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## **The Place and Role of Company Law in the Codifications of West-European Commercial Law During the 19th Century**

**Abstract.** The present study tries to summarise the role of company law in the codification process of civil law and commercial law. First, the study attempts to find the general features of the codification of company law summing up shortly the general history of company law. Later on the study describes the history of company law and commercial law in several Western-European countries. As a matter of fact the study deals with France, Italy, Spain, Portugal, Greece, Netherlands, Belgium, Germany, Austria, Switzerland, England.

The study tries to grasp the common characteristics of the legal development in the foregoing countries. The study also stresses the common features of the different forms of company and describes the way how the various forms of company were separated. The study pays high attention so the influence of company law on the development of civil law and commercial law. The study takes into consideration the comparative legal approach while describing the history of company law in the Western European countries.

**Keywords:** legal history, history of company law

The purpose of this study is to describe the role played by company law in the codifications of civil and commercial law during the 19th century, with special attention to the models of uniform regulation on certain forms of company and to the general characteristics of different legal institutions as covered by company law.

### **1. General features of the codification of company law**

The efforts at the codification of company law in the 19th century created a fundamentally new situation in legal development in this field of law. The adoption of related codes generally ran parallel to uniform regulations on commercial law, with company law forming part of commercial law and representing a special province thereof.

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At the end of the 19th century private law was no longer confined to civil law as traditionally understood, to regulating the exclusive daily relations of private persons and families, but comprised the general domain of the law of organizations as well.<sup>1</sup> The joint stock company form may be said to have generally emerged in the 19th century, which was also marked by the appearance of limited liability companies, cooperatives and associations. The general economic reasons for the full development of the joint stock company lay primarily in the fact that economic life called for an organization with assets of its own, where members' interests were independently transferable and members' rights in the company were linked to their shares, while their liability for the company's debts was limited.

In the Middle Ages the predecessors of the joint stock company were companies licensed by certain royal prerogatives and established chiefly in response to the legal and organizational needs of carrying on trade with remote countries. As against this, a new factor in the 19th century was represented by those new economic sectors which, emerging as a result of the industrial revolution, needed rather great amounts of capital and included—among other things—the establishment of railway companies in the 1830s and 1840s and of certain financing institutions such as banks. There were two ways open to bolstering these industries, namely financing through loans and devising an organization whose members were those persons who secured the necessary capital for the given activity and whose interests thus obtained in then company were embodied in shares.

Of course, partnerships (associations of persons) retained a role along with other companies (pooling capital), so the unlimited or general partnership (*offene Handelsgesellschaft*) and the limited partnership (*Kommanditgesellschaft*) continued in existence. Their disadvantage *vis-à-vis* capital pooling companies is to seek in the members' underlying unlimited liability and the limited transferability of their interests in case of change in members. Limited partnerships in Germany represented, mainly in the period preceding industrialization, a frequent form of company, the number of whose limited or silent partners often became considerable. This process led to the foundation of partnerships limited by shares (*Kommanditgesellschaft auf Aktien*). Legal regulation was similar in England, but known to England law was only the form equivalent to the unlimited partnership (partnership), limited partnerships not appearing until later, early in the 20th century.

<sup>1</sup> Coing, H.: *Europäisches Privatrecht. I. Älteres Gemeines Recht (1500 bis 1800)*. München, 1985. 95.

A great breakthrough in regulations on company law at the legislative level was marked by the adoption of the French *Code de commerce* in 1807. The French Code was the first to regulate the different forms of company on a comprehensive scale at the legislative level. Accordingly it was that Code, which set an example for the codification of company law in all states during the 19th century. It is necessary to underline basically two main features of the *Code de commerce*. Already known to it were the so-called capital-pooling company and two types thereof, the joint stock company and the partnership limited by shares. Art 38 of the *Code de commerce* regulated the latter jointly with limited partnerships, with the exception that the provisions on limited partnerships were applicable as supporting rules. It should also be mentioned, however, that in the case of joint stock companies Art. 39 of the French Code followed the concession principle, meaning that the foundation of joint stock companies was subject to government permission. That arrangement was an intermediate solution, for it represented progress in comparison with the establishment of companies formerly based on royal privileges, while it did not grant private persons a full right of association, the main reason being the requirement to afford appropriate legal protection for creditors and shareholders.

The *société anonyme* was given legal coverage by the third part of the French code. This amounted to raising to the level of written law the general practice of to hundred years preceding the Code. The relevant rules covered, *inter alia*, the stated capital of a fixed amount and its division into shares of a specified equal value (Art. 34), limited liability enunciated as a basic principle and limitations on cash contributions by shareholders (Art. 33), the appearance of the company under a firm name, with the obligation to use the mark "Corp." and the transferability of bearer shares and registered shares embodying the company's rights (Arts. 35–36). A revolutionary innovation was represented by the introduction of the concession system (Arts. 37, 40 and 45), which replaced the *octroi* system and is to be treated as an achievement by proclaiming at the statutory level the freedom of enterprise resulting from the French civil revolution. As it appears in the French *Code de commerce*, the joint stock company clearly separated the functions of the persons figuring in the name of the company (*mandataires*), who were eligible for a specified period and were recallable, and those of the general meeting representing the totality of shareholders.

As regards the legal regulation of the joint stock company by the *Code de commerce*, emphasis should also be laid on the fact that Art. 33 of the Code provided for a limited liability of shareholders, while permitting the issue of bearer and registered shares (Arts. 35–36) and laying down various rules on

transfer of such shares. Concerning the organization of the joint stock company, the *Code de commerce* applied the rules for the contract of agency in accordance with the fact that the company was represented by the so-called *administrateurs*, who personally bore no liability to third persons for contracts made on behalf of the company as such contracts contained obligations solely for the company. In addition, the Code laid down no further rules on the shareholders' status and their representation at the meeting, which were left to the articles of association to regulate. The foundation of a joint stock company was regarded by Art. 40 of the *Code de commerce* as an act under public law (*acte public*),<sup>2</sup> and the French Code contained several provisions for the protection of persons in contractual relations with the joint stock company, which is ample proof that the *société anonyme* is to be deemed a limited liability company, a capital-pooling company rather than an association of persons.

From the 1820s joint stock companies grew considerably in number in France and Belgium and from 1840 in Germany as well. In conformity with the French regulation, the concession principle became general in European legislation on companies, and the state authorities granting licence accordingly devised a set of general rules under which registration of companies was accepted and which were called normative regulations in Prussia. The French regulation was followed sooner or later by similar codes in all states of Europe.<sup>3</sup>

<sup>2</sup> The foundation of companies possessing juristic personality can be traced to the rules of Roman law in several aspects. "There is thus here a basis for the 'concession' theory of corporations, i.e. that they can only have personality by a creative act of the State, and Savigny, one of the chief exponents of this theory, held in fact that there are two separate rules. One was that the formation of an association without permission was an offence, though this rule only applied when the association was or might become harmful; the other, more important and still valid in the modern law, that no association whatever could become a legal person without public authorization." Jolowicz, H. F.: *Roman Foundations of Modern Law*. Oxford, 1957. 131.

<sup>3</sup> See, e.g., *Wetboek van Koophandel* (1838), Art. 36 ss.; *Gesetz Über die Aktiengesellschaften*, 9.11.1843; *GS für die Königlichen Preussischen Staaten* 1843, Nr. 31. 341 ss.; *Act for the registration, Incorporation and Regulation of Joint Stock Companies*, 5.9.1844. 7 & 8 Vict. C. 110; *Act for the Incorporation, Regulation and Winding-up of Trading Companies and Other Associations (Companies Act)*, 7.8.1862, 25 & 26 Vict. c. 89; *Loi sur les sociétés*, 24.7.1867, *Bulletin des Lois* 1867. 94 ss.; *Gesetz betr. Die Kommanditengesellschaften auf Aktien und Aktiengesellschaften*, 11.6.1870, *BGB1. Des Norddeutschen Bundes* 1870, Nr. 21.375 ss.; *Loi contenant le titre IX, livre I<sup>er</sup> du code de commerce relatif aux sociétés*, 18.5.1873, *Pasinomie* 1873, Nr. 157. 150 ss.; *Schweizerisches Obligationenrecht* (aOR 1881), Art. 612 ss.; *Codice di commercio* 1882, art. 121 ss.; *Código de comercio* 1885, art. 151 ss.; *Loi modifiant la loi du 18 mai 1873 sur les sociétés commerciales*, 22.5.1866, *Pasinomie* 1866, Nr. 156. 259 ss.; *Código comercial* 1888, art. 162 ss.; *Verordnung*,

The regulations on joint stock companies in Germany required a longer process, which included a comprehensive codification on joint stock companies (the Joint Stock companies Act) in Prussia.<sup>4</sup> That Act contained no concrete provisions for the internal organization of joint stock companies, only Art.19 thereof stating that the board of directors (*Vorstand*) must act on behalf of the company and its following articles specifying the powers of the board of directors. The primary importance of the Act was manifest in declaring the joint stock company to be a legal entity capable of acquiring immovable property on its own behalf (Arts. 8–9) and undertaking obligations concerning bills of exchange. This can be attributed chiefly to the influence of *Savigny*, who was Minister of Legislation in the Prussian cabinet at the time.

This was followed by a turn in the German law of joint stock company when, as a result of the revolution of 1848, the Government included *Camphauesen* as Prime Minister and *Hansemann* as Minister of Finance who abrogated the previous regulation and introduced the concession system leading to a significant increase in the number of joint stock companies. By that time it had also become a general practice for joint stock companies to form three main organs, notably the board of directors, the general meeting and the supervisory board (*Verwaltungsrat* or *Aufsichtsrat*). The rules on joint stock companies accordingly became generally applicable, so the ADHGB—when adopted in 1861—witnessed an uniform regulation in the whole territory of Germany. That Code followed the concession system, from which however, the different states were allowed to make exceptions (Art. 249). The board of directors (*Vorstand*, Art. 227), the general meeting (Art. 224) and the supervisory board (Art. 225), which was optional, became mandatory organs of the joint stock companies. Art. 224 (2) states that each share represented one vote, entitling the holder to attend the company's general meeting, an organ vested with considerably enlarged powers. The ADHGB was clearly indicative of a democratic tendency in the history of the German company law.

In England as in Germany and France, the process of development from the *octroi* system to the concession system in the field of company law can be attributed not only to economic, but also to political factors. Companies in the England of the Middle Ages were established by *royal charters* or *Acts of Parliament*. Along with such companies there operated companies under the common law, which were to be regarded as *unincorporated companies*. The

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20.9.1899, mit welcher ein Regulativ für die Errichtung und Umbildung von Aktiengesellschaften auf dem Gebiete der Industrie und des Handels verlautbart wird (Aktienregulativ), *Reichsgesetzblatt*. 1899, Nr. 1755. 839–858.

<sup>4</sup> Gesetz über Aktiengesellschaften vom 9. Nov. 1843.

latter were first considered invalid, but came to be recognized later, subject, however, to members bearing unlimited liability. The so-called Bubble Act of 1720 prevented the establishment of such companies, and then in the 19th century (1856, 1857 and 1862) there were adopted several statutes dealing with the English law of joint stock company. The reasons for the time-lag between the English codification and the German and French codifications were not only political and economic, but are also to be sought in the distinctive feature of English law, which is to be seen as a basically uncodified law. This not with standing, the 18th century witnessed efforts at regulation of some provinces of company law by the so-called *Trent Navigation Act* (1766), the *Companies Clauses Consolidation Act* (1845) and the *Railway Clauses Act*. The Bubble Act was repealed in 1825, thus opening the road to the free development of joint stock companies. At the same time, development in that direction bolstered speculative designs again, a reason why the obligation of companies to be incorporated became inevitable in 1826 and was also written into a statute in 1844. As regards the organization of companies, the establishment of the general meeting as the chief organ of the company's direction became general during that period.

The aforesaid general tendencies described, we shall now review the codifications and their results in some countries of the west European region.

## 2. France

In connection with joint stock companies it may be emphasized that in French law joint stock companies were regulated neither by the *Ordonnance du commerce* of 1673 nor by other general statutes. Establishment of joint stock companies was subject to *ad hoc* royal decrees, as is best exemplified by the emergence of companies trading with colonies and developing under the influence of Colbert (e.g. *Compagnie des Indes occidentales*, *Compagnie des Indes orientales*). In the case of those companies a large part of states capital was made available by the ruler himself. During that period joint stock companies were seen as an exceptional means to attain general goals of public interest, for which it was allowed to pool the necessary capital.<sup>5</sup>

It was one of the aims of the Great French revolution to abolish the guild system, for guilds represented privileges deriving from feudal mentality. That

<sup>5</sup> Koberg, P.: *Die Entstehung des Gesellschaft mit beschränkter Haftung in Deutschland und Frankreich unter Berücksichtigung der Entwicklung des deutschen und französischen Gesellschaftsrecht*. Köln, 1992. 217.

aim was achieved by the “le Chapelier” Act of 1791 granting every French citizen the freedom of enterprise subject to payment of business tax. Interestingly, however, although the “class of merchants” had been abolished, the commercial law related to it remained in existence, together with commercial adjudication redolent of by-gone days and old-time privileges.

The period of the French revolution was witness to the adoption of several statutes in rapid succession, such as the Decrees of 2 January 1791 and 24 August 1793, the former restricting the foundation of joint stock companies and the latter prohibiting the formation of different associations whose capital was embodied in bearer shares or similar securities and whose establishment was subject to consent of the state. A decree of 1793 prohibited the foundation of joint stock companies and ordered the dissolution of existing ones.<sup>6</sup> On 20 November 1795 there were passed a number of statutes which again permitted the foundation of joint stock companies without regulating in any way the organizational structure and the activities thereof.<sup>7</sup> These aspects were accordingly left to legal practice to govern.

On 3 April 1801 Bonaparte appointed a committee of seven members to frame the *Code de commerce*. Applicable from 1 January 1808, the uniform Code, adopted as five different statutes and consisting of four books (modelled on the *Code civil*: I. Commerce in general; II. Maritime trade; III. Bankruptcy; IV. Commercial adjudication), numbered 648 articles.

The *Code de commerce* of 1807 was the first European commercial code, which—although making allowance for the provisions of the *Ordonnance du commerce* of 23 March 1673, i.e. the work of Colbert—is to be regarded, in view of its significance, as a work influenced by early economic liberalism.<sup>8</sup> In the first part of the 19th century the *Code de commerce* served as an example for all states in respect of modern commercial legislation. Its elaboration started in 1801 in the committee set up by the *Conseil d'État*, in 1806 there were formulated separate codes, which were then incorporated in the *Code de commerce* of 15

<sup>6</sup> The reason is to seek in that the companies operating with royal permission belonged to the relics of the Ancien Régime and old royal privileges and were thus contrary to the republican ideas. Santuari, A.: The Joint Stock Company in Nineteenth Century England and France: ‘Kinf v Dodd’ and the ‘Code de Commerce.’ *Journal of Legal History* 14 (1993), 44.

<sup>7</sup> This was necessary in order to provide appropriate frameworks for the continuing operation of trade, with the freedom of enterprise now guaranteed. Santuari: *op. cit.*, 44.

<sup>8</sup> Zachariä von Lingenthal, K. E. (Carl Croma): *Handbuch des Französischen Zivilrechts*. I. Freiburg, 1984. 66. For a detailed analysis of the codification by the Code de commerce, see Mrs. Nagy Szegváry, K.: *Jog és gazdaság* (Law and Economy), Budapest, 2001. 46. et seq., and for its impact on the codification of the German commercial law see Mrs. Nagy: *op. cit.*, 67 et seq.

September 1807. Effective from 1808, the Code practically regulated three forms of company: general partnership, limited partnership, or partnership limited by shares as a special type thereof, and joint stock company. Its particular relevance for legal history lies in the fact that the common roots of West European regulations on commercial and hence on company law can be traced to this Code for the most part.<sup>9</sup> Its provisions were applied directly or indirectly in Belgium, Luxemburg, Netherlands, Greece, Turkey, Poland, and in several non-European countries such as Egypt and South American states. Special emphasis should be laid on the Italian *Codice de commercio* of 31 October 1882, the Spanish *Código de comercio* of 30 May 1829, and the Portuguese *Codigo commercial* of 18 September 1833.

The *Code de commerce* consisted of four books and 648 articles, and its part dealing with company law regulated four forms of company, namely general partnership, limited partnership, partnership limited by shares, and joint stock company.

The general partnership (*société en nom collectif*, SNC) was one founded by two or more members conducting commercial transactions under the same name, with members bearing personal liability jointly and severally for the company's debts (Co. Art. 20). Joint and several liability is practically the line of demarcation from the French civil-law society (*société civile*, Cc. Arts. 1832–1873), where—in the case of simple civil-law societies—members' liability was unlimited, but could be determined in proportion to their shares. The foundation of a general partnership was subject to a written contract and to compliance with the requirements of publicity, which meant the requirement for a copy of the signed articles of association, original and certified by a notary public, to be deposited with the local court (*justice de paix*) and with the commercial court (*tribunal de commerce*). However, judicial practice disallowed inspection of such document by anyone.<sup>10</sup> In connection with the amendment of 1867 it is to be stressed that Art. 56 made it mandatory for an excerpt of the articles of association to be published in an official journal (*Journal d'annonces légal*s), such excerpt to indicate the names of members, the company's name and domicile, the provisions on management, the company's capital, commencement and duration, the company's registration with the court, and the abbreviation or name referring to the type of company. In addition to the Act of 1867 On

<sup>9</sup> “Bei Beratung des Code de commerce schwachte der Gedanke vor, ein ‘droit commun de l’Europe’ zu schaffen. Dies entsprach der welternhernden Politik Frankreichs, die nicht so auf Rechtsausgleichung, als auf Rechtsverdrängung ausging.” Lehmann, K.: *Lehrbuch des Handelsrechts*. 2nd edition, Leipzig, 1912. 24.

<sup>10</sup> Koberg: *op. cit.* 200.



publicity, the acts of 1819 (18 March) and of 1820 (26 June) on trade registry required the court of the company's domicile to keep a trade register of those companies which had their registered office in their area of operation.

The general partnership was an association of persons, but it possessed juristic personality under the French law and was therefore entitled to be a member of another general partnership.<sup>11</sup> Unless otherwise provided by the articles of association, all members had the right to act on behalf of the company, while the right of representation was transferable to specified members or even to third persons. The members of the company bore subsidiary liability for its debts. In the 19th century the general partnership was one of the most popular forms of company, its percentage practically amounting to 75, with no significant change observed in this respect in France until the introduction of the limited liability company.<sup>12</sup>

Another significant form of partnership in France was the limited partnership (*société en commandite* SC), which was established by articles of association with one or more members bearing personal joint and several liability for the company's debts; the members were general partners (*associé solidaire, commandité*), and there were also one or more persons as limited partners (*commanditaires, associé en commandite*) joining the company as providers of capital (*bailleur de fonds*). The company was named after the general partners, and the names of limited partners could not figure in the company's name (cc. Art. 25). The company's management and representation were reserved for the general partners in accordance with the rules on general partnerships. The general partners' right of representation could not be limited except by the articles of association. The company's representative was liable under the rules on agency to the company's members for any damage caused in the exercise of his right of representation. The limited partners' liability was limited to making available to the company the amounts of cash contribution undertaken in the articles of association (Cc. Art.26). It should be mentioned that in the articles of association the parties could also stipulate that the company must pay interest to limited partners on their contributions in case the company obtained little profit. Limited partners were excluded from the company's management and representation.

The first legislation on simple limited partnership (*société en commandite simple, SCS*) was the *Ordonnance du commerce* of 1673, which demarcated the

<sup>11</sup> Koberg: *op. cit.*, 201.

<sup>12</sup> Koberg: *op. cit.*, 202.

general partnership from the simple partnership, then called *société générale*,<sup>13</sup> in para. 4 of Art. I. The *Code de commerce* of 1807 introduced several new elements in the regulation on limited partnerships, prescribing that the firm must have a name of its own, or subjecting limited partnerships, too, to the rules on general partnerships. This was followed by two minor amendments in respect of limited partnerships: the Act of 17 July 1856, which amended Arts. 51–63 of the *Code de commerce* and governed settlement of disputes concerning the legal relations of the company, and the Act of 6 May 1863 amending Arts. 27–28 of the *Code de commerce*. No statute required the limited partnerships to set up a supervisory board, but the possibility was left open of doing so.

There were no antecedents to the *Code de commerce* (Art. 38) incorporating the partnership limited by shares (*société en commandite par actions*) as a new form of company. In respect of such partnership the division of stated capital into shares was governed by the rules on joint stock companies, and other aspects by the rules on limited partnerships. This form of company was included in the Code at the request of various economic organizations, courts and chambers, since the first draft of the *Code de commerce* was to cover but one form of joint stock company, the formation of which was subject to state permission, but in the case of partnership limited by shares no further request was needed because it was compensated by the personal liability of general partners on the ground that shares could be issued without concession, thereby securing the necessary capital for the operation of the company. In the first part of the 19th century the partnership limited by shares became a significant vehicle for economic development, but it also naturally entailed transactions seeking profit derived from foundation and speculation. Abuses of such type reached quite large proportions during the 1830s and 1840s. The collapse of speculative businesses prompted the government to draft a bill in 1836–37 to abolish that form of company. However, the committee which had been set up to reform the relevant statute framed a bill that was to limit the transferability of the shares of partnerships limited by shares by allowing the issue of registered shares only, but the bill was not debated in the Parliament.

Thus it was the *Code de commerce* which regulated the joint stock company at the legislative level for the first time.<sup>14</sup> The joint stock company (*société anonyme*) was covered by Art. II of the Code. According to the relevant rules,

<sup>13</sup> The general partnership was legislatively governed by the *Code Savary* for the first time, and its designation was changed to *société en nom collectif* in the *Code de commerce*.

<sup>14</sup> The *Code de commerce*, too, made the foundation of joint stock companies subject to the consent of Parliament, thereby seeking to compensate possible abuses resultant from companies operating with limited liability. Santuari: *op. cit.*, 45.

the joint stock company appeared in commercial transactions under its own name, which was not allowed to contain the name of any shareholder, but was required to refer to the main object of the company (Cc. Arts. 29–30). The joint stock company was represented by mandataries (*mandataires*) who were elected for a specified period and were recallable. The representatives were not required to hold shares and were entitled to perform their function either without compensation or for a consideration (Cc. Art. 31). They were liable to the company under the rules on agency for any damage caused within the scope of management and bore no personal or joint and several liability to third parties (Cc. Art. 32). The shareholders were liable for the company's debts to the amount of their contributions (Cc. Art. 33). The stated capital could also be divided into bearer shares and transfer thereof was subject to assignment or, in the case of registered shares, to inscription in the book of share (Cc. Arts. 35–36). The foundation of joint stock companies was subject to a public document (*acte public*) and state authorization (*autorisation*) (Cc. Arts. 37 and 40).

Various decrees on state authorization laid down the rules for procedure. The Decree of 23 December 1807 was the first to specify the substantive elements of the charter required for the grant of permission. The Decree was later supplemented by detailed provisions on 22 October 1817, 11 July 1818 and 9 April 1819. The relevant rules on authorization may be summed up as follows. The founders of a joint stock company were required to present a petition (*petition*) to the local prefect (*préfet*) and the petition had to be signed by all shareholders, with the foundation document drawn up in a notarial document to be annexed thereto, and the prefect gave an expert opinion (*avis motive*) thereon and forwarded it and the annex thereto to the Minister of the Interior (*Ministre de l'intérieur*), the expert opinion to contain a prognosis of whether the economic goal to be achieved by shareholders was appropriate and whether the financial strength of the company was acceptable. As a first step, the Ministry's Internal Trade Department (*Bureau du Commerce Intérieur*) considered the petition before transmitting its decision to the home Affairs and commercial Committee of the Council of State (*Comité de l'intérieur et du commerce de Conseil d'État*). The Committee stated its opinion on the material and returned it again to the ministry. This draft was then approved by a resolution of the Emperor, the king or the President, which was published after signature in the trade journals (*Bulletin des Lois and Moniteur*).<sup>15</sup> That rather detailed and complicated procedure was needed because the joint stock company was a necessary tool of developing modern undertakings capable of representing appropriate strength in both public and private spheres, and practically that was

<sup>15</sup> For a full treatment of the procedure for authorization, see Koberg: *op. cit.*, 218 et seq.

the only course of action in specific areas (e.g. railway construction, canalisation). At the same time, however, the joint stock company had the drawback that the personal liability of entrepreneurs became limited, whereby the creditors' interests could be damaged and room was left for speculation. Nevertheless, the complicated procedure for authorization raised an obstacle to the spread of joint stock companies as the foundation of a company took a period of 12 to 18 months.<sup>16</sup>

### 3. Efforts at codification in Italy

The *French code de commerce* was received in full into Italy during the rule of Napoleon early in the 19th century. The *Codice di commercio* was enacted on 25 June 1865 and put into force on 1 January 1866, following the concession system.<sup>17</sup>

The *Codice di commercio* of 1865 was basically patterned on the Piedmont regulation of 1842 (*Codice Albertino*), which, on the other hand, was based to a considerable extent on the Napoleonic Commercial Code.<sup>18</sup> That Act disallowed stipulation of advantages for founders and prohibited the foundation of a joint stock company if four fifths of the capital were not subscribed and one tenth was not paid up.

The Code was not a significant work,<sup>19</sup> so MANCINI was entrusted in 1869 with elaborating a new commercial code. The called *Progetto preliminare* was published in 1872. Thereafter, on 6 October 1876 and on 26 May 1877, a new committee on codification was set up by departmental order. Its draft was adopted by the Senate on 27 March 1882 and was promulgated as a statute on 2 April 1882. Then the legislative text revised by the committee, and the new *Codice di commercio* came into being on 31 October 1882 and entered into force on 1 January 1883, remaining applicable until the entry into force of the *Codice civile* in 1942.<sup>20</sup>

<sup>16</sup> Koberg: *op. cit.*, 220.

<sup>17</sup> Calisse, C.: *A History of Italian Law*. New York, 1969.

<sup>18</sup> Pfenninger, I.: *Die Begriffe Impereditore, Impresa und Azienda im italienischen Codice Civile von 1942*. Diss. Diessenhofen, 1979, 33.

<sup>19</sup> "Der Codice von 1865 war kein ausgereiftes Gesetzgebungswerk." Mittermaier: *Das italienische Handelsgesetzbuch vom Jahre 1882. Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 29 (1884), 132.

<sup>20</sup> Calisse: *op. cit.*, 504.

That Act introduced the normative system, probably under the influence of the French Act of 24 July 1867, and the British-type supervision was replaced by provision for publicity on the English model.<sup>21</sup> The need for a reform arose in the wake of World War One; there appeared certain proposals (1922, 1925, 1934), the law-decree of 24 July 1936 was issued on the supervisory board (*collegio sindacale*), and the *Codice civile* became effective in 1942.

#### 4. Spain

The close of the 19th century ushered in a new era of international commercial law, in which the pre-existing commercial law of European merchants had ties with a trade or judicial customary law and resulted in the codification of divergent urban statute laws. In Spain that process began in 1797, when King Carlos IV ordered the elaboration of a uniform Spanish commercial code. It was not accidental that the need for it crystallized at the time of the French Revolution, the ideas of which brought great influence to bear on regulations on commercial law as well, for it was that period which saw the switch from the subjective system of commercial law (the law of the status of merchants) to the objective system of commercial law. The adoption of the Spanish Civil Code and Commercial Code in the period was another determinant factor in Spanish codification. It was under the influence thereof that the Constitution of Spanish provided for the unification of law in the whole territory of the country. Also implying the need for the elaboration of a uniform commercial code, which took place in various committees in different periods depending on political struggles and different political conditions. It was the irony of history that the uniform commercial code was adopted under the rule of King Fernando VII, who was expressly Francophobe, in no way supporting the French currents of thought, and was also opposed to the European efforts at codification. Still, the commercial code was framed, chiefly by *Pedro Sainz de Andino* (1786–1863), who was able to accomplish that goal even in the obtaining unfavourable political situation. *Sainz de Andino* can be considered to have been a prominent jurist and even more an excellent merchant, who recognized the dominant trends and elaborated the Spanish commercial code in keeping with the needs of modern economic life, having regard mainly to the achievements of the French

<sup>21</sup> Mittermaier: Die italienische Handelsgesetzgebung. *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 11 (1868), 314 et seq., and Mittermaier: das italienische Handelsgesetzbuch vom Jahre 1882, 132 et seq.

law.<sup>22</sup> In that activity he was supported by *Luis López Ballesteros* the Minister of Finance, also a man of a wide intellectual horizon. Their efforts resulted in framing a draft commercial code in 1827. Then King Fernando VII set up a committee to work out a counterdraft;<sup>23</sup> its draft was confined to laying down the general principles in brief terms as against *Sainz de Andino's* draft, which was detailed and practical. Fernando VII himself read both drafts and, on 31 May 1829, decided to accept the work of *Sainz de Andino*.<sup>24</sup> Then, on 5 May 1929, he issued a royal decree approving the commercial code with effect from 1 January 1831. At the same time he ordered the particular commercial laws and all previous decrees to lose effect on that date.

The *Código de comercio* (1829) contained 1219 articles and consisted of five books. The first book regulated the rights of merchants and commercial agents; the second book covered commercial contracts in general, i.e., their form and scope of application; the third book governed maritime trade; the fourth book was concerned with bankruptcy law; and the fifth book laid down the procedural rules. In its substance *Sainz de Andino* was guided by the French *Code de commerce* in many respects, particularly in the law of obligations, as the second and fourth books of the Code followed the subject areas of the *Code de commerce*. In addition, the Code comprised the traditional Spanish law, such as the *Consulado del Mar*, the *Ordenanzas de Bilbao*, the Castilian law, and in the maritime law it had regard to the Italian theories, while giving special consideration to the influence of the Prussian law.<sup>25</sup> Compared with the French model, the Spanish commercial code was considerably more thorough and gave a more detailed regulation. This is true particularly of commercial contracts, in respect of which *Sainz de Andino* formulated detailed rules for sale, exchange, loans and credits as well.

The greatest importance of the *Código de comercio* to legal history consisted in being the first in the world to introduce the trade register and the registration of firms.

In respect of company law the Code followed the French trichotomy, distinguishing the general partnership (*compania regular coledtiva*), the limited partnership (*compania en comandita*) and the joint stock company (*compania*

<sup>22</sup> Coing, H. (Hgg.): *Handbuch der Quellen und Literatur der neuen europäischen Privatrechtsgeschichte*. III/3, München, 1988. 3475.

<sup>23</sup> Löber, B.—Peuser, W.—Reichmann, A.: *Spanisches Handelsgesetzbuch. Código de Comercio*. I. Frankfurt, 1984. 5.

<sup>24</sup> *Sainz de Andino's* draft contained 1219 articles against 887 articles of the other draft. Coing: *Handbuch...* *op. cit.*, III/3. 3475.

<sup>25</sup> Löber—Peuser—Reichmann: *op. cit.*, 6.

*anónima*) and permitting the establishment of partnership limited by shares (Art. 275). The Code cushioned the rigour of the French concession system, prescribing only the permission of the local commercial authority (*tribunal de comercio del territorio*) and requiring no royal consent to the company's foundation (Art. 294).<sup>26</sup>

Although the Spanish commercial Code of 1829 received the highest professional recognition, it was discovered soon after its entry into force that the commercial transactions governed by it did not embrace all areas of economic life, and the changing political life of Spain revealed new aspect that were not covered in the Code. This led, in the years that followed, to the adoption of numerous supplementary statutes and to the preparation of a new programme for the elaboration of a completely new commercial code. As early as the 1830s, the procedural rules of the fifth book were found to call for additional provisions. Therefore, on 24 July 1830, there was adopted a comprehensive Act on procedure regulating commercial transactions and, on 10 September 1831, an Act establishing the stock exchange in Madrid. Both Acts can be considered to have been the constructs of *Sainz de Andino*.

The 1840s and 1850s saw a detailed regulation on company law process beginning on 28 January 1848 with the adoption of the Joint Stock Companies Act, which was followed by the Credit Societies Act of 28 January 1856 and the Mining Companies act of 6 July 1859. In the meantime, the Act establishing the Spanish National Bank (*Banco de España*) was adopted on 28 January 1856. The close of the 1860s witnessed a liberal turn in the territory of Spain, with efforts directed towards reforming the commercial law in its foundations. On 12 January 1869, legislation allowed the establishment of stock exchanges beside the Stock Exchange of Madrid, and the Act of 16 October 1869 liberalized the foundation of trading companies, allowing free establishment thereof, which had previously been subject to state authorization. As has been noted, efforts were being made at elaborating a new uniform commercial code during this period, and there were set up several committees for that purpose. The first such committee had started working in 1834, and another was set up in 1839 to prepare a complete draft, which was not adopted, however. In 1869, concurrently with the liberalization of commercial law, the state expressed a strong will to

<sup>26</sup> Sainz de Andino justified the mitigation by the fact that, given its losses connected with the colonies, the Spanish economy had considerably weakened and was therefore in need of urgent influx of foreign capital. Coing: *Handbuch... op. cit.* III/3, 3479. However, considering that the system left room for abuses in practice, the Act of 28 January 1848 on joint stock companies returned to the former concession system in Spain. Coing: *Handbuch... op. cit.* III/3, 3483.

have the commercial law recodified. On 20 May 1869 the committee set up in 1858 for that purpose were accordingly dissolved and the main principles governing the preparation of a new code were determined. A new committee was set up to do the work. Making slow progress but working with great care and precaution for 11 years, it produced by 1880 a draft stamped with the name of Minister of Justice *Manuel Alonso Martínez*. Revised by a new committee, the draft was submitted to the Spanish Parliament (*Cortes*), which, after its consideration thereof, adopted it on 22 August 1885 and put it into force on 1 January 1886.

The main task during the elaboration of the *Código de comercio* of 1885 was to adapt the commercial law to the economic and political trends that had emerged and changed since the Code of 1829,<sup>27</sup> the result being that, for all practical purposes, the structure of the Act of 1829 was also followed by the Act of 1885, which, however, divided the material of law into only four books, since the Spanish law of procedure had in the meantime been reformed to give a uniform regulation, thus eliminating the need for the fifth book. The substantive law retained several elements of *Sainz de Andino's* work, particularly in the field of maritime law, while the Code included a great number of new legal norms, such as rules of the stock exchange law, the bank law and the company law. The introduction of the normative system was seen as a significant step in respect of company law. The trichotomy of company forms remained unchanged.<sup>28</sup>

## 5. Portugal

The *Código commercial Portugues*, framed by *José Ferreira Borges*, was adopted on 9 September 1833, four years after the Spanish Commercial Code constituting its prototype.<sup>29</sup> The Code consisted of two parts, the first concerned with overland trade in three books and the second dealing with maritime trade. Chapter XII of the first part contained provisions on company law, beginning with general rules and laying down special rules on different companies. The Código was familiar with the joint stock company called *companhia de commercio*, the foundation of which was subject to concession. Also known were the *sociedade com firma*, the equivalent of general partnership, and the silent

<sup>27</sup> Löber—Peuser—Reichmann: *op. cit.*, 8.

<sup>28</sup> For a full discussion see Coing: *Handbuch*, III/3. 3487.

<sup>29</sup> The Code reflected Spanish and French influence, but a considerable number of rules were also taken over from Italian and Dutch law. Coing: *Handbuch... op. cit.* III/3. 3496.



partnership (*sociedade tacita*) as well as the *parceria mercantil*, the rules on which applied to limited partnerships, too.

This Portuguese Commercial Code of 18 September 1833 was elaborated on the basis of foreign commercial laws, inclusive of the British.

The committee set up by a royal decree was working from 1850 to 1859 to frame a civil code, its draft (*Código Civil Português*) was then revised by a separate committee of 10 members from 1860 to 1865 and submitted to the Parliament in November 1865. Following long debates in the committee, the revised draft was adopted by both chambers in July 1867. Thus, Act 213 (Diario do Governo Nr.213) adopting the Portuguese Civil code was passed on 1 July 1867. On 22 March 1868 the Portuguese Civil Code became effective in the Kingdom of Portugal and the surrounding islands, the Azores and Madeira. The Code consisted of 2538 articles and was divided into four parts. The first part (Arts. 1–358) regulated legal capacity in civil law and the second part (Arts. 358–2166) governed the law of inheritance and was divided into 3 books, the first dealing with basic rights, the second with acquisition of rights with third-party involvement, and the third with acquisition of rights through action. The third part (Arts. 2167–2360) covered the law of property and the fourth part (Arts. 2361–2538) contained provision on wrongs and restitution or damages in two books, the first concerned with civil-law liability and the second with compensation of damage.

Work preparatory to a new Portuguese commercial code began in 1868 with the participation of judges, jurists and different scientific organizations. The draft was considered by both Houses of Parliament in 1887 and in March 1888, respectively, and was finally adopted in June 1888. Thus the Portuguese Commercial Code (*Código Commercial Portuguese*) of 28 June 1888 came into being and was put into effect by the royal decree of 23 August 1888 (Diario do Governo Nr. 203), becoming operative in Portugal and the surrounding islands as from 1 January 1889. On 20 February 1894 the application of the Code was extended to the Portuguese colonies and oversea possessions. The Commercial Code consisted of 749 articles and was divided into four books, the first (Arts. 1–95) regulating commerce in general, the second (Arts. 96–484) dealing with special commercial transactions, the third (Arts. 486–691) governing maritime trade, and the fourth (Arts. 692–749) concerned with bankruptcy. The first book contained provisions on merchants, who were persons capable of concluding commercial transactions and operating commercial businesses. Trading companies were also covered. An association or a legal person having no economic goal was not deemed to be a trading company. Interestingly, where a husband was to start a business without his wife's consent, the presumption

was that both consorts participated in the business. The wife was not entitled to start a business without the husband's consent, such permission to be included in the official document. Similarly, the wife was not entitled to participate in a commercial business except with the husband's consent even if her liability would have been limited. Art. 18 required merchants to manage a firm, keep a book, make the necessary notifications in the trade register and draw up a balance sheet. Foreign companies wishing to engage in business activities in Portugal were required to obtain a certificate from the Portuguese consul to the effect that their operation was in conformity with their own law and they carried on business activities lawfully. In actual fact, the company law was to be found in Arts. 104–150 of the Code.

Known to the Code were the general partnership (*sociedade en nome colectivo*), the limited partnership (*sociedade em commandita*) and the joint stock company (*sociadade anónima*). The Code maintained the normative system introduced in 1867 and covered the board of directors (*direccao*) and the supervisory board (*conselho fiscal*) as institutions of the joint stock company. As under the Act of 1867, the cooperatives (*sociedades cooperativas*) did not constitute an independent trading company, but were held to represent a mixture of rules on the three types of company. This Code no longer regarded the silent partnership as a trading company, but considered it to be a mere contractual formation.<sup>30</sup>

Similarly known to the Commercial Code were the general partnership (*sociedade en nome colectivo*, Arts. 151–161), the joint stock company (*sociedade anónima*, Arts. 162–198), the limited partnership (*sociedade em commandita*, Arts. 199–206), the cooperatives (*sociedades cooperativas*, Arts. 207–223), the silent partnership (*conta em participação*, Arts. 224–229), and the enterprise (*empresa*, Art. 230).

In its main features the joint stock company law showed similarity to the German law. Thus, the system of 1833 established for the foundation of companies was subjected to government. The Portuguese Act of 22 June 1867 prescribed registration (Arts. 162–165), just as the new Commercial Code did, excepting the banks, where Art. 18 of the Act of 3 April 1896 required separate permission of the government. In like manner, the foundation of joint stock companies intending to acquire immovable property for a period longer than 10 years was made subject to government permission. The Ministry of Trade and Industry kept a special register of firms along with the trade register. The chief organs of the company were the board of directors, the supervisory board and the general meeting, either ordinary or extraordinary. In respect of limited

<sup>30</sup> Coing: *Handbuch...* *op. cit.* III/3. 3501.

partnerships it should be noted that they could be either simple limited partnership or joint stock companies.

## 6. Greece

The *Code de Commerce* was introduced in Greece in 1821 during the war of independence and was ratified by the constituent National Assembly. Thereafter the Commercial Code was taken over in official translation by the Decree of 19 April 1835. Originally being the French *Code de commerce*, it consisted of four books. The first three books were available in Greek translation, but the fourth was replaced by the Decree of 2 May 1835 introducing the commercial courts.<sup>31</sup> That Code gave no new regulation, for, as *Von Mauer* writes,<sup>32</sup> the French Commercial Code had been applied in Greek territory before the revolution. The *Code de commerce* contained references to the Code civil as well, since they were elaborated at the same time, and they referred, in the places concerned, to the Greek-Byzantine law in Greece, i.e. the Greek law was the subsidiary body of law.<sup>33</sup> According to *Rokas*, this gave rise to a fundamental problem between the substance of the civil and the commercial law,<sup>34</sup> for, on the French model, the civil law was supplementary to the commercial law in Greece, too.

Initially the courts applied the Code civil as the underlying regulation. The first to do so was a court of Syros Island in 1827, but given that such application of law would have led to an indirect introduction of the French Code civil, the courts began to apply the Roman Byzantine law. They more or less followed the French law in respect of partnerships as well. General and limited partnerships were trading companies (as their goal was commercial), both being regarded as legal persons. On the French model, the partnership was invalid in relation to third persons when the obligation for publicity was disregarded, but once the firm was already in operation, this rule was to apply *ex nunc*. Partnership

<sup>31</sup> The Code was published in German and Greek in the official gazette, as was the case with every Greek statute at the time.

<sup>32</sup> "Schon vor der Revolution ... dasselbe (d.h. das französische HGB) von denn Handelsleuten in Constantinaopel und Smyrna aufgenommen worden und auch in Griechenland in Gebrauch gekommen (ist)." Maurer, G. L. von: *Das griechische Volk*. Heidelberg, 1835. 164.

<sup>33</sup> Yiannopoulos, A. N.: Historical Development. In: Kerameus, K. D.—Kozyris, P. J. (ed.): *Introduction to Green Law*. 2<sup>nd</sup> edition. Deventer, Boston, 1993. 8 et seq.

<sup>34</sup> "...daraus entstand ein grundsätzliches Problem hinsichtlich des Verhältnisses zwischen Handels- und Zivilrecht." Rokas, K.: Die Übernahme des Code de commerce in Griechenland. *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 125 (1963), 27.

between husband and wife was null and void,<sup>35</sup> but the Greek interpretation was somewhat different.

## 7. The Netherlands

Following the revolution of 1795, there arose a need for codification, with no results achieved until after the establishment of the Kingdom of the Netherlands in 1806, and the Code civil was introduced in the Netherlands on 1 May 1809. After the attainment of independence in 1813 the various codes remained in effect until the national codification of 1838. During that period four codes were of decisive importance, namely the Civil Code, the Commercial Code, the Codes of Civil and Criminal Procedure, and the code of Judicial Procedure. Modelled on the French law, the Civil Code (*Burgerlijk Wetboek*, BW) was composed of four books concerned with persons, things, obligations and evidence, and prescription.

The Commercial Code (*Wetboek van Koophandel*, WvK), following the French model but exhibiting several independent features, was adopted on 1 October 1838. It consisted of three books, the first covering commerce in general, the second legal relations connected with navigation, and the third concerned with bankruptcy law in general. The first two books constituted no special law but were a part of civil law, especially of the law of contracts.

The first book regulated the trading company, the general partnership (*vennootschap onder eene firma*), the limited partnership (*vennootschap bij wijze van geldschieting v. commanditaire vennootschap*), the joint stock company (*naamloze vennootschap*), the cheque, the bearer security, and the insurance contract. The second book governed shipping contracts regardless of whether they were made between merchants. The cooperatives were introduced by a separate Act of 1876, which was modified in 1925.

The Dutch WvK was introduced in Indonesia on 1 May 1848. Its rules applied first to the European population of Indonesia and were gradually extended to the Asian population in 1855 and 1917. The WvK was subsidiary to the Data Law in respect of natives in case the latter did not cover some aspects (e.g. cheque and bill of exchange) or natives voluntarily subjected themselves thereto.

<sup>35</sup> See Code de commerce, Art. 5.

## 8. Belgium

Following its separation from the Netherlands, Belgium gained independence on 4 October 1830. Before that date the two countries were linked by the Treaty of London from 20 June 1814 and were under French jurisdiction from 2 June 1794 (the battle at Fleurus). The French statutes were the central elements of Belgian legislation. Art. 138 of the Belgian Constitution of 5 February 1831 repealed the regulations inconsistent with the Constitution and upheld the rest. Belgium adopted and upheld the French Code civil and the *Code de commerce*, albeit with partial modifications by special statutes. The Commercial Code consisted of four books, the first governing commercial status, the second regulating merchants' contracts of marriage, the third covering commercial book-keeping, and the fourth regulating commercial transactions. The foundation of companies was subject to public authorization, depending not only on observance of law, but also on whether the foundation was of general benefit.

It was in the second part of the 19th century that the form of joint stock company acquired significance in Belgium, owing chiefly to the freedom of trade and enterprise recognized by the Act of 1791, which was passed on 2 March and put into force on 17 March. The French *Code de commerce* 1807 was also effective in Belgium during the 19th century. It required official consent to the foundation of companies. As regards the *société anonyme*, it is necessary to emphasize that members of this type of company bore no liability for the company's debts.<sup>36</sup> In contrast to the joint stock company, the foundation of a partnership limited by shares was not subject to official consent, because in its case there was a member, the general partner, who was personally liable with his entire property for the company's debts. It was due to the possibility of foundation without official consent that merchants gave preference, as often as not, to partnerships limited by shares. It is important to note that in connection with the foundation of joint stock companies the state investigated not only the company's compliance with statutory provisions, but also whether its foundation served the general good, the company was viable and its organization was not designed in a way likely to prejudice the interests of its members or of third persons.

Within the framework of a comprehensive reform, the third chapter in the first book of the Napoleonic Code was replaced by a new regulation of 18 May 1873, which was still applicable in the 20th century (1964) to joint stock companies; it scrapped the requirement for preliminary official permission and introduced the normative system. There were two limitations on foundation,

<sup>36</sup> It will be noted here that formerly the *société anonyme* had been the equivalent of the silent partnership.

notably the founders' liability and publicity of foundation. As that too large freedom of foundation led to abuses, it came to be regulated by partial rules, such as the Act of 26 December 1881 on the authenticity of the balance sheet and on profit and loss; under it, unauthenticity of the balance sheet incurred criminal responsibility. The Act of 22 May 1886 covered flaws and inadequacies resulting in the company's nullity. The Act of 25 May 1913 contained rules on contributions in kind seeking to avoid overestimate, as well as on issue of shares and the general meeting. Royal Decree No. 26 of 26 October 1934 modified exercise of shareholders' rights in general meeting, while royal Decree No. 185 of 9 July 1935 established control over the issue and public sale of shares, while introducing the form of limited liability company and allowing establishment of silent partnerships.

Replacing the Napoleonic *Code de commerce*, a new Act of 18 May 1873 changed the system of foundation subjected to public authorization and can still be seen as the basic legislation on the Belgian joint stock company law. Under it, the foundation of a joint stock company was not conditional on official consent, with the freedom of foundation becoming general and made subject to meeting but two conditions, namely the founder's liability and the publicity of the foundation document. Since the freedom of foundation naturally left room for very frequent abuses, a new Act of 26 December 1881 regulated the balance sheet and laid down rules on the distribution of loss and profit. It was followed by Act of 22 May 1886 on joint stock companies (see the amendment act), which regulated the founders' liability in cases where the foundation of a company proved to be invalid for some reason. These rules governed the founders' liability with greater rigour and in greater detail. The second amendment act on joint stock companies, passed in 1913, contained rules mainly on creditors' protection and considerably stricter provisions on publicity.<sup>37</sup>

## 9. Germany

With the disintegration and demise of the Holy Roman Empire at the beginning of the 19th century, the various German states adopted differing legal regulations. Such differences in the domain of civil law can be said to have been of great dimension in German territory early in the 19th century.<sup>38</sup> During that period the

<sup>37</sup> Coing: *Handbuch... op. cit.* III/3. 3372.

<sup>38</sup> Recknagel, C.: Die Trennung von Zivil- und Handelsrecht unter besonderer Berücksichtigung der Untersuchungs- und Rügepflicht nach § 377 HGB. Eine rechtsvergleichende Untersuchung unter Einbeziehung internationaler Einheitsrechte (EKG, UN-Kaufrecht) und

Prussian territory was governed by the ALR of 1794, the code resulting from the codification led by High Chancellor *Johann Heinrich Casimir von Carmer*, which contained the first comprehensive rules of commercial law in the territories controlled by German law. The ALR was chiefly grounded on municipal laws and showed little evidence of the influence of the *Ordonnance du commerce* (1673), since its sections dealing with commercial law rested mostly on the former Prussian legislation of Brandenburg.<sup>39</sup> The second part of ALR covered commercial law, its 7th chapter governing company law (*Von Handlungsgesellschaften*). In Austria the ABGB of 1811 was in force at the time, but it did not affect commercial law. In the Rhine territory the *Code civil* and the *Code de commerce* continued in force even after the war of independence. Baden was under the control of the Code civil, its annex being applicable as a commercial act (*Von den Handelsgesetzen*); it can be deemed to have been a version of the *Code de commerce* as revised by Baden. Bavaria was controlled by the *ius commune* and, in this respect as well, primarily by the *Codex Maximilianeus bavaricus Civilis* of 1756, while Württemberg was likewise under the control of the *ius commune* and the *Württembergisches Landrecht* (1610). At the Congress of Vienna the German federation expressed the need for a codification of regulations by the German states in the domain of civil law, but Metternich insisted on strengthening the sovereignty of individual states. As against this, the Peace Treaty of Paris of 20 November 1815 laid down that the independent German states were not to do anything but enter into a federal union, so, in 1815, the endeavours to establish united German states failed to produce the necessary result, notably unity. At that time, therefore, one can only speak of a federation of states in German territory, which lacked powers to legislate uniform regulations in the field of civil law. Although under art. 6 of the Treaty of Federation it was possible to achieve uniform regulations in pursuance of general goals (*Gemeinnützige Anordnungen*), Art. 64 of the Treaty provided for enactment of legislations in the individual member states.

The first initiative for drafting a uniform commercial law for the whole of Germany was taken after the German war of independence, which lasted until 1813–14. The first draft commercial code was prepared by a committee which Imperial Minister of Justice *Wohl* had set up in November 1848.<sup>40</sup> The members

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des französischen, englischen, amerikanischen und schweizerischen Rechts. Europäische Handelsschriften, Serie 2, Vol. 463. Frankfurt am Main—Bern—New York, 1985. 12. Also see Schmidt, K.: *Gesellschaftsrecht*. 3rd edition, Köln—Berlin—Bonn—München, 1997. 769 et seq.

<sup>39</sup> Recknagel: *op. cit.*, 12.

<sup>40</sup> Entwurf eines Handelsgesetzbuches für Deutschland. Erste Abteilung, Frankfurt, 1849.

of the committee were *Widenmann*, Deputy Secretary of States of the Minister of Justice. *Broicher* and *Grimm*, judges of the Appellate Court of Cologne, and Professor *Thöl* of Rostock.<sup>41</sup> The draft was framed under strong French influence, but the related efforts were discontinued on account of political events. Then, in 1856, the federal legislature established a committee which prepared the Nuremberg draft in 1861. In its resolution of 31 May 1862 the Bundesrat directed the federal government to ensure adoption of the draft by the individual states. The draft became effective in Prussia, Saxony and Nassau on 1 March 1862 and in Hamburg on 1 May 1866, but was never brought into force in Limburg and Luxembourg. The constitution of the North-German federal states took over legislative powers in the province of commercial law and the bill of exchange law and, as a result, the Commercial and Bill of Exchange Code was adopted on 25 June 1869 and put into force on 1 January 1870. Its provisions that were consistent with the Constitution of the North-German federal states were included in the Imperial Constitution, and the ADHGB as an imperial Act became effective from 1 January 1871 and entered into force in Württemberg, Baden and Bayern with effect from 13 May 1871. The ADHGB relied heavily on the rules of the *Code de commerce*, which was most noticeable in the ADHGB also recognizing the status of general partnerships, limited partnerships and partnerships limited by shares as subject at law, albeit not as legal persons.<sup>42</sup>

On 21 February 1856 Bavaria entrusted a committee with preparing the draft of a uniform German commercial code, an effort at the unification of law closely connected with political events. A reform of the German federal system was constantly on the agenda from 1855, with King Maximilian von Bayern similarly oriented towards a reform.

The political controversies of German states could be attributed primarily to rivalisation between Austria and Prussia. Bismarck was squarely against a German federation and opposed any course of development based on a literal interpretation of the strict Treaty of Federation. His aim was to establish a non-federal organization that was to take over any task which the Austrians wanted to solve with the medium-sized and small German states through the in-

<sup>41</sup> It will be noted here that there arose a serious dispute between Thöl and Goldschmidt, because Thöl favoured a commercial code based on the subjective system, while Goldschmidt supported one based on the objective system. Bergfeld, C.: Die Bedeutung des Code de commerce für die Vereinheitlichung in Deutschland. Ius Commune Sonderheft 15. Vorträge zur Geschichte des Privatrechts in Europa. Symposium in Krakau 9–12. Oktober, 1979. Frankfurt am Main, 1981. 120.

<sup>42</sup> Bergfeld: *op. cit.*, 122.



strumentality of a federation. This also explains why Bismarck as a Prussian delegate voted against the proposal presented by the Bavarians on 17 April 1856. In doing so he stressed that he had no appropriate instructions and therefore requested that the records be left open. His request was motivated by thinking that the commercial code would otherwise be adopted even without Prussia. Bismarck was trying to hinder the work of the committee which had been set up to elaborate the code, claiming in part that it was impossible for such a code to be drafted by experts alone. At last, the committee was convened in Nuremberg on 15 January 1857, and it considered, along with the Prussian proposal seeking to elaborate the entire body of commercial law, the Austrian proposal aimed at enacting regulations on a narrower field of commercial law. In connection with the Prussian proposal mention should be made of an important antecedent thereof, that is to say that in 1814, when the Rhine province was annexed to Prussia, unsuccessful efforts had been made to introduce the ALR. Later, however, there was set up a committee attempting a revision of ALR in such a way as to align it with the Rhine law. Since that effort was similarly devoid of prospect, the Prussian focused on commercial law, first wishing to reshape the commercial-law part of ALR or to have it modified by basing themselves on the provisions of the *Code de commerce*. From the expert opinions of the chambers of commerce and of merchants it became apparent at that point that the Rhine merchants were more inclined towards maintaining the *Code de commerce*, while the old-time Prussian merchants preferred the ALR. That trend changed when a modification of commercial law was proposed in 1845. Great importance was then attached to the *Code de commerce*, but preparatory work did not begin until 1856. This makes it understandable that Prussia, too, made an immediate start on the preparation of a related Act after Bavaria had accompanied the acceptance of its proposal.

The draft was prepared on the basis of German jurisprudence and judicial practice and, first of all, on the examples of foreign states, including the French *Code de commerce*, as well as by drawing upon the Dutch Commercial Code of 1838, the Spanish Commercial Code of 1829, the Frankfurt draft of 1848 relating to a general German code, the draft commercial code of 1839 of the Kingdom of Württemberg, and the Austrian draft of 1849.

The Nuremberg committee considered the first three books of the Prussian draft at its first meeting from 21 January to 2 July 1857 and at its second meeting from 15 September to 30. There were tabled several motions for an amendment of the second draft, and, in accordance with the committee's decision of 11 March 1861, the draft of a general German commercial code was presented to the National Assembly on 16 March.

The historical antecedents served as a prelude to the elaboration of a commercial code, since the French *Code de commerce* had proved the existence of a possibility for the codification of commercial law in that period. In terms of substantive law, the mentioned Code had influence to bear, through the Prussian draft, on the elaboration of ADHGB as well. At the same time it may be stated that it was not the *Code de commerce* that provided a basis for the elaboration of ADHGB as a special province of commercial law.

The ADHGB established a distinction between trading companies and companies. A company founded by articles of association for the purpose of carrying out common economic activities was deemed to be a trading company. Economic activity meant engagement in commercial operations or transactions, the number of which was determined by ADHGB.<sup>43</sup> The general partnership (Arts. 85–149), the limited partnership (Arts. 150–172) and the partnership limited by shares (Arts. 173–206) as well as the joint stock company (Arts. 207–249) were known to ADHGB as trading companies. Following the reform of 1 June 1870, partnerships limited by shares and joint stock companies were regarded as trading companies irrespective of the object of business. Also, silent partnerships (Arts. 250–265), associations formed for the purpose of keeping joint accounts (*Vereinigung zu einzelnen Handelsgesellschaften für gemeinsame Rechnung*, Arts. 266–270) and cooperatives (*Genossenschaften*) belonged to the category of trading company.

Within the meaning of ADHGB, the general partnership (*offene Handelsgesellschaft*, OHG) was one consisting of two or more members who carried out commercial activities under an identical firm name and whose interests were not limited to a pre-established cash contribution. Members bore unlimited liability, joint and several, for the company's debts and obligations to the extent of their entire property (Art. 112). There was no formal requirement for the conclusion of articles of association (Art. 85 II.). The company had to be registered with the commercial court, which determined the members, the firm and its domicile and prescribed rules for representation. Accordingly it was not necessary to submit the full text of the articles of association. Commercial registration was public and open to inspection by all. The Act distinguished external and internal legal relations of the company. As regards internal legal relations, the rights and obligations of members could be determined on the basis of the freedom of contract, i.e. the Act contained permissive rules in this respect, whereas its provisions governing external legal relations were peremptory.

<sup>43</sup> Unlike the Code de commerce, which contained no such classification in Arts. 632–633.

The OHG was not a legal person, its assets were separated from those of its members, but the company itself possessed no juristic personality. The company could sue and be sued under its firm name. Its character as association of persons was shown by the fact that the death of a member led to the termination of the company. The OHG could not be a member of another general partnership. It bore the name of one of its members or the names of several members. Unless otherwise agreed upon, all members were entitled to manage the company and to represent it in relation to third persons. Any limitation on this right of representation was invalid (Art. 116). Members excluded from management were entitled to be informed of the company's affairs (Art. 105).

The regulations on the limited partnership were based on the *Code de commerce*, but the rules of ADHGB were much more precise.<sup>44</sup> The limited partnership was one, which carried on commercial activities under a common name and whose members, one or more, were liable for the company's debts to the amount of their cash contributions, while the members of an OHG, one or more, bore full, unlimited liability for the company's debts (Art. 150). Accordingly the *Kommanditgesellschaft*, KG) was a modified version of OHG, a distinction of relevance to general partners. One member of a KG was a general partner (*Komplementäre*) and the other a limited partner (*Kommanditist*). Also in the case of limited partnerships, internal legal relations were governed by the freedom of contract, the general partner being entitled to manage and to represent the company. For that matter, these aspects were subject to the rules on OHG. At the same the Act allowed limited partners to act on the company's behalf in the capacity of *Prokurist* of commercial proxy. The limited partnership was not a legal person either, but was a form of company that had come to allow for one member's limited liability for the company's debts.

The institution of the partnership limited by shares (*Kommanditgesellschaft auf Aktien*, KGaA) was also regulated by ADHGB in Arts. 173-206 based on the draft of the French and Prussian commercial codes of 1856. In the case of partnerships limited by shares the general partner were personally liable for the company's debts and were entitled and obliged to represent the company (Art. 196), while the limited partners were not entitled to participate in the company's management, but were tied to the company more closely than would have been the case if they were shareholders of a joint stock company. The interests of limited partners were expressed in shares, which were bearer shares of a face value of 200 thalers each (Art. 173). Shareholders had to be inscribed in the company's book of share, and the shares had to be subscribed in order for the partnership limited by shares to be entered in the trade register (Art. 177). Where

<sup>44</sup> Koberg: *op. cit.*, 8.

the company's capital was composed not only of cash contributions, but also of contributions in kind, the first general meeting had to estimate the actual value of contributions in kind and the second meeting had to decide on the acceptance thereof (Art. 180), whereas general partners were under the control of the rules on limited partnerships. Partnerships limited by shares had, in addition to management, two more organs: the supervisory board (*Aufsichtsrat*) of at least five members and the general meeting (*Generalversammlung*) of limited partners. The supervisory board was concerned to control management and was entitled to inspect at any time the company's businesses and annual balances as well as the distribution of profit (Art. 194). Along with general partners it had the right to convene the general meeting and to control implementation of its resolutions (Arts. 186–187). This form of company was most popular in the territory of Prussia, but it never became as significant in German territory as in France.

The rules of the reform Act of 1870 on partnerships limited by shares underwent minor modifications, which affected the members of the supervisory board and the general partners. It is important to underline, moreover, that the requirement for concession was removed in the whole territory of the empire.<sup>45</sup> The reformed Act of 1884 on joint stock companies similarly gave a clearer expression, at the statutory level, to the economic differences between partnerships limited by shares and joint stock companies. Seeking to prevent evasion of the rules on joint stock companies by choosing the form of partnership limited by shares, it provided that limited partners must be subject to the rules on joint stock companies and that general partners must have an interest of at least 4% if the company's stated capital was not more than DM 3 million and an interest of 2% if the stated capital exceeded that amount (Art. 174a).

The rules relating to joint stock companies (*Aktiengesellschaft*, AG) were laid down in Art. 207–249 of the ADHGB of 1861. A joint stock company was a trading company in which all shareholders, all members, made a contribution and bore no personal liability for the company's debts (Art. 207). The company's capital was divided into shares, but no minimum amount was fixed. The articles of association had to be drawn up in a document certified by a notary public or a court and had to show the main particulars of the company, such as its objects, the amount of stated capital, the value and types of shares (bearer or registered), the major rules on the acceptance of the balance sheet, and on the convening of the general meeting. Bearer shares could not be issued

<sup>45</sup> It will be noted here that the partnership limited by shares had formerly been one of the most popular forms of company in Prussia because its liability was limited, while no concession was required for its foundation.

unless the full amount of stated capital per share had been paid; that amount was fixed at 40% for registered shares. The company had to be entered in the trade register (*Handelsregister*) as a condition for acquiring juristic personality (Art. 213 of ADHGB). It had to establish a general meeting and a board of directors. Shareholders exercised their rights at the general meeting, and unless otherwise provided by the articles of association, each share had one vote (Art. 214 of ADHGB). The board of directors represented the company in concluding legal transactions. It was composed of one or more members, who were not required to hold shares and were entitled to a remuneration, were recallable at any time, and their right of representation in relation to third persons was not subject to any restriction. The members of the board of directors bore personal liability jointly and severally for any wrong or any contravention of the articles of association, particularly for payment to shareholders of dividend or interest in awareness of the company's insolvency (Art. 241 of ADHGB). Under the ADHGB, establishment of a supervisory board was optional, but once one had been established, it was governed by the rules on partnerships limited by shares. The foundation of joint stock companies was subject to state permission (Art. 208 of ADHGB). An exception to this rule was made by the federal states' statutes bringing the Code into force, as was done by cities of Hamburg, Lübeck, Bremen and Oldenburg, whereas Württemberg and Baden made public authorization compulsory for insurance companies and banks only. The ADHGB of 1861 relied heavily on the Prussian Joint Stock Companies Act of 1843.<sup>46</sup>

In Germany the reform of the Joint Stock Companies Act of 1870 broke with the former concession system and replaced it with the normative system. The previous requirement for public authorization was superseded by several new rules on the company's organs, publicity and liability. The minimum face value of each share was fixed at 50 federal thalers for registered shares and at 100 thalers for bearer shares (Art. 207a of ADHGB). Every joint stock company was required to set up a supervisory board of at least three members. The general meeting had to ascertain whether the entire capital of the company had been subscribed and whether at least 10% of shares had been paid. It was at that time that the Act included special provisions on contributions in kind (Art. 209b of ADHGB). Art. 210 of ADHGB provided that the articles of association must be entered in the trade register and that excerpts thereof must be made public. The members of the supervisory board bore personal liability jointly and severally in cases where unlawful repayments or payments of dividends had been made with their knowledge and they had failed to take appropriate measures against them

<sup>46</sup> Koberg: *op. cit.*, 14.

(Art. 225b). The board of directors was under obligation to make the balance sheet public. In addition, penal-law rules were laid down for members of the supervisory board and the board of directors who furnished false information for the trade register and the general meeting.<sup>47</sup>

From 1873 onwards, German territories began moving towards new reforms, and the related endeavours led to the amendment of the Act of 1884,<sup>48</sup> which sought to bring participants into closer contact with companies, create greater guarantees for securing stated capital, separate more sharply the workings of company organs and promote the performance of their functions. Another aim was to regulate the liability of participants. The minimum face value of shares was raised to DM 1,000, with departure from that amount allowed only in the case of joint stock companies founded for public purposes. For registered shares, the transfer of which was made subject to the company's consent, the face value was fixed at not less than DM 200. With respect to the company's registration, the requirement was to pay at least one fourth of stated capital against the previous one tenth (Art. 210 III. of ADHGB), and the company was prohibited from acquiring equity shares or burdening them with lien (Art. 215d of ADHGB). As regards foundation, the articles of association had to be signed, and the shares taken over, by at least five persons, such acts to be inscribed in a notarial or judicial document (Art. 209 of ADHGB). Art. 209h of ADHGB made an auditor liable to examining any contribution in kind made at the time of foundation. The liability of the members of the board of directors and the supervisory board as well as of the founder was expanded. The board of directors and the supervisory board were required to supervise and be liable for the process of foundation as well (Art. 213c of ADHGB). The liability of the members of the board of directors for the company's management was linked to the requirements of ordinary business activity and violation of those requirements incurred their liability to the company (Art. 241 of ADHGB). The same rule applied to the liability of supervisory board members. The powers of the general meeting were extended, and it was provided that, as a general rule, any matters outside the scope of competence of another organ of the company were amenable to decision by the general meeting. Such matters included modification of the articles of association, change in the structure of capital, election and recall of supervisory board members, acceptance of the balance

<sup>47</sup> The switch to the normative system gave impetus to the foundation of joint stock companies, which numbered in Prussia 203 in 1871, 178 in 1872 and 162 in 1873 against a total of 203 founded up to 1870. The number of newly founded companies began to fall afterwards. Koberg: *op. cit.*, 15.

<sup>48</sup> For a full discussion see Koberg: *op. cit.*, 16, fn. 28.

sheet and approval of specified contracts. That Act was the first to provide for the protection of minority shareholders' rights. Shareholders representing one tenth of stated capital were entitled to request the court to appoint an auditor to examine the company's management (Art. 222 of ADHGB). Shareholders representing 20% of the company's stated capital were accorded the additional minority right to sue members of the compensation of damage caused to the company by breach of duty (Art. 223 of ADHGB). Shareholders representing 5% of stated capital were entitled to obligate the company to place the items they proposed on the agenda of the general meeting (Art. 237 of ADHGB). It was an added minority right that any shareholder was entitled to contest before the court any resolution of the general meeting violative of the law or contrary to the articles of association.

In German law the ADHGB was the first to make a sharp distinction between the silent partnership (*stille Gesellschaft*) and the limited partnership. The economic goal pursued by both types of company was to ensure that outsiders, participating as partners contributing capital should be liable for the company's debts only to the amount of capital made available by them. In the case of silent partnership it was difficult to distinguish this form of company from simple loan. The ADHGB regulated the silent partnership in Arts. 250-265. A silent partnership was one in which a person made available capital to a trading company and shared in its profit and loss (Art. 250. I. of ADHGB). Such a company was founded by contract not subject to formal requirements (Art. 250. II. of ADHGB) and governing only the internal legal relations of members. It was not required to be entered in the trade register, and silent partners (*stille Gesellschafter*) were not entitled to participate in management. The owner of the assets made available to the company by the silent partner became a general partner, and in case of the company's bankruptcy the silent partner was entitled to notify as creditor one half of the loss exceeding the amount of his cash contribution (interest) (Art. 258. I. ADHGB). The silent partner's death did not terminate the company, so the death of the general partner, his own bankruptcy or his loss of disposing capacity naturally entailed termination of the silent partnership (Art. 261 of ADHGB). Of course, this form of company was of advantage because the limited partner's liability was limited to the amount of his cash contribution, while he was entitled to act with powers of attorney on behalf of the company, conducting affairs and even concluding legal transactions. Thus, in effect, it was only the general partner who bore liability and personal risk. The advantage of the silent partnership vis-à-vis the limited partnership lay in that the silent partner was in a position to act as creditor in case of the company's bankruptcy.

The shipping company (*Reederei*) was regulated by Arts. 450–476 of ADHGB. A shipping company was one in which the vessel was in common ownership in order that the parties might undertake business on sea routes by keeping a joint account (Art. 456 of ADHGB). The common ownership of the vessel was divided into property shares. The *Reederei* could not be regarded either as a trading company or as a legal person, but was a company covered by commercial law. Legal relations between members were controlled by the articles of association (Art. 457 of ADHGB). Unless otherwise provided by the articles of association, each member was entitled to participate jointly in the company's management, members acted on the basis of joint decisions governed by the majority principle, while the voting rights were determined by property shares. Management was transferable to an outsider as well (*Korrespondenzreeder*). Members were required to meet obligations in proportion to their property shares (Art. 467 of ADHGB). As a general rule, it was not possible to repudiate a shipping company contract, but members' interests were transferable at any time without the consent of the other members. Where a shipowner (*Mitreeder*) went bankrupt, died or became incapable of action, such events did not result in the company's cessation (Art. 472 of ADHGB). Thus, the *Reederei* was a form of company which bore the typical stamps of associations of persons on the one hand and of capital-pooling companies on the other. The high risks involved in maritime trade soon came to create a demand for limitations on the liability of shipping company members. Accordingly, members' liability for the company's debts was limited to the vessel and the cargo, but it was incurred only if the shipowner himself was not liable, for if he was liable for his decision, he bore personal and unlimited liability for the company's debts.

The ADHGB was followed by the adoption of the German Joint Stock Companies Act on 11 June 1870.<sup>49</sup> The subsequent efforts at reforming the ADHGB were, in some aspects, treading a common path with the preparations for the codification of civil law as a whole, although a commitment was clearly expressed to the effect that a dualist regulation should be adopted in Germany.<sup>50</sup> A significant role in revising the ADHGB was played by Secretary of State *Nieberding* of the Imperial Ministry of Justice, who proposed a revision of commercial law in 1893. It was on his initiative that *Eduard Hoffmann*, relying

<sup>49</sup> Gesetz, betreffend die Kommanditgesellschaft auf Aktien und die Aktiengesellschaft. EGB1. 1870, S 375.

<sup>50</sup> "Das Handelsrecht soll nicht in denn Entwurf eines bürgerlichen Gesetzbuchs aufgenommen werden, sondern Gegenstand besonderer Kodifikation sein ..." Excerpt from the expert opinion of the preliminary committee set up on 15 April 1874 for the codification of BGH. Quoted by Schubert: Die Entstehung, 2.



on the expert opinions of *Bolze* and *Behrend*, prepared the draft of a new commercial code consisting of 414 articles.<sup>51</sup> The draft was debated on several occasions, and the questions still outstanding were settled by the ministerial conference of 24 October 1896, which approved the HGB on 5 November 1896. The Bundesrat considered the draft on 11 and 22 January 1897, adopting it as an Act.

### 10. Codification of the Austrian commercial law

The need to undertake a unification of different legal regulations by the codification of commercial law arose early in the 19th century.<sup>52</sup> In 1809 the Royal Court of Vienna's committee on legal affairs was entrusted with preparing a draft commercial code. The Code was to consist of five books containing the rules on commerce in general, bill of exchange, maritime trade, bankruptcy, and the judicial system. Only two books were prepared, but neither entered into force. It was in 1842 that the need for codification was again brought into focus, and the related efforts produced in 1849 a new draft consisting of ten books and published under the title of *Entwurf eines österreichischen Handelsrechts (Zweiter Entwurf)*. The draft did not become an Act, but it had a significant influence on the dogmatics of commercial law. It was followed by the Ministry of Trade's draft in 1853,<sup>53</sup> which was revised by the Ministry of Justice in 1855 and presented to the ruler in 1857,<sup>54</sup> but not adopted as an Act either.

In the 1860s Austria could be divided into three parts in the field of regulations on commercial law: Dalmatia and South Tyrol under the influence of French law, namely the *Code de commerce* of 1807; the Hungarian territory (Hungary, Croatia, Slovenia) controlled by the commercial acts which the Hungarian Parliament adopted in 1839 and 1840; and the remaining Austrian

<sup>51</sup> Entwurf eines Handelsgesetzbuchs für das Deutsche Reich. For a full treatment see Schubert, W.: *Die Entstehung des Handelsgesetzbuch von 1897* (Hgg.: Schubert, W.—Schmiedel, H.—Krampe, C.). Frankfurt am Main, 1986. 2.

<sup>52</sup> During that period the influence of French and Bavarian law was felt in South Tyrol and Salzburg. Hämmerle, H.—Wünsch, H.: *Handelsrecht. I. Allgemeine Lehre und Handelsstand*. 4th edition, Wien, 1990. 10.

<sup>53</sup> For that matter, Tyrol adopted the Act on registration of firms and on trading companies as a separate act in that year. Randa, A. R.: *Das österreichische Handelsrecht mit Einschluss des Genossenschaftsrechtes und der Gesellschaft mit beschränkter Haftung*. I. 2nd edition, Wien, 1911. 7.

<sup>54</sup> This draft became known as Vierter Entwurf in the pertinent literature. Hämmerle—Wünsch: *op. cit.*, 11.

territories, where special statutes and decrees governing partial fields of law were in effect.<sup>55</sup>

In the meantime, the codification of commercial law was similarly under way in the German territories and produced the ADHGB, which was put into force with some modifications in Austria as in other countries.<sup>56</sup> The commercial code was composed of four books, the first covering the status of merchants, the second regulating trading companies, the third governing silent and accidental partnerships, and the fourth concerned with commercial transactions.

During World War One the need arose for a modification of the commercial code, and Professor PISKO drew up a draft in 1920 aimed at the unification of commercial law in the German Empire and therefore based mainly on the rules of the German HGB of 1897. The draft was not adopted, but the period under discussion was marked by the enactment of several special statutes such as those regulating shares in 1899 and introducing the limited liability company (GmbH) in 1906. For the known political reasons Austria adopted the German HGB of 1897 in 1928.

## 11. Switzerland

In the middle of the 19th century the intensity of industry and trade cut across the cantonal frameworks so strongly as to call for removal of commercial law barriers between the cantons. Creation and transformation of the necessary legal environment became a social demand also felt at the government level. In constituent assemblies the governments of the cantons of Bern and Solothurn proposed, as early as 1848, the unification of penal law, the law of penal procedure and commercial law as well as the centralization of commercial adjudication, but the Constitution of 1848 did not authorize the federal legislature to adopt such an act.<sup>57</sup>

<sup>55</sup> Randa: *op. cit.*, 6.

<sup>56</sup> The Austrian commercial code was named Allgemeines Handelsbuch and did not comprise maritime law Hämmerle—Wünsch: *op. cit.*, 12. It is to be noted here that this Austrian commercial code, resting on the ADHGB, served as a basis for the elaboration of Hungary's Commercial Code XXXVII of 1875, although the Hungarian Code showed several differences as it did not include, e.g., the partnership limited by shares and the silent partnership. For a full discussion see Randa: *op. cit.*, 10.

<sup>57</sup> For more detail see E. Huber: *System und Geschichte des Schweizerischen Privatrechts*. I–IV. Basel, 1893. 202. et seq.

On 17 January 1854 an intercantonal conference chaired by *Blösch* (a member of the Government of the Canton of Bern) met with the participation of 13 cantons<sup>58</sup> to make preparations for a uniform regulation on the bill of exchange law, although the more distant goal of unifying commercial law was already of topical interest at the time. Emanuel Burckhardt-Fürstenberger, a jurist of Basel, drew up the draft, which was considered by a committee<sup>59</sup> and was modified in several aspects. The draft on bill of exchange law thus prepared reflected German influence in the first place, since Burckhardt-Fürstenberger relied on the example of the *Allgemeine Deutsche Wechselordnung* of 1847, but he effected numerous structural and substantive changes (e.g. in respect of procedure and enforcement concerning the bill of exchange law). The cantons participating in the conference reached no agreement on the acceptance of the draft, because each canton demanded major modifications.<sup>60</sup>

A renewed effort at codification was motivated by the adoption of the *Allgemeines Deutsches Handelsgesetzbuch* (ADHGB) of 1861.<sup>61</sup> As was stressed by Staehelin,<sup>62</sup> the government of the Canton of Bern was specifically influenced by this Act in entrusting Professor Walter Munzinger<sup>63</sup> and Edouard Carlin in July 1861 with framing a commercial code for the Canton of Bern.

Concurrently with the preparations for the cantonal codification of Bern, the federal government sought expert opinion from three professors of law,<sup>64</sup>

<sup>58</sup> The conference was attended by representatives of the cantons of Zürich, Bern, Luzern, Freiburg, Schaffhausen, St. Gallen, Graubünden, Aargau, Thurgau, Waadt, Wallis and Neuchâtel as well of the city of Basel.

<sup>59</sup> Blösch, Adolf Burckhardt, a banker of Basel, and Emanuel Burckhardt-Fürstenberger were members of the committee.

<sup>60</sup> It will be noted here that several cantons such as Aargau, Solothurn, Bern, Luzern and Schaffhausen drew upon this draft for framing their own cantonal bills on exchange law.

<sup>61</sup> The adoption of ADHGB was instrumental in the unification of law in Germany, for most of the German Bünde gave it legal effect between 1861 and 1868.

<sup>62</sup> Staehelin, A.: *der Entwurf eines schweizerischen Handelsrechts von 1864*. In: *Hundert Jahre Schweizerisches Obligationenrecht* (Hgg. Peter, H.—Stark, E. W.—Tercier, P.). Freiburg, 1982. 35.

<sup>63</sup> Walther Munzinger (1830–1873) was the son of a liberal Landamman of Solothurn, brother of Werner Munzinger Paschka, a known African explorer. After the family had moved to Bern, he began to read law in that city and also studied in Paris and Berlin. From 1857 he was teaching commercial and exchange law, German private law and Swiss constitutional law at the University of Bern. He was professor from 1863.

<sup>64</sup> DUBS, a member of the federal government, had previously requested the expert opinion of Heinrich Fick concerning the possibility and desirability of elaborating a uniform commercial and exchange law for Switzerland.

notably Walther Munzinger, Heinrich Fick<sup>65</sup> and Emanuel Burckhardt-Fürstenberger. The prominent Swiss jurists in commercial jurisprudence were requested to identify the legislative enactments on commercial law in the different cantons, the advantages and disadvantages of unifying commercial law at the federal level, the possible content of such a commercial code and the changes which the adoption of the code would entail in the judicial system.

Munzinger and Fick thought that unification was possible by widening the scope of PGB, while Burckhardt-Fürstenberger proposed adoption of the ADHGB. The federal legislature took it into account that Munzinger was already working on a code of commercial law and that his expert opinion was shared by its representatives. Therefore, on 22 August 1862, it entrusted him with elaborating a body of uniform commercial and exchange law for Switzerland. His draft was considered by an expert committee (consisting of DUBS, Emanuel Burckhardt-Fürstenberger, Edouard Carlin, Heinrich Fick and Charles Friedrich, a member of the Ständerat) at two sittings (between 23 and 30 November 1863 and between 25 and 31 January 1864). The draft was modified and supplemented in several aspects, and its final version was prepared in German in June 1864 and then translated into French by Friedrich.

Munzinger's draft bill consisted of five books and 492 articles. In elaborating the parts on commercial law and the law of obligations Munzinger kept in view the provisions of ADHGB and PGB in the first place, while relying to a lesser extent on the *Allgemeine Deutsche Wechselordnung* and the bill of exchange codes of the Swiss cantons for formulating the rules of exchange law.

The first book (*von dem Handelsstand*) governed the legal status of merchants and such legal institutions as the trade register, the trading company, the business book, the powers to register firms (*prokura*), the commercial power of attorney and the commercial broker. The second book (*von den Handelsgesellschaften*) regulated trading companies like the general partnership (*Kollektivgesellschaft*), the limited partnership (*Kommanditgesellschaft*), the partnership limited by shares (*Kommanditaktiengesellschaft*) and the joint stock company (*Aktiengesellschaft*). The third book (*von Geschäften des Mobiliarverkehrs*) contained contract-law rules, including general provisions on the capacity to contract, the making of contract, the place and time of performance, stipulation of interest, acquisition of property by legal transactions, retention (*retentio*) and the like as well as special rules on contracts, such as those governing sale,

<sup>65</sup> Heinrich Fick was the son of a high-ranking state official of Hessen. He took his doctoral degree and was qualified as a lecturer at Marburg, where he was later elected mayor, but, given his liberal views, his post was not approved by the government of Hessen. Thereafter, from 1851, he was professor at the Law School of Zürich.

agency, forwarding, insurance, exchange, and issue of orders for payment. Furthermore, it included special rules such as conflict rules applicable to contracts between subjects at law in different cantons (e.g. Art. 205 governed the capacity to contract of citizens of another canton). The fourth book (*von dem kaufmännischen Konkurse*) laid down the rules of substantive law relating to bankruptcy proceedings. The fifth book (*von der Kassation und Urteilsfällung durch das Bundesgericht*) determined the jurisdiction of federal courts in matters of commercial law.

The third book of the draft outlined a mixed system of civil and commercial law rules, which were incorporated in a single code, for this book contained provisions applicable to merchants and non-merchants alike, but gave prominence to the special rules of commercial law expressly governing commercial transactions only.<sup>66</sup> With this legal-technical solution of codification Munzinger followed the PGB of Zürich, in which Bluntschli covered commercial contracts as part of contract law on the ground that commercial law was nothing else than a part of the law of contracts.<sup>67</sup> The draft met a favourable reception among the jurists of the day, with its precise and intelligible system and notions praised by, e.g., Albert Schneider (1836–1904), professor of Zürich, Wilhelm Endemann (1825–1899), professor of Jena and Bonn, Levin Goldschmidt, a jurist in German commercial law, and Bluntschli.<sup>68</sup> At the same time, Andreas Heusler (1834–1921), one of the best known and most acknowledged jurists of Switzerland of the day, strongly criticized, in a study of 115 pages, every detail of the draft, chiefly because, in his view, the time had not yet come for

<sup>66</sup> Such provisions expressly applicable only to merchants covered, e.g., the maximum rate of interest, merchants' right of retention (*retentio*), and pledge.

<sup>67</sup> "Es ist nun Anderes als ein Stück Obligationenrecht und zwar dasjenige Stück, das vornehmlich für den handelsmännischen Verkehr von Bedeutung und darum bedürftig und fähig ist." Munzinger, W.: *Motive zu dem Entwurfe eines schweizerischen Handelsrechts*. Bern, 1865. 11, fn. 39. Quoted from Staehelin. Staehelin: *op. cit.*, 43.

<sup>68</sup> The Swiss "popular feeling" demanded that in everyday life the law should be intellectually accessible even to simple merchants, should not be alienated from the people, as it saw the prefiguration of a police state in any overregulation. With that in mind, legislation should be simple, brief and understandable. Guggen-Bühl argued against overregulation when he wrote: "Dem Richter soll die Regel gegeben werden, aber die Ausnahme kann und darf nicht durch den Gesetzgeber normiert werden. Der Richter soll ... in einzelnen das Recht erkennen, er soll die rechte Regel anwenden, die rechte Ausnahme finden." Guggenbühl: *Die Entstehung des zürcherischen privatrechtlichen Gesetzbuches*. Zürich, 1924. Quoted by Schlegelberger, F. (Hgg.): *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*. I–VI. Berlin, 1929, I. 228.

commercial law to be governed by a uniform code in Switzerland.<sup>69</sup> The federal legislature did not vote for the draft bill, because, as was pointed out previously, the Swiss Constitution of 1848 did not authorize the Bundesversammlung to adopt such an Act.

At the intercantonal conference on 4 July 1868 the government's representative stressed the need for the Confederation to adopt a uniform code of contract law. The task of elaborating such a code was assigned to Munzinger.<sup>70</sup> Concurrently a committee of six members was set up to support the work of codification. One year later the committee gave opinion on the parts of the draft already prepared (the general part and the contract of sale) and then, early in 1871, on the first complete draft. The drafters of OR followed the model of the important European codes of the time, such as the French Code civil and the ABGB, and relied on the traditions of Roman law as preserved in the science of the German pandects. In addition, the Dresden draft of 1866 (*Dresdner Entwurf*)<sup>71</sup> regulating questions of liability, the *Bayerischer Gesetzentwurf über die Rechtsgeschäfte und Schuldverhältnisse*, the *Hessen-Darmstädtischer Entwurf* and für das Königreich Sachsen bürgerlichen Gesetzbuch exerted a great influence and served as important source-material.<sup>72</sup>

The thorough revision in 1874 of the Constitution removed the obstacles to the federal legislature adopting a code of contract law, which comprised commercial and exchange law as well. Art. 64 of the 1874 Constitution authorized the federal legislature to frame such a code.<sup>73</sup> The German and French texts of the draft were first published in 1877. The draft was considered

<sup>69</sup> For more detail see Staehelin: *op. cit.*, 40.

<sup>70</sup> After the death of Munzinger, Heinrich Fick continued and completed the elaboration of the code, and the draft underwent a profound change under the impact of German law. See Stolleis, M. (Hgg.): *Juristen. Ein biografisches Lexikon. Von der Antike zum 20. Jahrhundert*. München, 1995. 446.

<sup>71</sup> The drafters of OK took over some 400 articles from the Dresden Entwurf; Schneider and Fick made some 240 references to the bill in their commentaries. See H.-P. Benöhr: *der Dresden Entwurf von 1866 und das schweizerische Obligationenrecht von 1881. Motivationen der Redaktoren und Lösungen in den Kodifikationen*. In: Peter, H.—Stark, E. W.—Tercier, P. (Hgg.): *Hundert Jahre Schweizerisches Obligationenrecht*. Freiburg, 1982. 59 et seq.

<sup>72</sup> For more detail see Merz, H.: *Das schweizerische Obligationenrecht von 1881. Übernommenes und Eigenständiges*. In: *Hundert Jahre Schweizerisches Obligationenrecht. op. cit.* 10.

<sup>73</sup> "Dem Bund steht die Gesetzgebung zu: ...über alle auf den Handel und Mobiliarverkehr bezüglichen Rechtsverhältnisse (Obligationenrecht, mit Integriert des Handels- und Wechselrechts)", Bundesverfassung 64. §.

in several committees, was finally passed by the Bundesversammlung on 14 June 1881 and entered into force on 1 January 1883.

Its system being unique, the code was referred to as code unique in the pertinent literature. It gave a uniform regulation on both civil and commercial law unlike, e.g., the French model of regulation, where the Code civil as *lex generalis* and the *Code de commerce* as *lex specialis* represented a dualist model. On the other hand, the code unique showed many points of similarity to the PGB, which was basically applicable to both merchants and non-merchants, while some of its special provisions revealed differences in respect to merchants, the reason being that the special regulation on the situation of certain social segments (i.e. merchants) was not in accord with the “democratic feelings” of the Swiss people.

That system of the code of contract law, its structure being contrary to the contemporary European trend and resulting in the monism of civil and commercial law, was traced by *Eugen Bucher*<sup>74</sup> to disagreements between the Swiss federalists and centralists, since the Swiss cantons wishing to continue functioning in a loose confederation were interested in preventing a uniform regulation and therefore the most they agreed to was the unification of commercial law, which was becoming of vital importance to economic life. The centralist cantons supporting a strongly centralized political system set the aim of achieving the full unification of Swiss law, and they did attain that aim by amending the Constitution in 1898. The said monism of the code, however, could in no way be seen as a protest against the French system,<sup>75</sup> as was also stressed by *Bucher E*, but it merely pointed up the Swiss political constellation of the day,<sup>76</sup> as was also reflected in Art. 64 of the 1874 Constitution.

<sup>74</sup> Bucher, E.: Der Einfluss des französischen Code Civil auf das Obligationenrecht. In: Caaroni, P. (Hgg.): *Das Obligationenrecht 1883–1893. Berner Ringvorlesung zum Jubiläum des schweizerischen Obligationenrechts*. Stuttgart, 1984. 144.

<sup>75</sup> This is borne out in particular by Bucher’s study clearly indicating those rules in the Swiss code of contract law that were identical, often literally, with those of the French Code civil, influencing the OR or its drafters directly by borrowing from the Code civil or indirectly through the rules of the Dresdner Entwurf or the codes of some French Swiss cantons.

<sup>76</sup> “Der Code Civil war ja die Grundlage für die kantonalen Zivilgesetzgebung der west- und südschweizerischen Gruppe. Es versteht sich von selbst, dass Munzinger, der sich ja auch für französisches Recht habilitiert hatte, bei Ausarbeitung des aOR schon deswegen stark auf französisches Zivilrecht (Code civil, Code de commerce) zurückgreifen musste, um das Gesetz auch für die französischrechtlichen beeinflussten Kantone konsensfähig zu machen.” Kramer, E. A.: Die Lebenskraft des schweizerischen Obligationenrechts. *Zeitschrift für Schweizerisches Recht* 124. I. (1983), 251. Although, as was also emphasized by Kramer,

Another reason for a monist codification can be found in that the PGB as the prototype of OR likewise outlined such a system in Switzerland and that a similar demand was formulated by the Swiss people's sense of justice, as was voiced in the government's committee on codification, as well.<sup>77</sup> That legislative technique served to avoid a double regulation of the same daily relations, for which there was in fact no material basis.<sup>78</sup> Given that Switzerland had adopted no separate commercial code, views were also expressed that Switzerland had no commercial law either.<sup>79</sup> *Oftinger* held that although the Swiss law had indeed no set of norms embodied in a separate Act in respect of merchants, Switzerland did have a commercial law, for there existed special rules based on civil law material and applicable solely to merchants.<sup>80</sup>

The 1881 code of contract law consisted of five books and 33 chapters. The first book comprised the general part (*Allgemeiner Teil*) embodying general rules of contract law, such as those relating to the conclusion and expiration of contracts, the sanctions for and the consequences of non-performance, and the passing of contractual rights. The second book contained special rules on contracts (*Die einzelnen Vertragsverhältnisse*), such as those governing sale, donation, and lease. The third book laid down the rules of company law. The last two books regulated the trade register, accounting and securities. The third chapter on trading companies followed the German commercial code and the amendment acts of 1871 on joint stock companies. The association (*Verein*) was likewise regulated in those books. That legislation was followed by amendment acts supplementing the OR and laying down partial rules, such as the Decree of 6 May 1890 introducing the trade register and the official journal of commerce.<sup>81</sup>

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Munzinger was qualified as a lecturer on French law, it was an unquestionable fact that the drafters of the Swiss codes of commercial law (Munzinger, Fick and Huber) belonged in their cast of thought to the ambit of German law. (For more detail see Kramer: *op. cit.*, 247 et seq.)

<sup>77</sup> "Die Ablehnung eines Sondergesetzes für Kaufleute stehe »mit den demokratischen Gesinnung des Schweizervolkes im Zusammenhang, vermöge deren es jeder Sonderstellung eines Berufsstandes entschieden abgeneigt« sei." See Kramer: *op. cit.*, 255.

<sup>78</sup> It will be noted here that the current international trend is similarly moving towards unification (See, e.g., the Italian Codice civile of 1942 and the Hague Convention on International Sale).

<sup>79</sup> K. Oftinger: *Handelsrecht und Zivelrecht. Monismus oder Dualismus des Privatrechts und seiner Gesetzbücher? Süddeutsche Juristenzeitung* 50. (1954), 153. Oftinger refers here to Oser-Schönenberger's commentary on contract law, in which the authors questioned the existence of a Swiss commercial law.

<sup>80</sup> Oftinger: *op. cit.*, 160.

<sup>81</sup> The numerous other amendment acts, or the *Nebengesetze* can be divided into three groups in terms of content, notably acts on warranty (*Haftpflichtgesetze*), acts on industrial property, and acts on private insurance.



Eugen Huber, in evaluating the qualities of OR, emphasized that its parts dealing with the law of contracts rested on Roman law (e.g. the doctrine of error), and he confirmed that the OR was a mixture of the sciences of the German pandects and of the French doctrine based on the French Code civil.<sup>82</sup> In point of fact, Italian jurisprudence as the third “nation” of Switzerland added no more than the translation to the radiance of altOR, the work of Professor Filippo Sefarini of Pisa. Eugen Huber wrote in praise of the drafters of OR, because the old OR was conducive to the unification of law in the area where it was most needed.<sup>83</sup>

## 12. England

In 1825 in England three forms of company existed: company founded by royal charter, company founded by statute, and deed of settlement company.<sup>84</sup> During the decade after 1825 the legislators came under strong economic and social pressure to license the joint stock company on a general scale, or else unincorporated companies could have gained more ground, with their contradictory legal status and with the drawbacks of limitations on contractual liability merely under civil law.<sup>85</sup> During that period the legislators were hesitant

<sup>82</sup> Huber cited as examples compensation for damage, the theory of bilateral contract, performance of contract, and the regulation on transfer of property on the French model. For more detail see Kaufmann, H. A.: *Das Schweizerische Obligationenrecht und Eugen Huber*. In: Caroni, P. (Hgg.): *Das Obligationenrecht 1883–1998. Berner Ringvorlesung zum Jubiläum des schweizerischen Obligationenrechts*, Stuttgart, 1984. 79.

<sup>83</sup> “Es sei zugleich eine »politische Tat« deren Ergebnis »Vorarbeit für ein allgemeines europäisches Recht« sei.” Huber quoted by Kaufmann: *op. cit.*, 80.

<sup>84</sup> For a summary of this topic, see Boyle, A. J.: *The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History*. *MLR* 28 (1965); Buxbaum, R. H.—Hopt, K. J.: *Legal Harmonization and the Business Enterprise. Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A.* Berlin, New York, 1988; Teubner, G.: *Enterprise Corporatism. New Industrial Policy and the ‘Essence’ of the Legal Person*. In: *EUI Working Papers*, No. 87/294. Badia-Fiesolana, 1987; Tunc, A.: *A Comparison of European and British Company Law*. In: Schmitthoff, C. M. (ed.): *The Harmonization of European Company Law*. London, 1973; Sándor, I.: *Az angol társasági jog történetének főbb korszakai és azok jellemzői* (The Main Periods of the History of British Company Law and Their Distinctive Features). *Acta Facultatis Politico Juridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae* 36 (1997/98), 57 et seq.

<sup>85</sup> “If the State had not given way, we should have had in England joint stock companies, unincorporated, but contracting with limited liability.” *Maitland quoted by Palmer’s Company Law*. London, 1996. 1011.

in the question of authorizing on a general scale the establishment of joint stock companies possessing juristic personality. In the wake of the great French Revolution the existence and operation of capital-pooling companies, subject to limitations on members' liability, became a necessity but, in the light of previous experience, achievement of the related goal was not possible except by strict provisions for the protection of creditors and owners.<sup>86</sup> Propensity to invest was widespread in England at the time, and it was heightened by the possibility of reaping enormous profit from loans to be granted to the newly emergent states of South America and on the insurance market.<sup>87</sup> The firms that had not won royal or legislative favour could not but carry on such activities in a form of company possessing no juristic personality, and therefore, at the beginning of the 19th century, there operated in England a large number of firms that were not legal persons but were named joint stock companies.<sup>88</sup> The first step was taken in 1834 by the adoption of the Trading Companies Act, which ordered registration of the company's members, but gave no general regulation concerning the limitation of their liability.<sup>89</sup> By way of experiment, there were introduced, on the proposal of barrister H. Bellenden Kerr and on the continental model, companies that could be established by royal charter (Chartered Companies Act, 1837), but they did not gain much ground because of the heavy costs they involved.

In 1844, on the motion of Gladstone, Chairman of the Board of Trade, the Parliament passed the Joint Companies Act,<sup>90</sup> which prohibited the operation of

<sup>86</sup> Radia aptly terms them "blue sky laws". "Many Securities Acts ("Blue Sky Laws"), designed to protect investors, have been passed. The most striking characteristic of the modern corporation is the severance of ownership and control." Radta, M.: *Handbook of Anglo-American Legal History*. 1936. Reprint, Florida, 1993. 482.

<sup>87</sup> Hunt, C.: *The development of the Business Corporation in England 1800–1867*. New York, 1926. 30 et seq.

<sup>88</sup> Hunt: *op. cit.*, 54.

<sup>89</sup> In 1818 England made an initiative to introduce the French société anonyme, but the Parliament rejected it. Hunt: *op. cit.*, 52. Again, the Act of 1834 failed to introduce the normative system, and the process of foundation was long-drawn-out and expensive and remained impossible to complete in the overwhelming majority of cases.

<sup>90</sup> (7 § 8 Vict. C. 110) The Act rested on three basic principles. First, it sharply distinguished the partnership and the joint stock company, allowing foundation of firms of more than 25 members or where shares were freely transferable without the consent of the company's other members. Second, it required nothing but the mere fact of registration for the foundation of a joint stock company, but the company was to engage strictly in the same activity for which it had been established. Third, the registrar of Companies ensured full publicity of the company's particulars. However, the failure of the Act to have accepted the members limited liability remained a drawback, and members were not exonerated from

unincorporated companies and was the first to permit foundation of joint stock companies subject to registration, thereby introducing the normative system in England.<sup>91</sup> Another positive novelty of the Act lay in establishing the Company Registrar, i.e. the register of firms. While the Act allowed the companies to acquire immovable property, for instance, it did not invest them with juristic personality representing the greatest advantage, that is, members of the company remained directly liable for the company's debts.<sup>92</sup> Members were trying in vain to eliminate this drawback by including in the foundation document stipulations limitative of liability, but such stipulations were deemed invalid in relation to third persons. A further problem was presented by the cumbersome and unwieldy procedure of registration, for companies were not entered with full effect in the Registrar of Companies until after a preliminary, provisory procedure. It was only upon completion of such procedure that companies acquired separate juristic personality.<sup>93</sup> The introduction of the normative system placed foundation of joint stock companies within reach of all, although the two-tier system made the procedure bureaucratic.<sup>94</sup>

In 1852 the Mercantile Law Commission was entrusted with determining the type of modifications necessary for the introduction of the limited liability company. The Commission relied on French examples and examples of the States of New York and Massachusetts for preparing its report of 1854 showing that the proposed alterations would not be of benefit to the country's general

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unlimited liability for the company's debts until after three years following alienation of shares. *Gower's Principles of Modern Company Law*. 4th edition, London, 1979. 41.

<sup>91</sup> The registration of a joint stock company required at least 25 founding shareholders, and publicity was a requirement for the process of subscribing shares. This caused the registration procedure to be separated into two phases: the company was first registered conditionally, such registration was followed by public subscription of shares, the documents of subscription and the foundation document to be submitted concurrently and conjointly to the registry of firms, which registered the simultaneous certificate showing that at least three fourths of the company's stated capital had been subscribed. For that matter, the Act referred to this form of company as partnership in several places (e.g. sect. 25). For a detailed analysis of the Joint Companies Act of 1844, see Horowitz, W.: Historical Development of Company Law. *Law Quarterly Review* 62 (1946), 376 et seq.

<sup>92</sup> The introduction of limited liability had been proposed by the House of Commons as early as 1825 (Hansard XII (1825) 1284.) and then Bellenden Kerr proposed introduction of the *société en commandite* on the French model, namely the limited partnership, thus ensuring limited liability.

<sup>93</sup> For a full treatment see Hunt: *op. cit.*, 96 et seq.

<sup>94</sup> From 1844 to 1856 there were registered 910 English and 46 Irish companies. Hunt: *op. cit.*, 114.

economic life.<sup>95</sup> That notwithstanding, the House of Commons restated its case for progress in a resolution of that same year,<sup>96</sup> which eventuated in the passing of the Limited Liability Act.<sup>97</sup>

The Limited Liability Act of 1855 allowed limitation of joint stock company members' liability to the face value of their shares, subject to certain conditions, however. Thus, the company was required to have at least 25 members who had to own not less than three fourths of the face value of the company's capital and had to subscribe at least 20% of the face value of their shares; the last part of the company's name had to include the word Limited; and the company's auditor had to be approved by the Trade Commission. Further significant progress was made by the provision that the company's directors were not personally liable for their activities on behalf of the company except when, in awareness of the company's insolvency, they paid dividend or gave loan to members. The first two of the aforesaid requirements were removed by the Joint Stock Companies Act of February 1856,<sup>98</sup> but the second, invented by Lord BRAMWELL, is still mandatory in modified form. The Limited Liability Act (1856) consolidated all earlier legislation on joint stock companies and, guided by the spirit of *laissez-faire*, ushered in a completely new era in the development of company law.<sup>99</sup> Its essential principle was that of allowing everyone to form and operate a joint stock company with limited liability<sup>100</sup> and ensuring that third persons had knowledge of such facts. The procedure for registration of companies became simplified and less expensive, the foundation document required but seven signatures and the charter of company could be based on the model as devised in

<sup>95</sup> Horowitz: *op. cit.*, 379 et seq.

<sup>96</sup> "That the Law of Partnership which renders every Person, who though not an ostensible Partner, shares the Profits of a Trading Concern, liable to the whole of the Debts, is unsatisfactory, and should not be so far modified as to permit Persons to contribute to the Capital of such Concerns on Terms of sharing their Profits, without incurring liability beyond a limited amount." Hansard CXXXIV (1854), 764, 800.

<sup>97</sup> Furthermore, the Limited Liability Act of 1855 allowed companies founded under the Companies Act of 1844 and issuing shares at a face value of at least 10 English pounds each to bear legally limited liability. Holdsworth, W. S.: *A History of English Law I–XVI*. London, 1966. XV. (2). 54.

<sup>98</sup> "This Act, of 116 sections and a Schedule of tables and forms, was the first of the modern Companies Acts." Cover: *op. cit.*, 48.

<sup>99</sup> Horowitz: *op. cit.*, 383.

<sup>100</sup> Conferring limited liability on the shareholders of joint stock companies markedly increased propensity to invest: the companies formed between 1856 and 1862 numbered 2,500, a figure which rose to 3,500 between 1863 and 1866. Hunt: *op. cit.*, 143 et seq.

Table B annexed to the Act. The company was not required to pay up its capital before commencing business.

In 1862 the Parliament passed the Companies Act, denominated *magna carta* of co-operative enterprise by Sir FRANCIS PALMER, which made significant amendments to the Act of 1856,<sup>101</sup> containing—inter alia—the model charter in Table A for the first time. While the Companies Act of 1862 represented considerable progress, the first modern Act was the Companies (Consolidation) Act of 1908, which “consolidated” the 18 Acts passed since 1862.

It was practically the Companies Act of 1862 which introduced the *ultra vires* doctrine in English law,<sup>102</sup> serving as a restriction chiefly to provide protection against abuses of limited liability.<sup>103</sup> That Act was the groundwork for company law up to 1908. Under it, the company was allowed to make contracts only within its scope of activities as shown in the foundation document, while members were not entitled to alter the foundation document in this respect even by unanimous decision. Subsequent legal practice widened this rule to the effect that payments to members were similarly allowed within the company’s scope of activities only.<sup>104</sup> English law made continuous efforts to abrogate the *ultra vires* rule, which was changed by the Companies Act of 1947 empowering shareholders to alter the company’s scope of activities by unanimous decision without the consent of the court.<sup>105</sup> The Companies Act of 1862 had the added merit of introducing the company limited by guarantee (provided by members),

<sup>101</sup> For a full treatment see Horrwitz, W.: *Company Law Reform and the ‘Ultra Vires’ Doctrine*. *Law Quarterly Review* 62 (1946), 66 et seq.; Horrwitz: *Historical Development*, 3844 et seq.

<sup>102</sup> The *ultra vires* doctrine was formulated in Art. 12 of the Companies Act of 1862, providing that “...save as hereinafter provided in the Cas of Change of Name, no Alteration shall be made by any Company in the Conditions contained in its Memorandum of Association”. This specially Anglo-Saxon rule did not apply to companies formed by charter.

<sup>103</sup> The legislator’s intent is expressed with the greatest clarity in Judge Lord Hatherley’s judgement: “When you consider that this Act of Parliament (i.e. the Companies Act 1862) was passed with the view of enabling persons to carry on business on principles which were, up to that time, wholly unknown in the general conduct of mercantile affairs in this country ... it was necessary that the public, that is the persons dealing with a limited company, should be protected, as well as that the shareholders themselves should be protected.” *Ashbury Railway Carriage and Iron Co. (Ltd.) v Riche*, 7 H. L. 684.

<sup>104</sup> Horrwitz: *Company Law Reform*, 70. Also see Pickering, M. A.: *The Company As a Separate Legal Entity*. *MLR* 31 (1968), 485 et seq.

<sup>105</sup> Kahn-Freund, O.: *Companies Act 1947*. *Modern Law Review* 11 (1948), 82.

and extended its scope of applicability to insurance companies, which had formerly been covered by a separate Act.<sup>106</sup>

In addition to the introduction of limited liability, the election of an auditor was made mandatory to protect shareholders and creditors. Auditors came to play a decisive role in controlling the operation of companies.<sup>107</sup>

Another significant change was brought about by the amendment of 1867, which spelled out the unlimited liability of directors and managers to the company for any damage caused to it by their activity.

At the end of the 19th century the greatest weakness of company law was represented by misleading statements made in reports, a problem which became most conspicuous in the judgement rendered in the case known as *Derry v. Peek* (1889) 13 App. Cas. 337, the court holding that the directors who had furnished false information in the carefully prepared balance sheet were not liable for the damage caused thereby, provided they had acted truthfully and not fraudulently. That unfortunate decision was corrected by the Directors' Liability Act of 1890, and another Act of 1900 prescribed public registration of the company's debts in the balance sheet.<sup>108</sup>

### 13. Closing conclusions

It may be stated in general that company law played an important role in the codification of commercial law during the 19th century. The leading role in regulations on company law was assigned to the French *Code de commerce*, with significant contributions also made by the German ADHGB, the Swiss OR, and the British Acts on company law, which broke new ground in some respects.

Possibilities for formulating partial rules to govern different forms of company at the statutory level, thereby laying the basis for establishing the basic principles of a new branch of law drawing its nourishment from commercial law, were opened by the codifications of commercial law. No doubt that a great role in related efforts during that period was reserved for statutory regulations on companies possessing juristic personality and that the development of a normative system which became widely accepted on the English model can be said to have been of epochal significance.

<sup>106</sup> Holdsworth: *op. cit.*, XV. (2), 58.

<sup>107</sup> Hunt: *op. cit.*, 140.

<sup>108</sup> For a full discussion of the Company Act of 1900 see Topham, A. F.: *Company Law. Law Quarterly Review* 51 (1935), 211.

Of course, the company law achieving a status of its own within commercial law brought with it the formulation by this branch of law of its set of internal rules as well. Particular emphasis should be laid in this respect on the fact that the introduction of the normative system was primarily instrumental in the detailed elaboration of rules for the protection of minorities and creditors, which were conducive to the attainment of the foremost aims of company law in modern times.