

1954

The Status of Alien Corporations in the Law of The United States

Leo M. Drachsler

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Leo M. Drachsler, *The Status of Alien Corporations in the Law of The United States*, 23 Fordham L. Rev. 49 (1954).

Available at: <https://ir.lawnet.fordham.edu/flr/vol23/iss1/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The Status of Alien Corporations in the Law of The United States

Cover Page Footnote

This article is a somewhat condensed version of an article prepared for publication in Spanish in the Journal of the Institute de derecho comparado of Barcelona, Spain. The author wishes to express his indebtedness to Professor Henry P. De Vries of Columbia University Law School for his assistance in the preparation of this article. Member of the New York and Federal Bars.

THE STATUS OF ALIEN CORPORATIONS IN THE LAW OF THE UNITED STATES*

LEO M. DRACHSLER†

PRELIMINARY OBSERVATIONS

TWO major factors affect the law of corporations in the United States. The first is the inherent right of every state of the United States to exercise its sovereign powers over corporations not created by the laws of such state, subject to constitutional clauses designed to enforce a recognition of the interstate commerce clause and a minimum of recognition of the laws and acts of other states.

As a consequence, rules and attitudes with respect to the rights and disabilities of corporations organized under the laws of foreign nations were developed primarily within the orbit of relations among the states of the United States.

The starting point in United States legal thought with respect to corporations is the existence of multiple state laws governing corporate activity premised on the concept that except for certain constitutional clauses, each state of the Union is as foreign to the other as any foreign nation is to the United States of America. So pronounced is this attitude that the great weight of writing in the field of law governing foreign corporations refers almost exclusively to relations among the states of the United States. It is necessary, therefore, for the purposes of this article to characterize as "alien" a corporation organized under the laws of a foreign nation, since the term "foreign" is equally applied in the United States in these matters to a corporation organized under the laws of any state of the Union.

"Many of the difficulties which foreign enterprise encounters in the United States arise out of the nature of our federation and the fact that our laws, particularly those relating to commercial activity, do not approach uniformity. This fact, which we accept because it is so familiar to us comes as a distinct shock to persons and enterprises seeking to do business in the United States, because it is customary for uniform corporate and commercial laws to exist in other countries. For corporate purposes, enterprises domiciled in one state are foreign to other states of the United States, but an enterprise from another country finds little solace in the fact that some of those it assumed were nationals are merely aliens like itself. Those of us who urge that foreign countries adopt laws which are in conformity with our laws are inclined to overlook the fact that the United States is a group of individual states each having its own business laws. Some uniformity in commercial laws is being attained through the extension of the meaning of 'interstate commerce' and federal control over it, but this backhanded

* This article is a somewhat condensed version of an article prepared for publication in Spanish in the *Journal of the Institute de derecho comparado* of Barcelona, Spain. The author wishes to express his indebtedness to Professor Henry P. De Vries of Columbia University Law School for his assistance in the preparation of this article.

† Member of the New York and Federal Bars.

manner of securing a national code of commercial law is a slow and cumbersome one. Possibly corporations would shudder at the thought of federal regulation over all their activities, but actually federal laws now govern most of their important activities, and one set of national commercial and corporate laws and regulations would simplify business activities.

"This lack of uniformity cannot be classified as discrimination against foreign enterprise, but it is possibly the most serious obstacle a foreign enterprise seeking to do a nationwide business would meet in the United States. It also seriously handicaps us in making international agreements to do away with discrimination against foreign enterprises, as divergent state laws may affect commercial enterprises more than do federal laws. . . ."¹

The second factor of importance is the inheritance of English common law methods and sources modified to some extent by the demands of the United States constitutional system. The underlying pragmatic approach of the common law is preserved in United States legal development; the case law technique is particularly stressed in the area of corporation law and conflict of laws, because of the essential need to maintain a balance between rights arising under sovereign state laws and constitutional compulsions aimed at integration of national activity.

This study, devoted to the status of alien corporations in the law of the United States, is based on case law developed predominantly in the international rather than the inter-state field, as well as on federal and state statutes applicable to alien corporations. For our purposes, and to avoid the obvious and much discussed problems of the "nationality" of corporations, requiring a separate treatment, we shall assume that the alien corporation in question is organized pursuant to the laws of a foreign country with all of its shareholders nationals of that country and with its principal place of business in that country. As a general principle, in United States law, any corporation duly organized under the laws of a foreign country will have its corporate existence and juristic personality recognized.

THE "DOING BUSINESS" DOCTRINE

The real problem arises from the limitations on the corporation's rights and immunities expressed in the concept of "doing business." As a general rule, an alien corporation doing business in the United States will be subject to suit in the courts of the state in which it is doing business and may be denied the right to enforce its rights in those courts by bringing an action where it fails to qualify by filing the required documents and paying the required tax or "entrance fee."

Corporate behavior patterns are of course as infinitely varied and complex as business and industry itself. Juridical determination that an

1. Folsom, *Treatment of Foreign Enterprises in the United States* (New York, 1948), prepared for the United States Council of the International Chamber of Commerce.

alien corporation is "doing business" in the United States is of fundamental importance not only to the unit itself, but to all persons or business units who in their dealings with it may find themselves in legal collision, or conversely, who may be parties to suits attempted by it in courts of the United States, federal or state.

To illustrate whether or not the alien corporation has "crossed the jurisdictional barrier" is the object of our discussing the cases below. The bare legal principle is simple: An alien corporation may subject itself to the "jurisdiction" of the local courts in the United States if it "does business" in any one of the American states.

The following, for example, are among the more important conditions laid down in the corporation laws of New York State, under which "foreign" corporations may do business there. Every foreign corporation having an office for the transaction of business in the state of New York must keep at its office in the state, stock books and provide inspection facilities. Penalties are imposed for failure to exhibit books to authorized persons such as stockholders, judgment creditors, etc.² Officers, directors and stockholders of a foreign stock corporation are liable to the same extent as those of a domestic corporation for unauthorized dividends, unlawful loans to stockholders, false certificates, reports or notices, or illegal transfer of property.³

Other New York State corporation statutes⁴ also lay down specific conditions: An alien corporation may not do business in the state without first having obtained a certificate of authority from the Secretary of State of the State of New York, who must be designated as agent for the service of process, the filing of the corporate charter, etc. Details are prescribed as to contents of the certificate of authority, amendments thereto, surrender of authority, service of process, penalties for violations, etc.⁵

An important provision prohibits the maintenance of an action by an alien corporation or its successor in title or any person claiming under such successor or such corporation doing business in the state on any contract made by it in the state arising out of doing business in New York State unless before the contract was entered into, a certificate of authority was obtained.⁶ This provision is of particular importance for alien corporations which have been doing business in New York State, but have failed to procure the certificate of authority. So long as they lack it, they are

2. N.Y. Stock Corp. Law § 113.

3. N.Y. Stock Corp. Law § 114. Presumably the above sections, as well as those cited immediately below, though referring to "foreign" corporations, apply equally to "alien" corporations; The writer, however, has not found any cases of the New York State courts ruling to that effect.

4. N.Y. Gen. Corp. Law §§ 210-225.

5. N.Y. Gen. Corp. Law §§ 211-217.

6. N.Y. Gen. Corp. Law § 218.

prohibited from suing in the courts of New York State; upon obtaining it, they may sue upon contracts thereafter entered into. The policy is not to avoid contracts, but merely to provide an effective supervision and control of the business carried on by the alien corporations. There is no penalty other than the suspension of civil remedies.⁷

An alien corporation has the same right under this New York statute to maintain an action in the state as is possessed by a domestic corporation, except as otherwise specially prescribed by law.⁸ But it prohibits an action by such corporation, founded on an act, liability or obligation arising out of an act which the laws of the state forbid a corporation to do without express authority of law.

An action may be maintained *against* an alien corporation by a resident of the state or by a domestic corporation for any cause of action.⁹ Still

7. *Neuchatel Asphalt Co. Ltd. v. The Mayor*, 155 N.Y. 373, 49 N.E. 1043 (1898); *Drewry v. Onassis*, 266 App. Div. 292, 42 N.Y.S.2d 74 (1st Dep't 1943); *Chemacid v. Rothschild*, 180 Misc. 929, 44 N.Y.S.2d 356 (Sup. Ct. 1943); *Rothschild v. Chemacid*, 266 App. Div. 1017, 44 N.Y.S.2d 690 (2d Dep't 1943).

8. N.Y. Gen. Corp. Law § 223. *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 147 N.E. 703 (1925). On the standing of foreign corporations in American courts see Nussbaum, *Principles of Private International Law* (Oxford Press 1943): "Foreign corporations have a standing in American courts as plaintiffs or defendants in pursuance of a liberal tradition inherited from England. American states, however, have tried to bar foreign corporations from access to the courts unless and until the corporations submit to the conditions prescribed by state legislation as a prerequisite of doing business within the state. These attempts have been thwarted by the Supreme Court under the Commerce clause of the Federal Constitution with regard to corporations operating in interstate commerce and, more generally, in respect to all foreign corporations on the ground that discrimination against foreign corporations in the lawful prosecution of their rights would run counter to the equal protection of the laws accorded by the Constitution to 'any person within the jurisdiction of the state.' This constitutional protection extends to corporations not admitted to do business within the state and probably even to corporations of foreign countries. Besides, the standing of foreign corporations in the courts is largely guaranteed by the commercial treaties concluded by the United States. Whether or not a foreign association enjoys corporate rights depends on the foreign law. . . . In this country where the standing of foreign corporations in court is generally recognized there is no special problem about their suability. By state legislation, however, suability of foreign corporations as well as non-residents is sometimes restricted.

"This limitation is aimed at warding off foreign litigation which might be more appropriately conducted in the domicile or business place of the defendants, but it may actually favor the foreign corporations and the non-residents to a certain extent. Non-residents and foreign corporations regardless of 'residence,' if bringing suit are ordinarily required by statute to give security for costs, a rule employed in an even harsher way in civil law against non-nationals. In this country, discrimination against non-residents (or foreign corporations) in respect to security for costs, does not run counter to the equality of 'privileges and immunities' secured by the Federal Constitution to the citizens of each state in the several states. Nor does 'freedom of access to the courts,' frequently accorded by commercial treaties to the nationals of the co-contracting Power, render them exempt from the obligation to give security for costs."

9. N.Y. Gen. Corp. Law § 224.

another provision governs actions against alien corporations by other alien corporations or by non-residents.¹⁰ This provision is based upon the public policy of the State of New York that the courts of that state should not be vexed with litigations between non-resident parties or with causes of action which arose outside of New York State. Non-resident alien corporations are thus limited in using the New York courts to determine their controversies with other non-residents to cases where the cause of action arose in or the subject-matter of the litigation is within the state.¹¹

SUITS BY ALIEN CORPORATIONS AGAINST THE UNITED STATES GOVERNMENT

In this period of increasing commercial contacts not only between alien business entities and United States interests, but with the United States Government in its huge program of "off-shore" purchases and procurement abroad, and the consequent imposition of taxes on such alien business groups, the right to resort to the courts in the United States is of basic importance. Elsewhere we refer to the right of access to courts granted under treaty provisions, but it is of greatest importance for alien corporations to be aware of the federal reciprocity statute¹² which grants such right to sue. This provides that "citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts, may sue the United States in the Court of Claims if the subject-matter of the suit is otherwise within such court's jurisdiction." This section has been held to apply to alien corporations as well as to individuals.¹³ But the alien corporation must show that the reciprocity condition is met by the country of incorporation, otherwise jurisdiction is incomplete.¹⁴

10. N.Y. Gen. Corp. Law § 225. Such actions may be brought in one of four cases only: 1. Damage action for breach of a contract made within the state, or relating to property within the state at the time of making the contract. 2. To recover real property within the state or a chattel replevied therein. 3. Where the cause of action arose within the state, except where the object of the action affects the title to real property outside the state. 4. Where a foreign corporation is doing business within the state.

11. *Plesch v. Banque National de la Republique D'Haiti*, 273 App. Div. 224, 77 N.Y.S.2d 610 (1st Dep't 1948); *Robinson v. Oceanic Steam Navigation Co.*, 112 N.Y. 315, 19 N.E. 625 (1889); *Rederiet Ocean Akt. v. Kirk & Co.*, 51 N.Y.S. 2d 565 (Sup. Ct. 1944).

12. 28 U.S.C.A. § 2502 (1948).

13. *Eterpen Financiera Sociedad v. United States*, 103 F. Supp. 100 (Ct. Cl. 1952), in which an Argentine corporation sued for refund of United States taxes it had paid. In *Reid Wrecking Co. v. United States*, 202 Fed. 314 (N.D. Ohio 1913), a Canadian corporation was permitted to sue on an admiralty claim against the United States.

14. *Aktiebolaget Imo-Industri v. United States*, 54 F. Supp. 844 (Ct. Cl. 1944), in which the plaintiff alien corporation failed to show that its sovereign allowed United States citizens the same rights in its courts.

In his *Principles of Private International Law* Professor Arthur Nussbaum states:

"In view of the singular development of corporations in this country the problem of personal jurisdiction over foreign corporations constitutes a major problem of the American Conflict of Laws. Neither international law nor recognized principles of courtesy would stand in the way of assuming jurisdiction over foreign corporations, but American courts are confronted with constitutional limitations and even more with conceptualistic difficulties resulting from the inherited doctrine that a 'corporation can have no legal existence out of the boundaries of a state by which it is created.' Starting from this theory, the courts in the earlier stages of corporate evolution, based personal jurisdiction over foreign corporations exclusively on the latter's consent, which was particularly found in the fact that the corporation in compliance with the local law had appointed a local agent to receive service of process in suits brought in the local courts. Such consent was even implied where the corporation, without appointing the agent, had done business in the state, thereby assenting to service of process within the state. This type of consent being more or less fictitious, the outcome is that in addition to consent, the objective criterion of 'doing business' by the foreign corporation is considered sufficient to bring it within the range of the local jurisdiction. In these cases, however, jurisdiction is apparently confined to causes of action arising out of the business done within the state. The same restriction, by the weight of authority, applies to the consent implied from the fact that the corporation under the local statute has appointed an agent, public officer or private person, for the acceptance of service of process. Isolated transactions are not deemed to satisfy the requirement of 'doing business' within the state.

"Since corporations are considered 'domiciled' in the state of their incorporation, any suit *in personam* may be allowed by that state against the corporation—regardless of the location of the corporate business—in a similar way to those against foreign corporations 'coming into the state.'" ^{14a}

RECENT CASES ILLUSTRATING PATTERNS OF "DOING BUSINESS"

Where an alien corporation complies with the provisions of state law regulating the right of foreign (including alien) corporations to do business in that state, and appoints an agent for the service of process therein, it thereby "consents to be sued" in the courts of such state. A federal district court within such state is a court of that state within the consent so granted.¹⁵

Before examining the rationale of the United States "doing business" doctrine as announced in the leading case of *International Shoe Company v. State of Washington*,¹⁶ it may be useful to consider several other more recent cases which by the extremes of their factual patterns exhibit the

14a. Op. cit. supra note 8, at 210.

15. *Miss. Publishing Corp. v. Murphree*, 326 U.S. 438 (1946); *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. et al.*, 309 U.S. 4 (1940); *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939); *Davila v. Hilton Hotels International*, 97 F. Supp. 32 (D. Puerto Rico 1951) (insofar as the District Courts of Puerto Rico are concerned.)

16. 326 U.S. 310 (1945).

range of application of this basic principle of "subjection to jurisdiction." The cases presented involve alien corporations both as parties plaintiff or defendant. While the "doing business" doctrine applies with equal force to both domestic and alien corporations in the United States, we have chosen the decisions to illustrate the peculiar organizational and operating contexts as a result of which these business units may find themselves subjected to the jurisdiction of United States courts, state or federal.¹⁷

In *Sterling Novelty Corp. v. Frank and Hirsch Distributing Co.*¹⁸ a South African importing corporation was sued in New York for breach of contract. It had done considerable buying in New York but was not licensed under New York State law to do business there. It had no branch office in New York. Service of process was made on an officer of a New York corporation which had made purchases for the defendant alien cor-

17. For an exhaustive analysis of jurisdictional doctrine before the *Shoe Co.* case and the effect of that decision in cases after it, through August 1952, see: *Insurance Co. v. Live Star Package Co.*, 107 F. Supp. 645 (D. Texas 1952) at pages 650-653. For a discussion of the rule in the *Shoe Co.* case as applied in state courts (as for example in the California State courts) see: 5 Stan. L. Rev. 503 (1953).

18. 299 N.Y. 208, 86 N.E. 2d 564 (1949). The Statute of Limitations may become a factor, as where an alien corporation, unlicensed or unauthorized to do business in New York, had one or more of its officers in New York upon whom a summons could be served on behalf of the corporation, which had carried on its business regularly and continuously within that state. It was held that the Statute was not "tolled" against it, i.e. its operation suspended, since under Sec. 19 of the New York State Civil Practice Act such a situation is provided against, the last sentence of that section (governing conditions under which the Statute is tolled during a defendant's absence from the state) stating expressly that there will be no tolling "while a foreign corporation has had or shall have one or more officers in the state on whom a summons may be served." *McConnell v. Caribbean Petroleum Co.*, 278 N.Y. 189, 15 N.E. 2d 573 (1938); *Leonor v. Ingenio Porvenir Corp.*, 34 N.Y.S. 2d 705 (Sup. Ct. 1942). And an alien corporation failing to comply with the California Statute requiring all foreign corporations doing business in the state to file its articles and designate an agent for service of process may be conducting business there illegally but at the same time it is still "within" the state for purposes of suit, and it is not precluded from pleading the Statute Of Limitations when sued there, since the provision respecting tolling the Statute as to persons "out of the state" does not apply to it. *Taylor v. Navigazime Libera Trestiva*, 95 F. 2d 907 (9th Cir. 1938). The occurrence of war may complicate the picture still further. In *Bernstein v. Holland American Line*, 173 F. 2d 71 (2d Cir. 1949), in a suit against an enemy alien corporation with assets in the United States, it was held that Sec. 13 of the New York State Civil Practice Act providing for tolling of the Statute during wartime (in an action arising in a foreign country with which United States was at war or was occupied by an enemy of the United States) applies to suits by resident as well as non-resident plaintiffs. This construction of Sec. 13, it was held, does not produce an unconstitutional result, under the power of the New York Legislature to enact retroactive enlargements relating to the Statute of Limitations. (The case however went off on the point that since the plaintiff had procured the appointment of a receiver of the assets of the Defendant corporation in New York under Sec. 977(b) of the New York State Civil Practice Act, such appointment had to be validated by a license from the Treasury to entitle him to proceed further and handle the "blocked" assets).

poration. The New York Court of Appeals held that the defendant corporation was, for the purposes of suit in the New York State courts, "doing business" in New York, because, soon after its incorporation, it organized a South African partnership, with which it had interlocking controls and common offices. The alien corporation's two majority directors and stockholders were the founders of the partnership. The New York corporation, which was served with process, had as its Secretary-Treasurer a brother of one of the defendant corporation's directors. The New York corporation became the agent of the partnership, but in addition negotiated purchases for the defendant alien corporation as its exclusive agent, in a systematic and continuous fashion. This interrelated corporate and agency pattern, the court felt, was a sufficient basis for a finding that the defendant corporation was "doing business" in New York. The court held that the fact that an alien corporate defendant is represented in its local New York activities by a separate New York corporation, and not by a directly controlled subsidiary or branch office, is not of itself determinative. As long as the resident buyer is acting in New York as the agent of the alien corporation, the absence of a local office of the alien corporation will not deprive the New York courts of their jurisdiction.

In addition to interlocking control, the alien corporation and the partnership had intertwining physical set-ups in Johannesburg such as an identical mailing address, the same head office and the same branch offices, cable address, telephone number, shipping marks and stationery insignia. This virtual identity was held to be of significance in relation to the activities of the New York corporation on which service of process was effected. The latter corporation had a name closely similar to that of the partnership, and as stated, was organized shortly after the formation of the South African company, with a brother of one of the alien corporation's directors as Secretary-Treasurer. While officially agent of the partnership, it negotiated purchases as well for the defendant alien corporation, and was generally accepted not only by the plaintiff, but by the trading community in New York as the alien corporation's local representative. Thus, the court decided that the New York corporation had acted as defendant's exclusive buying agent, and there was no evidence that anyone else except the alien corporation itself ever had made any purchases in New York. Despite the denials of the alien corporation of any connection with the New York corporation, the court held that their actual relationship was that of principal and exclusive buying agent.

In another recent case in the New York State courts,¹⁹ the defendant, a British corporation, had failed to file a certificate of doing business in

19. *Gertsenstein v. Peninsular and Oriental S. Nav. Co.*, 202 Misc. 838, 113 N.Y.S. 2d 360 (City Ct. 1952).

New York State, had no directors, officers or employees or bank account there, but had used the Cunard Steamship Company (described as its "Personal Passenger Agent") to sell its passenger accommodations and freight space in its ships on trips from England to European and Far Eastern ports. None of its vessels entered United States ports, though it had its name listed in the New York City Telephone Directory, while for a number of years, Cunard had sold space, collected fares and transmitted the funds to London, where defendant alien corporation's main office was located. The court held that the defendant was not "present in New York," that Cunard's independent general agency (without any interlocking relationships with the defendant corporation) did not subject it to the court's jurisdiction. The "contacts" of the defendant, as above described, with New York's jurisdiction were minimal. It may have been otherwise, the court held, if the defendant had operated with its *own* employees in its *own* New York office.

Distinguishing *Sterling* the court asserted "that *Sterling* did not completely overturn the earlier cases in which effect was given or in which controlling significance was attached to the fact that the foreign corporation sought to be subjected to our jurisdiction acted through an independent agent, such as the typical manufacturer's representative. *Sterling* should be viewed in the light of its own facts; there the local independent agent or representative was a closely connected subsidiary corporation, and was little, if anything, more than the local buying office or department of the foreign defendant."²⁰

Difficulties in obtaining evidence prior to trial are obviously greater where one of the parties is an alien corporation with its "siège social" or administrative center, and virtually all personnel, abroad. However, directors of these corporations with personal knowledge of the litigated transaction, if served with process within the jurisdiction may be subjected to examinations before trial in the same way as agents, officers or employees of a domestic corporation. It is important, incidentally, to note the distinction observed in the Federal Courts, under the Federal Rules of Civil Procedure²¹ for the purposes of an examination before trial, between a director of an alien and a domestic corporation.

Under many articles of incorporation of alien companies, "directors" are administrative officials of the corporation and have active duties of conducting its business—which is not the case regarding directors of United States corporations. Such "directors" of alien companies, it has been held, are comparable to officers or managing agents of an American corporation and are therefore within the sanction of Rule 37(d) which

20. Id. at 842, 113 N.Y.S. 2d at 363.

21. Fed. R. Civ. P. 37(d).

provides for default judgment against their company or for striking out its pleading on wilful failure to appear for an examination.²² And conversely, under the same Rule, it was determined in a recent case²³ that a director of a domestic corporation may not be examined before trial, since the word "director" is omitted from that Rule (but the language was construed as clearly contemplating, as subject to examination, a "director" of an *alien* corporation). Where, however, a plaintiff alien corporation insists on its right to examine a defendant domestic corporation's officers or agents, it cannot escape a like liability at the instance of its opponent.

Thus a Soviet-owned commercial company with no office or place of business in the United States sued defendant,²⁴ a domestic corporation, for breach of contract for failure to complete delivery of machinery, after embargo by the United States on such equipment sold to Russia. The plaintiff company had had a full examination before trial of defendant company which in the case at bar now asked the same right against the plaintiff. Plaintiff company objected that all its officers, agents and employees were in Moscow, and complained that it would impose a great hardship to require them to testify. The court stated, however, that since plaintiff had selected our courts as its forum and they had acquired jurisdiction over the defendant in the Federal court, even though no other means existed to sue defendant, the plaintiff had an opportunity to litigate its claim in accordance with the principles inherent in the United States system of laws.²⁵ An open commission to Russia was held not feasible since no outside attorney may conduct or participate in an examination there—he may only observe, not question. The court, therefore, held that since plaintiff evidently had no trouble in sending Russian representatives here to examine defendant, it should likewise have no trouble in sending its personnel here *again* for examination by defendant, and its motion to vacate the notice of examination was denied.²⁶

A counterpart of the Soviet commercial company case is found in another New York case²⁷ in which plaintiff, a Brazilian corporation, sued in the New York Supreme Court, and was met with a counterclaim on the basis of which the court granted defendant its right likewise to an examination before trial. Although the plaintiff's president was not required to travel from Brazil to New York at the time requested by defendant, the

22. *Societe Internationale pour Participation Industrielles et Commerciales v. Clark*, 8 F.R.D. 565 (D.C. 1948).

23. *Campbell v. General Motors Corp.*, 13 F.R.D. 331 (S.D.N.Y. 1952).

24. *V.O. Machinoimpost v. Clark Equipment Co.*, 11 F.R.D. 55 (S.D.N.Y. 1951).

25. This was the ruling also in *Sekely v. Salkind*, 10 F.R.D. 503 (S.D.N.Y. 1950).

26. To the same effect: *Porrizzo v. Royal Mail Lines, Ltd.*, 8 Fed. Rules Serv. 582 (S.D.N.Y. 1944).

27. *Sociedad Intercambio v. Herman Inc.*, 66 N.Y.S. 2d 353 (Sup. Ct. 1946).

court did require the president or other officer of plaintiff company having knowledge of the facts to be examined at least ten days before the trial, but if either came to New York sooner, examination could be had on his arrival.

Where, as occasionally happens, an American citizen is a president or other officer of an alien corporation, the courts will go even further.²⁸ A defendant alien corporation's president, an American citizen, was ordered under a *subpoena duces tecum* to produce in Arizona, his home state, books of the alien company kept in Mexico. There was no Mexican law prohibiting such a step and accordingly the defendant corporation was ordered to apply to the Mexican authorities for permission temporarily to remove the books for the inspection of the United States Securities and Exchange Commission.²⁹

THE DOCTRINE OF THE *International Shoe Company* CASE

The constitutional limitations of a state's power to assume jurisdiction over a foreign or alien corporation on the basis of its doing business within that state were discussed in the important case of *International Shoe*

28. *Securities and Exchange Commission v. Minas de Artemis S.A.*, 150 F. 2d 215 (9th Cir. 1945).

29. Commenting on the inadequacy of United States facilities for international judicial assistance, and the difficulties encountered by United States lawyers in obtaining evidence and the testimony of witnesses abroad for use in legal proceedings within the United States, Harry Le Roy Jones, at the Sixth Session of the 45th Annual Meeting of the American Society of International Law, held at Washington, D.C. on April 28, 1951, Proceedings, p. 189, 190 stated: "It should be a cause of great chagrin that in this day and age the United States remains the most backward country in the world in matters of judicial assistance. The entire Western world is covered with a network of treaties and agreements on judicial assistance: the Hague Convention of July 17, 1905, and the 22 British bi-partite treaties in Europe; the Bustamante Code of 1928 and the Montevideo Convention of 1940 in this Hemisphere contain provisions relating to international judicial procedure. Since the close of hostilities in 1945 our courts have received an extraordinary number of cases with international or extraterritorial ramifications. Our practice and procedures, which rest in the main on usage and custom—perhaps I should even say on toleration by foreign governments—are completely inadequate to the demands of present-day litigation." Mr. Jones then stated that the provisions of the Federal Rules of Civil and Criminal Procedure relating to taking depositions abroad are largely abortive, since many countries either refuse to permit the taking of depositions according to American practice or their courts refuse or fail to issue compulsory process in the execution of "letters rogatory" from American courts; that the situation is even worse as to the service of judicial documents, since many of these countries forbid the service of judicial documents in their territory. Mr. Jones has proposed a program of reciprocal information as a major step in the reform of international judicial procedure (See: Bull. 83, International Bar Association Conference, Madrid, 1952). It is noteworthy that the subject of International Judicial Cooperation, at the Madrid Conference, 1952, of the International Bar Association produced more papers (18) than any other at that meeting—contributors represented Spain, Mexico, Venezuela, Greece, Germany, Iran, India, Japan, Canada, United Kingdom and the United States.

*Co. v. State of Washington et al.*³⁰ While involving a corporation organized under the laws of the state of Delaware, with its principal place of business in St. Louis, Missouri, the principle enunciated in that case by Chief Justice Stone has been held equally applicable to the activities of alien corporations operating within one of the states of the Union. Briefly the facts were these: the International Shoe Co. maintained factories to manufacture shoes, and distributing units, branches and places of business for the sale of shoes at locations outside of the state of Washington. It had no office in that state, made no contracts there either for sale or purchase of shoes, maintained no stock of merchandise there and made no deliveries there of shoes. For some years, the company employed salesmen who resided in the state of Washington, but worked under the direct supervision and control of sales managers located in St. Louis, Missouri. The salesmen's activities were confined to the state of Washington; their compensation was based on commissions dependent on the amount of their sales. The company supplied these salesmen with a line of samples, each consisting of one shoe of a pair, which they displayed to prospective customers. Occasionally, they rented permanent sample rooms for exhibiting samples, or temporarily, rooms in hotels or business buildings for that purpose; the company reimbursed the salesmen for such rentals. The authority of the salesmen was limited to exhibiting their samples and soliciting orders from prospective buyers at prices and terms fixed by the company. The salesmen transmitted orders to the company's office at St. Louis for acceptance or rejection. When accepted, the merchandise on these orders was shipped "f.o.b." from points outside the state of Washington to the purchasers within that state. All shoes shipped into that state were invoiced at the place of shipment, from which collections were made. No salesmen had authority to enter into contracts or make collections. The state of Washington had personally served upon one of these salesmen in the state of Washington and by registered mail upon the company at its St. Louis address a notice of assessment of delinquent contributions the state claimed the company owed, pursuant to the State Unemployment Compensation Law, to the fund to which each employer was obligated to pay annually a specific percentage of the wages earned by his employees in the state of Washington. The assessment and collection of these contributions were administered by the Washington State Office of Unemployment Compensation and Placement, which was the plaintiff in the action.

The United States Supreme Court held that the company had rendered itself amenable to suit upon obligations arising out of its activities in the state of Washington and that that state could maintain the suit to collect

30. 326 U.S. 310 (1945).

the tax laid upon exercising the privilege of employing salesmen within that state. Chief Justice Stone stated:

" . . . the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which the appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

"We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. . . . Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit. . . ." ³¹

In a more recent case³² the criteria set forth in the *Shoe Co.* case were reinterpreted by Judge Learned Hand and as a result their implications were pushed to the utmost logical limits. Judge Hand stated:

"However, in *International Shoe Company v. State of Washington*, Chief Justice Stone said of a corporation that 'unlike an individual, its presence without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.' Such an approach was *toto coelo* different from that of *Bank of Augusta v. Earle* [38 U.S. 519 (1839)]; it regarded the corporation, not as a fabricated jural person, but as a confederative venture to which, like all concerted activities, one can ascribe location only in places where its purposes are either planned or executed, although it is immanent in all of these. It does not indeed follow that a corporation should be subject to process wherever it is 'present' in that sense; but continuous activities, be they little as one will, satisfy the necessity of that physical 'presence' on which jurisdiction depends in a jurisprudence, territorially limited. . . . Our answer, as we have said, is that, given any continued local activities the strict requirement of 'presence' is satisfied; and that the rest is a matter of more or less. . . ." ³³

31. *Id.* at 320. Where an exclusive general agent in Massachusetts does more than merely solicit business (i.e., he allocates space, collects for tickets, deposits funds and distributes advertising for an alien corporation, that constitutes "doing business" in that state). *Ippolito et al. v. Societa di Navig. Italia*, 100 F. Supp. 73 (D. Mass. 1951). See also: *Van Horn v. Waterman S.S. Corp.*, 71 F. Supp. 347 (E.D. Pa. 1944); *Holland v. Parry Navig. Co.*, 7 F.R.D. 471 (E.D. Pa. 1947); *Neset v. Christensen*, 92 F. Supp. 78 (E.D. N.Y. 1950).

32. *French v. Gibbs Corporation*, 189 F. 2d 787 (2d Cir. 1951).

33. *Id.* at 789, 790. The argument has been made that as a result of the *Shoe Co.* doctrine and the cases adopting its criteria (such as the *French* case), there has in effect, resulted in the Federal cases, a merger of the jurisdictional doctrine and the rule of "forum non con-

The factual situation in the *Shoe Company* case was carried one step further in a recent case³⁴ involving a "refugee" Philippine Corporation carrying on its business affairs in the United States. Defendant Philippine Mining Corporation, leaving its gold and silver mining properties inactive during the Japanese occupation, continued its business during and immediately after the occupation through an office in Ohio, the home state of the president, manager and principal stockholder. This officer kept files, carried on correspondence, drew and distributed checks to employees and himself, used local Ohio banks for deposits as well as for transfer of stock, held directors meetings, supervised the rehabilitation of the corporation's Philippine properties and dispatched money to purchase machinery for such purposes. The President was served with a summons in Ohio in a suit brought by a non-resident of Ohio on a cause of action which did not arise in Ohio or relate to the corporation's activities there.³⁵ Objection had been made that to require Ohio to take jurisdiction under the circumstances described would violate the "due process clause" of the Fourteenth Amendment to the United States Constitution.

In a curiously equivocal opinion which, while intimating that there might be sufficient factual basis for the assumption of jurisdiction by the Ohio state courts, yet returning to the courts of that state the final responsibility for assuming it, Burton J., speaking for the majority, stated: "Using the tests mentioned above [in the *International Shoe Company* case] we find no requirement of federal due process that either *prohibits* Ohio from opening its courts to the cause of action here presented or *compels* Ohio to do so. This conforms to the realistic reasoning in *International Shoe Company v. State of Washington*, supra."³⁶ Minton, J. (with Chief Justice Vinson joining) dissented, stating: "What we are saying to Ohio is: 'You have decided this case on an adequate ground, denying service, which you had a right to do, but you don't have to do it if you don't want to, as far as the decisions of this Court are concerned.' I think what we are doing is giving gratuitously an advisory opinion to

veniens," under which the court must balance the gain to the plaintiff as opposed to the burdens upon the defendant should the action be retained in the forum chosen by the plaintiff, as these considerations were enunciated in the leading case on that problem. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); see also, *Kilpatrick v. Texas & P. Ry.*, 166 F. 2d 788 (2d Cir. 1948); and *Latimer v. S/A Industrias Reunidas f. Matarazzo*, 175 F. 2d 184 (2d Cir. 1949). See also, *Service on a Foreign Corporation After Withdrawal from the Forum State: The Merger of Jurisdiction and Forum Non Conveniens*, 47 N.W.L. Rev. 392 (1952).

34. *Perkins v. Benguet Mining Co. et al.*, 342 U.S. 437 (1951).

35. Despite Ohio Statutory requirements (Throckmorton's Code Sec. 8625-2-4-5) requiring foreign corporations to obtain a license to transact business in that state and appointing a "designated agent" for the service of process, the defendant corporation did neither.

36. 342 U.S. 437, 446 (1951).

the Ohio Supreme Court. I would dismiss the writ as improvidently granted." ³⁷

The *Benguet* case is a reflection of the doctrinal cleavage in the United States between the school of thought which urges an expanded jurisdiction for the federal courts and those who resist such expansion as an encroachment upon the inherent power of the state courts to determine controversies arising out of commercial and industrial activities within their own borders. The present tendency of the Supreme Court seems to be in the direction of favoring those interpretations which strengthen the power of the state courts to determine questions of jurisdiction. ³⁸

Manufacturing, selling or purchasing in the United States, are not, however, the sole criteria for determining whether an alien corporation is "transacting business." This is illustrated by an important case ³⁹ in which the defendant British Corporation, with main offices in London, was involved in complex contractual arrangements with domestic corporations calling for its constant intervention and supervision and was represented in New York by two of its directors, one of whom held a comprehensive power of attorney to protect its interests in the United States. The Court held its subject to Sec. 12 of the Clayton Act fixing venue for anti-trust suits in "judicial districts" wherein a defendant corporation "may be found or transacts business." ⁴⁰ In determining whether this requirement was satisfied, the Court held that "practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue." ⁴¹ Speaking for the Court, Rutledge, J., made an exhaustive analysis of the evolution of the modern conception of

37. *Id.* at 450.

38. Where an English corporation owned a New York corporation (i.e., Imperial Chemical Industries Ltd., owned Imperial Chemical Industries, New York Ltd.) and the latter's offices and staff were used solely for the purpose of carrying out the business of the English corporation, the English corporation was held to be "doing business" in New York and service on the New York corporation in an anti-trust suit (in which these two were parties defendant among many others) afforded reasonable assurance that notice would be "actual" (under the Shoe Co. case doctrine) and was sufficient to confer jurisdiction over the English corporation. (*United States v. Imperial Chemical Industries Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951). Alien friends as well as United States citizens are entitled to the protection of the United States Constitution. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

39. *United States v. Scophony Corporation*, 333 U.S. 795 (1948).

40. Sec. 12 of the Clayton Act (15 U.S.C.A. § 22 (1914)) reads: "Any suit, action or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." The term "venue" connotes generally the locality, the place where the suit should be heard—as contrasted with "jurisdiction" which refers to the power to hear and determine the case.

41. 333 U.S. 795, 807 (1948).

"transacting business" from the earlier narrower concepts of "found," "inhabitant," and "presence" to the practical and broader business conception of engaging in *any substantial business operations*, which was established in the *Shoe Company* case. He stated that in such a continuing and far-reaching enterprise as Scopphony (which had been attempting in the United States to make arrangements for patent exploitation and financing of the enterprise) the Court was not limited in its analysis and reasoning to follow analogies restricted solely to cases involving manufacturing and selling, as criteria for "transacting" business.⁴²

Concurring, Frankfurter, J., said: "Whether a corporation transacts business in a particular district is a question of fact in its *ordinary untechnical meaning*. The answer turns on an appraisal of the unique circumstances of a particular situation. And a corporation can be 'found' *anywhere, whenever the needs of law make it appropriate to attribute location to a corporation*, only if activities in its behalf that are more than episodic are carried on by its agents in a particular place. . . ."⁴³

ALIEN CORPORATIONS AND THE ANTI-TRUST LAWS

Foreign business organizations operating in the United States economy are, as has been pointed out, subject to the enlarging rule of jurisdiction of the *Shoe Co.* case, when found to be "doing business" here. In most instances, such companies function on a strictly separate, arms-length basis, vis-à-vis their United States competitors and others of different nationality. When, however, their operating arrangements involve *agreements* with American companies in the *same field*, affecting prices, in United States or foreign markets, production quotas, employment of United States and foreign patents through licensing, cross-licensing and pooling arrangements, as well as the interchange or control of patent technology relating to products marketed not only in the United States but in the countries of their corporate domicile and elsewhere, there is danger that they may run afoul of the United States anti-trust laws, the Sherman, Clayton and other statutes which in general prohibit monopolies and contracts and combinations in restraint of trade affecting the domestic and foreign commerce of the United States.

Practices which under alien law may be sanctioned by legislation, custom or practice, indeed encouraged as the most effective mechanism for controlling industry or commerce in the interests of their home countries, may well be attacked by the Department of Justice as unlawful under the anti-trust laws. Such companies may to their surprise find themselves

42. *Id.* at 817.

43. *Id.* at 819. (Emphasis supplied.) For the purpose of liability to United States capital stock tax of an alien corporation doing a large "arbitrage" business in the United States see: *Berliner Handels Ges. v. United States*, 30 F. Supp. 490 (Ct. Cl. 1939).

involved in that most complicated, costly, time-consuming and frustrating of all types of litigation, the anti-trust suit.

We can only summarize a few recent examples of the factual patterns and circumstances in which an alien business entity may become implicated with its American "co-conspirators," and the conditions under which the Federal courts will assume jurisdiction over such a company and order it to cease or modify its *modus operandi* both here and abroad.⁴⁴ The courts have shown a marked liberality in the admission of evidence in anti-trust suits; indeed it has become at times possible for the entire corporate practice of an indicted company to be subjected to inquiry.⁴⁵

Alien companies run the risk of being equally responsible for and chargeable with the same unlawful conduct as their United States "partners,"⁴⁶ as where an alien corporation-licensee (Phillips) was found guilty of manipulating its agreements with the General Electric Co., thereby becoming the latter's direct tool in establishing territorial restrictions to protect G.E.'s domestic market from foreign competition, and *itself* thereby restraining trade in violation of the Sherman Act.

Alien corporations, furthermore, if they are found to have entered into "cartel" arrangements with United States export associations (organized under the Export Trade Act—The Webb-Pomerene Act)⁴⁷ composed of major United States producers, to divide the world markets, assign quotas and fix prices in territories, may be subject to prosecution as co-conspirators and defendants in suits under the Sherman Act. It has been held that the Export Trade Act (permitting domestic corporations to combine in the export trade) does not withdraw the prohibitions of the Sherman Act to such practices and makes the rule of competition equally applicable to commerce between nations as it is to trade among the several states. Such was an important ruling in the case of an export trade association engaged in foreign commerce in alkali products.⁴⁸

44. For an interesting presentation of the impact of recent United States case law in the anti-trust field upon cartellized United States-European international commerce, see Heinrich Kronstein, *Neue Amerikanische Lehren zum internationalen Privatrecht im Lichte des Amerikanisch—Europäischen Kartellkonflikts*, an essay in a series in *Festschrift für Martin Wolff; Beiträge zum zivilrecht und internationalen Privatrecht*. (Tübingen, 1952). Also, Report of the Committee on International Trade Regulation on Impact of the Anti-Trust Laws on [United States] Foreign Trade, submitted to the American Bar Association Section on International and Comparative Law for discussion at the 76th Annual Convention of the American Bar Association, Boston, Mass., August 1953.

45. *United States v. Du Pont*, 10 F.R.D. 618 (D. Del. 1950).

46. *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949).

47. 15 U.S.C.A. §§ 61-65 (1918).

48. *United States v. United States Alkali Exports Ass'n.*, 86 F. Supp. 59 (S.D. N.Y. 1949). See also the case of *United States v. Minnesota Mining and Manufacturing Co. et al.*, 92 F. Supp. 947 (D. Mass. 1950).

More recently, duPont, Imperial Chemical Industries, and a number of other large industrial companies were found to have violated the Sherman Act by reason of various agreements to divide territory, allocate customers and markets and by misuse of their patents and technology.⁴⁹ It is unnecessary for our purposes to comment on the history of the operations in international commerce of these defendants and their utilization of the intricate production and marketing techniques and patent technology which were condemned as violations of the anti-trust laws. We point out merely certain highly significant statements of the court bearing on its jurisdiction over alien corporations, involved in illegal combinations with domestic corporations indicating the reach and international scope of these laws. Speaking of the illegal use of patent licensing to restrain exports to Great Britain and vice versa, the court stated: "It does not seem presumptuous for this court to make a direction to a foreign defendant corporation over which it has jurisdiction to take steps to remedy and correct a situation, which is unlawful both here and in the foreign jurisdiction in which it is domiciled. Two evils have resulted from the one understanding of I.C.I. and duPont—restraints upon the foreign trade and commerce of the United States as well as on that of Great Britain. It is not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States."⁵⁰ Further: "There is no substance to the contention that by directing divestiture of some of these companies we are extending the court's jurisdiction 'beyond places over which the United States has sovereignty or has some measure of legislative control,' [*Foley Bros. v. Filardo*, 336 U.S. 281 (1949)]. Such a direction would not be an attempt to impose the regulatory provisions of the Sherman Act on commercial activities of business enterprises organized and operating under the laws of foreign countries. This court's decree will not be directed to the jointly-owned companies; they are not parties to this suit; they have not been served with process and this court, therefore, has no jurisdiction over them. The decree will contain directives which govern the actions and conduct only of the defendants; as to them, we have concluded jurisdiction exists. We are directing that these defendants take definitive action to remove restraints of trade placed upon the commerce of the United States. This is done not by reason of the fact that the Government has been able to 'catch' the defendants and to bring them within the jurisdiction of the court, but because their concerted acts have in part, been committed here

49. *United States v. Imperial Chemical Industries, Ltd. et al.*, 100 F. Supp. 504 (S.D. N.Y. 1951). In a sequel to this case, 105 F. Supp. 215 (S.D. N.Y. 1952), the court had the task of formulating the final decree in the case, designed to restrain and prevent these violations.

50. 105 F. Supp. 215, 229 (S.D. N.Y. 1952).

and the result of their agreement has directly affected our trade and commerce. The provisions directing divestiture of joint companies are consonant with the *Foley* case, supra, and *American Banana Co. v. United Fruit Co.* [213 U.S. 347 (1909)].

"We are not restricted by the fact that what the joint companies may have done was or was not lawful in those countries wherein they are located. These actions, whether legal or not where committed, were had pursuant to an agreement unlawfully made and consummated in part by acts of the defendants within our jurisdiction. It would be an idle gesture merely to say, 'stop this, and cease what you have for so many years been doing'; firmer measures must be applied. That these measures direct the defendants to do certain things the effect of which is felt or realized beyond our borders is immaterial. Equity has often required such steps to be taken; like remedies have frequently been applied in anti-trust suits."⁵¹ Finally: "It is not our purpose to restrain the defendants from operating in a foreign market through a wholly-owned or controlled subsidiary; but the use of that subsidiary to impose agreed restraints upon the foreign commerce of the United States must be prevented. We do not by so decreeing impose American policy in matters of concern local to a foreign sovereign. We do seek to control and direct the actions of an American company and a foreign fellow conspirator over whom jurisdiction exists insofar as their actions violate American law and impose restraints upon our foreign commerce. When we do so, we are not unmindful that I.C.I. is incorporated under the laws of Great Britain, that its principal office and its activities are there centered and that its operations are dominated by British necessities. We do not presume to dictate the manner in which the affairs of the I.C.I. are to be conducted; whether the exports of I.C.I. to the United States are to be continued to be restricted is to be determined by those who direct its affairs and by the British authorities. This observation is equally applicable to the joint companies organized under the laws of other foreign countries. The provisions of our decree recognize and are compatible with this limitation on our authority and jurisdiction."⁵²

Under the judgment of the court, among other provisions, I.C.I. was ordered to reassign certain patents to duPont, on which patents I.C.I. had previously agreed to give exclusive license rights to British Nylon Spinners, a British corporation in which I.C.I. had a half-interest (and to license the patents to all persons desiring to sell goods in England). But in litigation in England⁵³ British Nylon Spinners was held entitled to

51. *Id.* at 237.

52. *Id.* at 242.

53. *British Nylon Spinners, Ltd. v. Imperial Chemical Industries* [1952] 2 T.L.R. 669 (C.A.).

an injunction against I.C.I. restraining it from reassigning or licensing the patents as ordered by the Federal Court. It was held also that "comity" does not require acceptance of a foreign decree impairing British contract rights respecting British patents at least where the injured party was not subject to the jurisdiction of the United States court.⁵⁴

"COMITY" AND THE ALIEN CORPORATION'S RIGHTS AS
CREDITOR OF UNITED STATES DEBTORS

An alien corporation's access to American courts⁵⁵ is frequently guaran-

54. A note in 69 L.Q. Rev. 7, 8 (1953) comments: "In *British Nylon Spinners, Ltd. v. Imperial Chemical Industries* [1952] 2 T.L.R. 669 the defendants, an English Company, made a contract with plaintiffs, another English company, under which the defendants were bound to grant to the plaintiffs exclusive licenses under certain English patents which the defendants had acquired by an agreement in 1946 from du Pont de Nemours, an American corporation. No steps had ever been taken to make an actual grant of the licenses, but this was of no practical importance as the plaintiffs had carried on their manufacture without any objection on the part of the defendants.

"In July 1952, final judgment in an action entitled *United States of America v. Imperial Chemical Industries, Ltd.*, and a number of other defendants, was given in the United States District Court by His Honour Judge Ryan, the action being concerned with the Sherman Anti-Trust Act. The order made by the learned judge purported to cancel the 1946 agreement between the du Pont Corporation and the defendants, and it also directed the defendants not to dispose of the patents to the plaintiffs unless they conformed with certain conditions. The present proceedings were brought by plaintiffs to restrain the defendants from reassigning the patents to the du Pont Corporation as directed by Judge Ryan's order. Upjohn, J., granted an interim injunction, and the Court of Appeals affirmed it.

"The Master of the Rolls, while stating that he 'should be the last to indicate any lack of respect for any decision of the District Courts of the United States' (p. 670), held that order, in the form that it took, asserted an extraterritorial jurisdiction which the courts of this country could not recognise, notwithstanding any such comity. In his judgment Judge Ryan had said that: 'It is not an intrusion on the authority of a foreign sovereign for this court [the United States District Court] to direct that steps be taken to remove the harmful effects on the trade of the United States,' but in the present case the order affected the rights of the plaintiffs who were not subject to the jurisdiction of the American courts. The contract between the plaintiffs and the defendants was an English contract, subject to the jurisdiction of the English courts; moreover the subject-matter of the contract was a number of English patents which are a species of English property. The Master of the Rolls concluded by saying (p. 672) that the order was 'an assertion of an Extra-territorial jurisdiction which we do not recognize for the American courts to make orders which would destroy or qualify those statutory rights belonging to an English national who is not subject to the jurisdiction of the American courts.' The principle stated in the present case is an important one, for with the development of international trade there is always the temptation to extend the effect of the laws of one country beyond its own borders into those of another. However desirable this may seem to be in a particular case, this practice is bound to lead to conflict and confusion." Also see note in 66 Harv. L. Rev. 924 (1953). Also: *The Impact of the Anti-Trust Laws on Patents and Trade-Marks in Foreign Commerce*, 41 Geo. L. J. 663 (1953); Hansard, *United States Anti-trust Process Beyond Our Borders: Jurisdiction and Comity*, Anti-Trust Law Symposium 1953, Commerce Clearing House, Chicago.

55. For a comprehensive review of the rights of aliens in the United States to invoke the

teed under treaty provisions, and normally all local remedies and process, resort to which is necessary for the collection of debts owing to it here, are similarly available to the alien corporation. Due process under the Fifth Amendment extends its benefits to alien friends as well as to citizens. This was decided in a case in which the petitioner was a Russian corporation suing the United States government at a time prior to the latter's recognition of the Soviet Government.⁵⁶

Vis-à-vis local state creditors, however, alien corporations will find that these rules of liberal and equal treatment meet considerable restrictions. Many states have legislation which grants priority to their local state creditors over alien creditors' claims to local funds of local debtors. Thus in a leading case,⁵⁷ the Supreme Court has held that an alien corporate creditor may not, after obtaining a judgment, attach a local debtor's funds and remove them from the state's jurisdiction. Legislation prohibiting such a step does not deprive such alien creditor of property rights without due process, nor, in the case at bar, was it a violation of any treaty rights (treaty with Prussia). An alien corporation may, of course, sue in the federal and state courts to protect its property rights but "comity" does not require states to subordinate rights of their local creditors to those of alien creditors. What property may be attached or removed, or what creditors may be preferred in proceedings against local debtors involving local property is entirely a matter of local jurisdiction under the state's own public policy.⁵⁸

jurisdiction of the courts, see Wilson, *Access-to-Courts provisions in United States Commercial Treaties*, 47 *Am. J. Int'l L.* 20 (1953). As to the rights of alien corporations' access to United States courts see Wilson's discussion at 41-42.

56. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931). See also: *Guessfeldt v. McGrath*, 342 U.S. 308 (1952). The "due process" clause of the 5th Amendment to the Constitution of the United States reads: ". . . No person . . . nor be deprived of life, liberty or property without due process of law;" It is important to note that this amendment is a limitation on the powers of the Congress of the United States. There is however a "due process clause" in Section 1 of the 14th Amendment to the United States Constitution which limits the powers of the state legislatures. This clause reads: ". . . nor shall any State deprive any person of life, liberty or property without due process of law;" (The "equal protection" clause follows immediately after, and reads: "nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.")

By a long line of the United States Supreme Court decisions, corporations have, for the purposes of these constitutional protections of their property been held to be "persons," and therefore entitled to the benefits accruing to "persons" under these clauses.

57. *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908).

58. Where, however, there is no question of conflicting claims or priorities among creditors of local debtors, an alien company (in this case a British Insurance Company) may even, as a substituted creditor (i.e. as subrogee of a French corporation which due to the German occupation was precluded, as an "enemy corporation" from suing in the United States under the Trading with the Enemy Act) sue for damages to the cargo belonging to the French corporation, having paid the latter the marine loss under its policy of insurance, and may

JUDGMENTS AGAINST ALIEN CORPORATIONS BASED ON ATTACHMENTS
AGAINST PROPERTY IN THE UNITED STATES

Alien business entities operating in the United States frequently of necessity acquire property here and maintain bank balances used in their day-to-day functioning. Obviously these assets are vulnerable to the claims of their domestic creditors, whether unsecured or reduced to judgment. Attachment is the most effective statutory proceeding to secure the creditor of an alien corporation prior to judgment. (The New York Civil Practice Act contains provisions typical of the machinery most states have adopted for the issuance, execution, vacation, modification and discharge of this powerful remedy.) With some exceptions, the pursuit of or the legal consequences of this remedy do not ordinarily differ in the cases either of a domestic or friendly alien corporation.⁵⁹ Where, however, the attached property belonged to an *enemy alien* corporation, the ensuing pattern becomes complicated by the claims of the United States Government against such corporations under "freezing orders" issued to handle the program of foreign funds control.⁶⁰

Such cases have at this time naturally greater interest for domestic creditors of former enemy alien business interests and for the Attorney-General in his liquidation of the enemy property and foreign funds control program. Enemy alien business entities could in any event only stand by as onlookers while creditors (domestic or foreign) and the Government quarrel over the management and distribution of their American assets and funds—but in the absence of modifying legislation, the cases lay down principles which may, in a fresh emergency, become important to all other interests.

properly claim to be the real party in interest in the libel action. *Compagnie Francaise de L'Afrique v. The Otho et al.*, 57 F. Supp. 829 (S.D.N.Y. 1944).

59. N.Y. Civ. Prac. Act §§ 902-973. In New York, for example, it has been held that a warrant of attachment will not be issued in an action by an alien non-resident creditor (personal or corporate) against an alien corporation, where neither has been authorized to do or has been doing business within the state, and where the contract sued on was not made in the state, or the cause of action did not arise, or did not concern property there. *Swift & Co. v. Karline*, 245 N.Y. 570, 157 N.E. 861 (1927); *Gano-Moore Coal Mining Co. v. W. E. Deegans Coal Co.*, 214 App. Div. 634, 213 N.Y. Supp. 54 (1st Dep't 1925); *Rzeszotarski v. Cooperative Assn. Kasa Polska*, 139 Misc. 400, 247 N.Y. Supp. 471 (Sup. Ct. 1931). And in *Swift & Co.* case (*supra*) attachment was refused even though the plaintiff foreign corporation was doing business in the state.

60. Exec. Orders No. 8389 and 8785 and Section 5(d) of U.S.C.A. ("Trading with the Enemy Act"). See the recent United States Supreme Court cases determining the relative claims in this context of the United States Government, friendly alien corporate creditors of enemy alien corporate debtors and domestic creditors: *Orvis v. Brownell*, 345 U.S. 143 (1953); *Zittman v. McGrath*, 341 U.S. 446, 471 (1951); *Commission for Polish Relief v. Banca Nationala a Rumanei*, 288 N.Y. 332, 43 N.E. 2d 345 (1942); *Propper v. Clark*, 337 U.S. 472 (1949); *Lyon v. Singer*, 339 U.S. 841 (1950).

LOCAL PROCEEDINGS TO WIND UP ALIEN CORPORATION
AND LIQUIDATE ITS UNITED STATES ASSETS

Termination of an alien company's affairs especially where it leaves American assets (whether in the form of property, "causes of action," credits, bank accounts, etc.) presents many interesting problems of judicial administration and adjustment. In some states, liquidators of an alien corporation duly appointed by order of the court of competent jurisdiction in the foreign country where such company is domiciled will be recognized by American courts as authorized to wind up its affairs and be permitted to sue as the real parties in interest in local courts on claims against American debtors, and will be granted the same status and duties as local receivers for the purpose of suing on behalf of the company's creditors.⁶¹ Even in the absence of ancillary administration (in the country of an alien corporation, wholly-owned by an American decedent) for a decedent's estate, the domiciliary (local) representative of the estate has the power to administer the liquidation of the corporation in the absence of any law of the foreign country which would not recognize such proceedings.⁶²

But where receivers of *branches* of an alien corporation are appointed in countries other than that of the corporation's domicile, they will have no standing to represent the corporation proper in local receivership proceedings relating to assets in the United States. In a case where plaintiffs were general creditors of a defunct Czarist bank, and owned an unpaid ruble balance in the Moscow office, the New York banks held property of the Russian bank which plaintiffs claimed on their own and other creditors' behalf.⁶³ A receivership was asked, and liquidators of the French and Chinese branches appeared specially for the bank proper. It was held they had no authority to appear in New York on behalf of the bank proper, since they were empowered to act only within the jurisdictions creating them to wind up the affairs of the branches in those countries—they had no extraterritorial power to appear for the corporation, although they may have had a status in their own behalf to claim some *ultimate* interest in the funds of the bank. New York alone, said the court, has power to administer New York assets.⁶⁴

To protect creditors and stockholders of alien corporations against the destructive effects of confiscatory decrees of foreign governments, the

61. *Seth v. Lew Hing*, 125 Cal. App. 729, 14 P. 2d 537 (1932). Hong Kong liquidators of a Chinese bank suing in California courts on the promissory note of American maker.

62. *In re Barreiro's Estate*, 125 Cal. App. 752, 13 P. 2d 1033 (1932). Mexican corporation wholly-owned by United States decedent.

63. *Issaia v. Russo-Asiatic Bank*, 266 N.Y. 37, 193 N.E. 543 (1934).

64. *Rolfe v. Rundle*, 103 U.S. 222 (1880). *Ebsary Gypsum Co. v. Ruby*, 256 N.Y. 546, 177 N.E. 134 (1931).

New York Legislature has enacted special protective provisions.⁶⁵ These provide for the appointment of receivers to liquidate the local assets of alien corporations, when they have been dissolved, liquidated or nationalized, their charter or organic law suspended, revoked or annulled, and they have ceased to do business voluntarily, or by reason of the expiration of their term. However, it has been held that such a suit for receivership would not lie at the instance of a creditor and stockholder if the facts showed that following the German occupation and seizure of a Dutch corporation's securities in Holland, the exiled Netherlands Government returned and adopted measures to adjust and reclaim the properties and securities of Dutch businesses and since there never was any suspension or nationalization of the defendant corporation's business in Holland, receivership would not lie.⁶⁶ All other types of alien corporations in the circumstances set forth in these special provisions may have local receivers appointed to take possession and administer assets, later pay claims, and subsequently turn over surplus, if any, to receivers or liquidators appointed in the domicile of the alien corporation, if the latter prove their right thereto.⁶⁷

But nationalization decrees must effectively terminate an alien corporation's existence in order to deprive it of any rights it otherwise might have had to control its local assets, or to entitle creditors in United States to invoke the statutory remedies available for receivership. Thus where the company manages to avoid the full impact of the decree by continuing operations *outside its domicile*, it preserves its corporate existence as well as its full powers to control its property abroad. This was the situation in a case⁶⁸ where plaintiff Estonian corporation, prior to 1940, had a bank balance with defendant bank. Estonia was incorporated into the Soviet Union in that year, but in 1945, at a Stockholm meeting the majority stockholders transferred the seat of the corporation from Talinn to Stockholm and re-elected directors who were then empowered to withdraw the funds from the account with the bank. Defendant bank claimed the nationalization decree of the Estonian Soviet Republic terminated its existence, but the court held otherwise, i.e. that the company continued to

65. N.Y. Civ. Prac. Act § 977 (b).

66. N.Y. Civ. Prac. Act § 977(b) was held not to apply to alien insurance companies, where the New York State Superintendent of Insurance had taken possession of assets in New York of such company and was liquidating them in that state (*Mejulis v. 1st Russian Insurance Co.*, 161 Misc. 715, 292 N.Y.S. 2d 753 (Sup. Ct. 1936)). *Rothschild v. N.V. Gebr. et al.*, 194 Misc. 889, 88 N.Y.S. 2d 157 (Sup. Ct. 1949).

67. *Oliner v. American Oriental Banking Corp.*, 252 App. Div. 212, 297 N.Y. Supp. 432 (2d Dep't 1937), *aff'd*, 277 N.Y. 588, 13 N.E. 2d 783 (1938); *Clark v. Willard*, 294 U.S. 211 (1935).

68. *A/S. Merilaid & Co. v. Chase Nat'l Bank*, 189 Misc. 285, 71 N.Y.S. 2d 377 (Sup. Ct. 1947).

exist and was entitled to its fund: and that the decree was confiscatory and contrary to the public policy of New York, which will determine when foreign legislation will be recognized and applied. Previous United States Supreme Court cases⁶⁹ which legalized such a turnover were held not applicable, since those cases rested on the "Litvinov assignment" (an express international arrangement for the turnover to the United States of local assets of liquidated Czarist insurance companies), whereas in the case at bar there was only the absorption of Estonia into the U. S. S. R. and the subsequent nationalization decree, the legality of neither being recognized by the United States.

The court stated: "The Estonian Soviet Socialist Republic by its decree placed the plaintiff corporation in jeopardy. The directors and shareholders were forced to change the seat of the corporation in order to continue its business and conserve its asset. Irregularities in procedure in so doing are not enough to render their efforts void. All that could be done to conform with the usual formalities was done. . . . the corporation was continued in business and its property protected in the only manner feasible at the time."⁷⁰ Payment to plaintiff corporation, however, was ordered only upon compliance with United States Treasury regulations and procurement of a Treasury license.

Similarly, where a Haitian commercial bank (with whose New York correspondent plaintiffs had deposited securities) was nationalized by the Haitian government, and the New York depository, despite warnings not to do so, returned the securities to Haiti, it was held that New York would not recognize the bank's changed status from a commercial bank to a government instrumentality immune from suit; that the bank retained its former private status and the plaintiffs were entitled to proceed against its property here by attachment.⁷¹

BANKRUPTCY ABROAD OF ALIEN CORPORATIONS—RESULTANT JURISDICTION OF UNITED STATES BANKRUPTCY COURTS

What is the jurisdictional situation when an alien corporation previously active in the United States and with property here, is adjudicated bankrupt by the courts of its own sovereignty? What are the rights of its United States creditors? What is the jurisdiction of an American bankruptcy court? These questions were answered in a case⁷² in which the bankrupts (copartners in a French as well as British partnership) were

69. *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203 (1942).

70. 189 Misc. 285, 287, 71 N.Y.S. 2d 377, 379 (Sup. Ct. 1947).

71. *Plesch v. Banque Nationale de la Republique Haiti*, 273 App. Div. 224, 77 N.Y.S. 2d 43 (1st Dep't), *aff'd*, 298 N.Y. 573, 81 N.E. 2d 106 (1948).

72. *In re Neidecker*, 82 F. 2d 263 (2d Cir. 1936).

declared bankrupt by a "jugement déclaratif de faillite" of the Seine Tribunal of Commerce at Paris. Later in the United States District Court they were also adjudicated bankrupt on the basis of the French judgment. The bankrupts challenged the jurisdiction of the United States court, but it was held that under the Bankruptcy Act⁷³ United States courts have the requisite jurisdiction since among other conditions set forth in Sec. 11 of the Bankruptcy Act the one was met here which vested jurisdiction when "persons had been adjudicated bankrupt by courts of competent jurisdiction without the United States" and have property within the jurisdiction of the court in question. Further, it does not matter that the French law requires only "suspension of payments of debts," rather than an "act of bankruptcy" such as is required by the United States Bankruptcy Act, or that the judgment in Paris was entered *ex parte* without notice to the bankrupts. The proceeding in the United States court is not to enforce the French judgment but to determine whether jurisdiction of the District Court has been established, and the procedure in Paris is sufficiently similar to the United States procedure to be recognized on such a basis. The court said:⁷⁴ "Any judgment is sufficient by which the debtor's property is seized in accordance with the laws of a civilized country for distribution among his creditors. When that has occurred, the statute authorizes adjudication here if the debtor has property within the territorial jurisdiction of the District Court and has committed an act of bankruptcy. In short, it means that once distribution has begun elsewhere, we will not allow a scramble of creditors to reach property here but will permit the debtor to be adjudicated bankrupt even though he has had no stable abode within the district for the greater part of six months."⁷⁵

TRUSTEE'S TITLE TO BANKRUPTS' ASSETS ABROAD

In July 1952, the United States Bankruptcy Act was amended to make it clear that the United States trustee in bankruptcy is vested with the

73. 11 U.S.C.A. § 11 (1898).

74. 82 F. 2d 263, 265 (2d Cir. 1936).

75. Sec. 2 of The Bankruptcy Act. Also see: *In re Carnera*, 6 F. Supp. 267 (S.D. N.Y. 1933), in which the Italian pugilist was held properly to have filed his voluntary bankruptcy petition in the United States District Court and satisfied the jurisdiction of the court since he had for the major part of six months prior to the petition had his "principal place of business" (two rooms at a New York hotel) within the District. Also: *In re Berthoud*, 231 Fed. 529 (S.D. N.Y. 1916). As to the effect of "foreign arrangements" in the United States or their recognition in United States law, see: Nadelmann, *The Recognition of American Arrangements Abroad*, 90 U. Pa. L. Rev. 780 (1942). As to statutory foreign "assignments in bankruptcies," it seems that these cannot affect local property, and claims of a foreign trustee in bankruptcy will not be sustained against domestic creditors, but the trustee may obtain the assets in the absence of attaching local creditors; this does not extend to local land. But the writer believes the law in the United States is unsettled as to the effect in the United States of a foreign discharge in bankruptcy. (*Id.* at 785, 788).

title of the bankrupt in property located *without as well as within* the United States—the trustee now obtains title of the bankrupt to all kinds of property “wherever located.”⁷⁶

CONCURRENT BANKRUPTCIES

Another important amendment of July 1952,⁷⁷ eliminates the former differentiation between “resident” and “non-resident” creditors where a concurrent bankruptcy occurred (i.e. bankruptcy declared in a foreign court as well as in a United States bankruptcy court). Formerly resident creditors *first* received a dividend equal to that received in the foreign court by other creditors, *before* the latter creditors received any amounts. The amended section now reads: “Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, all creditors with claims allowed by the court of bankruptcy who have not had a dividend paid or declared in their favor by a court without the United States shall first be paid a dividend equal to that paid or declared in such foreign court in favor of other creditors of the same class under this title, before creditors who have had a dividend paid or declared in their favor by such foreign court shall be paid any amount in the court of bankruptcy.”

BANKRUPTCY JURISDICTION

Conflicts of jurisdiction in bankruptcy proceedings between American and foreign courts, especially where assets and creditors are found in the other jurisdiction present many unsolved substantive as well as administrative problems.

“Under the American Bankruptcy Act, existence of assets in the United States suffices to furnish jurisdiction for a bankruptcy adjudication [Sec. 11(a)(1)]. The debtor need not be a resident of the United States or have carried on business in the United States, as would be required under the system followed by some other countries. This part of the Act has not been touched by the recent revision. If the only jurisdictional basis for a bankruptcy adjudication is presence of assets in the United States, title under Sec. 70 [11 U.S.C.A. § 110] to assets abroad will hardly be asserted by the American trustee. Chances for recognition are indeed slim. Such chances may not be great either if, thinking in terms of other systems, the adjudication has taken place where the debtor carried on business and the assets claimed are in the country where he resides.⁷⁸ In cases of such kind another adjudication is likely to be made abroad and title to assets in the foreign jurisdiction will not be asserted.

76. 11 U.S.C.A. 110(a) (1952). Nadelmann, Revision of Conflicts Provisions in the American Bankruptcy Act, 1 Int'l & Comp. L.Q. 484, 486 (1952).

77. 11 U.S.C.A. § 105(d) (1952). (Declaration and Payments of Dividends).

78. On the American “turnover” procedure and punishment for contempt for non-compliance see *Maggio v. Zeitz*, 333 U.S. 56 (1947); *Francisco N. Garcia*, 26 *Referees' Journal* 91 (W.D. Texas 1952)—turnover against a Mexican resident who was adjudicated bankrupt in Texas, and ordered to turn over to the trustees, Mexican land he held within 100 kilometers of the frontier; (under Mexican law only a Mexican national may own land so situated).

"The reasons for allowing a bankruptcy adjudication when assets are in the United States, whatever the place of residence of the debtor, have not always been appreciated abroad. Under the American rules of conflict of laws, a foreign trustee in bankruptcy may not defeat rights which local creditors acquired by attaching local assets, even if such attachments took place after the adjudication abroad. Decisions in many states are to that effect. Grant of bankruptcy jurisdiction to the federal court where the assets are located creates the possibility of bringing local assets under bankruptcy control and of providing for their equal distribution among all creditors. A preference obtained by attachment after adjudication abroad will regularly be voidable under the provisions of the American Bankruptcy Act [11 U.S.C.A. # 107]. Attaching creditors can thus be deprived of the benefits of the preference—which is not the case under some other systems. The very possibility of a bankruptcy adjudication in the United States has in fact discouraged attachments after an adjudication abroad.

"Needless duplication of administrations should of course be avoided. Courts should have discretion to refuse adjudication where administration abroad will suffice. It is submitted that laws making adjudication mandatory upon a petition in due form should be amended accordingly. After adjudication, the courts should likewise have power to dispense with local administration in appropriate cases and to approve arrangements between the administrations found to be beneficial or convenient with due regard to the rights of the creditors who have proved their claims."⁷⁹

ALIEN BUSINESS ENTITIES UNDER UNITED STATES ARBITRATION LAW

While known and employed for centuries in the world trading community, international commercial arbitration has only in recent decades developed as an effective alternative method of disputes settlement between business interests of different national origins. No review of the rise of this important movement can be made here,⁸⁰ nor of the legal bases in various countries, implementing arbitrators' powers.⁸¹ There are presented here only a few illustrative problems (primarily procedural) in the growing United States case law, which have arisen when questions relating to arbitrations involving *alien* business entities are submitted to American courts for resolution. The conclusion may be ventured that, at least as

79. Nadelmann, *op. cit. supra* note 76, at 488-490. See also: Nadelmann, *Legal Treatment of Foreign and Domestic Creditors*, 11 *Law & Contemp. Prob.* 696 (1946). (As to jurisdiction in England to wind up foreign unregistered companies, see Lipstein, *Jurisdiction to Wind Up Foreign Companies*, 11 *Camb. L.J.* 198 (1952)).

80. On this see: Wolaver, *The Historical Background of Commercial Arbitration*, 83 *U. Pa. L. Rev.* 132 (1934); also the writings of leaders in the movement, such as Frances Kellor, Morris S. Rosenthal, Martin Domke. The many publications and reviews of the American Arbitration Association, the Inter-American Commercial Arbitration Commission, the Court of Arbitration of the International Chamber of Commerce, the London Court of Arbitration, etc. provide current and exhaustive reports of arbitration activities throughout the world.

81. See Cohn, *Commercial Arbitration and the Rules of Law: a Comparative Study*, 4 *Univ. of Toronto L.J.* 1, 2-7 (1941). Also: Rosenthal, *Arbitration in the Settlement of International Trade Disputes*, 11 *Law and Contemp. Prob.* 808 (1946); *The Symposium on Commercial Arbitration* contained in 17 *Law and Contemp. Prob. Parts I and II* (1952); Mosk, *The Lawyer and Commercial Arbitration; The Modern Law*, *A.B.A.J.* 193 (March 1953).

respects international commercial arbitration, the era of United States judicial hostility and distrust, based on the alleged "ousting of jurisdiction" seems ended. The arbitration process seems rapidly to be reaching the stage where a substantial body of judicial case law is emerging, subjecting that process to judicial interpretation, restriction, or liberalization,⁸² and most important of all, to judicial enforcement.

Federal and New York State cases, under the respective statutes, will be commented on. The latter are selected because of the predominant international commercial significance of that jurisdiction.⁸³

The United States is not a party to any international agreements for the enforcement of foreign arbitration awards, either for those agreements in force in the Western Hemisphere or in Europe.⁸⁴ But in recent bilateral treaties of Friendship, Commerce and Navigation, the United States has provided enforcement provisions.⁸⁵

Very soon after the enactment of the 1920 New York Arbitration Law, the validity, under that statute, of a contract between an alien (Japanese) corporation and a United States corporation was upheld,⁸⁶ as well as the right of the alien corporation to sue upon it in the New York courts, as a contract made in the "course of commerce with foreign nations."⁸⁷ A state, it was held, had no power to restrict the right of such alien corporation to sue in its courts to enforce rights arising out of that contract.⁸⁸

Where the requirements of an arbitration statute have been complied with (i.e. in the absence of any showing of corruption, fraud, undue means of procurement, etc.) courts in the United States seem firmly to support

82. There seems to be a remarkably high voluntary compliance with awards in the international commercial arbitration field; see figures quoted in Domke, *On the Enforcement Abroad of American Arbitration Awards*, Part I, *Commercial Arbitration Symposium*, op. cit. supra note 81, which offers an effective analysis of the converse of the subject of this section.

83. As to foreign awards, see Heilman, *The Enforceability of Foreign Awards in the United States*, 3 *Arb. J.* 183 (1939). "In 1920 New York provided the leadership in this field, and since then, at least thirteen states, the territory of Hawaii, and the federal government have enacted statutes, generally modeled on that of New York, providing for the enforcement of contracts to arbitrate future controversies. An examination of these Statutes reveals that New York has the most complete and thorough statutory scheme with little, if any, that it can borrow from other jurisdictions." (17th Annual Report and Studies of the New York State Judicial Council 217 (1951)).

84. Domke, op. cit. supra note 82, at 546, 547; the Montevideo Treaty of 1889; the Bustamente Code of 1928; the Montevideo Treaty of 1940; nor of the Geneva Protocol of 1923 and Geneva Convention of 1927.

85. Domke, op. cit. supra note 82, at 549; i.e. China, 1946; Ireland, 1950; Colombia, 1951; Israel, 1951; Denmark, 1951; Italy, 1951 (Supplementary to the 1948 treaty); Greece, 1951.

86. *In re Shima & Co.*, 113 Misc. 612, 186 N.Y. Supp. 154 (Sup. Ct. 1920), aff'd, 200 App. Div. 864, 192 N.Y. Supp. 950 (1st Dep't 1922).

87. U.S. Const. Art. 1 § 8 (Commerce Clause).

88. *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914).

awards, and will generally refuse to impeach the judgment of the arbitrators even when they have misconceived or misconstrued the law, since the latter is included in the arbitration risk.⁸⁹ Even when parties select arbitrators who are not disinterested, in fact officials of the contending companies, and who in turn, select an umpire to decide the issues (despite a clause which states that a Board of three, acting as a Board, was to decide the issues) such changes will be held to amount to a waiver of any objection to the award, which will be confirmed as in compliance with the Federal Arbitration Act of 1947.⁹⁰ The Federal Act⁹¹ governs arbitration contracts arising out of maritime transactions, i.e. charter-parties, bills of lading of water carriers, etc. or subjects embraced in admiralty jurisdiction, or commerce among the states or with foreign nations.

United States courts hesitate to upset an arbitration award.⁹² But where contrary to the requirements of the Federal Act⁹³ as to naming or appointing all arbitrators, only two are appointed, who, agreeing on the issues, make an award, without appointing a third (believing it unnecessary, despite the charter party's requirement that three constitute the tribunal), the award will be vacated, since any number less than the entire panel is not authorized to hear the case or arrive at a decision.⁹⁴ Similarly, where arbitrators clearly exceed their powers and make awards as to terms foreign to the controversy, their awards may be modified or vacated. In one case,⁹⁵ pending an arbitration between plaintiff, a New York corporation, and defendant, a French corporation, on the question of the latter's liability for failure to deliver French seeds meeting Federal statutory requirements, plaintiff attached the rejected seeds stored in a bonded warehouse. The arbitrators awarded plaintiff damages for non-delivery, but went further and assessed plaintiff with all charges after a certain date (incurred because of the delay in sending the seeds back, on defendant's instructions, due to plaintiff's attachment), as well as the legal

89. *Gov't of Kingdom of Netherlands v. American Armament Corp.*, 58 N.Y.S. 2d 300 (Sup. Ct. 1945).

90. 9 U.S.C.A. §§ 1-14 (1947). *Petrol Corp. v. Groupement D'Achat des Carburants*, 84 F. Supp. 446 (S.D. N.Y. 1949).

91. 9 U.S.C.A. §§ 1, 2 (1947).

92. *Karppinen et al. v. Karl Kiefer Machine Co.*, 187 F. 2d 32 (2d Cir. 1951).

93. 9 U.S.C.A. § 5 (1947).

94. *Western Canada Steam Co. v. Cia De Nav. San Leonardo*, 105 F. Supp. 452 (S.D. N.Y. 1952).

95. *Cerf. v. La Maison du Paysan du Sud-Ouest*, 202 Misc. 360, 110 N.Y.S. 2d 127 (Sup. Ct. 1952). But a contract between an alien corporation and a domestic corporation, providing for arbitration in New York under the rules of the Inter-American Arbitration Commission, implies a consent without reservation by the parties to arbitrate in New York, and such an arbitration will not be enjoined. *In re Gantt*, 189 Misc. 237, 70 N.Y.S. 2d 55 (Sup. Ct. 1947) and *Son Shipping Co. v. De Fosse*, 199 F. 2d 687 (2d Cir. 1952).

“costs” of the attachment proceedings. These “extrinsic” items in the award were held not proper subjects of arbitration and the award was modified accordingly.

MEANS OF ENFORCING THE AWARD

Where arbitration is agreed upon, it is of utmost importance to stipulate the means of enforcing the award, i.e. whether the parties will restrict themselves to a specified arbitration statute as the sole recourse for enforcement, or leave open to them the right to bring an action in the courts to enforce the award. The intention of the parties, as expressed in the contract controls.⁹⁶

A contract between parties, one of whom was a Latin-American corporation, provided for arbitration in New York, pursuant to the rules of the Inter-American Arbitration Commission, and omitted any reference as to whether the statute should be the sole recourse of the parties. The plaintiff nevertheless was permitted to resort either to action in the courts for enforcement of his award, or to the statute, and an attachment by the plaintiff in the court action was sustained, despite the fact that the award had not yet been confirmed.⁹⁷ An attachment, moreover, is valid and may be levied upon though obtained in a prior action which was later stayed to permit arbitration. Thus an arbitration clause does not deprive a party of his usual provisional remedies.⁹⁸

Normally, the bringing of an action waives the right to arbitration since a party to an agreement containing an arbitration clause must elect whether to bring suit for breach, or to resort to arbitration. But commencement of the suit itself may not constitute a waiver; only persistence in its prosecution does that. This is illustrated in a recent unusual case⁹⁹ in which arbitration was directed pursuant to a charter party and bill of lading containing the arbitration clause. The consignee (who had failed to pay demurrage charges and had delayed unloading, which were the issues in the arbitration) had given an undertaking to obtain the release of the cargo. The undertaking provided “that it would become invalid if within three months from its date a claim is not lodged with a competent Dutch judge, an arbitration agreement is not signed or an amicable settlement is not arrived at.”¹⁰⁰ The ship owner was unable within the three months to obtain an arbitration submission from the shipper, and therefore brought suit in the Dutch court; in order to keep the benefit of the

96. *Sandford Laundry, Inc. v. Simon et al.*, 285 N.Y. 488, 35 N.E. 2d 182 (1941).

97. *Bromand Co. v. Exportadora Afonso de Albuquerque Ltda.*, 110 F. Supp. 502 (S.D. N.Y. 1953).

98. *Murray Oil Products Co. v. Mitsui & Co.*, 146 F. 2d 381 (2d Cir. 1944).

99. *In re Cia Naviera Veragua S.A.*, 129 N.Y. L.J. 381, col. 1 (Sup. Ct. Feb. 3, 1953).

100. *Ibid.*

undertaking. The court held that "commencement of the Dutch suit was not a waiver of the petitioner's right to arbitrate, but persistence in the prosecution would manifest a purpose to relinquish the arbitration remedy." The arbitration petition was granted on condition that the Dutch suit be abandoned and terminated within a reasonable time after entry of the order directing arbitration; otherwise the application would be denied.

STAY OF ACTIONS IN THE UNITED STATES
OR ABROAD PENDING ARBITRATION

When, in the face of an arbitration clause, a party resorts to court action instead, his opponent may be compelled to apply for a stay of such action, under either the Federal Statute¹⁰¹ or the corresponding section in a state statute¹⁰² depending on the court in which suit is brought.¹⁰³ And even where the agreements called for arbitration in London according to English law, the Federal courts will stay suits, pending conclusion of arbitration in London, notwithstanding that the court could not *compel* arbitration there or anywhere else.¹⁰⁴

Choice of a location for arbitration which for ideological reasons would be unquestionably hostile to the interests of one of the parties may not for that reason be used to resist the arbitration. Where a Pennsylvania corporation made a contract with an agency of the Soviet Government (Amtorg) providing for arbitration at Moscow by the U.S.S.R. Chamber of Commerce Foreign Trade Arbitration Commission, the New York Court of Appeals¹⁰⁵ held that the United States corporation, having chosen to do business with Amtorg, and having accepted as one of the conditions arbitration in Russia, may not ask the courts to relieve it of its contractual obligation. In any case, in the event of an award in favor of Amtorg, the United States corporation may, if it claims it was based on partiality of the arbitrators, move to set it aside, or object to its confirmation under the appropriate provisions of the New York Arbitration Act.¹⁰⁶ If the award is enforced by action, that argument would be a valid defense that the proceedings were not conducted in a manner to result in a fair and impartial determination.¹⁰⁷

101. 9 U.S.C.A. § 3 (1947).

102. For example, Section 1451 of the New York State Civil Practice Act.

103. For a review of the historic background of commercial arbitration, the circumstances under which the original (1925) Federal Statute and the 1920 New York Statute were enacted, as well as the conditions under which stays generally will be granted against actions pending arbitration see: *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. 2d 978 (2d Cir. 1942).

104. *International Refugee Organization v. Republic S.S. Corp.*, 93 F. Supp. 798 (D. Md. 1950) (Admiralty Suit).

105. *In Matter of Amtorg Trading Corp.*, 304 N.Y. 519, 109 N.E. 2d. 606 (1952).

106. N.Y. Civ. Prac. Act §§ 1458, 1461, 1462.

107. *Gilbert v. Burnstine et al.*, 255 N.Y. 348, 174 N.E. 706 (1931).

In the Federal courts, the trend also is to hold parties to their arbitration contract despite later developments unfavorable to the prospects of success of one of the parties. Particularly is this illustrated in shipping controversies between business interests of differing national origins eventuating in admiralty arbitrations, where Federal statutes are involved.¹⁰⁸ A consignee of goods shipped by libellant from Spain agreed in the bill of lading to submit, pursuant to the right granted under Article 846 of the Spanish Code of Commerce, to "liquidation of general average" in Barcelona extrajudicially by experts appointed by the shipowner and to be made up according to the York-Antwerp Rules of 1924. The parties also renounced Articles 847, 851 and 865 of the Spanish Commercial Code and gave approval to such adjustment of general average. (Art. 846 prescribes rules to follow in proof and liquidation of averages in the absence of agreement of the parties). The libellant insisted that all of the articles of the Spanish Code of Commerce were irrelevant and inapplicable—first, because the parties renounced Articles 847, 851, 865 and further because the rights of the parties are determined under United States law, since the contract voyage terminated in New York, because liability for general average is controlled by the law of the final port of destination, and liability for general average arises not out of the general contract but independently from the participation in the common venture. Also that requiring the consignee to give a bond for its share of general average would "relieve" the carrier of the effects of its own negligence in violation of the applicable United States Statute (Harter Act) which voids any clause limiting carriers' liability for negligence. But the court held that the clause in the bill of lading was *nothing more than an arbitration agreement as to general average*, and a provision in a shipping document under which the parties bind themselves to arbitrate in controversies arising thereunder in a *foreign country* is not unlawful. Since the parties had agreed on the method and the forum they must be left to their contract. The court also held that there is no necessary conflict between the Harter Act (which attempts to regulate the rights and liabilities between carriers and cargo interests with a view to international uniformity) and the Federal Arbitration Act.¹⁰⁹

In another case¹¹⁰ libellant and respondent, both Portuguese corporations, contracted for shipment from New York to Portugal. Libellant sued

108. "The Harter Act" (Carriage of Goods by Sea Act—46 U.S.C.A. §§ 1300-1315 (1936)).

109. *Pfizer & Co. et al. v. 912 Bags of Tartar et al.*, 40 F. Supp. 123 (E.D. N.Y. 1941). See also: *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935); and *Danielsen v. Entre Rios Rys. et al.*, 22 F. 2d 326 (D. Md. 1927).

110. *Uniao De Transportadores Para Importacao E Comercio Ltda. v. Companhia de Navegacao*, 84 F. Supp. 582 (E.D. N.Y. 1949).

for damages to the cargo and the defense was that a clause in the contract provided for arbitration in Lisbon; a stay of libellant's suit pending the arbitration was therefore asked. Libellant claimed that the shipment was governed *solely* by the United States statute (Harter Act), since the bill of lading incorporated that Act's provisions—that, therefore, the defense was bad, since arbitration is "inconsistent" with that Act, and arbitration has no place in the controversy.¹¹¹ The court held that if the United States Congress in 1947 thought the 1936 Harter Act affected or forbade arbitration, it could have, but did not, say so; therefore in the absence of any inconsistency or prohibition, the parties may arbitrate. Further, that a stay does not oust the court of jurisdiction—this, the court retains, and a stay pending arbitration was granted.

In a recent case the rule of the court's retention of jurisdiction pending arbitration was reinforced.¹¹² The United States District Court had declined jurisdiction in an admiralty suit for damages to the cargo of a vessel proceeding from Colombia to New York on the ground that the parties were foreign nationals (a Colombian corporation and a Danish partnership). The Federal Court of Appeals reversed on the ground that the execution of the charter in New York, the provisions that the shipments and bills of lading should be subject to the maritime laws of the United States, for payment in New York in dollars, and arbitration held in New York all required the court to retain jurisdiction and pursuant to the arbitration clause of the charter, refer the matter to arbitration. In the light of this decision, it may well be that the 1947 United States Arbitration Act has abrogated the traditional discretion of the Federal District Courts (in cases involving arbitration agreements) to decline jurisdiction of admiralty suits wholly between foreign nationals.

ENFORCEMENT OF FOREIGN ARBITRATION AWARDS IN THE UNITED STATES

United States courts, both state and federal, have on the whole, acted favorably to suits for the execution of arbitral awards made in foreign countries. In New York, the leading case¹¹³ involved a British award

111. The 1947 Federal Arbitration Act § 1 provides for arbitration in any "maritime" transaction; and § 3 provides for a stay of a suit upon an issue referable to arbitration.

112. *Industrial y Frutera Colombiana S.A. v. The Brisk et al.*, 195 F. 2d 1015 (5th Cir. 1952).

113. *Gilbert v. Burnstine et al.*, 255 N.Y. 348, 174 N.E. 706 (1931). Nor does a provision in an arbitration contract that an award shall be a condition precedent to suit (the parties having agreed to arbitration in China), bar an attachment in a suit, since the party opposing the suit may still obtain under § 1451 of the N.Y. Civ. Prac. Act, a stay of the suit (his exclusive remedy, where agreement to submit to arbitration has been violated). *American Reserve Ins. Co. v. China Ins. Co.*, 297 N.Y. 322, 79 N.E. 2d 425 (1948). *Sargant et al. v. Monroe*, 67 N.Y.S. 2d 591 (Sup. Ct. 1944) (English Award) followed the Burnstine case (*supra*) and illustrates the sharp distinction the courts make between actions on an award

obtained against American defendants who had pursuant to British procedure been properly notified in New York of the arbitration in England, but had ignored it. Thereupon, the plaintiff brought an action on the award (not on the English judgment which had been obtained) and was upheld by the New York Court of Appeals, on the ground that since the parties had impliedly submitted to the terms of the British arbitration law and to the British procedural machinery permitting service of process outside the jurisdiction, defendants had contracted that the arbitration machinery would be foreign, operating from the foreign court.

However, actions in the United States on *foreign judgments* obtained following arbitration awards, must be distinguished from actions on the *awards* themselves. If no personal jurisdiction had been obtained abroad over the defendant in the action there to enter judgment on the award, United States courts will deny relief to the party obtaining such judgment, as well as to the party suing in a state like Georgia (under whose arbitration laws only judgments on awards may be enforced) who has obtained a common law award under the foreign arbitration act, but who has failed to make the arbitration the *order* of the foreign court.¹¹⁴

obtained abroad (in which all the foreign procedural requirements had been met) and an action to enforce the award as a judgment which had been obtained thereon. In the first case where defendant had appointed an arbitrator and a representative in London for all purposes of the arbitration the award that followed was upheld by the New York court in a motion for summary judgment, but the British judgment was not upheld in the New York court in a suit on the judgment, since defendant had not, in that action, submitted to the British courts personally or through his representatives. See also: *Moyer et al. v. Van-Dye-Way Corp.*, 126 F. 2d 339 (3d Cir. 1942); *Mulcahy et al. v. Whitehill*, 48 F. Supp. 917 (D. Mass. 1943), and other cases cited by Domke, *op. cit. supra* note 82, at 554.

114. See *Skandinaviska Granit Aktiebolaget v. Weiss*, 226 App. Div. 56, 234 N.Y. Supp. 202 (2d Dep't 1929) (English Arbitration Act), and *Wright, Graham & Co. v. Hammond*, 41 Ga. App. 738, 154 S.E. 649 (1930) (criticized by Lorenzen in *Commercial Arbitration—Foreign Awards*, 45 Yale L. J. 39 (1935)). See also: *Tiefenbacher v. Dulien Steel Products*, No. 308 Super. Ct. Wash. (1943). Additional New York cases in which foreign awards were enforced: *Coudenhove-Kalergi v. Dieterle*, 36 N.Y.S. 2d 313 (Sup. Ct. 1942); *Stern v. Friedman*, 113 N.Y. L.J. 691, col. 7 (City Court Feb. 21, 1945); *Manasse v. Heine & Co.*, 188 Misc. 535, 68 N.Y.S. 2d 494 (Sup. Ct. 1947); *Cerf. v. La Maison du Paysan du Sud-Ouest*, 202 Misc. 360, 110 N.Y.S. 2d 127 (Sup. Ct. 1952). By an amendment in 1950 to Sec. 1450 of the N.Y. Civ. Prac. Act, the Supreme Court of that state was given the power to enter judgment on an award, in addition to enforcing an arbitration contract or submission, thus eliminating previous doubts as to the jurisdictional status of non-residents in arbitration proceedings held in that state. See also 17th Annual Report of New York State Judicial Council 220-224 (1950) and articles there cited; also: *Galban Lobo Co. Importing & Exporting Assn. S.A. v. Haytian Amer. Sugar Co.*, 187 Misc. 448, 61 N.Y. Supp. 611 (Sup. Ct. 1946); *Matter of Bradford Woolen Corp.*, 189 Misc. 242, 71 N.Y.S. 2d 257 (Sup. Ct. 1947). Indicative of the growing importance in the United States of the problem of enforcement abroad of arbitration awards made in that country, is the announcement by the Committee on Foreign Law of the Association of the Bar of the City of New York of research initiated by that body on that topic. *The Record of the Association of the Bar of the City of New York*, Vol. 8, § 6

THE "DOING BUSINESS" AND "PERMANENT ESTABLISHMENT" CONCEPTS
IN UNITED STATES INCOME TAXATION AFFECTING ALIEN CORPORATIONS

Comprehensive definitions of these basic concepts as employed for United States income taxation purposes cannot be found in the United States Internal Revenue Code or the Commissioner's Regulations. However, the phrase "engaged in trade or business within the United States" as used in various connections in the applicable sections of the Revenue Code and Regulations "includes the performance of personal services within the United States at any time within the taxable year. . . ." ¹¹⁵ But conducting only a relatively small amount of any type of business activity in the United States is enough to determine that the alien corporation is "engaged in business" in the United States. ¹¹⁶

The United States Supreme Court has stated: ¹¹⁷ "'Business' is a very comprehensive term and embraces everything about which a person can be employed . . . 'that which occupies the time, attention and labor of men for the purpose of a livelihood or profit.'" In a leading decision of the Tax Court, ¹¹⁸ it was stated: "The test is both a quantitative and a qualitative one," ¹¹⁹ and it was held that the making of one or two isolated and fortuitous sales of merchandise in the United States does not constitute engaging in business there. There must be some progression, continuity or sustained activity. ¹²⁰ Another factor is whether or not the

(June, 1953) (the study will include the problem of enforcement abroad of American money judgments). A valuable bibliography of Anglo-American, continental as well as Latin-American articles and treaties on these subjects is attached to the Committee report.

115. Int. Rev. Code § 211(b) which refers to §§ 119, 143, 144 and 231. See also United States Treas. Reg. 111, § 29.231-1(b) (1945). If classified as a "corporation," (or a partnership) the entity will be considered "domestic" if it was created or organized in the United States or under the law of the United States or of any State or Territory; and conversely, if it is not "domestic," it will ipso facto be considered "foreign" (or "alien," as that term is employed for the purposes of this article). See 26 U.S.C.A. § 3797(a)3, (a)4, (a)5 and United States Treas. Reg. 111, §§ 29.3797-2 to 3797-8. No cases or rulings appear to have dealt with the meaning of "created or organized in . . . or under the law of." In the case of a corporation, the meaning is generally clear. The authority granting the corporate franchise determines the status of the corporation as domestic or foreign. For a partnership, the meaning is more doubtful. *Craik v. United States*, 31 F. Supp. 132 (Ct. Cl. 1940) suggested the problem but its resolution was unnecessary to the decision. A partnership may be considered to be "created or organized" where the parties are located at the time of creation or organization (See Restatement, Conflict of Laws § 342 (1934)), or perhaps where the central control of management is, or the major activities are conducted.

116. *Yerburgh*, 5 T.C. Mem. No. 6367 (1945).

117. *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1910).

118. *The Linen Thread Company Ltd.*, 14 T.C. 725 (1950).

119. *Id.* at 736.

120. *Lewellyn v. Pittsburgh B. & L.E.R. Co.*, 222 Fed. 177 (3d Cir. 1915). *Berliner Handels-Gesellschaft v. United States*, 30 F. Supp. 490 (Ct. Cl. 1939); *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915).

corporation has complied with state laws as to licenses, etc., so as to be authorized to do business. Business activities may take the form of selling, purchasing or producing goods, rendering service or engaging in real estate or investment operations. An alien corporation is not engaged in United States business when its activities concern foreign commerce exclusively. Maintaining and operating a "permanent establishment" in the United States, such as a branch, a warehouse, a factory, or a purchasing or sales office or agency to pursue these activities for the alien corporation constitutes "engaging in business" in the United States. But if the activities of a selling or purchasing agency or office in the United States are limited solely to soliciting orders, this would probably not be considered as such. But even if the alien corporation does not maintain a "permanent establishment" in the United States, its activities in the country, such as providing service through agents, or purchasing or selling through agents, may constitute engaging in business there. It is not engaged in business in the United States where it merely establishes an office there, and certain acts incident to its foreign commerce activities take place there, relating solely to its interval management, or an agent is appointed there or the corporation holds or acquires stock in domestic corporations, including subsidiaries or merely collects interest and dividends from investments in the United States.¹²¹

It is believed¹²² that the United States Bureau of Internal Revenue may contend that certain activities of a domestic subsidiary, such as the sale of a foreign parent's products in the United States are equivalent activities by the foreign parent through an agent maintained in the United

121. *Scottish-American Investment Company, Ltd.*, 12 T.C. 49 (1949); *Amalgamated Dental Company, Ltd.*, 6 T.C. 1009 (1946); *British Timken Ltd.*, 12 T.C. 880 (1949). See also: *Continental Baking Corp. v. Higgins*, 130 F. 2d 164 (2d Cir. 1942); *United States v. Nipissing Mines Co.*, 206 Fed. 431 (2d Cir. 1913), *aff'd*, 234 U.S. 765 (1914); *Rose v. Nunnally Investment Co.*, 22 F. 2d 102 (5th Cir. 1927); *Automatic Fire Alarm Co. v. Bowers*, 51 F. 2d 118 (S.D. N.Y. 1931); *United States v. Hotchkiss Redwood Co.*, 25 F. 2d 958 (9th Cir. 1928); *Eaton v. Phoenix Securities Co.*, 22 F. 2d 497 (2d Cir. 1927).

122. *Schneider, Foreign Corporations and the Income Tax*, 29 *Taxes—Tax Magazine* 637 (1951). Where a parent alien corporation is more than a mere passive owner, and manages or otherwise actively helps its domestic subsidiaries, or devotes substantial attention to its investments, or generally does anything outside the scope of normal passive "holding company" activity, it is considered as engaged in trade or business in the United States. Domestic subsidiaries wholly owned by an alien corporation and actively operating in the United States are not mere agents, regardless of the status of the parent and are also considered as so engaged, as are domestic subsidiaries, organized to perform specific services in aid of its parent, even when such subsidiaries themselves are "holding companies." *Ward Baking Corp. v. United States*, 66 Ct. Cl. 456 (1929); *Hastings Pavement Co. v. Hoey*, 28 Fed. Supp. 897 (S.D. N.Y. 1939); *American Investment Securities Co. v. United States*, 112 F. 2d 231 (1st Cir. 1940). The leading case on this phase is *Edwards v. Chile Copper Co.*, 270 U.S. 452 (1926) or when the alien parent is a member of a "syndicate" carrying on business within the United States (*Cantrell & Cochrane, Ltd.*, 19 B.T.A. 16 (1930)).

States even though the subsidiary buys the product from the parent and sells for its own account. Sales from abroad directly to a United States customer without the intervention of any employees, agents or without an office of the alien corporation in the United States is not engaging in business there. Purchases of merchandise in the United States by way of a systematic and regular practice through an agent in the United States who is employed there to do such buying and arranging for shipments may be considered by the United States Internal Revenue Bureau as "engaging in business" in the United States.¹²³ If the purchasing is done directly from abroad without the use of an office, an agent or other employees the alien corporation is not engaged in United States business. Thus, unless contracts for the purchases or sales in the United States are negotiated and concluded in the United States through a resident employee or agent or deliveries of goods are effected from or to stocks of such goods maintained in the United States or the goods sold are installed or serviced there by the corporation, such sales or purchases do not constitute "engaging in business" in the United States.

The owning *and* leasing (operation) of real estate in the United States constitutes engaging in business by an alien corporation.¹²⁴ But the owning by an alien corporation and leasing of a building which is operated by the lessee on a "net rent basis" is not engaging in business in the United States, and mere ownership of income-producing real estate in the United States will not of itself subject the alien corporation to being held as engaging in trade or business here.¹²⁵ Where an alien corporation-lessor merely receives the income from the property leased and divides the profits among its shareholders (after making a very small investment for profit) it will not be so engaged. But where it is actively engaged in managing the leased property, collecting the rents, investing the profits, all beyond the "mere receipts of income from property and the payment of organization and administration expenses incidental to the receipt and distribution thereof" it will be so engaged.¹²⁶

Dealing in transactions on a United States commodity exchange through resident brokers, commission agents, etc., is not "engaging in trade or business" here. On this point the United States Internal Revenue Code and Regulations state: ". . . the phrase engaged in trade or business

123. I.T. 2792, XIII-1 Cum. Bull. 85 (1934), citing I.T. 1406, I-2 Cum. Bull. 151 (1922).

124. G.C.M. 18835, 1937-2 Cum. Bull. 141, and the Investor's Mortgage Security Company Ltd., 4 T.C. Mem. 45 (1945).

125. Evelyn M. L. Neill, 46 B.T.A. 197 (1942).

126. G.C.M. 18835, 1937-2 Cum. Bull. 141; *Zonne v. Minneapolis Syndicate*, 220 U.S. 187 (1911); *McCoach v. Minehill and S.H.R.R.*, 228 U.S. 295 (1913); *United States v. Peabody Co.*, 104 F. 2d 267 (6th Cir. 1939); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1910); *Von Baumbach v. Sargent Land Co.*, 242 U.S. 503 (1917).

. . . does not include the effecting, through a resident broker, commission agent, or custodian, of transactions in the United States in commodities (if of a kind customarily dealt in on an organized commodity exchange, if the transaction is of the kind customarily consummated at such place and if . . . the corporation has no office or place of business in the United States at any time during the taxable year through which or by the direction of which such transactions in commodities are effected), or in stocks or securities.”¹²⁷ “Commodities” means goods of a kind customarily dealt in on an organized commodity exchange such as a grain futures or a cotton futures mart, and does not include merchandise in the ordinary channels of commerce.¹²⁸

A “commission agent” is similar to a broker who effects transactions in commodities for the public in general, as distinguished from an ordinary agent who receives his compensation on the basis of a percentage of merchandise sold.¹²⁹ But where a resident agent, acting upon the directions of an alien corporation effects the above transactions in commodities or securities, the exception noted¹³⁰ is not applicable. However, in a case¹³¹ involving an alien investment trust, it was not held to be engaged in United States business where all policy decisions were made in the home office outside the United States and all purchases and sales of securities were made through resident brokers, even though substantial clerical functions were performed in the alien corporation’s office in the United States.

It is important to distinguish between trade or business in *commodity* exchange transactions and those in *securities* from trade or business, i.e. purely of *investment* in securities; the latter problem is governed by the same rules as the real property rental investment cases.¹³²

The above-noted exception¹³³ applies only where there is no exercise of trading discretion in the United States, and where the activity of the resident broker, commission agent or custodian is the only connection with business done in the United States. If the agent in the United States uses his own discretion in making transactions by using resident brokers for the alien corporation’s account, the exemption does not apply. The agent must be a mere conduit for the placing of orders and receiving income, for the exemption to apply.¹³⁴

127. Int. Rev. Code § 211(b) and U.S. Treas. Reg. 111, §§ 29.211-7, 29.231-1(b), 29.231-2(b).

128. U.S. Treas. Reg. 111, § 29.231-1(b).

129. G.C.M. 21219.

130. Int. Rev. Code § 211(b).

131. *Scottish-American Investment Co. Ltd.*, 12 T.C. 49 (1949). See also: *Commissioner v. Nubar*, 185 F. 2d 584 (4th Cir. 1950).

132. *Rose v. Nunnally Investment Co.*, 22 F. 2d 102 (5th Cir. 1927).

133. Int. Rev. Code § 211(b).

134. *Commissioner v. Nubar*, 185 F. 2d 584 (4th Cir. 1950); *Fernand C.A. Adda*, 10 T.C. 273 (1948), *aff'd*, 171 F. 2d 457 (4th Cir. 1948).

Where an alien corporation and a United States selling corporation (both controlled by the same interests) act as separate entities and do not give each other preferential treatment, the United States selling corporation will not be held to be an agent of the alien corporation so as constitute the latter's being engaged in trade or business in the United States.¹³⁵ And where for a number of years prior to the war, a United States corporation made sales to an alien corporation, a change, due to war conditions in method of shipment whereby the United States vendor shipped directly to vendee's customers and then sent the vendee the difference between the price so received and the wholesale price and disbursements, did not change the relationship to agent and principal.¹³⁶

BASIS FOR TAXATION OF ALIEN CORPORATIONS

The Sixteenth Amendment of the United States Constitution, declared in effect February 25, 1913, states that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Congress for the purpose of taxing or wholly or partially exempting from taxation alien corporations, may place them in a separate classification from domestic corporations and treat them differently, by way either of favorable treatment or of unfavorable discrimination, depending entirely on congressional policy in the field of foreign economic relations, without being guilty of the charge of violating the Fifth Amendment (which prohibits the enactment by Congress of a statute depriving a person of life, liberty or property without due process of law), as long as the classification is reasonable, and not merely arbitrary and capricious.¹³⁷

CLASSIFICATION OF ALIEN CORPORATIONS FOR UNITED STATES INCOME TAX PURPOSES

All alien corporations are taxed only upon their gross income from sources within the United States.¹³⁸ But under the Internal Revenue Code, there are two classes of foreign corporations—depending on whether the corporation is or is not engaged in trade or business within the United States: (a) A "non-resident foreign corporation" i.e. one not engaged in trade or business within the United States at any time within the taxable year. This corporation is subject to income tax at the rate of 30% on that part of its gross income from United States sources, which constitutes

135. *European Naval Stores Co.*, 11 T.C. 127 (1948).

136. *Amalgamated Dental Co.*, 6 T.C. 1009 (1946); *British Timken Ltd.*, 12 T.C. 880 (1949).

137. *Barclay & Co. v. Edwards*, 267 U.S. 442 (1924); *National Paper Co. v. Bowers*, 266 U.S. 373 (1924).

138. Int. Rev. Code § 231(a)(1).

“fixed or determinable annual or periodical income.”¹³⁹ (b) A “resident foreign corporation” i.e. one which at any time within the taxable year is engaged in trade or business within the United States. This corporation is taxed on its gross income from sources within the United States at the same rates as domestic corporations.¹⁴⁰ “Gross income” includes only income from sources within the United States¹⁴¹ but it includes all such income without limitation to fixed or determinable annual or periodical income. Deductions are generally allowed to a “resident” foreign corporation only to the extent that they are connected with income from United States sources.¹⁴² Except for the purpose of apportioning certain deductions in the computation of net income from United States sources, the nature and amount of the income of a foreign corporation from sources without the United States is irrelevant to the determination of its United States tax.¹⁴³

As to non-resident alien corporations (i.e. one not engaged in trade or business within the United States at any time within the taxable year) the tax is on their gross income within the United States, taken into account at 100% of the income and no deductions or credits are allowed.¹⁴⁴ These corporations are in no case taxable on their capital gains from United States sources, and the tax is on gross income, regardless of the amount of the income. As to a resident foreign corporation, the tax is on all of its income from United States sources.¹⁴⁵ All income including both long-term and short-term capital gains, is taken into account at 100% of the income or gains.¹⁴⁶ From this income, it may take as allowable deductions,¹⁴⁷ those connected with income from United States sources, and the so-called “charitable deductions” to the extent allowed.¹⁴⁸

UNITED STATES TAX CONVENTIONS “FOR THE AVOIDANCE OF DOUBLE TAXATION AND FISCAL EVASION WITH RESPECT TO TAXES ON INCOME”

As of March 1, 1954, the United States has ratified income tax treaties with Australia, Sweden, Belgium, Finland, Greece, Canada, France, United Kingdom, Denmark, the Netherlands, New Zealand, Norway, Ireland, Switzerland and South Africa. Formal negotiations have been held with Colombia, Uruguay, Israel, Italy, and Japan; exploratory discussions

139. Int. Rev. Code §231(a).

140. Int. Rev. Code § 231(b) and §§ 13 and 15.

141. Int. Rev. Code § 232(a).

142. Int. Rev. Code § 232.

143. U.S. Treas. Reg. 111, § 29.231-2.

144. U.S. Treas. Reg. 111, §§ 29.231-1(a), 29.231-2(a), 29.233-1.

145. U.S. Treas. Reg. 111, § 29.231-2(b).

146. Int. Rev. Code § 117(b).

147. Int. Rev. Code § 23; U.S. Treas. Reg. 111, §§ 29.231-1(b), 29.232-1(b).

148. Int. Rev. Code § 232(b) and U.S. Treas. Reg. 111, § 29.232-1(b).

with Argentina, Austria, Brazil, Cuba, Mexico, Western Germany, Luxembourg, Mexico, Paraguay, Philippines and Venezuela. The chief provision of the treaties embodies the "doing business" and "permanent establishment" concepts, by limiting the United States income taxation to industrial and commercial profits derived by alien enterprises from "sources within the United States."

Other rules established in these treaties are: (1) the reduction in the rate of United States tax imposed on certain investment income, such as dividends, interest and royalties; (2) the exemption by the United States of income from shipping and aircraft operations; (3) taxation of governmental salary and other compensation by the country of source and exemption by the other country; (4) a limited exemption from United States tax on income earned by so-called commercial travelers.

In the field of administrative assistance, the treaties usually provide for the exchange of information between the tax officials of the two countries, and for consultation between them in cases of double taxation, preparation of regulations and other administrative matters.¹⁴⁹

149. In addition to the many general United States treatises, texts and encyclopedias on United States Income Tax Law, the following books and articles are devoted to the specific problem of United States income taxation of alien business entities: Phillips, *U.S. Taxation of Non-Resident Aliens and Foreign Corporations* (Toronto, Canada, 1952); Roberts and Warren, *Income Taxation of Non-Resident Aliens and Foreign Corporations* (Practising Law Institute, New York, 1953); Schneider, *Foreign Corporations and the Income Tax*, 29 *Taxes—Tax Magazine* 637 (1951); Carroll, *International Tax Conventions*, 30 *Taxes—Tax Magazine* 269 (1952). Also Carroll, *The Achievements and the Limitations of Tax Treaties*, National Foreign Trade Council, Inc. (New York, Nov. 19, 1952). For a brief comparative study of the systems of corporate taxation of the United Kingdom, France, and the United States: see Hornsey, *Corporate Taxation—A Comparative Study*, 16 *Mod. L. Rev.* 26 (1953). In view of the extreme complexities of the United States Excess Profits Tax Act of 1950 as amended in 1951, which added §§ 430-472 to the Internal Revenue Code, and the expiration of this much-debated piece of United States tax legislation on December 31, 1953, we omit any extended discussion of it here. Foreign corporations not engaged in trade or business within the United States are exempt from this excess profits tax (Int. Rev. Code § 454(e)). However, those which are so engaged are subject to the tax and the Int. Rev. Code and pertinent Regulations provide special treatment in such cases (Int. Rev. Code §§ 434(b), 435(a), 436(b), 454(e), 470(a) and corresponding Regulations). No cases have been found in which these sections were directly applied to foreign corporations. The United States Excess Profits Tax is frequently the subject of important tax provisions found in the increasing number of reciprocal tax conventions which have recently been entered into between the United States and other countries. Also omitted is any discussion of the intricate features and distinctions of the Int. Rev. Code relating to "personal holding companies" and "foreign personal holding companies" (Int. Rev. Code §§ 500-511). These provisions were designed to prevent the use of the corporate entity as a means of postponing receipt of incomes by corporate accumulations. See: Carroll, *The Achievements and Limitations of Tax Treaties* (Address at 39th Annual National Foreign Trade Convention, New York, Nov. 19, 1952). For a detailed analysis of these treaties, see Phillips, *supra*, Chap. VI, 181-313. For a discussion of the United States-Belgian Tax Convention see Carroll, *Income Tax Conventions between Belgium and the United States*, 31 *Taxes—Tax Magazine* 554 et seq. (1953).

CONCLUSION

1. The juristic structure governing the operations of alien corporations in the United States has as its foundation the doctrine of "doing business," as exemplified in the *International Shoe Company* case.

2. Accessory to and implementing this doctrine procedurally are the corollary concepts of the right of access of these entities to the courts in the United States to enforce their claims or to resist liabilities alleged against them.

3. Functioning in the area of international conventions for the avoidance of double taxation to which the United States has become signatory, the same basic notion of "permanent establishment" is expressed by provisions confining the effect of United States income tax legislation to profits derived by alien corporations "from sources within the United States."

4. External to the judicial machinery in the United States and freed from the shackling technicalities of its conceptual and jurisdictional conflicts relating to "doing business," there has developed in the past three decades the international commercial arbitration movement, which with increasing effectiveness has been performing the important task of resolving private international commercial disputes by means of its rapid, non-legalistic methodology.

5. The areas of contact between this informal system and United States judicial administration are, however, steadily increasing, due to its growing dependence upon the compulsory powers of the courts for the enforcement of arbitration awards involving alien corporations.

6. The above-described range of variant expressions in different industrial and commercial contexts of the underlying "doing business" doctrine composes the present juristic framework within which the status of alien corporations in the United States may be determined.

7. We emphasize that this is a changing, not a rigid, framework, especially so in the case law, which continues in the United States as the predominant technique of doctrinal development.

8. It is to be hoped that despite diversities of national economic aims and rates of industrial development and despite divergent juridical notions as to the rights and obligations of alien business entities in the country of the forum, studies such as this may contribute to clarification of the problems explored, and lead to such a favorable world-wide pattern of recognition of alien corporations in all countries through international unification and codification of corporate structures, methods and practices, as will gradually reduce the multitude of existing legal barriers among the nations, thus providing a powerful impetus to an improved international economic and political climate.

FORDHAM LAW REVIEW

Published in March, June and December

VOLUME XXIII

MARCH, 1954

NUMBER 1

Subscription price, \$2.00 per year

Single issue, Seventy-five cents

Edited by the Students of the Fordham University School of Law

EDITORIAL BOARD

SIDNEY M. FRUHLING

Editor-in-Chief

JOSEPH T. RYAN

Recent Decisions Editor

WILLIAM J. HOLLAND

Comments Editor

REMO J. ACITO

Book Review Editor

MARTIN J. MURTAGH

Business Manager

Associate Editors

ANDREW J. AZZARA
BERNARD S. BERGMAN
JOHN P. CLARK
SAMUEL J. DAVIS JR.
ELAINE P. DISERIO

JOAN T. HARNES
JOHN D. HERTZ
ROYAL E. HUELBIG JR.
DONALD T. KILEY
EDWARD D. LOUGHMAN

WILLIAM F. LAFFAN JR.
WILLIAM N. MAIRS
JOHN A. MANNING
JAMES H. REIDY
JAMES J. TAYLOR
FRANCIS J. YOUNG

Faculty Advisors

FRANCIS X. CONWAY

WILLIAM HUGHES MULLIGAN

THOMAS J. SNEE

EDITORIAL AND GENERAL OFFICES, 302 BROADWAY, NEW YORK 7, N.Y.

CONTRIBUTORS TO THIS ISSUE

OSCAR HALECKI, Ph.D., 1913, University of Cracow. Honorary Doctorates: 1934, University of Lyons, 1943, Montreal University, 1945, DePaul University. Professor of History, 1944 to date, Fordham University. Author of *BORDERLANDS OF WESTERN CIVILIZATION; A HISTORY OF EAST CENTRAL EUROPE* (Roland Press, 1952); *EUGENIO PACELLI, POPE OF PEACE* (Creative Age Press, 1951); *THE LIMITS AND DIVISIONS OF EUROPEAN HISTORY* (London, N.Y., 1950). Author of numerous historical articles.

JOHN C. H. WU, LL.B., 1920, Comparative Law School of China; J.D., 1921, Michigan University Law School; LL.D., 1953, Boston College. Judge and Chief Justice of the Provisional Court of Shanghai International Settlement, 1927-1929. Member of the National Legislature of China, 1933-1946. Professor of Law, 1924-1939, Comparative Law School of China. Professor of Law, 1951 to date, Seton Hall University School of Law. Author of *THE ART OF LAW* (Shanghai, 1936); *BEYOND EAST AND WEST* (New York, 1951); *The Interior Carmel* (New York, 1953). Author of various articles and reviews in American and European periodicals.

LEO M. DRACHSLER, B.A., 1920, City College of N.Y.; LL.B., 1924, Columbia University. Editorial consultant on Legal Aspects of Foreign Trade, "International Market" magazine, Dun & Bradstreet Inc. Special research for Parker School of Foreign and Comparative Law, Columbia University, 1953. Author of various articles on legal aspects of foreign investment laws.