of business in the territory, of the origin of the share or loan capital of the company, of the nationality or habitual residence of the shareholders or of those in control of the company.

## **Article 5**

The actual seat of a company is the place at which it has its principal centre of control and management, even if the decisions which are taken at that place follow directives given by shareholders who reside elsewhere.

## **Article 6**

A company which is recognized in accordance with the preceding provisions enjoys all rights which are conferred upon it by the law by which it is governed, except rights which the State by which it is recognized refuses to grant either to foreign nationals in general or to companies of a corresponding type governed by its own law.

It can however carry on its business only under the conditions which are imposed by the local laws concerning the carrying on of business.

## **Article 7**

The law governing the company applies to the form and to the substance of its constitution.

It applies in particular to the requirements concerning its capital, both at the time of its incorporation and in the course of its existence.

## **Article 8**

The law governing the company determines what organs the company must have in order to operate, the powers of those organs, the rights and obligations of the persons serving as organs of the company and of the shareholders, both among each other and in relation to the company, including in particular the protection of minority shareholders and the replacement of lost or stolen share documents.

## **Article 9**

If a company has a place of business in a State other than the State of its incorporation, the State in which that place of business is situated may impose upon the company obligations with regard to :

- a) the publication or the registration of its constitution, its annual accounts, and the powers conferred upon its organs ;
- b) the appointment of a representative in charge of the management of the place of business and, if required, the application to this representative of the local laws concerning the powers and duties of members of organs of management ;
- c) the application of the local provisions concerning the representation of the employees within the enterprise, but only of those which operate at the level of the plant or place of business ;
- d) the protection of creditors through the creation of financial securities.

The State in which the place of business is situated may also, in the interest of the creditors and under the conditions laid down in its own law, liquidate the place of business and the other assets belonging to the company situated in its territory.

## **Article 10**

The public issue of shares is governed by the provisions of the law which governs the company as well as by the law of the country in which the issue takes place. The public issue of debentures is governed by the provisions of the proper law of the contract of loan as well as by the law of the country in which the issue takes place.

## **Article 11**

The powers of the organs of the company to act on its behalf are governed by the law which governs the company. The liability of a person who has entered into a transaction by which the company is not bound is governed by the law of the place at which he has entered into that transaction.

## **Article 12**

If a contract has been concluded in a country other than that in which the company is incorporated, the company cannot rely on any limitations of the power to act on behalf of the company which the law governing the company imposes upon the organ of the company that has concluded the contract if such limitations do not exist under the law of the place where the contract was concluded and if the other party to the contract did not have reasonable notice of the provisions of the law governing the company.

For the purposes of the preceding provision a contract is deemed to have been concluded in a given country only if it has been concluded there *inter praesentes* or, in the case of contracts by correspondence, if both the offer and the acceptance have taken place in that country.

## **Article 13**

Any liabilities incurred by reason of a violation of the law governing the company are governed by that law.

## **Article 14**

Any law which would be applicable by virtue of the preceding articles can be excluded if in a given case its application would lead to a result clearly incompatible with the public policy of the forum.

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(10 September 1965)