1933

The Mexican Law of Business Organizations

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SOUTHERN CALIFORNIA
LAW REVIEW

VOL. VI MARCH, 1933 No. 3

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1. PURPOSE OF ARTICLE

It is the purpose of this article to present a survey of the Mexican law of business organizations as it has existed during the past half century, under the Civil Code of 1884 and the Code of Commerce of 1889. One or more subse-

†[This is the second of a series of articles on Mexican law by these authors. The first article, entitled "The Mercantile Act: A Study in Mexican Legal Approach," appeared in 6 SOUTHERN CALIFORNIA LAW REVIEW, 1 (1932). Subsequent articles will appear in future issues of the REVIEW.—Ed.]

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quent articles will discuss the changes effected by the contemporary new Civil and projected Commercial Codes.[1]

The Civil Code of 1884 was adopted almost *in toto* by the several States of the Mexican Union in the formation of their state Civil Codes. These state codes will continue in force for some time to come, since in all probability several years will be required for the various States to enact new Civil Codes, modeled upon the new federal Civil Code. The federal Code of Commerce controls commercial matters throughout the country, but the various States have their own Civil Codes, the federal Civil Code being in force only in the Federal District, comprising the city of Mexico and its suburbs, and in the federal Territories of Northern and Southern Lower California.[2] The discussion in this article relating to civil matters[3] will be based entirely upon the provisions of the federal Civil Code of 1884. The state Civil Codes present only slight modifications, which it will not be practicable to notice.

2. CONTRACTUAL THEORY

In the common law, a corporation is sharply distinguished from a partnership, in that the one is created by a charter granted by the State, whereas the other is brought into existence by the agreement of the parties. There is no such line of demarcation between the various forms of business organizations in the Mexican jurisprudence, nor in the civil law generally. In the Mexican law, all forms of business organizations are purely contractual and are formed entirely by the agreement of the parties, without the intervention of any act upon the part of the State.[4] The various forms which take the place of the common law corporation and partnership are treated together in the Codes, being given the same name, *"Sociedad"*—literally, "Society." Their essentially consensual character is evidenced by the fact that, where not over three hundred pesos is involved, it is possible, in certain situations, to create an organization recognized

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[1]The new Civil Code was published by the President August 30, 1928, and went into effect October 1, 1932, by presidential decree of August 29, 1932 (74 Diario Oficial, No. 1, p.3 (Sept. 1, 1932)) under authority conferred by the National Congress. Acts of Jan. 7, 1926, Dec. 6, 1926, and Jan. 3, 1928.

A draft of the new Commercial Code has been submitted to the President by a commission appointed for that purpose, and has been published by the Secretary of Industry, Commerce and Labor, as "Proyecto para el Nuevo Código de Comercio" (2 vols., Mexico City, 1929 & 1930). The President has been vested by the Congress with authority to put this new Code into effect by presidential decree, which, however, had not been issued up to the time this article went to press.

The new Codes have been composed to concord with the fundamental organic reforms introduced by the Constitution of 1917 and will effect important changes in the methods of organizing for business purposes.

[2]The new federal Civil Code is given a somewhat wider effect than its predecessor, in that its provisions are controlling on all federal matters, including commerce, throughout the Republic. Compare: Code of Commerce (1889), c.2; Civil Code (1932), Art. 1. Previously the state Civil Codes have prevailed in general in this regard.

[3]The distinction between civil and commercial matters has been discussed in a previous article in this series. Barker and Cormack, The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW, 1 (1932).

[4]Under certain circumstances, foreiguers must secure a permit to form an organization to acquire or hold real estate.

as a separate legal entity without the execution of any writing and without any sort of entry upon the public records.[5] The existence of such a legal entity may even be implied.[6]

There are in the Mexican law requirements, as to most organizations, that documents be deposited or recorded with public officials, but these regulations are made only to furnish proof of the validity of acts or to give notice for the protection of the puhlic, and not because of a governmental grant of legal personality.

3. LEGAL ENTITY CONCEPTION

By the express language of the Codes, all Mexican business organizations, except certain informal organizations in the nature of loosely formed joint ventures,[7] constitute legal entities,[8] unlike the common law distinction in this regard between corporations and partnerships. This is true, with the exception mentioned, of all the various forms covering the field occupied by the common law corporation and partnership. The interest of those investing in any of them is regarded as personal property,[9] although the interest of the organization in its property is regarded as real or personal, depending upon the character of such property.[10]

The blending of the treatment of the various forms of business organizations in the Mexican law, in regard to their contractual basis, their existence as legal entities and other attributes, is due to the nature of the historical development of the law of business organizations in Mexico. In the common law the

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[5]Civil Code (1884), Art. 2225. The reader is reminded that here, as throughout this paper, the law stated is that which existed prior to the promulgation of the new federal Civil Code, which became effective Oct. 1, 1932, and prior to any new Code of Commerce which may be enacted.

[6]Civil Code (1884), Art. 2227; 4 Manuel Mateos Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 383–384.

[7]These are the momentary associations and associations in participation, treated later in the text in Sec. 17, Associations, or Joint Ventures. Consult, *infra:* Pp. 218–219.

[8]Civil Code (1884), Arts. 38(3) & 2230; Code of Commerce (1889), Art. 90.

Pedro Lascuráin, a contemporary Mexican writer, has contended that it is not sound on principle to conceive of an organization as a legal entity if there is individual liability upon the part of the members. He also contends that the same is true if any attributes of the legal status of the organization can be fcund which indicate the existence of joint ownership of its property upon the part of its members, such as a provision for dissolution upon the death of one of the members. Pedro Lascuráin, Las Personas Morales en Relación con las Sociedades Civiles y Comerciales, 1 Revista Juridica de la Escuela Libre de Derecho, 12, 25–28 (Mexico, 1921). His contentions are in conflict with the direct language of the Codes. He would make a distinction such as that which exists under the common law between the corporation and the partnership, although he does not make any comparative reference to this law. He feels that a legal entity is the result of economic necessity and that the existeuce of the legal attributes to which he refers is proof of the absence of such necessity.

Eduardo Pallares, who will be referred to in the text, has suggested that business organizations which are recognized as legal entities are, nevertheless, not truly such, because there is no dcpersonalization of their property. In the case of a business organization, he argues, it is always possible to point out certain human beings who hold the ultimate beneficial interest in the property, whereas in the case of a true legal entity, such as the church, no specific number of persons can be found who are the beneficiaries. Eduardo Pallares, Derccho Comercial Mexicano (1922), 57. In using the church as an illustration, be bases his argument upon an assumption of looser practice than prevails in many American churches in regard to church membership. Perhaps a better illustration of his contention, in the eyes of a common law reader, would be a municipal corporation. It would hardly be feasible to identify the persons domiciled within it at any given time.

[9]Civil Code (1884), Art. 689.

[10]Civil Code (1884), Art. 689.

conception of a corporation developed from the royal grant.[11] The royal grant of a charter to private individuals, composing such an organization as the East India Company, was the creation of a legal entity by act of the State, and in the common law it is still conceived that an act of the State is required if a legal entity is to be brought into existence. In the Mexican law, on the other hand, the conception of a juristic person has developed from that of a loosely amalgamated partnership, through the introduction of provisions for the limitation of personal liability in connection with certain contracts of the partnership.[12] In a broader sense, in the Mexican jurisprudence the law relating to business organizations is basically a development of the law of agency. In the *Siete Partidas*, or Seven Parts, the great landmark of Spanish law promulgated by Alfonso the Wise in 1505, the *compañia*, or company, is given the simple definition of a joining together of two or more persons with the intention of gaining something from the union[13] and there is no provision for limitation of personal liability. From this early conception of partnership there has developed the modern Mexican law of all forms of business organizations.[14] All types have been thought of as permitted variations of the original simple contract.

It is a natural result of this development that today the various forms of business organizations known to the Mexican law are such that they can not be given fixed classifications as corporations or partnerships, as those terms are known to the common law reader, and their exposition will be in the form of a common treatment. An attempt will be made to indicate the features wherein the various types resemble, or differ from, the common law organizations.

It may be of interest to note the following summary by a Mexican writer, enumerating the various consequences resulting from the conception of a business organization as a separate legal entity. According to Eduardo Pallares, perhaps the most brilliant contemporary Mexican juristic writer, the consequences are as follows:

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[11]1 Fletcher, Private Corporations (1917), 7.

[12]T. Esquivel Obregón, Latin American Commercial Law (1921), 155. This development has occurred, notwithstanding the fact that in the Roman law, insofar as the conception of corporate personality existed, it could be acquired only by an act of the State. Buckland, Manual of Roman Private Law (1928), 34; Buckland, Text-Book of Roman Law (1921), 175 & 178. In this connection the common law, paradoxically, is closer to the Roman law than the civil.

[13]"Compañia es ayuntamiento de dos omes, o de mas, que es fecho con entencion de ganar algo de so vno (sic), ayuntandose los unos con los otros." Ley 1, Titulo X, Quinta Partida (Barcelona ed., 1843).

[14]Lascuráin finds in the Roman law the origin of the conception that a group of private persons not constituting a governmental or ecclesiastical organ may have a legal personality distinct from that of the individuals composing it (translations of Samuel P. Scott):

"All persons are not permitted indiscriminately to form corporations, associations, or similar bodies, for this is regulated by laws, Decrees of the Senate, and constitutions of the Emperors. Associations of this description are authorized, in very few instances; . . . ." Gaius, on the Provincial Edict, Dig. 3.4.1.

"As the Senate, in the time of the Divine Marcus, permitted bequests to be made to corporations, there is no doubt that if a bequest is made to a body which has a legal right to assemble, the latter will be entitled to it. However, a legacy left to one which has no right to assemble will not be valid, unless it is specially left to the members composing the same, for the latter will then be permitted to receive the legacy, not as an association, but as separate individuals." Paulus, on Plautius, Dig. 34.5.21. Pedro Lascuráin, Las Personas Morales en Relación con las Sociedades Civiles y Comerciales, 1 Revista Juridica de la Escuela Libre de Derecho, 12 & 15–20—esp. 20 (Mexico, 1921).

"1. The estate of the entity is distinct from that of the members individually.

"2. The entity has legal representatives for all classes of juristic acts.

"3. It is able to be a party to litigation.

"4. The members individually may be debtors or creditors of the entity.

"5. The entity in its character as a merchant may be placed in bankruptcy, and the members need not also go through bankruptcy.

"6. The entity has a domicile distinct from that of its members.[14a]

"7. It incurs civil and criminal liabilities.

"8. The rights of the members are personal property, even when the estate of the entity includes real property.

"9. Since the assets belong to the legal entity, they are not held in joint ownership.

"10. The entity has a nationality.

"11. Set-off does not operate between debts owed to the legal entity by third parties and debts owed to the same parties by its members individually.

"12. Individual creditors of members do not share with creditors of the entity in the distribution of its assets."[15]

It may be added that in the Mexican jurisprudence any business organization constituting a legal entity is *ipso facto* able to acquire property by will[16] or gift.[17]

4. COMPOSED OF PERSONS OR OF CAPITAL

While, as we have seen, in the Mexican legal system there is no line of demarcation corresponding to the common law distinction hetween corporations and partnerships, from the standpoint of formation by charter of the State as distinguished from act of the parties, there is in the Mexican jurisprudence a distinction drawn hetween different classes of business organizations. The division is based upon somewhat the same feeling as the common law distinction hetween corporations and partnerships, although the parallel is not closely marked and does not lead to similar results. The distinction in the Mexican jurisprudence is expressed as one hetween organizations which are formed *intuitu personae,* with a view to the person, and those formed *intuitu capitalis,* with a view to the capital.[18] It is said that the former are combinations of the "interests" of persons, whereas the latter are combinations of "shares" of

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[14a]As to the Mandatory Form consult: Puerto Rico v. Russell & Co., 53 Sup.Ct. —, 77 L.Ed.(Adv.Ops.) — (March 13, 1933) (discussing similar provisions of the Puerto Rican codes).

[15]Eduardo Pallares, Derecho Comercial Mexicano (1922), 53–56.

[16]Eduardo Pallares, Derecho Comercial Mexicano (1922), 63, discussing Civil Code (1884), Arts. 3288, 3289 & 3301. Certain restrictions upon the acquisition of real property by foreigners, religious bodies and certain forms of business organizations are contained in the Constitution of 1917, Art. 27.

[17]Eduardo Pallares, Derecho Comercial Mexicano (1922), 62–63, discussing Civil Code (1884), Art. 2629, and Code of Commerce (1889), Art. 90.

[18]Manuel Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 94 & 99; Antonio de J. Lozano, Código de Comercio (1889, anotado 1899), annotation to Art. 178; Eduardo Pallares, Derecho Comercial Mexicano (1922), 50.

capital.[19] It is felt that in organizing the former the personal qualities of the members are considered, whereas in organizing the latter only the amounts of capital invested are taken into consideration. The distinction is regarded as fundamental and a great deal is written about it, but to the foreign reader much of the discussion seems purely theoretical. No express mention of the distinction is to be found in any of the Codes, but its existence is responsible for many code provisions which will seem strangely arbitrary to the common law practitioner unless it is borne in mind.

Eduardo Pallares has deduced the following consequences from the distinction: If a contract of formation of an enterprise is celebrated with a view to the persons:

> "1. The contract is rescinded by the death or incapacity of one of the members. 2. The rights of members in the company capital can not be assigned to third parties except with the unanimous consent of the other members. 3. The contract may be rescinded because of error as to the identity of the persons involved."

If a contract of organization is entered into with a view only to the contributions of capital:

> "1. Error in regard to the persons involved is not ground for rescission. 2. The company is not rescinded or liquidated because of the death or incapacity of the members in general, nor because of that of the administrators. 3. The rights of the members are represented by economic values denominated shares, which they may transmit without the necessity of securing the consent of the other members."[20]

Pallares points out that organization *intuitu capitalis* is in accord with modern economic tendencies and is better adapted to the formation of great enterprises.

5. TERMINOLOGY

The wide scope of the Spanish term *sociedad*, or society, which in legal parlance largely has superseded the term *compañia* of the *Siete Partidas*, creates difficulties in the rendition of the Mexican law into English. *Sociedad* is the common term used in the Codes to refer to organizations of widely differing types, some resembling the corporation and others the partnership of the common law. It also embraces non-commercial organizations, such as matrimonial unions. There is no English word which can serve as a satisfactory synonym, and adjectives will be used to distinguish the various types of organizations. The Spanish word *corporación*, or corporation, applies only to religious and municipal organizations.

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[19]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 88–103; Lozano, Código de Comercio (1889, anotado 1899), annotation to Art. 178; Eduardo Pallares, Derecho Comercial Mexicano (1922), 50. The writers disagree as to the nature of the distinction between "interests" and "shares" and all do not agree that it coincides with the distinction between enterprises organized *intuitu personae* and those organized *intuitu capitalis*.

[20]Eduardo Pallares, Derecho Comercial Mexicano (1922), 50.

6. LITERAL INTERPRETATION

The Mexican method of juristic interpretation is more literal than that of the common law. This applies particularly to the interpretation of codes in the lower courts. As a consequence of the literal viewpoint, there is, for example, in the Mexican law no "piercing of the corporate veil" and only a comparatively limited doctrine of implied corporate powers. It can hardly be said that there is any law of trusts, or of implied authority on the part of agents. The Codes are very comprehensive in their provisions and, because of their literal application by the courts, persons who comply strictly with the letter of the law are given greater protection than would be accorded in common law jurisdictions under similar circumstances. In like manner, technical compliance with the literal requirements of the Mexican law affords a higher degree of security than reliance upon general principles of jurisprudence. For this reason, in a consideration of the Mexican law, attention must be devoted primarily to the language of the Codes, as distinguished from the decisions of the courts and the opinions of text-writers. This must be done to an extent more nearly exclusive than would be appropriate under the common law.

To the mind of one learned in the Mexican law, the opinions of the legal writers are valuable rather as illustrating the juristic background in the light of which a particular code provision was adopted, than as co-ordinate authorities. When the language of a code provision is clear and specific, there is no room for "rules of reason" in its interpretation. On the other hand, the provisions of the Codes frequently are very general and abstract in nature, making interpretation inescapable. On the whole, therefore, the work of the juristic writers is as important as in common law countries.

7. CIVIL DISTINGUISHED FROM MERCANTILE, OR COMMERCIAL

In a previous article a study was made of the distinction between civil and mercantile acts.[21] As elsewhere throughout the Mexican law, this distinction applies to business organizations. In the present connection the distinction is fundamental. A company can not be organized without a definite decision as to its character in this regard. If it is mercantile, it is governed by the federal Code of Commerce, which controls as to mercantile matters throughout the country.[22] If civil, it is governed by the federal Civil Code,[23] applicable to the Federal District and Territories, or by the Civil Code of one of the States.[24] Excepted from the foregoing are certain classes of organizations governed by special laws, which will not be treated in this article. Among these are banks, pawnbrokers, railroads, warehouses and insurance companies.

Whether an organization is civil or mercantile depends upon its purposes. If these involve the performance only of mercantile acts, as defined in the Code of Commerce,[25] and as set forth fully in the earlier article referred to,[26] the

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[21]Barker and Cormack, The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW, 1 (1932).

[22]Code of Commerce (1889), Art. 1; Civil Code (1884), Art. 2234.

[23]Civil Code (1884), Art. 2234.

[24]A civil organization is governed by the Civil Code in force in the State or territory where it is domiciled.

[25]Code of Commerce (1889), Arts. 75 & 76.

[26]Barker and Cormack, The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW, 1, 18 (1932).

organization is mercantile, otherwise it is civil.[27] The reason for this method of approach is that the Civil Code, the older in historical origin, is thought of as setting forth the general body of legal principles, derived largely from the Roman law. The Commercial Code, arising out of the necessities of modern business, commencing with the dissolution of the feudal system,[28] is regarded as establishing special provisions, in the nature of exceptions to the general rules, to take care of particular situations.[29] Therefore the provisions of the Civil Code apply unless it can be shown affirmatively that some portion of the Commercial Code is applicable.[30] Under the distinction as stated, an organization formed to execute both mercantile and civil acts is civil. However, the parties may stipulate that such an organization shall be governed by the commercial law,[31] and customarily this is done. The organization is then for all purposes mercantile.

The Code of Commerce provides for the creation of mercantile enterprises in certain forms, but a civil company also is permitted to adopt one of those forms.[32] As the organization remains civil in nature,[33] such action creates seri-

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[27]This statement of the distinguishing criterion is in general accord with: Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 197-219—esp. 212 & 219; Jacinto Pallares, Derecho Mercantil Mexicano (1891), 922; and Eduardo Pallares, Derecho Comercial Mexicano (1922), 47; and with the direct language of the Civil Code: "Organizations are civil or commercial. Those are commercial which are formed for affairs which the law designates as acts of commerce; the others are civil." Civil Code (1884), Art. 2233. The language of the Commercial Code, however, is in conflict: "The following are considered in law merchants: . . . Organizations formed in accordance with the mercantile laws . . . ." Code of Commerce (1889), Art. 3(2). The conflict between these sections arose in the process of copying portions of the Spanish Code. Jacinto Pallares, Derecho Mercantil Mexicano (1891), 924.

Further confusion is added by another provision of the Civil Code: ". . . But it can be stipulated that even civil organizations are to be governed by the mercantile laws." Civil Code (1884), Art. 2234. This provision generally is ignored as a dead letter.

Complications which arise in the application of the distinction between civil and mercantile organizations have caused writers to disagree as to what should be taken as the distinguishing criterion. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 210.

[28]In the earlier article referred to it is pointed out that the first true codifications of the mercantile law, as such, are to be found in the two Colbert Ordinances of Louis XIV, in 1673 and 1681. Barker and Cormack, The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW, 1, 6 (1932).

[29]Paulino Machorro Narváez, Sociedades Anónimas—Su Incapacidad para Adquirir Propiedad Rústica, 1 Revista General de Derecho y Jurisprudencia, 161 & 163 (Mexico, 1930).

[30]Code of Commerce (1889), Arts. 2 & 81; Jacinto Pallares, Derecho Mercantil Mexicano (1891), 755.

[31]This is expressly provided by Civil Code (1884), Art. 2236: "An organization which is formed at the same time for affairs which are commercial and for those which are not, shall be considered civil, unless the parties have declared that they desire to subject the organization to the rules relating to mercantile organizations." The language of this section seems to negative the suggestion which has been made that in such a case the test should be the class of acts which is habitually performed by the organization. Jacinto Pallares, Derecho Mercantil Mexicano (1891), 908 & 922; Eduardo Pallares, Derecho Comercial Mexicano (1922), 47; Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 213, n.9.

[32]Code of Commerce (1889), Art. 91; Civil Code (1884), Art. 2234. Two advantages from the adoption of a mercantile form by a civil enterprise have been suggested: (1) that under the Commercial Code the articles of association and the by-laws may be changed by a pre-ordained majority vote, whereas unanimity is required under the Civil Code; and (2) that under the Commercial Code there is no provision, such as that contained in the Civil

ous difficulties in determining to what extent each body of law is applicable. For example, is the extent of the personal liability of the individual members a matter included within the scope of the form of the organization and therefore governed by the commercial law; or is it dependent upon the inherent nature of the organization and so governed by the civil law? The problem stated is one of practical importance, as there is no provision in the Civil Code for personal liability upon the part of members of an organization as such,[34] whereas such liability exists in connection with several forms of commercial organizations.

The division of the body of the law into two parts, relating respectively to civil and to commercial acts, is largely an expression of the Latin temperament as applied to social and legal problems.[35] The fundamental principles underlying the two portions of the law are much the same.[36] It is therefore not surprising to find that in practice the distinction between civil and commercial acts is extremely technical in application, turning upon niceties of construction of the language used in the Commercial Code in defining acts of commerce.[37]

All Mexican individuals as well as organizations are classified as either civil or mercantile. The latter, denominated merchants, are subject to special requirements in regard to keeping books, publishing notices and the like,[38] based upon a belief that there is a public interest in promoting rectitude upon the part of persons actively engaged in business and in stimulating public confidence in them.[39] It is not within the purview of this article to discuss the application of the distinction between the civil and commercial portions of the law to individuals. It is desired here simply to point out that whether a business organization is civil or mercantile in certain instances may determine the status of its active members as individuals in that regard.[40]

Eduardo Pallares has summarized the practical differences between civil and mercantile organizations thus:[40a]

Code, to the effect that before a sale of a member's interest is consummated, the other shareholders must be notified, and that they then have a preferential right of purohase at the price for which the interest is offered for sale, to be exercised within a specified period. Narváez, Sociedades Anónimas—Su Incapacidad para Adquirir Propiedad Rústica, 1 Revista General de Derecho y Jurisprudencia, 161 & 166 (Mexico, 1930). In the same article the author discusses problems arising in connection with such organizations, which he terms hyhrid.

[33]Jacinto Pallares, Derecho Mercantil Mexicano (1891), 923–927—esp. 925; Code of Commerce (1889), Art. 91.

[34]Under the Civil Code there never is personal liability upon the part of the owner of an interest, or a shareholder, as such, beyond the amount of his suhscription. Civil Code (1884), Arts. 2231, 2259, 2303 & 2304. It is true that under the Civil Code there is personal liability, upon another theory, on the part of those members actively engaged in the conduct of the enterprise. Civil Code (1884), Art. 2258.

[35]This has been developed fully in the earlier article referred to: Barker and Cormack, The Mercantile Aet: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW, 1, 8–10 (1932).

[36]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 197.

[37]Code of Commerce (1889), Arts. 75 & 76.

[38]Code of Commerce (1889), Arts. 3–17 & 33–50. Also, only merchants are subject to bankruptcy proceedings. Jacinto Pallares, Derecho Mercantil Mexicano (1891), 909.

[39]Jacinto Pallares, Derecho Mercantil Mexicano (1891), 910.

[40]Jacinto Pallares, Derecho Mercantil Mexicano (1891), 909. On the other hand, the company may be mercantile although its members are not. Jacinto Pallares, Derecho Mercantil Mexicano (1891), 921.

[40a]Eduardo Pallares, Derecho Comercial Mexicano (1922), 45–46.

(1) If not over three hundred pesos is involved, no public writing is required to organize a civil organization;[41]

(2) All contracts organizing, modifying, rescinding or dissolving mercantile enterprises must be recorded.[42] With civil enterprises this is required only when a contract of organization transfers or modifies either the title, possession or use of real property, or mortgages upon such;[43]

(3) As mercantile enterprises are considered merchants, they must advertise in newspapers their character as such, keep books of account and preserve their correspondence.[44] There are no such requirements as to eivil organizations;

(4) Mercantile organizations are suhject to the jurisdiction of the federal courts to a greater extent than the civil;

(5) As merchants, mercantile organizations can be placed in bankruptcy.[45] Civil enterprises are subject only to receiverships;

(6) Debts of commercial organizations are subject to shorter periods of limitation.[46]

8. PROTOCOLIZATION AND THE FUNCTION OF THE NOTARY

Every Mexican business organization must be formed by the parties before a *notario* (notary public).[47] This is true as to all organizations having a form prescribed by either of the Codes. It does not apply to the relatively unorganized enterprises which are in the nature of joint ventures.

The parties themselves, or their attorneys-in-fact acting under a formal power,[48] must appear personally before the notary for the process of *protocolización* (protocolization) of the contract of association. In Mexican practice, when a notary acts in regard to a document it is said to be protocolized, because the aetual original of the instrument is spread upon the *protocolo* (protocol), or official book, of the notary and there executed by the parties. The original remains with the notary and the parties receive certificd copies. Protocolization of the contract of association is essential to the validity of the organization, even as among the parties themselves.

While at any time the notary will furnish to the organizers or their successors certified copies of any of the documents he has protocolized throughout the life of the organization and will permit any of the interested parties to inspect

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[41]Civil Code (1884), Arts. 2225 & 2226.

[42]Code of Commerce (1889), Art. 2I(5).

[43]Civil Code (1884), Art. 3194.

[44]Code of Commerce (1889), Art. 16.

[45]Code of Commerce (1889), Arts. 945 & 946.

[46]Code of Commerce (1889), Arts. 153, 1045 & 1047.

[47]Code of Commerce (1889), Art. 93; Civil Code (1884), Art. 2225. In the latter Code an exception is made in the case of organizations in which an amount not over three hundred pesos is involved.

[48]Mexican powers of attorney are treated excellently in a booklet issued by the American Department of Commerce: Powers of Attorney in Mexico, Department of Commerce Circular, C.L. No. 300 (Feb. 1, 1932). Under certain ciroumstances a party is permitted by law to act "officiously," without express power, for another. Civil Code (1884), Arts. 2416-2433.

his protocols at any time,[49] the books are not open to the public. Thus the function of protocolization is not the same as that of the common law recording systems. In Latin American countries the two functions are separate. As to mercantile organizations—there being no such provisions as to civil—the Code of Commerce provides also for the *inscripción* (recordation) of documents in public registers, for the information and protection of the public.[50] To one familiar with the practice in common law countries, this seems to be an expensive and needless duplication, although, as will be seen, something more is accomplished by it than by common law notarial and recording systems.

The explanation of the Mexican system is to be found in the history of the office of notary public in Latin American countries. It is an ancient and honorable office, with its origin far preceding the establishment of recording systems. It has been handed down from the period when few persons were literate and the legal profession was in its infancy. The notary then necessarily represented both parties to the various transactions before him and, in theory at least, he still does so.

Even today the civilian notary is a much more important official than his common law brother. His preservation of the originals of documents is of more value to the parties than the issuance of common law notarial certificates and protects both those executing the documents and third parties[51] against the assertion of false claims later. After he has kept the originals for a term of years, the length of which varies under the notarial laws of the Federal District[52] and the various States, they pass for permanent preservation to the notarial archive office of the jurisdiction which appointed him.[53]

Before protocolizing an agreement, it is the notary's duty to satisfy himself of its legal validity. Consequently, he will not protocolize a contract of association unless he finds it sufficient validly to constitute the enterprise an organization in the form it assumes to adopt. Nevertheless, in spite of the care and precaution he must exercise, if the requirements of the law are validly complied with, he has no discretion to prevent the organization from coming into existence. As yet no Mexican official has been vested with such authority and there is no governmental check upon the issuance of fraudulent stock. It should be noted also that, even though the notary protocolizes a contract of association, his action is not to be construed as in any sense constituting the granting of a charter and the validity of the organization must depend entirely upon the sufficiency of the agreement of association as a contract.

In accordance with the importance of his office, the compensation of the Mexican notary is correspondingly greater than it is in common law countries. His fees in connection with the formation of enterprises are very substantial. Frequently he is an attorney, and in any case is officially deemed competent to prepare documents as well as protocolize them. His fees are fixed in contem-

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[49]A member of the public will be permitted to inspect the documents spread upon the protocol when accompanied by one of the parties thereto or when acting in his behalf.

[50]Code of Commerce (1889), Arts. 18-32.

[51]Third parties are protected through being afforded a means of guaranteeing the date and genuineness of such documents when produced later, particularly in litigation.

[52]Applying also to the federal Territories of Northern and Southern Lower California.

[53]Either the Federal District or one of the States. The President appoints the notaries of the Federal District and Territories.

plation of the preparation of the documents by him and are not reduced when, as has become the usual case in modern practice, the documents are prepared by the attorney of the organizers. The notary enters upon the protocol, after each document, his certification of the authenticity of its execution.

Failure to protocolize a contract of association[54] results in nullity of the operation.[55] Nothing remains but quasi-contractual rights to restitution of payments made or property delivered. All amendments of a contract of association must be protocolized also.[56]

9. RECORDATION

Recordation in registers open to the public, in addition to protocolization, has been resorted to in modern times for more ample protection of the public in connection with mercantile organizations. It bas not been provided for as to civil organizations.[57] Since the originals of documents remain with the notary, recordation consists of the copying of certified copies into the appropriate public registers.

There must be recorded the following documents relating to business organizations: (1) The contract of association, and all amendments; (2) All general powers of attorney executed by the organization, and their revocations; (3) All important grants of authority as executives, and their revocations; (4) Changes in the capital of certain organizations; and (5) The details of all issues of stocks and bonds.[58] There must be recorded also, in the case of certain organizations, the proceedings of the first meeting of stockholders.[59]

Failure to record a document required by law to be recorded does not affect its validity as between the signatories.[60] Such a document, unless it relates to real property and has been duly recorded as such in the real property register,[61] can not be used to prejudice the rights of third parties, but third parties at their option may take advantage of it.[62] Failure to record a contract of association also raises a rebuttable presumption of fraud in the event of bankruptcy.[63]

10. GENERAL SURVEY OF VARIOUS FORMS

In the civil organization it is possible to issue shares of stock, although this is infrequent. There is personal liability only on the part of those members actively participating in the management. In the absence of stock, the common law reader will think of the organization as a limited partnership.

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[54]Unless in the instances, previously indicated, where not required.

[55]Code of Commerce (1889), Art. 93; Civil Code (1884), Arts. 2222, 2225–2226.

[56]Code of Commerce (1889), Art. 94; Civil Code (1884), Arts. 2225, 2235 & 2300.

[57]Under the 1932 Civil Code, to be discussed in a subsequent article, this has been done.

[58]Code of Commerce (1889), Art. 21(1–7, 12 & 14). The requirement relating to changes of capital is made in regard to the anonymous form of organization and in regard to the mandatory form when shares of stock are issued. These forms of organization will be discussed in the text.

[59]Code of Commerce (1889), Art. 21(6). This requirement relates to anonymous organizations using the public subscription method of formation, which will be discussed in the text.

[60]Code of Commerce (1889), Art. 26.

[61]Code of Commerce (1889), Art. 26.

[62]Code of Commerce (1889), Art. 26.

[63]Code of Commerce (1889), Art. 27.

In the "anonymous" form, the first type of mercantile organization to be considered, stock is issued and there is no personal liability. It corresponds to the corporation of the common law.

In the "collective" form, stock is not issued and there is personal liability on the part of all members. It is analogous to the common law general partnership.

In the "mandatory" form, there may or may not be shares of stock. There are two classes of members: those who engage actively in the business and are individually liable; and those who supply capital, without further participation, and assume no personal liability. Here the common law reader, as in the case of the civil organization, above mentioned, again finds the limited partnership.

Co-operatives resemble the organizations of that character with which the common law reader is familiar.

The momentary associations and associations in participation, in the nature of joint ventures, are thought of not as organizations, but rather as joint undertakings on the part of several individuals. They may be said to be governed by contractual and other general principles of law. Under the common law, some of the undertakings included in this category would be found to involve partnership liability.

11. CIVIL ORGANIZATIONS

A. IN GENERAL

Civil organizations are those created to perform civil acts[64] and are governed by the Civil Code[65] of their domicile, that is, either the federal Civil Code[66] or that of one of the States. As previously indicated, the differences between the various Civil Codes are not marked and the discussion in this article is based entirely upon the federal Code. As the federal Code of Commerce, which defines mercantile acts,[67] applies throughout the country, all States necessarily have the same distinction between civil and commercial acts and organizations.[68]

From the Mexican viewpoint, the Civil Code of each jurisdiction is of basic nature, as compared with the Commercial. As already pointed out, the principles set forth in the Civil Codes are of more ancient origin than those contained in the Commercial, and the Civil Codes are regarded as laying down the general principles, to which the latter creates exceptions.[69] Because of this, it is convenient to treat civil organizations first. This is true although, from the

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[64]Civil Code (1884), Art. 2233; consult footnote #27, *supra*.

[65]Civil Code (1884), Art. 2234.

[66]Applying to the Federal District, containing the City of Mexico, and to the federal Territories of Northern and Southern Lower California.

[67]Code of Commerce (1889), Arts. 75 & 76.

[68]The distinction is discussed in Sec. 7, Civil Distinguished from Mercantile, or Commercial, *supra*, pp. 187–190.

[69]It follows from this that even as to mercantile organizations the provisions of the Civil Code are applied when there are no applicable provisions of the Code of Commerce. This is expressly provided for. Code of Commerce (1889), Arts. 2, 81 & 1051.

comprehensiveness of the list of mercantile acts as set forth in the Code of Commerce,[70] most organizations necessarily are commercial in character.

It is provided, as previously noted, that a civil organization, without losing its character as such, may adopt one of the mercantile forms.[71] This provision has been availed of very seldom and is of negligible importance.

B. FORMATION

The provisions of the Civil Code in regard to business organizations are very general in character, unlike the much more detailed provisions of the Code of Commerce. In the discussion of mercantile organizations it will be seen that there are several sharply distinguished forms provided for by the Commercial Code. In contrast with this the Civil Code sets forth provisions relating to civil organizations generally. Therefore it may be said that there is but a single form of civil organization.[72] This is subject to the slight qualification that there is a largely obsolete form known as the "universal," which will be given separate treatment.[73] Differences in detail may exist between civil organizations. For example, stock may or may not be issued.

Assuming that over three hundred pesos is involved, every civil organization must be formed by a protocolized written contract.[74] If under three hundred pesos, it may be formed orally,[75] or its existence may be implied.[76] The Code states that such implication arises when the facts make the existence of the organization a necessary presumption.[77] Since such an organization is recognized as a legal entity,[78] the possibility of its formation in that way illustrates the completely contractual nature of this branch of the Mexican law.

The organizers must protocolize also an inventory of any property accepted in fulfillment of subscriptions to the capital.[79] There are no requirements of recordation, as distinguished from protocolization, in connection with civil enterprises.

The contractual nature of the process of formation is emphasized by the fact that the Civil Code does not prescribe the contents of the agreement of association. There are no restrictions upon the selection of a name. The period of duration of the organization should be stated. If there is no express provision in that regard, the organization will continue until the business for which it is formed has been completed, provided the nature of its activities is

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[70]Code of Commerce (1889), Arts. 75 & 76. This list is set forth in full in: Barker and Cormack, The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW 1, 18 (1932).

[71]Code of Commerce (1889), Art. 91.

[72]Jacinto Pallares, Derecho Mercantil Mexicano (1891), 926. Cervantes states that the provisions of the Civil Code in regard to business organizations can be used helpfully as the bases upon which to distinguish the civil organizations into several forms. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 190–192.

[73]Subsection G of this section, *infra*, p. 203.

[74]Civil Code (1884), Art. 2225.

[75]Civil Code (1884), Art. 2225.

[76]Civil Code (1884), Art. 2227.

[77]Civil Code (1884), Art. 2227.

[78]Civil Code (1884), Arts. 38(3) & 2230.

[79]Civil Code (1884), Arts. 2224 & 2265. This applies even though not more than three hundred pesos is involved.

such that they are essentially of limited character.[80] If the business may continue indefinitely, the organization will be considered of unlimited duration.[81] However, it will end upon the death of any of the members,[82] or upon the occurrence of any one of a number of other contingencies,[83] which will be discussed in connection with dissolution.

It is not necessary to specify in the agreement of association the location of the principal office, nor to select a domicile. In the absence of such designation, the domicile will be where the administrative activities are carried on.[84] Any place within the territorial jurisdiction of the Civil Code to which the particular organization is subject may be selected as the domicile.[85] The location of the domicile of the organization does not affect the domicile of the members individually, nor prevent them from designating any place for the fulfillment of a contractual obligation of the organization.[86]

Amendments to the agreement of association can be made only by unanimous consent.[87] This is a serious practical objection to civil organizations. Amendments in the provisions designating the representatives of the company do not affect third persons unless noted on the certified copy of the contract issued by the notary to the organizers and on his protocol.[88] The practical value of this provision is greatly limited by the fact that the protocol is not open to public inspection.

If an organizer fails to make a contribution of money as agrecd, he is liable for interest and, in addition, if he acts negligently or fraudulently, for all damages sustained.[89] During any period of delay in making an agreed contribution of the title or use of property, the acts of the organizers remain without legal effect.[90] If an organization is formed *de facto* which can not exist legally, as, for example, when organized for an unlawful purpose,[91] any member at any time may require liquidation of all operations and return of all contributions.[92] The defective nature of the existence of an organization can not be set up against third parties.[93]

The title to personal property contributed by organizers passes by execu-

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[80]Civil Code (1884), Art. 2263.
[81]Civil Code (1884), Art. 2263.
[82]Civil Code (1884), Art. 2263.
[83]Civil Code (1884), Art. 2308.
[84]Civil Code (1884), Art. 36.
[85]Civil Code (1884), Art. 36.
[86]Civil Code (1884), Art. 37.
[87]Civil Code (1884), Art. 2235.
[88]Civil Code (1884), Art. 2300.
[89]Civil Code (1884), Art. 2267. The latter portion of the statement in the text is contrary to the general rule of damages for non-payment of money, which limits the damages to legal interest, in the absence of express agreement by the parties that the damages shall be greater. Civil Code (1884), Art. 1451. The reason given for the distinction is that the organization is not seeking merely interest upon the money, but profits from its use. 4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 405.
[90]Civil Code (1884), Art. 2307.
[91]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 379.
[92]Civil Code (1884), Arts. 2222 & 2223; 2 Alarcón, Código Civil Concordado (1904), annotation to Art. 2223.
[93]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 387. Third parties may prove the *de facto* existence of the corporation by the use of books of account, circulars announcing the formation of the company, or other relevant evidence. 4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 388.

tion of the agreement of association; the title to real property, as to third parties, passes only by recordation of the contract in the property register.[94] Except in the case of goods consumed by use, it is presumed that the organization receives only the use, and not the ownership, of either real or personal property.[95]

C. INTERESTS OF MEMBERS

There is no personal liability on the part of members as such in the case of a civil organization.[96] As will be seen in the discussion of administration, they may incur liability through participation in the management.[97] The freedom of the members from individual liability is not in harmony with the conception of a civil enterprise as a personal organization, *i.e.*, one organized *intuitu personae*, with a view to the persons involved.[98] The exemption from personal liability is granted, inconsistently, as a concession to modern economic conditions.

The conception of the personal character of civil organizations is indicated by the fact that there is no provision in the law for the transfer of the interests of members. This is true unless shares of stock are issued, and if there is stock the possibility of transfer is rendered largely nugatory, from a practical standpoint, by the provision for a preferential right of purchase on the part of other shareholders in connection with any proposed sale.[99] Consequently, it is not usual for civil organizations to issue stock. This right of the other shareholders is an interesting relic of partnership principles, surviving here even in connection with organizations issuing stock. It is a unique consequence of the development of the Mexican law of business organizations from the partnership form.

There are only two brief sections of the Civil Code[100] which refer to stock. They provide merely for sales, subject to the preferential right of purchase. The chief significance of the sections is to indicate the possibility of the issuance of stock in a civil organization.

When a sale of stock is contemplated, the preferential right of purchase requires that the seller notify the other shareholders of the proposed sale and state the price at which the stock is being offered.[101] They then have fifteen days within which to decide whether they desire to take the stock at that price. If several of the shareholders elect to purchase, they take in proportion to their respective interests in the company. Under certain conditions a shareholder who does not desire to purchase will be able to block a sale by causing dissolution, as will be seen in the discussion of that subject.[102] Ordinarily, of

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[94]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 407.

[95]Civil Code (1884), Arts. 2254 & 2255; Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 189. Included in the use are the fruits. Civil Code (1884), Art. 2254. If only use is transferred, there are special provisions in regard to payment by the organization and by the contributing member of debts relating to the property. Civil Code (1884), Arts. 2260 & 2249(2).

[96]Civil Code (1884), Arts. 2259, 2303 & 2304. The contract of association may provide for greater liability, but in the absence of express provision the rule is as stated.

[97]Civil Code (1884), Art. 2258.

[98]That a civil enterprise is so regarded, consult: Eduardo Pallares, Derecho Comercial Mexicano (1922), 49–50.

[99]Civil Code (1884), Art. 2298.

[100]Civil Code (1884), Arts. 2298 & 2299.

[101]Civil Code (1884), Art. 2298.

[102]Subsection F of this section, *infra*, p. 202.

course, a member would not desire to break up the company in order to prevent a sale and such a dissolution can be provided against in the contract of association.

The preferential right of purchase is imposed in order to preserve, as far as possible, the mutual confidence thought to arise from the personal character of the enterprise. Because of this personal conception, it is not possible to stipulate in the contract of association against the exercise of the right. Such a provision would be void because in conflict with the essential character of the organization.[103] This line of reasoning is unfamiliar to common law readers, but is fundamental and inescapable in Mexican jurisprudence and of widespread application. Likewise, in an organization issuing stock, it would not be possible to stipulate against transfers in the event of failure of the other members to purchase. This would be contrary to the character of stock, which can be thought of only as representing interests which to some extent are transferable.[104] Nevertheless, the difficulty in transferring the interests of members makes civil organizations, either with or without stock, undesirable from a practical standpoint.

In a civil organization not issuing stock, the law contemplates complete absence of transfers of the interests of members.[105] The Code sections just previously discussed, relating only to transfers of stock, do not apply to civil organizations generally. Because of the conception that civil organizations are personal undertakings, any stipulation in the contract of association for transfers, except by unanimous consent, would be ineffective, as contrary to the essential nature of such organizations.[106] It would, of course, be possible, at any time, without any provision in the articles of association, to arrange for the sale of the interest of a member to an outsider, by an agreement joined in by all the members. Such an arrangement would be in the nature of a new contract of association, constituting a novation, and would require a notarial instrument for its validity.

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[103]The right to transfer stock, as pointed out, is an exception not in harmony with the personal character of a civil organization, but the doctrine that provisions of the contract must not be in conflict with the essential character of the organization nevertheless prevails to the extent that it requires that the scope of the exception be limited strictly by preserving the preferential right of purchase.

[104]The inconsistency of such a provision with the nature of a stock organization is indicated by the consideration that it would, in substance, turn the company into a civil organization of the usual type, about to be discussed, as far as the interests of the members were concerned. The mere issuance of certificates has no significance *per se*.

[105]There are no provisions in the Civil Code making transfers possible and, in the absence of express statutory provision, transfers clearly are inhibited as being contrary to the nature of civil organizations. The transfer of an interest would constitute an important modification of the contract of association and Civil Code (1884), Art. 2235, provides that the contract forming an organization can be modified only by another agreement executed by all the members. The extent of the change in the original contract would be especially great in the case of a sale to one not already a member, thus introducing a new member. But even if the transfer were to one already a member, the modification of the agreement of association would be important, as the balance of voting power would be rendered different from that contemplated by the other members upon entrance. The absence of code provisions providing generally for transfers is rendered especially significant by the express recognition of transfers in the case, treated as an exception, of organizations issuing stock. Civil Code (1884), Art. 2298.

[106]A removal of the requirement of unanimous consent would, in substance, transform the organization into one with stock, so far as the interests of the members were concerned. The failure to issue certificates would be an inconsequential detail.

Although, in the absence of unanimous consent, a member of an organization without stock can not sell his interest, so as to constitute the purchaser a member of the organization, he has an inherent right to sell at any time the title to his undivided share of the assets and future dividends.[107] A sale of this character does not give the purchaser any voice in the affairs of the enterprise, but entitles him to all payments which otherwise would have been made to the seller. A purchaser rarely would be willing to assume this position.

The Code contemplates that some of the members may contribute money or property and that others may contribute services.[108] The former are known as "capitalist," and the latter as "industrial," members.[109] The Code contains detailed provisions for determining the share in the profits of the industrial members, in case no provision is made in the contract of association.[110] In the absence of contrary agreement, distribution of dividends among capitalist members is made in accordance with the extent of their respective interests,[111] This is true whether or not there are industrial members.

Voting in a civil organization, in general, is by *per capita* majority.[112] If a majority can not be obtained in that way, a majority vote by interests is taken, provided a controlling interest is not held by one person.[113] In that event arbitration is had.[114]

D. ADMINISTRATION

The affairs of the organization are in the hands of one or more members named as *administradores* (administrators). They are designated as such either in the contract of association or by election. No other member can take any action in behalf of the organization.[115] In the absence of an express designation, all the members act as administrators.[116] They act independently of each other, subject to the limitation that each, by objection, may suspend the operation of any action about to be taken by another.[117] Needless to say, in practice all the members act as administrators only in very small organizations. When all the members are acting, a limitation upon their power to act independently is made in connection with the sale, incumbrance or alteration of real property. In these situations, the consent in advance of the other members must be

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[107]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 427.
[108]Civil Code (1884), Art. 2269.
[109]Civil Code (1884), Art. 2232.
[110]Civil Code (1884), Arts. 2277–2279. These archaic provisions contemplato the case of an organization which does not issue shares of stock. If the services contributed by the industrial member could have been performed by another, he is compensated out of the profits on a *quantum meruit* basis. If the services could not have been performed by another, he receives a share of the profits equal to that of the largest capitalist member, except that if there are more than one industrial members they will receive together one-half of the profits, dividing them among themselves by agreement or arbitral decision. If there are only one capitalist member and one industrial, the profits are divided equally. The same person may receive profits both as a capitalist member and as an industrial. In the event of dissolution without profits, the industrial member receives nothing.
[111]Civil Code (1884), Art. 2276.
[112]Civil Code (1884), Art. 2297.
[113]Civil Code (1884), Art. 2297.
[114]Civil Code (1884), Art. 2297.
[115]Civil Code (1884), Art. 2301.
[116]Civil Code (1884), Art. 2293.
[117]Civil Code (1884), Art. 2293.

secured.[118] In the absence of contrary provision, designated administrators may exercise their powers singly.[119] Although joint action has been required expressly, nevertheless separate action is permitted in a situation where otherwise irreparably serious injury would result.[120]

In addition to being organized *intuitu personae*—with a view to the personality of the members generally—a civil enterprise is regarded as formed in reliance upon the personal qualities of the administrators. This explains the stringent character of the provisions about to be discussed.

In addition to the liability of the organization, the administrators are individually liable to third persons in connection with all liabilities of the enterprise.[121] The administrators can not be relieved from this liability by a provision in the contract of association and their important functions would make it impracticable to substitute irresponsible dummies. In support of their personal liability it is said, as with trustees under the common law, that sueh officers should not contract obligations unless they know that they can be satisfied out of the *res* in their care.[122]

The designation of an administrator in the contract of association can not be revoked, even by a majority of the members, except for legitimate cause.[123] If the designation is made subsequently, it can be revoked by a *per capita* majority of votes.[124] An administrator named in the articles of association can resign only with the consent of a *per capita* majority.[125] The members who vote against a resignation which is accepted by the majority are expressly permitted to withdraw.[126] The effect of this provision is to recognize dissatisfaction with the acceptance of the resignation of an administrator named in the agreement of association as a justifiable cause for withdrawal and, thus, in this connection, to free the right to withdraw from the restrictions usually placed upon it—which restrictions will be discussed subsequently.[127] Withdrawal for this or any other cause results in dissolution, unless provided against in the contract of association. When an administrator named in the articles of association ceases to act as such from death or any cause other than an accepted resignation, dissolution results,[128] unless provided against in the articles.

Unanimous consent is required to revoke or alter the powers of administrators, if the powers have been defined in the contract of association.[129] If the extent of the powers has been fixed subsequently, revocation or alteration can be effected by a majority in interest vote of the members.[130]

If their powers are not specified in the agreement of association, the administrators are vested with control as general managers over the ordinary

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[118]Civil Code (1884), Art. 2296.
[119]Civil Code (1884), Arts. 2283, 2290 & 2292.
[120]Civil Code (1884), Art. 2291.
[121]Civil Code (1884), Art. 2258.
[122]2 Alarcón, Código Civil Concordado (1904), annotation to Art. 2293.
[123]Civil Code (1884), Art. 2281.
[124]Civil Code (1884), Art. 2281.
[125]Civil Code (1884), Art. 2282.
[126]Civil Code (1884), Art. 2282.
[127]In the following subsection of this section, *infra*, p. 201.
[128]Civil Code (1884), Art. 2308(5).
[129]Civil Code (1884), Art. 2284.
[130]Civil Code (1884), Art. 2285.

business of the organization.[131] Express written authority, either in the contract of association or subsequent thereto, is required to enable the administrators to sell assets of the organization, unless it has been formed for that purpose, or to mortgage or in any other way burden real property, or to accept cash loans.[132] It is provided that an administrator is held to personal responsibility for any action taken in excess of his authority, although he may have invested all proceeds from such action in the business of the organization.[133] In case of emergency, when the administrator can not confer with the other members, an exception is made, to the extent that he is freed from responsibility if he has acted in accordance with the high standards set up by the civil law for a volunteer agent by necessity.[134]

If an administrator receives a payment from a person indebted both to himself personally and to the organization, he must apply the amount proportionately upon both debts, even though he gives the receipt in his own name individually.[135] If he makes the receipt in the name of the organization, the entire amount must be applied to its debt.[136] The foregoing is subject to an exception where it can be shown that the debt owed to the administrator personally is more onerous than the other, from the debtor's standpoint, for example, at a higher interest rate, in which event the debtor may declare how the money is to be applied and if he does not make any declaration the entire amount must be credited to the debt to the administrator personally.[137] If a member has received from a debtor the member's share of a debt due to the organization, the member is obligated, in the event of insolvency of the debtor, to transfer to the organization what he has received, although he has made the receipt in his own name individually.[138] A member is responsible to the organization for damages which he causes by his fault or negligence and he can not set off against such loss profits secured through his industry in other instances.[139]

The organization is responsible to a member who acts authorizedly in its behalf for the sums which be expends with profit to the enterprise, for the obligations which he contracts in good faith in the business of the organization and for the risks inherent in the administration which he undertakes.[140] A member or other person who assumes to act in behalf of an organization should be careful to secure written evidence of his authority. An administrator binds the organization only when he executes a contract in its name, unless it can be shown that the contract thereafter has been transferred to the organization.[141]

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[131]Civil Code (1884), Art. 2286.
[132]Civil Code (1884), Art. 2287.
[133]Civil Code (1884), Art. 2288.
[134]Civil Code (1884), Art. 2289.
[135]Civil Code (1884), Art. 2270.
[136]Civil Code (1884), Art. 2271.
[137]Civil Code (1884), Arts. 2272 & 1455.
[138]Civil Code (1884), Art. 2273.
[139]Civil Code (1884), Art. 2274.
[140]Civil Code (1884), Art. 2275.
[141]Civil Code (1884), Art. 2302.

E. WITHDRAWAL OF MEMBERS

As previously noted, the entire Mexican law of business organizations has developed from a simple form of general partnership. Originally, therefore, in all organizations any member could withdraw at any time and cause immediate dissolution. Under the Code of Commerce, in mercantile organizations issuing stock, in accordance with the requirements of modern business,[142] there is no place for such a right. The Civil Code in principle preserves the privilege to withdraw, because of the theory that civil organizations are of a personal nature, but largely deprives the privilege of practical effect by limiting its capacity to bring about dissolution. Unless dissolution results, the right to withdraw is an empty one, as the member still has his investment tied up in the organization. By withdrawing he simply has forfeited his rights to participate in its administration. If the organization is a small one, in which all members are acting as administrators, he also has freed himself from personal liability in that capacity. Any member may, then, withdraw at any time. If the withdrawal is malicious or inopportune, it does not cause dissolution.[143] It is considered malicious if done with intent to bring about dissolution so as to enable the member to secure profits which otherwise would go to the organization.[144] It is considered inopportune if done at a time when the affairs of the enterprise are not in a well organized condition and would be prejudiced by dissolution at that moment.[145] Alarcón gives as an illustration of this a situation where the organization possesses a large quantity of assets, immediate sale of which could be effected only at low prices.[146] If the provision is to be given such a wide interpretation, the category of situations where a member can bring about dissolution is relatively limited.

In enterprises of limited duration—that is, those in which the period of existence is specified in the contract of association or in which the character of the business is such that it can not continue indefinitely[147]—a further restriction upon the bringing about of dissolution is imposed—namely, that there must exist a legitimate cause for the withdrawal.[148] A legitimate cause is defined as incapacity of one of the members for the business of the organization, failure of a member to comply with his obligations or other similar cause which might result in irreparable injury to the enterprise.[149]

Finally, in all organizations, whether of limited or unlimited duration, it is permissible for the contract of association to stipulate entirely against dissolution as the result of withdrawal.[150] Capacity on the part of a member to cause

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[142]Except co-operatives.
[143]Civil Code (1884), Art. 2308(4).
[144]Civil Code (1884), Art. 2309.
[145]Civil Code (1884), Art. 2310.
[146]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 451.
[147]Civil Code (1884), Art. 2263.
[148]Civil Code (1884), Art. 2315.
[149]Civil Code (1884), Art. 2315. Alarcón suggests as the test, whether prolongation of the organization would place in jeopardy its interests or the interests of one of the members. 4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 453. The Code, however, in the section cited, speaks only of injury to the organization and does not include injury to the interests of members.
[150]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 443.

dissolution is not a fundamental attribute of a personal organization, so as to be beyond the control of the parties. This may be fairly inferred from the express provision of the law that the parties may stipulate for continuance of the organization upon the death of a member.[151] Other provisions of the Code, already referred to,[152] indicate that withdrawal of a member is not necessarily followed by dissolution. It is provided also that an administrator named in the contract of association may resign only with the consent of a majority of the members, but that those who do not consent may withdraw.[153] Obviously, if he is to be kept in office, the organization must continue.

The right to withdraw, without causing dissolution, is, however, of such a personal character that, in accordance with Mexican legal theory, it must be preserved in an organization of a personal nature. It is therefore beyond the power of the parties to stipulate for abolition of the right. Preservation of the right to withdraw also is regarded as a matter of public interest, to preserve the liberty of the members of organizations,[154] and this alone would be sufficient to put it beyond the control of the parties.[155] In organizations where all the members are acting as administrators, it is expedient also that a member should be able to avoid personal liability in that capacity in connection with the activities of a badly managed enterprise. The right of withdrawal is exercised by giving notice to the other members.[156]

There would be no objection to a provision in the contract of association extending, rather than diminishing or abolishing, the right of withdrawal. It would only enhance the personal character of the enterprise. Subject to the limitation that action must not be taken which is inconsistent with the inherent nature of the organization or with public policy, the will of the parties is supreme. Subject to that limitation, and unless expressly prohibited by law, they may modify by agreement any of the provisions prescribed by the Code for their government.[157]

F. DISSOLUTION

Dissolution[158] as the consequence of withdrawal by a member has been treated in the preceding subsection. Dissolution from any cause can be conditioned by stipulation in the contract of association. In the absence of such provision, dissolution results from any of the following causes listed in the Code: (1) The death or insolvency of a member;[159] (2) Destruction of the property of the organization;[160] (3) Termination of the services of an adminis-

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[151]Civil Code (1884), Arts. 2311–2312.

[152]In the preceding subsection of this section, *supra*, p.199.

[153]Civil Code (1884), Art. 2282.

[154]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 452–453.

[155]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 452–453.

[156]Civil Code (1884), Art. 2308(4).

[157]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 443.

[158]Dissolution is discussed fully in 4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 439–454.

[159]Civil Code (1884), Art. 2308(3). The Code here notes specifically that the parties may provide that the organization shall continue with the heirs as members. Civil Code (1884), Arts. 2311–2312.

[160]Civil Code (1884), Art. 2308(2). Partial destruction is sufficient, if it is such as to render impossible continuance of the business of the organization. 4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 446.

trator named in the contract of association,[161] unless because of acceptance of his resignation;[162] (4) Attachment by the individual creditors of a member of his interest in the assets;[163] and (5) In the case of an organization of limited duration, completion of the business or of the specified term of existence.[164]

The period of existence of an organization of limited duration may be extended by unanimous consent through the execution of a protocolized agreement.[165] Writers differ as to whether in theory this amounts to the creation of a new legal entity or the continuance of the old.[166]

c. THE UNIVERSAL FORM

The discussion thus far has dealt with organizations which are regarded as "particular" in nature, because limited in their application to particular property or to a particular undertaking.[167] The Mexican law, as does the civil law generally, also recognizes a universal form of civil organization,[168] of ancient historical character, with its origin in the *Siete Partidas* and the conception of universal succession in the Roman law.[169]

The central principle of the conception of a universal organization is that it is to be unlimited in its scope, as applied to the economic life of those entering it.[170] It is to place them in a communistic order of co-operation. The community property system as applied to husband and wife is an example of a universal organization. Under the Code it may consist either of all the present assets of the parties or of all their gains from any source.[171] The universal organization is practically obsolete at the present time.[172]

12. THE CONTRACT OF FORMATION OF MERCANTILE ORGANIZATIONS

Commercial, or mercantile, organizations are those organized to perform acts of commerce, as defined in the Commercial Code.[173] They are as contractual in nature as civil organizations. They are governed by the provisions of the Code of Commerce. These provisions, as previously indicated, are much more detailed in character than those of the Civil Code.

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[161]Civil Code (1884), Art. 2308(5).

[162]Civil Code (1884), Art. 2282.

[163]Civil Code (1884), Arts. 2305-2306; 4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 438-440.

[164]Civil Code (1884), Art. 2308(1 & 2).

[165]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 444.

[166]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 444.

[167]Civil Code (1884), Art. 2252.

[168]Civil Code (1884), Arts. 2237-2251.

[169]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 391 *et seq.*

[170]Cervantes devotes four chapters to universal organizations. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 165-188.

[171]Civil Code (1884), Art. 2238. If of all present assets, there are included the future gains from those assets. Civil Code (1884), Art. 2239. Except as between spouses, community of after-acquired goods can not be provided for. Civil Code (1884), Art. 2228.

[172]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 393. Alarcón remarks that if the passion for gain is one of the distinguishing features of our age, so also is the desire for individual independence.

[173]Code of Commerce (1889), Arts. 75 & 76. The list of such acts is set forth in full in: Barker and Cormack, The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW 1, 18 (1932).

The contract of association,[174] and all amendments thereto,[175] must be protocolized. The significance of this requirement has been discussed. The Commercial Code, unlike the Civil, sets forth specific requirements in regard to the contents of the agreement of association. The contracts of association of all forms of mercantile organizations are treated together in the Code,[176] and it is provided that they shall contain the following data:

> (1) The full names and places of residence of the organizers;
>
> (2) The name of the organization, and the location of its domicile;
>
> (3) The object, and the period of duration;
>
> (4) The amount of the capital; if shares of stock are issued, their nature, number, and value, and the amount subscribed; a statement of the services, credits, or properties contributed by each person, with the value ascribed to each item;
>
> (5) In the case of a collective organization, or a mandatory not issuing stock, the names of the members who are to have charge of the affairs of the enterprise and the use of the name of the organization; as to other forms, the method of management, and the powers which those in charge are to have;
>
> (6) The amount of the reserve fund of all organizations issuing stock, except co-operatives;
>
> (7) The method of distribution of profits and losses;
>
> (8) In organizations issuing stock, the share in the profits reserved for the promoters, and how distribution to the promoters is to be made;
>
> (9) The causes which are to produce dissolution before the expiration of the prescribed term; and
>
> (10) The method of dissolution and, if liquidators are not named, the method of their election.[177]

Perhaps the most interesting requirement is that of publicity in regard to the shares of promoters, in all organizations issuing stock.[178] This could well be copied in common law jurisdictions. If any of the requisites prescribed are lacking, the organization is subject to a judicial declaration of nullity, at the instance of any member.[179] The absence or insufficiency of a contract of association can not be set up against a third person who has contracted with the organization.[180]

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[174]Code of Commerce (1889), Art. 93.

[175]Code of Commerce (1889), Art. 94.

[176]Certain minor forms which will be discussed—the momentary association and the association in participation, both in the nature of joint ventures—are not subject to any formal requirements in regard to method of organization. Code of Commerce (1889), Arts. 92 & 98.

[177]Code of Commerce (1889), Art. 95. In addition there are special requirements relating to co-operatives. Code of Commerce (1889), Art. 243.

[178]Code of Commerce (1889), Art. 95(8).

[179]Code of Commerce (1889), Art. 96.

[180]Code of Commerce (1889), Art. 97; S. Moreno Cora, Tratado de Derecho Mercantil Mexicano (1905), 250 *et seq.*

Arbitration clauses frequently are inserted in the contract of association,[181] but in practice they are seldom effective. The technical requirements of the law relative to such clauses[182] open the way to dilatory, if not definitely obstructive, proceedings in the arbitral tribunals.

13. THE ANONYMOUS FORM

A. IN GENERAL

There are several forms of mercantile organizations. The distinction between the various forms is fundamental, perhaps more so than that between the corporation and the partnership at common law. An organization when formed must definitely assume one of the various forms and it is the universal practice to state in the contract of association which form is being taken. If an organization is not effectively organized in the form it is purporting to adopt, it will entirely fail as a legal entity. The selection of a form is, therefore, of the utmost importance.

The first form of mercantile organization to be considered is the anonymous, the *sociedad anónima*. It is called anonymous because, unlike other civil or mercantile forms, the name is not permitted to disclose the identity of any of the interested individuals.[183] It more closely approximates the common law corporation than does any other form of Mexican business organization and is the most widely used in the conduct of large enterprises.

The origin of the anonymous form has been found variously. The more generally accepted opinion traces it back to the chartering of the East Indies Company in Holland in 1602.[184]

B. FORMATION

There are two methods of formation of mercantile organizations, the "public writing" and the "public subscription" methods.[185] Both require that the contract of association be protocolized and that it be recorded in the Registry of Commerce.

Under the "public writing" method, which is much the more commonly used, the contract bringing the organization into existence is executed directly by two or more persons in the first instance and there are no preliminaries to its execution.[186] The contract must be accompanied by proof of the value of any properties taken in payment for stock.[187] This is accomplished ordinarily by attaching the certificate of an appraiser.[188] By-laws are adopted at a meet-

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[181]Eduardo Pallares, Derecho Comercial Mexicano (1922), 66; Cora, Tratado de Derecho Mercantil Mexicano (1905), 193, n.2.

[182]Code of Commerce (1889), Art. 1053.

[183]Code of Commerce (1889), Arts. 163–164. Originally they were called anonymous because in the earliest times such organizations had no names by which to distinguish one from another. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 80. Now that they have names, Cervantes points out that it is ideologically infelicitous to call them anonymous.

[184]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 82 *et seq.*

[185]Code of Commerce (1889), Art. 166.

[186]Code of Commerce (1889), Arts. 166, 175.

[187]Code of Commerce (1889), Art. 175.

[188]Jorge Vera Estañol, lectures delivered at the University of Mexico, 1908–1909.

ing of stockholders, convened as prescribed in the contract of association.[189] This meeting is required to approve all acts of the organizers, other than those necessary to bring the organization into existence.[190] Under either method of formation the capital must be fully subscribed, all properties to be given in exchange for stock transferred, and at least ten per cent. of the subscribed cash paid in, before holding the first meeting of the subscribers, or shareholders, or commencing business.[191]

Under the "public subscription" method,[192] the promoters issue a prospectus containing detailed information concerning the nature of the proposed organization and of the properties which will be turned over to it.[193] The subscriptions of the public are taken upon copies of the prospectus.[194] The contract of association is not protocolized until after a meeting of the subscribers, which approves the steps taken in the formation of the organization.[195]

Under either method, stock may not be issued for strictly promotion services, that is, for the conception of the idea of the organization and the interesting of others in it,[196] although, as already seen, the contract of association may provide for the reservation of a share of the profits to the promoters.[197] Stock may be issued for such services rendered by the promoters as produce a definite, ascertainable pecuniary value to the organization in the conducting of its business, such as the preliminary surveys of a railroad line.[198] Stock may not be transferred until the process of formation has been completed.[199]

The name of the organization must indicate its object.[200] Where various organizations are engaged in the same business, they are distinguished by adding a geographical or fanciful name to the term or terms describing the character of the enterprise.[201] For example, a name in use is: "The Grand Union. Distillery, S.A."—"*La Gran Unión. Fábrica de Alcoholes, S.A.*"

The name must not include the name of any individual,[202] under penalty of personal liability on the part of the person whose name is used.[203] The use of the name of an individual is deemed to be inconsistent with the conception of the organization as one formed *intuitu capitalis*—with a view to the capital contributed and without regard to the persons involved.[204]

The name must be followed by the words *Sociedad Anónima*[205] (anony-

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[189]Code of Commerce (1889), Art. 175.
[190]Code of Commerce (1889), Art. 176.
[191]Code of Commerce (1889), Art. 170. In practice these provisions are quite generally disregarded. Roberto A. Esteva Ruiz, Transformación Radical del Régimen de Acciones en las Sociedades Anónimas, 2 Revista de Ciencias Sociales, 20, 28-29 (Mexico, 1925).
[192]Code of Commerce (1889), Arts. 167-174.
[193]Code of Commerce (1889), Art. 168.
[194]Code of Commerce (1889), Art. 169.
[195]Code of Commerce (1889), Arts. 172-174.
[196]Vera Estañol, lectures delivered at the University of Mexico, 1908-1909.
[197]Code of Commerce (1889), Arts. 95(8) & 172(3).
[198]Vera Estañol, lectures delivered at the University of Mexico, 1908-1909.
[199]Code of Commerce (1889), Art. 177.
[200]Code of Commerce (1889), Art. 163.
[201]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 86.
[202]Code of Commerce (1889), Art. 163.
[203]Code of Commerce (1889), Art. 164.
[204]Cora, Tratado de Derecho Mercantil Mexicano (1905), 226.
[205]Code of Commerce (1889), Art. 165.

mous organization)—customarily abbreviated to "S.A." The practice of such abbreviation is so universal, and of such long standing, that judicial approval of its validity may be assumed, although it is not expressly provided for in the Code. The name can be changed, without affecting the identity of the organization, by a protocolized and recorded agreement.[206]

C. STOCK

Stock is issued in all anonymous organizations. The shares are of equal par value,[207] may be bearer or registered,[208] and may be preferred or common.[209] They must have a par value.[210] Different classes of stock may have different numbers of votes, and the number may vary upon different questions, but a class may not be deprived entirely of voting power upon any subject.[211] Shareholders of a designated class, or those holding less than a certain number of shares, may be deprived of capacity to hold office.[212] Different classes of stock may be given different percentages of the profits, or the preferred may be given a certain percentage before any payment upon common.[213] The preferred may not, however, be guaranteed a certain amount upon dissolution before payments upon common.[214] Stockholders are not subject to any personal liability beyond the amount of their subscriptions.[215]

The contract of organization may provide that stock shall not be transferred until fully paid.[216] Dividends upon stock not fully paid are applied toward the purchase price.[217] If calls are not covered in this way, or paid when due, the stock may be sold for the account of the subscriber, in the absence of contractual provision to the contrary.[218] In the event of bankruptcy, unpaid calls may be collected upon registered shares, but not upon those to bearer.[219] The organization may not make loans or advances upon its stock,[220] although under certain circumstances it may purchase it.[221]

Dividends are to be paid only out of profits, except that the contract of

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[206]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 87.

[207]Code of Commerce (1889), Art. 178.

[208]Code of Commerce (1889), Arts. 178–181.

[209]Code of Commerce (1889), Art. 178.

[210]In order to satisfy the Code requirements relating to the value of the stock and the contents of the stock certificate. Code of Commeree (1889), Arts. 95(4) & 179(3).

[211]Vera Estañol, lectures delivered at the University of Mexico, 1908–1909. Contra: Ruiz, Transformación Radical del Régimen de Acciones en las Sociedades Anónimas, 2 Revista de Ciencias Sociales, 20, 31 (Mexico, 1925), relying upon Code of Commerce (1889), Arts. 178 & 204.

[212]Vera Estañol, lectures delivered at the University of Mexieo, 1908–1909.

[213]Vera Estañol, lectures delivered at the University of Mexico, 1908–1909.

[214]Vera Estañol, lectures delivered at the University of Mexico, 1908–1909.

[215]Code of Commerce (1889), Art. 163. In one situation they are not liable to this extent. In the event of bankruptcy, the holders of bearer shares not fully paid in can not be made to contribnte. Code of Commerce (1889), Art. 1020; Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 87.

[216]Vera Estañol, lectures delivered at the University of Mexieo, 1908–1909.

[217]Code of Commerce (1889), Art. 183.

[218]Code of Commerce (1889), Art. 183.

[219]Code of Commerce (1889), Art. 1020; Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 87.

[220]Code of Commerce (1889), Art. 186.

[221]Code of Commerce (1889), Arts. 184–185.

association or the by-laws may provide for the payment of not over six per cent. annually for five years, regardless of profits.[222] This exception is designed to assist organizations engaged in activities where long periods of construction are required before any profits can be secured. The dividends thus paid are considered an operating expense and in the event of bankruptcy do not have to be returned by the shareholders.[223] In all organizations it is required that at least five per cent. of the annual profits be paid into a reserve fund, until the fund equals twenty per cent. of the capital.[224] If the fund is later depleted, it is to be restored to that amount.[225] The fund need not be in cash, but must be in liquid assets.[226]

The amount of the original capital as specified in the contract of association may be increased or decreased at a meeting of stockholders.[227] The details of all issues of stock must be recorded in the Registry of Commerce.[228] There is no preferential right of purchase, such as is found in the civil organization. This is in keeping with the conception that an anonymous organization is a combination of capital, whereas a civil organization is regarded as a combination of persons.

D. STOCKHOLDERS' MEETING

The structure of an anonymous organization is as follows, the last named uuit being optional:

(1) The stockholders' meeting;
(2) The board of directors;
(3) The executives;
(4) The inspectors; and
(5) The advisers.

The meetings of the stockholders, known as general assemblies *(asambleas generales)*[229] are of two kinds—ordinary, usually held annually, and extraordinary.[230] The assemblies have general power to transact and ratify all acts in behalf of the organization,[231] and unless expressly prohibited may amend the by-laws.[232] The ordinary assemblies elect all the officers,[233] unless the by-laws provide for selection otherwise of the executives.[234] It is generally provided in the contract of association, or in the by-laws, that the board of directors shall

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[222]Code of Commerce (1889), Art. 213.
[223]Code of Commerce (1889), Art. 213.
[224]Code of Commerce (1889), Art. 214.
[225]Code of Commerce (1889), Art. 214.
[226]Vera Estañol, lectures delivered at the University of Mexico, 1908–1909.
[227]Code of Commerce (1889), Art. 206(4 & 5). In the absence of contrary provision, representation at the meeting of three-quarters of the outstanding stock, and a favorable vote of a majority of the outstanding stock, are required. Code of Commerce (1889), Art. 206(4 & 5).
[228]Code of Commerce (1889), Art. 21(14).
[229]Code of Commerce (1889), Arts. 201–212.
[230]Code of Commerce (1889), Art. 202.
[231]Code of Commerce (1889), Art. 201.
[232]Code of Commerce (1889), Art. 201.
[233]Code of Commerce (1889), Arts. 190, 198, 202.
[234]Code of Commerce (1889), Art. 197.

fill vacancies in its own number, subject to action at the next meeting of the stockholders.

The first stockholders' meeting enacts the by-laws *(Estatutos)* and, if organized under the "public subscription" method, approves the acts of the organizers and passes upon the value of property contributed by subscribers.[235] The original subscribers can not make resales of stock until the contract of association has been protocolized.[236]

The ordinary meetings approve the accounts of the organization, appoint officers and may transact other business of which notice has been given in the published order of the day.[237] Extraordinary meetings are called as provided in the by-laws,[238] and also when requested by a third in value of the stock, specifying in writing the questions to be presented.[239] Notice of either ordinary or extraordinary meetings must be published in an official newspaper.[240] Proxies may be used at all meetings and the holders of the proxies need not be stockholders.[241] Directors are prohibited from acting as proxies.[241a]

A quorum consists of representation of half in value of the capital, but if a quorum is not secured an adjourned meeting may be held, after further publication of notice, at which there is no quorum requirement.[242] In general, voting is by a majority in value of the stock voted.[243] Unless otherwise provided in the contract of association or the by-laws, representation of three-fourths of the outstanding stock, and a majority in value vote of the outstanding stock, are required for the following acts: (1) Dissolution prior to the time specified in the contract of association, unless half of the capital has been lost; (2) Extension of a fixed period of duration; (3) Fusion with other organizations; (4) Increase or decrease of the capital; (5) Modification of the object of the organization; and (6) Any change in the contract of association or the by-laws.[244] Members of the board of directors may not vote on the approval of the accounts of the organization, nor on matters affecting their liability as agents of the organization.[245]

The actual holding in proper manner of stockholders' and directors' meetings, and the keeping of proper records, is of the utmost importance. Throughout the Mexican law, as in the civil law generally, formalities, and the preparation of written evidence of grants of authority and other acts, are much more important than under the common law. Even though having no substantive law effect, such records are almost indispensable as means of proof in connection with litigation. In ordinary business dealings persons are expected to be able

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[235]Code of Commerce (1889), Art. 172.
[236]Code of Commerce (1889), Art. 177.
[237]Code of Commerce (1889), Art. 202.
[238]Code of Commerce (1889), Art. 203.
[239]Code of Commerce (1889), Art. 209.
[240]Code of Commerce (1889), Art. 203.
[241]Code of Commerce (1889), Art. 210.
[241a]Code of Commerce (1889), Art. 210(2).
[242]Code of Commerce (1889), Art. 204.
[243]Code of Commerce (1889), Art. 205.
[244]Code of Commerce (1889), Art. 206. Most of these acts must be recorded in the Registry of Commerce and in order to make this possible must be set forth in protocolized instruments. Code of Commerce (1889), Arts. 21(14), 207–208.
[245]Code of Commerce (1889), Art. 212.

to produce such records, particularly in connection with representative acts, and are likely to encounter difficulties if they can not do so. From the standpoint of the substantive law, it must be remembered that there are only very limited doctrines of implied powers, or tacit consent, and consequently if formal actions are not taken, serious questions frequently arise. Minutes of stockholders' and directors' meetings are expressly required[246] and their contents are prescribed in detail.[247] The minutes are to be signed by the parties designated for that purpose in the by-laws,[248] except that the minutes of the first general assembly in connection with formation of an organization under the public subscription method must be signed by all those present.[249]

E. DIRECTORS

The *consejo de administración* (literally, council of administration) corresponds to the board of directors of the common law corporation.[250] The original members are usually named in the contract of association; thereafter they are elected by the stockholders at the annual general assembly.[251] Vacancies are filled as provided in the by-laws.[252] Each director makes a deposit of a certain number of shares of stock, fixed by the by-laws, to guarantee the faithful performance of his duties.[253]

It would not be possible for the parties to stipulate, in the agreement of association, that an anonymous organization should not have a board of directors, as required by law.[254] In general, in the Mexican law, parties are permitted to exempt themselves by agreement from the operation of specified portions of the voluminous provisions of the Codes.[255] This is not always true, however, and it is one of the great difficulties of interpretation of the Mexican law to know when such action can be taken.[256] This is discussed more in detail at the end of the article.[256a]

F. EXECUTIVES

The *directores generales* (literally, general directors) are the executives of the organization.[257] The method of their selection and removal and their powers are fixed by the by-laws.[258] Their responsibility is governed by the general law of agency.[259]

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[246]Code of Commerce (1889), Arts. 41 & 211. There is no express requirement in regard to civil organizations.
[247]Code of Commerce (1889), Art. 41.
[248]Code of Commerce (1889), Art. 41.
[249]Code of Commerce (1889), Arts. 173 & 211.
[250]Code of Commerce (1889), Arts. 187–196.
[251]Code of Commerce (1889), Art. 190.
[252]Code of Commerce (1889), Art. 191.
[253]Code of Commerce (1889), Art. 193.
[254]Eduardo Pallares, Derecho Comercial Mexicano (1922), 49.
[255]4 Alarcón, Estudios Sobre el Código Civil del Distrito Federal (1893), 443.
[256]Eduardo Pallares, Derecho Comercial Mexicano (1922), 49.
[256a]In Section 23, Waivers of Law, *infra*, p.228.
[257]Code of Commerce (1889), Arts. 188 & 197.
[258]Code of Commerce (1889), Art. 197.
[259]Code of Commerce (1889), Art. 197.

It is the theory of the Code that the executives of the organization together shall constitute an executive board, paralleling the administrative board—the board of directors. In modern practice, however, the board of directors decides all matters of importance and one of its members usually acts as the chief executive officer of the company. Under him there is commonly a *gerente* (manager), in charge of the routine conduct of the business. The employees in charge of the different departments of the business are sometimes known as sub-managers *(sub-gerentes)*. The theory of the Code that the executives shall constitute themselves into a board is disregarded almost universally. This is one of the rare instances in the Mexican law where failure to comply with literal legal requirements produces no ill results, because of the fact that the powers of the executives are left so completely in the hands of the stockholders.[260]

Unlike the administrators of the civil organization, none of the officers of an anonymous organization incur personal liability to third parties in connection with their acts in the name of the organization.[261] They are, of course, responsible to the organization, in accordance with general principles of law, for the proper performance of their duties as its agents.[262] Such responsibility may be exacted only by a vote of a general meeting of stockholders, and not by a minority body of stockholders through court action.[263]

G. INSPECTORS

The *comisarios* (literally, commissaries) are shareholders elected by the annual general assembly to act as inspectors of the administration of the organization for the protection of the interests of the stockholders, both individually and collectively.[264] They are authorized to investigate all activities of the organization and to inspect all records at any time.[265] Because of this, these privileges are expressly denied to the other shareholders.[266] In this connection, it may be noted that in practice the rights of minority stockholders are protected inadequately under the Mexican law. The board of directors submits an annual balance sheet to the inspectors for their approval and the inspectors present to the annual general assembly a report, based upon the balance sheet and their inspections throughout the year.[267]

Since the commissaries represent the majority interest in the stock, which has elected them, they are in harmony with those administering the affairs of the company; in general the commissaries tend to be perfunctory and ineffective in the performance of their functions. Like the members of the council of administration, each commissary is required to deposit a certain number of shares of stock with the corporation.[268]

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[260]Code of Commerce (1889), Art. 197.
[261]Code of Commerce (1889), Art. 194.
[262]Code of Commerce (1889), Art. 195.
[263]Code of Commerce (1889), Art. 195.
[264]Code of Commerce (1889), Arts. 198–200.
[265]Code of Commerce (1889), Art. 199.
[266]Code of Commerce (1889), Art. 199.
[267]Code of Commerce (1889), Art. 199.
[268]Code of Commerce (1889), Art. 198.

H. ADVISERS

The Code provides that an organization may name a body of advisers (a *consejo consultivo*) which will act at places other than the location of the principal place of business.[269] The advisers are to exercise the executive powers conferred upon them by the by-laws.[270] It is not customary to select an advisory board, chiefly because of the uncertainty which exists as to the extent of its powers, in relation to those of the board of directors.

I. DISSOLUTION

The usual cause of dissolution is the expiration of the period fixed in the contract of association for the duration of the organization.[271] Dissolution may be voted also by the stockholders.[272] The affairs of the organization are wound up by liquidators, appointed by the general assembly or by judicial authority.[273] The books of the company are preserved in the Registry of Commerce.[274]

14. THE COLLECTIVE FORM

The collective form, the *sociedad en nombre colectivo* (literally, society with a collective name),[275] corresponds to the general partnership of the common law.[276] Although now governed by the Commercial Code, which, as has been pointed out, is more recent in origin than the Civil Code, it is the oldest form of business organization in the Mexican law.[277]

All the members are subject to unlimited personal liability and any clause in the contract of association to the contrary has no effect as to third persons.[278] It is organized with a view to the persons (*intuitu personae*), to the fullest extent.[279] The requirements of the agreement of association have been set forth.

The firm name must consist only of names of members.[280] If the names of all the members are not included in the firm name, the words "and company" (*y compañia*), or their equivalent, must be added.[281] The abbreviation "*& Cia.*"

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[269]Code of Commerce (1889), Art. 188.
[270]Code of Commerce (1889), Art. 188.
[271]Code of Commerce (1889), Art. 216(2).
[272]If one-half of the capital has been lost, this action may be taken hy a majority in value stock vote, provided that half of the outstanding stock is represented at the meeting. Code of Commerce (1889), Art. 216(3). If half of the capital has not been lost, dissolution may be voted at any time hy a majority in value of the outstanding stock at a meeting at which three-fourths of the outstanding stock is represented. Code of Commerce (1889), Art. 206(1).
[273]Code of Commerce (1889), Arts. 217-225; Cora, Tratado de Derecho Mercantil Mexicano (1905), 247 *et seq.*
[274]Code of Commerce (1889), Art. 225.
[275]Code of Commerce (1889), Arts. 100-153.
[276]Obregón, Latin-American Commercial Law (1921), 165.
[277]Cora, Tratado de Derecho Mercantil Mexicano (1905), 189. Cervantes finds its germs in the Roman law. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 24 *et seq.* The name, however, is of modern origin. Until the end of the eighteenth century such partnerships were known as "general," "ordinary" or "free" organizations.
[278]Code of Commerce (1889), Art. 100.
[279]Eduardo Pallares, Derecho Comercial Mexicano (1922), 49-50.
[280]Code of Commerce (1889), Art. 101.
[281]Code of Commerce (1889), Art. 101.

is commonly used to satisfy this requirement. When a collective succeeds to the name, rights and obligations of another, the word "successors" (*sucesores*) must be added also.[282] When this is done, members of the predecessor organization are not subjected to personal liability for the debts of the new by reason of the use of their names.[283] Only those members who are authorized expressly to do so, may make use of the firm name.[284] If other members do so, they do not bind the collective, but only themselves individually.[285]

The members are either capitalist—that is, furnishing money or assets—or industrial—that is, furnishing services. The industrial partners can not transfer their rights, and the capitalist members may do so only with the consent of the others.[286] The consent may consist of a provision in the contract of association.[287] Unless expressly permitted, an industrial member may not engage in any other business.[288]

While both capitalist and industrial members are fully liable to third parties,[289] they may make any sort of arrangement in regard to the division of profits and losses among themselves.[290] In the absence of an agreement by the members, the Code provides as follows: The capitalist members participate in the profits and losses in proportion to their contributions;[291] industrial members do not share in losses;[292] a single industrial member will receive a share of the profits equal to that of the smallest capitalist member.[293] If there are several industrial members, they divide equally one-half of the profits.[294] In the absence of agreement, alimentary advances to an industrial member—that is, payments for his support—are not charged against him in determining his share of the profits upon dissolution.[295] An express agreement is necessary to authorize the distribution of profits prior to dissolution.[296]

In the absence of contractual provision, the collective can not be dissolved at the will of any member, but only as follows: (1) As the result of certain wrongful acts specified in the Code;[297] (2) Because of completion or impossibility of the business for which organized;[298] (3) Upon the loss of two-thirds

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[282]Code of Commerce (1889), Art. 102.

[283]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 34, interpreting Code of Commerce (1889), Art. 102. In the absence of compliance with this requirement, any member who has left a collective, and thereafter permits his name to be used, continues to incur personal liability. Cervantes states that this is true of his estate even when a member dies.

[284]Code of Commerce (1889), Art. 104.

[285]Code of Commerce (1889), Art. 105.

[286]Code of Commerce (1889), Art. 106. Consent is likewise required for the admission of new members.

[287]Code of Commerce (1889), Art. 106.

[288]Code of Commerce (1889), Art. 112.

[289]Code of Commerce (1889), Art. 100.

[290]Code of Commerce (1889), Art. 126(1); Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 31 & 39-40.

[291]Code of Commerce (1889), Art. 126(3).

[292]Code of Commerce (1889), Art. 126(4).

[293]Code of Commerce (1889), Art. 126(4).

[294]Code of Commerce (1889), Art. 126(4).

[295]Code of Commerce (1889), Art. 125.

[296]Code of Commerce (1889), Art. 130.

[297]Code of Commerce (1889), Art. 131.

[298]Code of Commerce (1889), Art. 133(2).

of the capital, or of one-third if dissolution is requested by any member;[299] (4) Upon the death or incapacity of an industrial member who brought the collective into existence, or of any capitalist member;[300] (5) Because of the incapacity of a managing member, coupled with a request by another member;[301] (6) Upon the revocation of the designation of a managing member, if dissolution is then requested by any member;[302] or (7) By reason of judicially declared bankruptcy.[303] The words "in liquidation" (*en liquidación*) must be added to the name when the organization is in process of dissolution.[304] The managing members are required to preserve the books and papers for ten years after completion of the liquidation.[305]

Unless certain members are designated in the contract of association to manage the business, all share in the management.[306] When the members who are authorized to share in the administration can not agree, action taken by the majority binds the collective, but the majority are liable to the group in the event of damage resulting from the action thus taken.[307] In the absence of contrary agreement, the members have voting powers in proportion to their contributions to the capital, except that if one member has contributed over one-half of the capital, the vote of another is required to constitute a majority.[308] This leaves the industrial members without a vote, but justification for this may be found in the fact that, apart from agreement, they do not share in losses.[309]

If the contract of association permits sales of the interests of members, the other members have a preferential right of purchase.[310] Because of the personal character of the collective, it would not be possible for the parties to waive this privilege. Unless credit was extended before organization of the collective, individual creditors of a member can not compel dissolution, and can secure capital and profits only as they would be payable to the member.[311] The Code expressly prohibits a stipulation depriving the heirs of a deceased member of the right to require an accounting and payment of the proper share of capital and profits.[312]

The joint liability of the members continues for five years after publication of liquidation.[313] The same period of limitation applies, in connection with all forms of commercial organizations, as to actions between the organization and the members,[314] among the members[315] or against the liquidators.[316] A judgment against a collective establishes the liability against the members individually.[317]

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[299]Code of Commerce (1889), Art. 133(3).
[300]Code of Commerce (1889), Art. 133(4).
[301]Code of Commerce (1889), Art. 133(5).
[302]Code of Commerce (1889), Art. 133(6).
[303]Code of Commerce (1889), Art. 133(7).
[304]Code of Commerce (1889), Art. 138.
[305]Code of Commerce (1889), Art. 149.
[306]Code of Commerce (1889), Art. 113.
[307]Code of Commerce (1889), Art. 114.
[308]Code of Commerce (1889), Art. 121.
[309]Code of Commerce (1889), Art. 126(4).
[310]Code of Commerce (1889), Art. 107.
[311]Code of Commerce (1889), Art. 152.
[312]Code of Commerce (1889), Arts. 129 & 137.
[313]Code of Commerce (1889), Art. 153.
[314]Code of Commerce (1889), Art. 1045(1).
[315]Code of Commerce (1889), Art. 1045(1).
[316]Code of Commerce (1889), Art. 1045(2).
[317]Code of Commerce (1889), Art. 124.

15. THE MANDATORY FORM

The mandatory form of mercantile organization[318] resembles the limited partnership of the common law,[319] in that in it there are two classes of members—one subject to personal liability[320] and managing the enterprise,[321] and the other free from personal liability[322] and having no share in the control.[323]

The mandatory form derives its name from the conception that the silent members furnish capital only, the business being commended, or entrusted, to the active members. Thus the silent members are known as the *comanditarios* (the givers of the mandate) and the active members as the *comanditados* (the recipients of the mandate).[324]

Shares of stock may be issued to represent the interests of the silent members. If this is not done, the organization is known as a simple mandatory, *sociedad en comandita simple* (literally, a simple society in commendation). If stock is issued, the organization is known as a mandatory with shares, *sociedad en comandita por acciones* (literally, a society in commendation with shares). The former is regarded as organized with a view to the persons, and the latter with a view to the capital.[325]

The simple mandatory is much the more ancient. Cervantes states that it can be traced back to the Roman law.[326] The mandatory with shares was developed to avoid restrictions placed upon the anonymous organizations, and at the same time to secure the advantages of stock.[327] At the present time the latter object falls short of accomplishment, as bearer shares can not be issued.[328]

The name of a simple mandatory consists only of the individual or trade names of active members.[329] If the names of all the active members are not included, the words "and company" (*& compañia*), or their equivalent, must be added.[330] In any event there must be added to the name words designating the organization as a mandatory, that is, *sociedad en comandita.*[331] In practice the abbreviation "*S. en C.*" often is used.

The name of a mandatory with shares need not include the names of mem-

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[318]Code of Commerce (1889), Arts. 154–162 & 226–237.

[319]It also will be remembered that in the civil organization the members who act as administrators assume unlimited personal liability in connection with all business of the enterprise. Civil Code (1884), Art. 2258.

[320]Code of Commerce (1889), Arts. 154 & 226.

[321]Code of Commerce (1889), Art. 156.

[322]Code of Commerce (1889), Arts. 154 & 226.

[323]Code of Commerce (1889), Art. 156. There need be only one silent member. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 64.

[324]Code of Commerce (1889), Art. 154. The Spanish terms *comanditario* (the silent partner) and *comanditado* (the active partner) are conveniently represented in English by the terms "mandator" and "mandatee," respectively. The term "mandatary," or "mandatory," denotes in English the mandatee, and therefore can not be used as an equivalent of the Spanish *comanditario.*

[325]Eduardo Pallares, Derecho Comercial Mexicano (1922), 52; Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 114.

[326]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 50 *et seq.*

[327]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 115.

[328]Code of Commerce (1889), Art. 235.

[329]Code of Commerce (1889), Art. 155.

[330]Code of Commerce (1889), Art. 155.

[331]Code of Commerce (1889), Art. 155.

bers.[332] If names are used, they must be those of active members.[333] If the names of only a portion of the mandatees are used, the words "and company" (*& compañía*), or their equivalent, must be added.[334] If no names of members are used, words designating the organization as a mandatory with shares—that is, *sociedad en comandita por acciones*—must be added.[335]

The Code provides that, insofar as there are no specific provisions relating to the active members of simple mandatories, they are to be governed by the provisions relating to the collective form.[336] It is provided that, in the absence of specific provisions, mandatories with shares are to be governed by the provisions relating to the anonymous form.[337] There are excepted from the latter direction those portions of the Code governing the anonymous form which relate to the board of directors, the executives, the inspectors and the advisers.[338] There is also excepted the provision for dissolution of anonymous organizations upon the loss of one-half of the capital.[339]

In the simple mandatories—that is, those not issuing stock—it is provided, in general, that the silent members can not perform acts of administration, even in the character of attorneys-in-fact of the active members.[340] An important limitation upon this rnle is that the silent members may inform themselves in regard to the general state of the business, at times fixed in the contract of association.[341] It is provided also that acts of advice, of the giving of authority or of supervision, performed in accordance with the agreement of association, shall not be considered acts of administration.[342] Silent members incur personal liability in connection with all acts in which they participate and if they interfere habitually, or permit their names to be used in the name of the organization, they are personally liable in connection with all the operations of the enterprise.[343] A silent member is entitled at any time to a judicial order requiring the exhibition of all books and papers.[344]

In mandatories issuing stock, a *consejo de vigilancia* (conncil of vigilance) is formed by representatives of the silent members.[345] The council presents a

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[332]Code of Commerce (1889), Art. 229.

[333]Code of Commerce (1889), Art. 228. Articles 228 and 229 are contradictory, but are construed thus. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 117–118.

[334]Code of Commerce (1889), Art. 228.

[335]Code of Commerce (1889), Art. 229.

[336]Code of Commerce (1889), Art. 162.

[337]Code of Commerce (1889), Art. 227; Cora, Tratado de Derecho Mercantil Mexicano (1905), 255–257.

[338]Code of Commerce (1889), Art. 237, excepting Arts. 187–200.

[339]Code of Commerce (1889), Art. 237, excepting Art. 216(3).

[340]Code of Commerce (1889), Art. 156. Writers are not agreed as to whether a silent member may be an employee. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 71, n.6.

[341]Code of Commerce (1889), Art. 159.

[342]Code of Commerce (1889), Art. 156.

[343]Code of Commerce (1889), Art. 157. In case of emergency, due to death or incapacity of an administrator, they may participate in the management for one month without incurring personal liability. Code of Commerce (1889), Art. 158.

[344]Code of Commerce (1889), Art. 159.

[345]Code of Commerce (1889), Art. 231. The council is required to have at least three members. They are named at the first general assembly. It has been suggested that because of the requirement of three members to form the council of vigilance, a mandatory with shares must consist of at least four members, one active and three silent, but the point is not regarded as settled. Cora, Tratado de Derecho Mercantil Mexicano (1905), 255.

report to the annual meeting.[346] The stockholders, that is, the silent members, have no further participation in the affairs of the organization, either by way of administration or by inspection.[347] Although the active members have charge of the administration, they do not need to manage the business personally. The management may be delegated to one not a member of the organization.[348] The details of all issues of stock must be recorded in the Registry of Commerce.[349] In the absence of provision to the contrary in the by-laws, the organization will be dissolved upon the death or incapacity of an active member who has been acting as administrator.[350] In the absence of contrary provision, in such cases the council of vigilance will have the authority to appoint an administrator to perform emergency or routine acts until the next meeting of the members, which will be convened not more than one month from the designation of the administrator.[351]

16. CO-OPERATIVES

The co-operatives of the Mexican law are like the organizations so denominated under the common law. They developed historically in open conflict with the then established principles of law, in order to make possible the free entrance and departure of members and capital at various times.[352] In turn, they exerted a strong influence upon the other forms of organizations, in regard to fixity of the number of members and the quantity of capital.[353]

Co-operatives are organizations of persons and not of capital.[354] In keeping with this conception, all stock is registered and can be transferred to a third party only with the consent of the general assembly.[355] The detailed provisions of the Code of Commerce[356] relating to co-operatives[357] are designed primarily to facilitate the entrance and exit of members and capital.

The name must be different from that of any other organization,[358] and must not contain the names of members.[359] After the name are added the words,

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[346]Code of Commerce (1889), Art. 232. The balance sheet, inventory and accounts are required to be at the disposal of the council, at the offices of the organization, for one month prior to the meeting. Code of Commerce (1889), Art. 234.

[347]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 119.

[348]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 118, n.3.

[349]Code of Commerce (1889), Art. 21(14).

[350]Code of Commerce (1889), Art. 236.

[351]Code of Commerce (1889), Art. 236.

[352]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 125.

[353]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 128.

[354]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 129.

[355]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 130; Code of Commerce (1889), Art. 239.

[356]A new law relative to co-operatives was passed in 1927. Diario Oficial, Jan. 23, 1927. The President was given authority to amend the law of 1927, Diario Oficial, Feb. 10, 1931, and another law is now contemplated. Excelsior, Mexico City, Nov. 13, 1932. The brief treatment herein is based entirely upon the Code of Commerce. Changes relating to the matters discussed herein, and other important changes, will be noted in a subsequent article dealing with the contemporary development of the Mexican law of business organizations.

[357]Code of Commerce (1889), Arts. 238–259; Cora, Tratado de Derecho Mercantil Mexicano (1905), 257 *et seq.*

[358]This is the effect of *sociedad* as used in Code of Commerce (1889), Art. 241.

[359]Code of Commerce (1889), Art. 241.

"co-operative organization" (*sociedad cooperativa*).[360] A statement of the degree of personal liability of the members also is added.[361]

The liability is as specified in the contract of association. It may be unlimited, or the liability of each member may be limited to a certain sum, and the total liability of all the members at any given time may be less than the nominal capital of the organization.[362] Unless otherwise specified, subscriptions for stock are payable in weekly installments.[363] There may be provisions for the exclusion of members at any time.[364] A member may withdraw only during the first six months of the fiscal year.[365]

The management of a co-operative is in the hands of one or more executives, who need not be shareholders.[366] The executives also act as a board of directors.[367] They are supervised by a "Council of Vigilance," which acts as a board of inspectors.[368]

17. ASSOCIATIONS, OR JOINT VENTURES

The Commercial Code also contains brief and obscure provisions relating to *asociaciones* (associations).[369] They are thought of rather as joint acts on the part of several individuals, than as organizations of any sort. They are not subject to any formal requirements in regard to method of organization,[370] which may even be oral,[371] and the parties are allowed complete latitude in regard to the objects and conditions of their existence.[372] They are not subject to any requirements of protocolization[373] or recordation.[374]

The Code provisions in regard to associations have aggravated, rather than diminished, the difficulty in drawing the line between organizations and mere joint action on the part of several individuals.[375] The common law reader will be reminded of the difficulty in determining the existence of a partnership. The Code provisions in question do not often present problems in practice, and have had little or no effect upon the general principles of law which otherwise would be applied to joint acts, in situations not involving an attempt to set up one of the established forms of organizations which have been described.[376]

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[360]Code of Commerce (1889), Art. 242.
[361]Code of Commerce (1889), Art. 242.
[362]Code of Commerce (1889), Art. 240.
[363]Code of Commerce (1889), Art. 244(2).
[364]Code of Commerce (1889), Arts. 243(1, 2), 244(1, 2) & 245(3).
[365]Code of Commerce (1889), Art. 247.
[366]Code of Commerce (1889), Arts. 255–257 & 259.
[367]Code of Commerce (1889), Art. 256.
[368]Code of Commerce (1889), Arts. 258–259 & 231–234.
[369]Code of Commerce (1889), Arts. 92, 98–99 & 268–271.
[370]Code of Commerce (1889), Art. 98.
[371]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 154.
[372]Code of Commerce (1889), Art. 271.
[373]Code of Commerce (1889), Art. 98.
[374]Code of Commerce (1889), Art. 99. Cervantes says that the reason for this is that they are not legal entities. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 153.
[375]Cervantes states that the obscurity of the law relating to associations is not limited to the Code, but extends to authors generally and to the practice of the courts. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 135–136.
[376]A student writer making a thorough study of the application of the law relating to associations in various connections repeatedly reaches this conclusion. José Alfaro Bárcena,

The Code divides associations into two classes, *asociaciones momentaneas* (momentary associations) and *asociaciones en participación* (associations in participation).[377] No good reason for the division is apparent and it produces no discernible consequences. Each is described as the undertaking by several persons of operations in which they do not use a joint name.[378] In both there is joint personal liability to third parties,[379] but only on the part of those associates whose names appear in connection with the particular business of the association.[380] This is in barmony with the general principles of the Mexican law relating to joint undertakings. It will be remembered that the Mexican law is likely to be literal in its treatment of any action taken.

If a distinction between the two classes of associations is to be derived from the language of the Code, it is that momentary associations are formed for definitely specified operations,[381] whereas associations in participation are formed to undertake an indefinite number.[382] Neither is a legal entity.[383]

Historically, the association in participation gave rise to the use of the name term "anonymous" in connection with business activities.[384] It was so denominated because, as to third parties, the entire existence of the association, and the names of its members, were secret.[385]

Momentary associations ordinarily are present in the preliminary stages of the setting up of anonymous or other formal organizations.[386] The persons thus involved are referred to customarily, in the Mexican business world, as a syndicate.[387]

Las Asociaciones en Participación, 1 Revista Juridica, 268, 279, 293, 294, 300, 313, 314 & 341 (Mexico, 1916).

[377]Code of Commerce (1889), Art. 268.

[378]Code of Commerce (1889), Arts. 269–270.

[379]This is expressly stated only as to momentary associations, Code of Commerce (1889), Art. 269, but undoubtedly is true as to associations in participation. As to the latter Cervantes says that this is the case because of their very nature. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 158.

[380]This qualification is stated only as to associations in participation, Code of Commerce (1889), Art. 270, but undoubtedly is true as to momentary associations.

[381]Code of Commerce (1889), Art. 269.

[382]Code of Commerce (1889), Art. 270. The definition of associations in participation in this article literally includes momentary associations, as defined in Art. 269, but in view of the express division into two classes in Art. 268, it may be inferred that the definition of momentary associations in Art. 269 is intended to constitute them an exception to the application of the more general language used in the definition of associations in participation in Art. 270.

As another possible basis of distinction between the two classes of associations, it is stated, in Art. 270, that the operations of the association in participation are conducted in the names of one or more of the members, whereas there is no such provision in regard to the momentary. From this it might be inferred that in the case of the latter, operations necessarily are conducted in the names of all of the members. Cervantes takes this position. Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 163. It is not believed that the inference from the language of the Code is sufficiently compelling to justify the creation of such an anomalous exception to the general principles of the Mexican law relating to joint undertakings.

[383]Code of Commerce (1889), Arts. 92, 270; Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 153. It is stated in the Code that those persons who act in behalf of an association in participation must constitute a legal entity. Code of Commerce (1889), Art. 270. No practical consequences are deducible from this statement.

[384]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 80 & 139.

[385]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 8.

[386]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 164.

[387]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 164.

18. CLASSIFICATION OF VARIOUS FORMS

There is freedom from personal liability in:

(1) Civil organizations, except as to administrators;
(2) The anonymous form;
(3) The co-operative form (unless expressly assumed); and
(4) The mandatory form, as to silent members.

There is personal liability in:

(1) Civil organizations, as to administrators;
(2) The mandatory form, as to active members; and
(3) The collective form.

The following are considered organized *intuitu personae* (with a view to the persons):

(1) Civil organizations, unless stock is issued;
(2) The mandatory form, if stock is not issued; and
(3) The collective form.[388]

The following are considered organized *intuitu capitalis* (with a view to the contributions of capital):

(1) Civil organizations, as to certain aspects, when stock is issued;
(2) The anonymous form;
(3) The mandatory form, if stock is issued; and
(4) The co-operative form.[389]

To the foreign student of the Mexican law it would seem natural to assume that the presence of personal liability could be used as a test to determine whether the organization was formed with a view to the persons, the presence of such liability indicating that it was so formed. It will be noted from the foregoing, however, that this does not accord with the Mexican viewpoint.[390] The Mexican classification in this regard is based upon a conception of the internal structure of the organization, as concerns the relations of the members among themselves, instead of having regard to the external relations of the organization with third parties.

In civil organizations there are no restrictions upon the choice of a name. In the anonymous and collective forms the name of the organization must not include the names of members. In the simple mandatory and collective forms

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[388]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 114; Antonio de J. Lozano, Código de Comercio (1889, *Anotado* 1899), annotation to Art. 160 of the Spanish Code, corresponding to Art. 178 of the Mexican Code; Eduardo Pallares, Derecho Comercial Mexicano (1922), 49 *et seq.*

[389]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 114; Antonio de J. Lozano, Código de Comercio (1889, *Anotado* 1899), annotation to Art. 160 of the Spanish Code, corresponding to Art. 178 of the Mexican Code; Eduardo Pallares, Derecho Comercial Mexicano (1922), 49 *et seq.*

[390]Eduardo Pallares, Derecho Comercial Mexicano (1922), 49 *et seq.*

the use of the names of members in the name of the organization is required. Bearer stock can be issued only in the anonymous form.

19. ADVANTAGES AND DISADVANTAGES OF THE VARIOUS FORMS

In considering the advantages and disadvantages of the various forms of organization under the Mexican law, we are guided partly by the conclusions of the Mexican commentators themselves and partly by utilitarian practices developed in common law countries. The objectives of legislators in different jurisdictions always reflect, to some extent at least, the genius and ideals of the people. In Mexico, relatively a non-commercial country, the goals and conveniences of merchant organizations are often sacrificed to considerations of public welfare.

There are two great advantages which are found together only in the anonymous form: (1) The right to issue bearer stock; and (2) The right of members to transfer their interests without any possibility of interference upon the part of other members. These advantages assimilate the anonymous form to the common law corporation and, in the eyes of common law readers, place the anonymous form far in advance of the other mercantile forms and of the civil organization.

The great practical disadvantage of civil organizations is the preferential right of purchase on the part of other members, even though stock is issued. This makes the issuance of stock largely useless, from a practical standpoint. The possibility of precipitation of dissolution by a member is also objectionable. The requirement of personal liability upon the part of members acting as administrators imposes a burden, particularly as the importance of the functions of administrators destroys the feasibility of the substitution of dummies.

The mandatory form may be said to accomplish the purposes of the common law limited partnership. It does not do more, even if stock is issued, because of the requirement that all stock be registered. The collective form corresponds to the common law general partnership.

The late Manuel Cervantes, an able representative of contemporary Mexican legal thought, who has published an excellent and informative volume surveying the Mexican law of business organizations,[391] at various points in his study gives us an interesting presentation of the advantages and disadvantages of the various mercantile forms, from the viewpoint of a Mexican writer.

ANONYMOUS FORM

He says in regard to the anonymous form:

> "Concerning anonymous organizations, what Aesop said of tongues is apposite: that they are very good and very bad, very useful and very harmful. They are held responsible for the greatest financial scandals; it is said that they have ruined many thousands of stockholders, and have especially injured the humble classes; but on the other hand it must be confessed that the largest mercantile and industrial enterprises, that are able to sustain the contemporary civilization, have been realized thanks to the anonymous organizations.

[391] Las Diversas Clases de Sociedades Mercantiles y Civiles (1915).

"We are among the optimists. All the disasters that are attributed to these organizations do not necessarily depend upon their form, but result from diverse causes. Among these the principal are: First. The anonymous organization is the only one adequate to undertake insecure or hazardous enterprises. Because of this many have failed. But these failures, it must he agreed, have not been due to the form of the organization, but to the unfortunate character of the projects undertaken. Second. The negligence, and more especially, the ignorance, of the shareholders in regard to their rights and the manner to enforce them. Giovanni Pateri relates that at one period the newspapers of Turin entered upon a campaign against the negligence of stockholders in not attending the assemblies, and that the result was satisfactory in the sense that the attendance was increased. But nevertheless, because of their ignorance, they were not able to contribute anything to the assemblies other than their presence. They listened to the reports of the directors and the inspectors, and accepted and applauded them, as is customary, without asking a question, offering a suggestion, or making a motion. This was true, even in organizations in which they would have been able to take such action. It was true even in those which a short time later found themselves on the verge of bankruptcy, on account of causes which could be attributed to the fault of the directors, and which were such that in any event there might have been a chance that the shareholders would foresee or prevent disaster. Constant and intelligent vigilance is one of the secrets of the success of any kind of business, of any sort of organization, but this is especially true in the case of the anonymous organizations, because they involve affairs which are the most complicated and the most difficult to manage. Third. The lack of adequate and severe laws against the frauds and machinations of directors and the connivance of the inspectors; and especially the absence of a public agency to discover those frauds and prosecute them. . . .

"The anonymous organization presents great advantages over other forms. Among these the principal are: First. Unless bankruptcy supervenes, or it is voluntarily dissolved, or the term fixed for its duration is completed, and is not extended, the organization can exist indefinitely. The death, incapacity, or even the disagreements, of the stockholders, do not legally affect the existence of the organization. 'By this means,' said the American Judge Marshall in 1819, referring to such an organization, 'a perpetual succession of individuals is capable of working toward the realization of a particular object, like an immortal being.' Second. The limited liability of all the shareholders is an invaluable advantage. Third. The shares are transferred easily, quickly, and without expense, and it is, furthermore, an easy matter to secure a sale. Stock can easily be pledged to secure loans. The transfer of stock does not alter the identity of the organization, nor require, in consequence, the previous consent of the other members. Fourth. The anonymous form lends itself admirably to the securing of a sale of valuable properties or mercantile or industrial businesses for which it would be very difficult, if not impossible, to find an individual buyer. Fifth. The anonymous organizations contribute powerfully to the prosperity of nations. The United States and England, the greatest and richest countries in the world, owe their great-

ness, their well-being, and their richness definitely to the increasing number of their corporations or anonymous organizations.

"In conclusion, we may say that the day the laboring class ceases to be guided by utopian preachments, and to be so interested in demagogues and social agitators, that day, we repeat, the workers will learn that the anonymous organizations can open for them the doors of emancipation, elevate them to the position of shareholders, give them participation in the management of the enterprises in which they are employed, and cause them to share in the profits which are realized, all of them saving by mutual agreement in order to accumulate funds with which to acquire more stock."[392]

COLLECTIVE FORM

Cervantes thus discusses this form:

"The collective organization has these principal advantages: I. As it is very ancient in origin, and exists in only a few forms, the law controlling it is very complete, not to go so far as to say that it is almost perfect. It does not present to the courts, nor to attorneys, that uninterrupted series of new, difficult, and numerous problems which daily arise from the womb of the organizations which issue shares of stock. With the collective organization, the rights of the members are more clear, and litigation less frequent, and, as a result, there is greater security. II. The management and operations of the collective organization are more simple, from the juridical point of view. There do not exist in the collective organization the numerous, time-consuming, and often costly, formalities which the law requires for the functioning of the anonymous organization. III. The members exercise a personal and direct superintendence over the operations and accounts of the organization. . . . This does not occur in either the mandatory or the anonymous organizations. . . . IV. In the case of the collectives, a knowledge of unfortunate events in the affairs of the organization is generally sufficient to enable each member, without assistance, to understand and protect his rights, and this knowledge the members can acquire easily, because of their relative simplicity. In the anonymous organizations, on the contrary, the material involved is very extensive, and the members, as a general rule, have no idea of their rights or obligations, especially in Mexico, where there do not exist, as elsewhere, manuals to enlighten them.

"By the side of these advantages, the collective organization presents the most serious inconveniences: I. By reason of the unlimited joint responsibility, the members contingently risk their entire fortune. Because of this, the collective form can be recommended only for the execution of safe enterprises, and when composed of persons who possess great mutual confideuce, as between members of the same family, between a master and an old servant, or between good and loyal friends. II. The bankruptcy of the organization legally involves the personal bankruptcy of the members; the bankruptcy of one of the members does not involve that of the organization, but commercially it redounds

[392]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 108 *et seq.*

to the injury of its credit. III. No member can sell or in any other manner alienate his interest without the previous consent of the other members. The law endeavors to mitigate this inconvenience by permitting a provision in the contract of association that the members may freely dispose of their interests; but in practice such a provision gives results entirely absurd and dangerous, because by reason of it the members, over-night, may find themselves bound, jointly and without limit, with a stranger, who may be an insolvent or a person of bad commercial antecedents. Further, this does not constitute an exception to the principle, because the variation consists only in requiring that the consent be given at the very moment of forming the organization, instead of having it granted specially in each instance, with full knowledge of the facts. IV. Precisely because of the unlimited and joint liability, it is extremely difficult to find a purchaser of an interest in a collective organization. V. The death of one of the members dissolves the organization prematurely; for although the law permits the contract of association to provide for continuance with the heirs of the deceased, such a stipulation is never to be highly recommended, because it is almost certain that the heirs will not have the same aptitudes, nor the same gifts of honor and intelligence, nor deserve the same confidence, as the departed member. VI. Because of the unlimited and joint liability, a collective organization can not consist of a large number of members, nor can it gather together large quantities of capital. Such an organization is adequate only for small enterprises.

"In concluding we may say that in spite of these disadvantages, the collective organizations are the most numerous. Thaller explains this as arising 'from the necessity, when the capital is small,' and this is the more common situation, of substituting pecuniary guaranties for some other form of credit."[393]

THE MANDATORY FORM, WITHOUT STOCK

The learned author continues, in regard to this form:

"Not only did the ancients eulogize the mandatory organization, but even to-day economists and jurists generally heap upon it fulsome eulogies. They say that it is the best balanced and most moral combination; because it unites capital with labor, and facilities for men of industrial or mercantile talent their exit from the salaried class. They say also that it is very attractive for investors, because the limited responsibility of the silent members lessens considerably their risks; and finally, they think that it is very worthy of commendation to those who are not of an aptitude to handle their funds themselves, but desire, nevertheless, to have them productively employed in mercantile or industrial enterprises. Nevertheless, whatever may be the juridical and moral value of these excellencies, the fact is that the mandatory organization, as it is organized in accordance with the law, suffers from a capital vice which makes it of little practical value, and especially inacceptable to men of business. This vice consists in the legal prohibition which denies the administration of the organization to the

[393]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 52 *et seq.*

silent members; because it is not pleasing to capitalists, and with reason, to invest their funds in enterprises which they themselves are not able to protect or direct. Because of this, in spite of such theoretical excellencies, the number of mandatory organizations is very small.

"The unlimited, joint liability of the active members is also a great inconvenience. Further, the mandatory organization has the same disadvantages as the collective, in regard to the death of one of the members, or the alienation of the interest of one of them; and is equally inadequate for large enterprises, because it can neither gather together a large number of members, nor, for the same reason, extensive amounts of capital.

"Finally, another disadvantage, which may be very serious to the silent members, is that they can not, like the active members, receive from the organization the funds which may be necessary for their subsistence; because Article 160 of the Code of Commerce prohibits any distribution of funds to silent members, for any reason whatsoever, except from net profits."[394]

"History shows us that the mandatory organization has been able to develop and prosper in countries where usury bas been prohibited by law; beeause, then, all the funds available for loans are invested in mandatory organizations, and more especially in the secret forms.

"If the legislature were to prohibit usury among us, the mandatory organization would be developed artificially; if the prohibition against administration which operates against the silent members were to be removed, the mandatory organization would be popularized upon firm and natural bases."[395]

THE MANDATORY FORM, WITH STOCK

Cervantes then discusses the mandatory form, when stock is issued:

"While the mandatory form, without stock, has had the good fortune to achieve for itself eulogies on every hand, the mandatory with shares, on the contrary, has been the object of very bitter criticisms. In France it was sought to subject it, like the anonymous form, to previous authorization and to inspection at the hands of the government. Later, in 1838, there was thought of suppressing it because of scandals arising out of speculation in its shares. This was considered on three occasions in Germany. Finally, even in the field of pure scientific theory, doubts have been had as to its usefulness, in view of the exeellencies of anonymous organizations. Nevertheless, the mandatory with sbares has been able to resist all these onslaughts. It exists to-day in the legislation of all cultured peoples, and with very good reason, as it is well adapted to the situation of a mercantile or industrial enterprise which has already been established, but in which the owner, without desiring to abandon the management and direction, nevertheless, in order to develop or enlarge it, needs an amount of capital sufficiently large to make it difficult to secure through the

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[394]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 76 *et seq.*

[395]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 78, n.13.

creation of a mandatory without shares. Further, and this reason was decisive in France, the tendency of the legislature should always be to increase, and not to diminish, the categories of commercial organizations.

"The mandatory with shares has a great disadvantage, in that it may be prematurely brought to an end through the death, incapacity, or disability of all the active members."[396]

Prior to 1910, there existed no discrimination between the different forms of business organization in regard to the holding of land. With the exception of ecclesiastical bodies, all forms of organizations could acquire and hold real estate lawfully, regardless of its extent, nature or location. Nor was there any discrimination of importance as between the national and the foreigner, whether as an individual or as a member of an organization. Since 1910, however, and particularly as a consequence of the provisions of Article 27 of the new Constitution of 1917 and related subsequent legislation,[397] agrarian and alienship provisions of law have become important factors in the selection of the form of business organization.[398] These provisions will be discussed in a later article.

20. FUSION

The Commercial Code provides expressly for the amalgamation of organizations.[399] There are no corresponding provisions in the Civil Code relating to civil organizations and with them it would be necessary to dissolve the organizations and form a new one.

The fusion must be made pursuant to resolutions adopted by each of the organizations to be fused[400] and in strict accordance with the contract of association in each case. As to those members who do not assent, the old organizations are considered dissolved.[401] The other provisions of the law relating to fusion are designed chiefly to protect creditors. The last balance sheet of each organization must be published, as also the plan proposed for taking care of the outstanding liabilities of the disappearing organizations.[402] Should this plan not involve the immediate satisfaction of these liabilities, then the amalgamation will not become effective until three months after the publication of the balance sheets referred to above. Within this term any creditor of either of the organizations to be fused may stay the amalgamation until his credit is satisfied.[403] In

[396]Cervantes, Las Diversas Clases de Sociedades Mercantiles y Civiles (1915), 119 *et seq.*

[397]Ley Orgánica de la Fracción I del Articulo 27 de la Constitución (Dec. 31, 1925), Arts. 1-3; Regulations to same law, Arts. 1-3, 5-6.

[398]Consult, generally: Barker, New Laws and Nationalism in Mexico, 5 Foreign Affairs, 589 (1927); Barker, Alienship Legislation in Mexico, 7 Pan Pacific Progress, 46 (1927); Jorge Vera Estañol, Cuestiones Juridico-Constitucionales (1923), 91 *et seq.*; Paulino Machorro Narváez, Sociedades Anónimas—Su Incapacidad para Adquirir Propiedad Rústica, 1 Revista General de Derecho y Jurisprudencia, 161 (Mexico, 1930); Eduardo Pallares, Derecho Comercial Mexicano (1922), 58 *et seq.*

[399]Code of Commerce (1889), Arts. 206, 208 & 260-264.

[400]In the absence of contrary provision in the contract of association or the by-laws, the vote in favor of fusion must be passed by a majority in interest of the outstanding capital stock, at a meeting at which three-fourths of the outstanding stock is represented. Code of Commerce (1889), Art. 206.

[401]Code of Commerce (1889), Art. 260.

[402]Code of Commerce (1889), Art. 261.

[403]Code of Commerce (1889), Art. 262.

any event the continuing organization assumes the rights and obligations of the organization extinguished.[404] The creation of the new organization also is subject to the general code provisions relative to the formation of organizations.[405]

21. ISSUANCE OF BONDS

This has been one of the weakest points of the Mexican law of business organizations. Until very recently, the general laws relating to business organizations have not contained any provisions for the issuance of bonds. While special laws dealing with the subject have been enacted,[406] their provisions have been somewhat intricate and cumbersome and have not worked out well in practice. Holders of such bonds, when defaulted, often have found it difficult to recover either principal or interest in the Mexican courts.[407] Recordation of the details of all issues of bonds has been required.[408] A contemporary law[409] dealing with the subject will be discussed in a later article.

22. FOREIGN ORGANIZATIONS

The Mexican system in regard to foreign business organizations[410] is much the same as that in vogue in common law countries. If a foreigu organization desires to do business in Mexico, other than by mail or through traveling salesmen, it is required to comply with certain requirements. It must protocolize and record its charter, by-laws and all other documents relating to its formation, and must also record an inventory of its property or its last balance sheet and a certificate that it is established and duly authorized to do business under the laws of its own country.[411] If a foreigu organization has shares of stock, it must publish aunually a balance sheet and the names of the persons in charge of its business.[412]

If the requirements are not fully complied with, the individuals acting incur personal liability, jointly with the organization, upon all obligations contracted in its name and this liability can not be avoided through agreement.[413] The status in court of a foreign organization which has transacted business in Mexico without having complied with these requirements has not been fully settled. It is probable that it may bring suit in counection with such business if it complies

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[404]Code of Commerce (1889), Art. 263.

[405]Code of Commerce (1889), Art. 264.

[406]Act of Nov. 29, 1897, as amended by Act of June 4, 1902.

[407]See, generally, Manuel Borja, Emisión de Bonos y Obligaciones en Derecho Privado Mexicano, 1 Revista General de Derecho y Jurisprudencia, 359 (Mexico, 1930).

[408]Code of Commerce (1889), Art. 21(14).

[409]Ley General de Títulos y Operaciones de Crédito of August 26, 1932 (Diario Oficial, Aug. 27, 1932).

[410]Code of Commerce (1889), Arts. 15 & 24-25. An exhaustive treatment of this subject will be found in a paper entitled "The Judicial Status of Foreign Corporations in Latin-America—Mexico," prepared for the Committee on Foreign Law and Confiict of Laws of the Bar Association of the City of New York by Edward Schuster, of the Bars of New York and Mexico City, a distinguisbed authority in tbe field of Latin-American law. The study will be published in an early issue of the Tulane Law Review.

[411]Code of Commerce (1889), Art. 24. The certificate is to be executed by the Mexican Minister to that country or by a Mexican consul.

[412]Code of Commerce (1889), Arts. 265-267.

[413]Code of Commerce (1889), Art. 266; Jacinto Pallares, Derecho Mercantil Mexicano (1891), 928.

with the requirements before doing so.[414] In a recent decision it was held that a foreign corporation could not bring suit for infringement in Mexico of its trademark, which had been duly registered in Mexico, without having first fulfilled these requirements.[415]

23. WAIVERS OF LAW

To what extent under Mexican practice may parties to a transaction stipulate against the application of the multitudinous provisions of the Codes? The Code of Commerce, as has been seen, sets forth in considerable detail the rights and obligations of the members of business organizations, both as among themselves and in regard to third parties. Some of these provisions may be modified by agreement among the parties, and some may not. Where the law expressly prohibits waiver, of course there can be no room for doubt. But where, as very often happens, the law is silent, questions arise upon which the authorities are likely to disagree fundamentally.

As a general principle, the persons forming a business organization may not modify provisions of the law made in the interests of the public treasury, creditors of the organization, public policy, or the community at large. Nor may they claim the benefits or advantages of a certain form of organization without becoming subject to the corresponding charges and disadvantages. For instance, persons can not form what purports to be a collective organization and at the same time insert in the contract of association a provision relieving the members of unlimited personal liability. Furthermore, when the law accords rights to a party under a contract of a certain kind, and the party desires to waive such rights, he must do so clearly and expressly, citing the code provisions waived, by number or otherwise.[416]

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[414]Ricardo Couto, Existencia de Las Sociedades Extranjeras en México, 1 Revista General de Derecho y Jurisprudencia, 589, 599 (Mexico, 1930).

[415]Palmolive Co. v. Campedra y Ayala, decided by the Third Chamber of the Supreme Court Oct. 26, 1929, order of Dec. 3, 1929; discussed: Elvin R. Latty, International Standing in Court of Foreign Corporations, 29 Mich.L.Rev. 28 (1930); Ricardo Couto, Existencia de Las Sociedades Extranjeras en México, 1 Revista General de Derecho y Jurisprudencia, 589 (Mexico, 1930).

[416]Civil Code (1884), Arts. 6, 1276 & 1307–1310; Code of Commerce (1889), Arts. 78 & 81.