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The Emergence and Development of Limited Liability in the Field of the Company Law

One of the most important vehicle of the development of the economy can be searched and found in the creation of limited liability of the entrepreneurs. Undoubtly the phenomenon of limited liabiliy ensures the separation and protection of private property from the assets designed to a special business purpose. In this study the historical milestones of the emergence of limited liability are covered.

1. The Roots of Limited Liability in the Ancient Laws

There are several sources which prove the existence of legal structures for common and joint entrepreneurships in the ancient Egyptian, Babylonian, Greek and especially in Roman law. All of these evidents focus on the contractual aspect of these legal relationships, upon which the separate legal personality of these undertakings cannot be stated.

In the early ages, the *societas* in Roman law was applied mostly in family and inheritance law, then in 2 BC, due to the flourishing trade, it gained more importance as the legal form of commercial enterprises. Merchants who wished to associate for the purposes of banking activities, the slave trade or road construction did not necessarily wish to unify all of their property, but only a defined part thereof. The *societas omnium bonorum* was not best suited for this purpose. In the age of the late republic, the praetor started to protect informal associations established for the operation of certain commercial enterprises. In the classical age, the *societas* provided a general framework for all partnership agreements. It also had several subtypes: the *societas omnium bonorum*, the *alicuius negotiationis*, the *rei unius*[1], and the *omnium bonorum quae ex quaestu veniunt.*[2] When signing rental contracts, the most appropriate legal

1 Ulp. D. 17.2.52.13. The *societas omnium bonorum* and the *societas totorum bonorum* basically have identical content, but a different name (Nelson, H. L. W. – Manthe, U.: Gai Institutiones. III. Bd. 88–181. Die Kontraktsobligationen. Text und Kommentar. Berlin, 1999. p. 304.).

2 Textbooks generally distinguish between three forms of *societas*. In certain cases, however, the *societas omnium bonorum ex quaestu veniunt* is still treated separately.

means for establishing a legal relationship between the renters, and between the head lessee and the sub-lessee, was the *societas negotiationis*.[3]

For lack of a separate agreement, if the members of the partnership jointly entered into a contract with a third party, they were liable for the execution of their obligations resulting from the contract in accordance with their participation in the partnership.[4] Only partnerships for the slave trade could deviate from this rule, where the contracting third party was able to raise all his claims against the member with the largest share in the partnership.[5] If a member entered into a contract with a third party individually, he was personally liable for said performance, and the possible several liability established in the contract for partnership was not applicable in relations with the third party. Exceptions to this rule were the cases of *societas exercitorum* and *societas argentarium*.

The *societas publicanorum* also played an important role in the development of contracts of partnership. During the development of *societas* in Rome ecomomy was based on agriculture, and accordingly, the contract for partnership did not play a significant role in trade. At the time of the kingdom, tax collection ensued primarily in kind, and in many cases in the form of public works (*opera publica*), while tax collection was often rented out (*vectigalia ultrove tributa*). In time, this system led to the unification of renters (*publicani*) for state rentals and services, as individuals did not hold sufficient capital to lease the lands from the state, nor did they wish to bear the risks of rental contracts alone.[6] Essentially, the *societas publicanorum* can be seen as the equivalent of a commercial partnership under Roman law, as it was not only a replicate of a simple *societas* but also comprised corporative elements.[7] In this legal construction, the *manceps* entered into a contract with the state and was solely liable to the state, whilst concluding partnership contracts with his capital partners.

The *societas publicanorum* is also known as *societas vectigalium,*[8] which was organised for tax collection.[9] These partnerships combined the characteristics of a *societas* and a *collegium*. In a *societas publicanorum* the partnership's assets were the members' private assets. At the same time, it was organised based on a *collegium* model,[10] and accordingly, it also bore

3 The state expressly prescribed the establishment of a partnership in case of publicans; this partnership was not an independent legal entity, but its members were jointly liable to the state. See Taubenschlag, R.: Die societas negotiationis im Rechte der Papyri. ZSS Rom. Abt. 52 (1932). 65. and 69. ff.

4 Ulp. D. 14.1.4.

5 Trumpler, H.: Die Geschichte der römischen Gesellschaftsformen. Untersuchungen über die Anfänge des modernen Gesellschafts- und Korporationsrechts. Berlin, 1906. p. 33.

6 The first documented versions of *societas publicanorum* can be dated back to 215 BC when three partnerships were established with the participation of nineteen private individuals (Trumpler: op. cit. p. 25.). For details on the economic reasons for the development of *societas publicanorum* see de Martino, F.: Wirtschaftsgeschichte des alten Rom. München, 1985.160. ff.

7 Trumpler: op. cit. 24. ff.

8 The concept of *publicanus* is debated in literature. According to Kniep, only the collectors of vectigal were included in this category (Kniep, F.: Societas Publicanorum. Jena, 1896, 1. ff.). The majority believe the entrepreneurs of public works, mine renters, renters of domestic waters and salt mines were also included (Cimma, M. R.: Ricerche sulla società dei publicani. Milano, 1981, 11. ff.). See also Nelson – Manthe: op. cit. p. 306.

9 Several authors discuss this as a sub-type of societas, a special type of *societas alicuius negotiationis* (Buckland, W. W.: A Text-Book of Roman Law from Augustus to Justinian. Cambridge, 1963. p. 507.).

10 Trumpler: op. cit. p. 71.

the characteristics of corporative organisations.[11] The partnership was managed by one or several *magistrati*, who were elected annually by the members of the partnership. It was seated in Rome, and the management and bookkeeping of the partnership was also located here. In the provinces, *promagistrati* acted on behalf of the partnership, who maintained continuous contact with the head office of the partnership by mail.

Evidence for the existence of *societas publicanorum* partnerships date back to 3 BC, and they played a significant role primarily in the last centuries of the republic and the first centuries of the Principate. From the reign of Augustus, imperial taxes were collected by imperial officers who continuously controlled the activity of the *societas publicanorum*. The *societas publicanorum* partnerships only handled the collection of the *vectigal* from 2 BC, thus their role receded. In 3 AD they essentially ceased to exist.[12]

Hence, on the one hand the *publicani* collected state taxes, and on the other they were responsible for spending them by financing state investments and supplies (such as corn). In various auctions – where the collected state revenues were rented – the partners could act jointly through their senior partner (*magister, manceps*). The *manceps* entered into a contract with the *censor* or with the *quaestor* to obtain the right to collect state taxes – similarly to concessions of today – and always for a set period of time, five years.[13] The contract generated obligations only for the *manceps*, which the *manceps* transferred to the partnership on the basis of the partnership contract. Public records were kept of all members (*praedes*) of the partnership.[14]

The partnership did not cease upon the death of a member. Third parties could also invest in the partnership by obtaining a participation. The primary reason for the emergence of the *societas publicanorum* was that the state claimed such a large advance for ceding the tax collection right that the tax collectors could only pay it by association, thus decreasing their obligations and risks.

Duff[15] sees a similarity between the *societas publicanorum* (*vectigalium*) and a legal entity, and a difference compared to the societas as follows: the *societas vectigalis* could hold independent assets, could employ an *actor* (representative), just like the cities,[16] and could also claim *bonorum possessio* (possession of heritage given by the praetor).[17] According to sources, the members could represent each other[18] and they could launch an *actio furti* against anyone who robbed them.[19] Otherwise, the jurists generally emphasise the differences to the societas

11 Literature often draws parallels between the *societas publicanorum* and the modern joint-stock companies. According to some, the *societas* is considered as a legal entity. Doubtlessly a parallel can be drawn between the two, as the societas publicanorum obtained limited legal capacity in 2 AD. However, it cannot be stated that the *societas publicanorum* was a legal entity, since the *manceps* did not enter into a contract with the state as a representative but in his own name (Cimma, M. R.: Ricerche sulla società dei publicani. Milano, 1981. p. 98).

12 From the reign of Augustus, public works were performed primarily by slaves as well, but road maintenance remained the activity of the *publicani* (Cimma: op. cit. 1. ff., pp. 101. and 120.).

13 Considering that the partnership entered into a contract with the state, the participation of senators in partnerships was prohibited as of 2 BC. At the same time, members of the lower classes did not hold sufficient capital to participate in these, thus the *societas publicanorum* practically became a privilege of the Roman plutocrats, the equestrians (Trumpler: op. cit. p. 74., Cimma: op. cit. p. 3.).

14 Besides the *mancepses*, *magisters* and *promagisters* there were the regular *socii*, who contributed to the functioning of the societas with material resources and labour, or both (Cimma: op. cit. p. 87.).

15 Duff, P. W.: Personality in Roman Private Law. Cambridge, 1938, 159. ff.

16 Gai. D. 3.4.1.

17 Ulp. D. 37.1.3.4.

18 Flor. D. 46.1.22.

19 Ulp. D. 47.2.31.1.

and not the similarities with other "legal entities". In the case of a *societas vectigalium* the *manceps* entered into a contract with the state for tax collection and gave a guarantee. The *societas vectigalium* did not cease upon the death of the members. According to DUFF, the heir of a member of the societas could enter the societas on the basis of a preliminary agreement. The *publicani* were liable for the *delicti* of their slaves in certain cases, without giving *noxa* (*sine noxae deditione*).

The *societas vectigalium* was probably subject to the same rules as other enterprises entering into contracts with the state, such as mining enterprises. In the broader sense, all contractual constructions qualified as *societas publicanorum*, but stricter rules applied in the case of the *societas vectigalium*.[20]

2. THE MEDIEVAL LAWS

The *commenda*[21] was a form of venture which already involved the limited liability of members. According to certain views, the forerunner of the *commenda* is the *faenus nauticum*, the ancient maritime loan.[22] In a maritime loan, the financial investor stayed at home and gave money or merchandise to the contractor for the maritime venture. If the venture generated profit, the lender recovered the amount lent and the value of the merchandise, and shared the profit. Often he also received interest at a rate set in advance. If the ship and the cargo were lost, he lost his investment. As profit sharing and interest functioned as compensation for risks, a maritime loan did not qualify as a usurious loan prohibited by the church.[23]

Scholars reached differing conclusions when studying the origins of the *commenda*. LEHMANN derives the *commenda* from the institution of *faenus nauticum* under Roman law,[24] whose spreading in his view was supported by the ecclesiastical ban on interest.[25] It became popular due to the fact that the merchants of Italian city-states slowly extended their activities to German lands as well. When researching the Venetian sources to study the origins of the *commenda (collegantia)*, CONDANARI-MICHLER stated that this type of contract appeared in the city law of Rialto in 976.[26] According to the work of Jacobus Bertaldus in 1245, *Splendor Venetorum*, if someone gave merchandise (*transmissum*) to another party for overseas trading, and the other party did not return, "he could place the merchandise in the partnership under another name, which was obliged to tolerate the delay" ["*poterit ipsum (transmissum) ibi in*

20 BUCKLAND: op. cit. 513. p.

21 The commenda derives from the word *commendare* (commend, deposit), cf.: "*commendare nihil aliud est quam deponere*" Ulp. D. 50.16.186. This changed to *entrust* in the Middle Ages ("to give someone to take care of"). According to Rehme, the compagnia developed after the times of the commenda (REHME, P.: Die Geschichte des Handelsrechts. In: Handbuch des desamten Handelsrechts mit Einschluß des Wechsel-, Scheck-, See und Binnenschiffahrtsrechts, der Versicherungsrechts sowie des Post- und Telegraphenrechts. I-VIII. (Hgg. V. Ehrenberg). Leipzig, 1913. p. 103.) The *commenda* under Roman law was a commodate, which meant giving for use free of charge, however the free nature was left behind in the Middle Ages, leaving the aspect of giving for use.

22 ASHBURNER, W. (ed.): The Rhodian Sea-Law. Oxford, 1909. CCXXIV. ff.

23 In the Middle Ages, the church forbade usury, as it considered that money, as opposed to animals, did not spawn. This gave rise to the principle "*pecunia pecuniam parere non potest*".

24 LEHMANN, K.: op. cit. p. 18.

25 *"Mutuum date nil inde aperantes"* (The Gospel according to Luke 6,34-35 – ...and lend, hoping for nothing again – KJV), and *"pecunia pecuniam parere non debet"* (Decretum Gratiani II, C. 14. qu. 3. cau. 3,4. – property cannot produce property).

26 CONDANARI – MICHLER, S.: Zur frühvenezianischen Collegantia. München, 1937. p. 9.

commendacione deponere ad nomen illius, qui illud recipere debet, ubi morabatu"].[27] The *collegantia* also included an element of safeguarding similar to depositing. At the same time, however, CONDANARI-MICHLER believes the origin of the *commenda* in Roman law has not been proven, particularly back to maritime loans.[28]

DIETZEL links the antecedents and the emergence of the *commenda* to the *actiones adiectitiae* known under Roman law. In his view, the limited liability of the members derives from trading the property (*peculium)* received by the son from the *pater familias*.[29] However, trading the *peculium* did not yet create partnership property. This legal structure was merely a liability construction.[30] In comparison to the liability constructions created by actiones adiectitiae, factors pointing towards separate partnership property are found in situations such as the *actio tributoria* where the *pater familia*s was no longer granted the privilege of deduction (*privilegium deductionis*) from the *peculium*, his claims to it were equal to those of the other creditors of the son.[31] It follows that the *institor* known in Roman law is practically the equivalent of the *commenda* member in the Middle Ages, implying the development of a silent partnership.[32]

REHME traces the development of commenda to Islamic law, where it had two forms: a partnership functioning with the capital contribution of only one party (*kirad)*, and a partnership functioning with the contribution of both parties (*schirkat inan*).[33] Given that the *commenda* could be found in almost all European states, with various differences, it can be considered a universal legal institution.[34]

In ASHBURNER's view, *commenda*-like company structures appeared all over Europe. Thus, the *collegantia* in Raguza and Spalato, the *com(m)endacio* or *accomendacio* in Genoa (*accomendacio siue societas*), the *recomandigio* in Ancona, and the *companhia* in Marseilles.[35] They were similar in that one party gave money or merchandise to the other party who could trade it freely, and had to account for the results within a term set in advance. Risks were borne by the party staying at home (*socius stans*). In the event of profit, the *commendatarius* was obliged to give back the loan first, then the parties shared the profit. As a general rule, the *socius stans* received ¼ and the *commendatarius* received ¾ of the profit.[36] The *rogadia*, *rogancia* exhibited some differences to this type of contract, where the active partner was not liable for losing the property entrusted to him if his own property was lost as well.[37]

Loans given for maritime (*trans mare*) ventures were soon extended to inland (*in terra*) ventures as well. As the lender shared equally in the profit and loss (*ut pecunia et lucrum et damnum sentiat*) for his investment, the transaction did not qualify as usurious.[38]

Initially, the *commenda* was an occasional community, later it functioned as a continuous business venture.[39] The capital partner (*commendator, socius stans*, *portator*) gave the mer-

27 CONDANARI – MICHLER: op. cit. p. 11.

28 CONDANARI – MICHLER: op. cit. 20. ff.

29 DIETZEL, G.: Die Commanditen-Gesellschaft und die „actio tributori". ZHR 2 (1859). 2. ff.

30 DIETZEL: op. cit. 5. ff.

31 DIETZEL: op. cit. p. 7. Cf. FÖLDI – HAMZA: A római jog története és institutiói [History and Institutions of Roman Law]. Budapest, 2008. 353. ff.

32 DIETZEL: op. cit. p. 11.

33 REHME: op. cit. p. 94.

34 *"With regard to the commenda, this connection is challenged; thus it is without doubt a universal legal institution"* (REHME: op. cit.: p. 94.)

35 ASHBURNER: op. cit. p. CCXXXVII.

36 ASHBURNER: op. cit. CCXXXIX. ff.

37 The *rogadia* – according to its rules – is rather a special type of deposit contract (ASHBURNER: op. cit. p. CCXL.).

38 London Ordinance, 1391. Pursuant to this ordinance, profit-oriented investment is not punishable if the investor shared the risks of loss as well.

39 REHME: op. cit. p. 102.

chant (*commendatarius, socius tractans, tractator*) merchandise or money for the commercial venture.

The commenda had two basic forms. In the earlier form, on behalf of the *commendator* the *tractator* performed his activity with the *commendator*'s capital and at the *commendator*'s risk. In the other version of the *commenda*, both the *commendator* and the *commendatariu*s made contributions to the venture. In the first form of the *commenda*, the capital partner (*principal*) was the *commendator* and the *tractator* was his agent. The *tractator* shared in the profit of the venture for his work. While the *colonna* only covered maritime ventures, the *commenda* gradually started to play an important role in inland ventures as well.

From the *commenda* we should distinguish the *comune* (or *comunitas, commune marinariorium* or *comunitas nauis*), which developed on the grounds of the *koinoinia*, where the partners (ship owner, merchant, crew) shared the property of the ship and the cargo.[40] A special form of this structure was the *entigum* (or *entega* or *enticha*) known in Amalfi (*tabula Amalfitana*) where the merchant and the ship owner entered into a contract for certain commercial journeys.[41] Similar legal structures related to the *commune (navigatio in commune)* were found in the ordinance of James I of Aragon in 1258.[42]

Special types of maritime company developed in other regions of the continent. Such was the aforementioned Italian *colonna* and the similar Dutch *rhederij*.[43] In the case of the Dutch *rhederij* the ship was the joint property of several partners who shared in the profit gained according to the quotas of their share in the ship. Merchant vessels functioned in joint ventures, where several persons, i.e. the merchants providing the cargo, the captain and the crew, as well as the ship owners had their own shares. The so-called "*principal partners*" assumed the responsibility for the liabilities of the venture, the investors *(participes)* provided the capital for the venture or gave money to a partnership member. The investors stayed in the background, thus they did not participate in the functioning of the company.[44] The captain was authorised to hire crew, transport cargo or passengers, sign contracts for repairs related to the regular business, or contract a loan to cover the needs of the ship or the crew. The "shares" of the venture could be transferred freely. The "principal partners" were personally liable for expenses undertaken by the captain, while the liability of investors was limited to the quota of their material contribution. Based on the principle of maritime law, if one invested in an "*avontuur der zee*" (sea adventure), one could not lose more than he entrusted to the sea.

While the first version of the *commenda* can be considered a type of agency, the second version qualified as a real partnership venture, where both the *commendator* and the *commendatariu*s contributed to the venture. This version had two sub-types. In one case, the partner residing at home (*socius stans*) provided a fixed amount to the active partner (*socius tractans*, *tractator*). The *tractator* thus performed his own business venture partially from his own capital and partially from the capital provided by the *socius stans*. In the other case, the *socius stans* and the *socius tractans* unified their contributions, considering them a sort of separate joint partnership property administered by the *tractator* as the active partner. In both cases the *socius stans* shared in the profit and loss, but this differed from the *compagnia*, as his participation in the venture was unknown to the outside world. As the *socius tractans* was

40 Ashburner: op. cit. CCXLIV. ff.

41 Ashburner: op. cit. CCXLVIII. ff.

42 Rehme: op. cit. p. 100.

43 For medieval Dutch partnerships, see J. Kohler: Niederländisches Handelsrecht in der Blütezeit des Freistaates. Unter Benutzung und Beifügung der von Felix Hecht 1868 gesammelten Materialien und mit einem Effan Hechts von gleichem Jahr. ZHR 59 (1907). 293. ff.

44 Cf. societas publicanorum.

liable personally and without limitation in relations with creditors, the *socius stans* was liable only according to the proportion and extent of his contribution (*pro rata*).[45]

Commendas could be established for a certain venture, for a fixed or unlimited period of time. If a *socius stans* and a *socius tractans* participated as members, generally the *socius stans* provided 2/3 of the capital and the *socius tractans* 1/3, whilst sharing equally in the profit. It was also possible to involve several partners with limited and unlimited liability in the partnership. In the case of several partners with limited liability, their internal legal relationships were regulated by the rules of the *compagnia* and the *societas*. Where several partners with limited liability were involved, their actions were legally independent from each other. The investor could also secure the financial support for an active or passive member without entering into a legal relationship with the others, based on the principle "my partners are not partners of my partner" ("*socii mei socii socii non sunt*").

The *commenda* established according to the Italian model were particularly characteristic of the Northern-German regions, where they played an important role in commerce. However, it is debatable whether this was derived from Roman law surviving in Italy or this form of partnership developed independently on German territories.[46]

The *commenda* had also two forms on German territories: one was created by the capital investment of one party, similarly to the Roman *accommendatio,* while the other was established with the financial deposit of both parties, similarly to the Roman *collegantia*. It appeared primarily on Northern-German lands, in the 12th century in Westford and in the 14th-15th century in Lübeck, under the name *Sendevegesellschaft* (*wedderleginge*, *contrapositio*, *compositio*).[47]

The *commenda* can be considered the forerunner of the French *société en commandite*. This legal structure was unknown in England for a long time; it was introduced in 1907 with the *Partnership Act*.

In addition to the development of limited partnerships, the *commenda* also played an important role in the development of silent partnerships. In France, silent partnership (*association en participation*) was regulated by Act 66-537 (§ 419–422) of 1966 until 1 July 1978, before it was included in the *Code Civil* (§. 1871–1873). In Italy, provisions regarding the silent partnership (*associazione in partecipazione*) are found in the Codice Civile §. 2549, while in Liechtenstein it was regulated in the 1926 Companies Act in §s 768-778 under the name *stille Gesellshaft* (hereinafter: *stG*). Austria, under German influence, regulated this type of partnership in §s 335–342 of the commercial code. The Swiss *Obligationenrechts* (hereinafter: *OR*) does not specify it separately, however, legal practice provides the grounds for such establishments. The new Dutch civil code also recognises the establishment of a silent partnership (*stille vennootschap*), and Belgian commercial code expressly regulates it in §. 3 (*association commerciale en participation*). In Sweden, it is not regulated by positive law; however, legal practice does recognise this type of partnership.[48]

The major family companies also included the Medici, Peruzzi and Bardi families from Florence,[49] the Saulis and the Vivaldis in Genoa, as well as the German Fugger, Hochstätter and Herwart families. These operated under their family names, and in several respects they

45 For the internal legal relations of the parties in the case of the *commenda*, see details in CONDANARI – MICHLER: op. cit. 62. ff.

46 REHME: Geschichte des Handelsrechts. p. 162.

47 The phrases *sendeve*, *sendegut* mean giving money, capital. (Rehme: op. cit. p. 163.)

48 For details on silent partnerships see PAULIK, H. – BLAUROCK, U.: Handbuch der stillen Gesellschaft. Cologne, 1988^4, 32. ff.

49 The Peruzzi and Bardi families lent large amounts to Edward III who refused to repay them, and consequently they went bankrupt.

qualify as the forerunners of modern multinational companies.[50] They were known all around the world. They performed various activities: trade, export-import, mining and loan transactions, etc. Most members were family members who participated actively in the business and were personally liable for the company's liabilities. Passive members also shared in the profit and loss, but only to the extent of their contributions. Occasionally, the Fuggers established a *consortium* i.e. a quasi-mixed company with other companies. For example, in 1498, German companies established a union with Venice for copper trading.

The Genoese *Casa (Banca) di San Giorgo* was an early commercial law structure displaying the characteristics of a joint stock company.[51] The *Casa* did not start operating as a bank, but was a loose association of the creditors of Genoa city. For lack of money, Genoa city borrowed money from its citizens. The capital[52] drawn from various sources was used for secular or humanitarian purposes (*montes profani*, and *montes pietatis*), as well as for transferable bonds (*loca, partes*) representing the value of the loan (*comperae*). The repayment of loans was guaranteed by state revenues, particularly by revenues from the state's salt monopoly (*compera salis*) and from the colonies. Creditors received compensation or an annuity for their money. Thus, the acquisition of bonds was not to prove the loans but to purchase the revenues, i.e. they were not subject to the prohibitions on interest-bearing loans. Bonds had to be registered (*cartularia*), and they were freely transferable in the 13th century. A formal statement before an official or a certified person was sufficient in this regard, and it served as the basis for registering the transfer. In 1323 the office of "capital protectors" (*protectores et defensores capituli*) was established; its members were elected by the bond holders (*participes*) and it represented the interests of the bond holders. The *Casa di San Giorgo* evolved from an association of bond holders into a company in 1407 (*la società delle compere e de bandri di San Giorgio*), following the model of a joint stock company. The *Casa Genova* took over all the debts of its city, and in return, the city transferred certain state revenues and governmental powers. As of this time the *Casa* became the creditor of the city, while the former creditors (*comperae*) – the shareholders of the *Casa* – did not receive fixed repayments from 1419 but shared the profit of the *Casa,* annually in the form of dividends. The *Casa* was reorganised in 1412 and eight representatives (*procurator)* and protectors (*protectores comperarum)* were appointed who were elected by the company members from among the main shareholders.

Similar company structures were found in German territories as well. According to Gmür[53] the companies from Emden displayed features of both civil law and public law. These companies issued participation certificates (*Anteilscheine*) to members, generally called *Actien,* as in the Netherlands.[54] Occasionally, participation certificates were referred to as obligations (*obligatio*). Every share of the African Company in 1682 had a separate nominal value depending on the amount contributed by the shareholders to the company. Companies established later issued with no more than two different nominal values, in the names of the shareholders. Shares could be transferred by assignment. The assignment had to be registered in the share register kept at the company. Foreign partners were issued shares via the principal who assigned them to the foreign partner. Shares were distributed in successive subscriptions, often in the form of public announcements. In many cases the basic capital was raised by newly issued shares.

50 The Fugger company was founded by Hans Fugger in the Middle Ages and was continued by his sons; it flourished under the direction of *Jacob Fugger*.

51 The *Ambrosiusbank* (*Banca di Ambrosio*) in Milan functioned similarly (Lehmann: op. cit. p. 378.).

52 The *mons* derives from the Arabic word *maona*, and means capital.

53 Gmür, R.: Die emder Handelscompagnien des 17. und 18. Jahrhunderts. Festschrift für Harry Westermann. Hgg.: W. Hefermehl, R. Gmür, H. Brox. Karlsruhe, 1974, 185. ff.

54 The appearance of the word *Actie* dates back to 1606 at the earliest, when it occurred in one of the resolutions of the 17 member college of the Dutch East-Indian Company (Gmür: op. cit. p. 187.).

The main decision-making body of the company was the general meeting. However, not all shareholders could participate in the general meeting. Only the major shareholders could exert their rights in person, while minor shareholders elected a common representative. The principals (generally four in number) acted under the leadership of the general meeting, and they were called *bewindheber* or *bewindhaber*, following the model of Dutch companies. The principals made decisions and handled the company affairs based on the majority principle. The major shareholders strongly influenced the company's management through the *directorate*. Principals were elected by the general meeting, or the *octroi* often granted the major shareholders the possibility to occupy the positions of directors. Besides this, a so-called chairman's position could be established, as the African Company did in 1682. The chairman was appointed by the emperor. Accordingly, the aristocratic elements were accompanied by monarchical influence. It is important to mention that these companies had no body corresponding to modern supervisory boards. Supervision was performed exclusively by the general meeting, and rarely by supervisors appointed by the rulers. A specific feature of the companies in Emden was the fact that their management – as opposed to the English or Dutch commercial companies – was not performed by an experienced merchant, but generally by some politician or a person acting on behalf of the monarch.

3. The Establishment of the Joint Stock Company

The general view in literature was that the development of the stock company law started in the 17th century with the appearance of companies to establish colonies. The companies – primarily stock companies – had forerunners in German territories too in the form of various associations, such as the minting house cooperative (*Münzerhausgenossenschaft*), which was essentially a real capital company.[55] The development of European law marks the beginning of stock company regulation with the Dutch East Indian Commercial Company established in 1602, until the adoption of the first legal regulation, the *Code de Commerce* in 1807. In Germany, the early modern age witnessed the development of commercial companies, which led to the development of German company law. We should mention the Prussian National Bank established by Frederick II in 1772, called the Maritime Commercial Company (*See-Handlungs-Gesellschaft*). Initially, this bank was a commercial venture and later it evolved into a state banking house. By the end of the 17th century, the form of stock company appeared with larger banks as well, for the first time in Europe at the *Bank of England* in 1694. Insurance companies were established in the form of stock companies a decade earlier than banks. These companies contributed significantly to the development of stock companies. There is a direct link between modern joint stock company law and the development of commercial companies, for reasons rooted in the history of their origins. On German territories, based on public law, stock companies were first regulated within the framework of association law. Initially, stock companies included commercial companies endowed with state privileges which could only be established with official authorisation.

The regulations of stock companies in the various countries display several similarities in this period. Nevertheless, three main legal fields can be distinguished: the Roman, the German, and the English and American. The first two of the three legal fields were influenced by the French *Code de Commerce*, while we see a differing development in the English and Northern American law. As Wieland demonstrates, not only the structures of the regulation were sig-

55 Rauch, K.: Die Aktienvereine in der geschichtlichen Entwicklung des Aktienrechts. ZSS Germ. Abt. 69 (1952). p. 239.

nificantly similar, but also issues related to company regulation.[56] Thus the main question was the issue of speculation related to founding, which played a dominant role in almost all cases.

The beginnings of modern stock company law date from when the new French law entered into force in 1867, followed by the German stock company amendments in 1870 and 1884, as well as the Swiss contract law code in 1881. The latter's special importance resides in the fact that it tightened the founding procedures both from the perspective of penal and civil law. Furthermore, it introduced the institution of the permanent supervisory board and granted prominence to the protection of minority rights.

The earliest regulation of stock companies in Germany is considered to be the Prussian law in 1843, and the general German Commercial Code (*ADHGB*) for the unified Germany, followed by the stock company amendment (*Aktiennovelle*) replacing this on 11 June 1870. The importance of the latter lies mostly in the fact that it terminated the concession system and introduced a normative system. It is also worth mentioning the regulation on partnerships limited by shares in 1884. This served as the basis for the *HGB* adopted in 1897. Of particular significance is the so-called "Gold Balance" law adopted in 1923, as well its enacting regulations. Employee participation in the supervisory boards was introduced in German law in 1922.

In Austrian law, the legal regulations were based on the *ADHGB*. This is accompanied by the ordinance from 1899 introducing the so-called *Aktienregulativ* regulation.[57] Furthermore, an important role was played by the regulation adopted in 1896 with regard to the insurance companies, as well as the regulation adopted in 1925 with regard to the introduction of gold.

The partnership limited by shares was essentially established by combining certain elements of the stock company and the limited partnership. The unlimited liability of the unlimited member in the limited partnership was governed by the provisions of regulations regarding the unlimited members of limited partnerships, thus the unlimited members were subject to the rules regarding shareholders in the case of stock companies. Consequently the partnership limited by shares bore the advantages of the associations of people and capital companies. The partnership limited by shares is a special institution of French law. In the 18th century, it emerged from the simple limited partnership and was regulated first by the *Code de Commerce*, and via this code it moved into the company law of other countries. In Germany the partnership limited by shares (*Kommanditgesellschaft auf Aktien,* hereinafter: *KaG*) was prepared by the *ADHGB*, then it was regulated by the joint stock company amendment in 1870 and the *HGB* in 1884. In Switzerland, the *OR* established in 1881 took over the role of this company form. The *KaG* was not a homogeneous company form, but combined the characteristics of the stock company and the limited partnership.

The joint stock company was run by the *governor* and the *associates*, and unless the charter stipulated otherwise, the consent of the majority engaged the minority. In the *East Indian Company*[58]– which was the first such company with its statute obtained in 1600 – the profit generated at the end of trips was divided among the shareholders. After 1614 it was possible to participate in the company for a certain number of years. In 1653 continuous shares were introduced and private trading was forbidden for the members only in 1692. Until then the East Indian Company represented the transition from the *regulated company* to the joint stock

56 WIELAND, K.: Handelsrecht. I–II. München, Leipzig, 1921. II. Bd. p. 7.

57 *Regulativ für die Errichtung und Umbildung von Aktiengesellschaften auf dem Gebiete der Industrie und des Handels.*

58 Its full name according to the charter issued by Queen Elisabeth is *Company of Merchants of London trading to the East Indies*.

company.[59] In 1692, besides the East Indian Company two similarly important companies existed in England, the *Royal African Company* and the *Hudson's Bay Company*. These companies served state purposes as well: they reflected the endeavours to intensify foreign trade.[60]

With English companies functioning under permission from the monarch it is often hard to distinguish whether they were simply *regulated companies* – where the members traded independently on their own account – or joint stock companies, where the resources were pooled in a joint corporative form, and profit was shared pro rata.[61]

In the *Case of Sutton's Hospital*, Coke states that organisations with separate legal personality had to be established rightfully, which could take place on the basis of a charter from the parliament or the monarch, and according to the rules of *common law*.[62] Accordingly, corporations could not be created without state permission. Medieval English literature distinguishes three main categories with regard to the powers of organisations with legal personality. On the one hand, there were activities which could not performed by a corporation (e.g. it could not be a testator, it could not have committed criminal acts, etc.). Then there were the activities closely related to the legal personality (e.g. the ability to acquire capital, a common seal, etc.). In the 16th century it was also recognised that exerting the main rights was based on the will of the majority shareholders. The third category comprised the activities which depended on the nature of certain corporations, since ecclesiastical and lay corporations for example had different powers.[63]

There were three main reasons for the termination of corporations in medieval English law: withdrawal of all or essential members, the corporation renouncing the *charter* or the confiscation of the charter.[64]

In early literature, Blackstone studied the issue of English regulation of corporations in detail.[65] Blackstone divides corporations into two main categories: *aggregate* and *sole* corporations. The main difference between the two resides in whether the independent personality was granted to one or more members. Furthermore, within aggregate corporations he distinguished between the *ecclesiastical* and the *lay* organisations. The organisation could be established in England only with the consent of the king, or only organisations existing by force of *com-*

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59 *"Until this date, therefore, the constitution of the East India Cp. represents a compromise between a regulated company, formed primarily for the government of a particular trade, and the modern type of company, designed to trade for the profit of its members"* (Gower's Principles of Modern Company Law. London, 1979[4]. p. 24.). CARR, C. T.: Select Charters of Trading Companies A.D. 1530–1707. London, 1913. p. XXI.

60 *"In the course of the seventeenth century some form of continuous organisation with transferable shares and limited personal liability was a commercial need"* (CARR: op. cit. p. XIX.).
"But the corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked on as a public agency, to which had been confined the due regulation of foreign trade, just as the domestic trades were subject to the government of the guilds" (Williston, S.: The History of the Law of Business Corporations Before 1800. In: Select Essays In Anglo-American Legal History. I–III. Boston, 1909. p. 201.).

61 E.g. in the case of the *East-India Company* it is hard to decide whether its charter provided for a *regulated company* or a *joint stock company*. Only the references found at the end of the document – that is any member who fails to pay his subscribed participation for the first trip within twenty days at the latest is excluded from the company – indicate that the company was actually established for trade on joint account. For details see CARR: op. cit. p. XXI.

62 HOLDSWORTH, W. S.: A History of English Law. vol. IX. p. 46.

63 HOLDSWORTH: op. cit. vol IX. 57. ff.

64 HOLDSWORTH: op. cit. IX. vol. 62. ff.

65 BLACKSTONE, W.: Commentaries on the Laws of England. I. Chicago, London, 1979. 455. ff.

mon law could be recognised.[66] Blackstone defines five main elements of the organisations:[67] *perpetual existence and succession*, the ability *to sue or be sued*, *grant or receive*, the ability *to purchase land and hold them*, the *common seal*, and the possibility to *make by-laws or private statutes for the better government of the corporation*.[68]

The first forms of corporations in Scotland were the city and church foundations.[69] In the next stage, companies were created according to commercial needs.[70] While in England the practice in the 16th–17th century was to create companies only with the consent of the king, in Scotland the *Council of Trade* was established in 1661, with powers covering the authorisation to establish companies and secure various rights and privileges.[71] In 1693 a law[72] was created whereby merchants could associate in order to establish companies, which later received privileges. Scottish companies were managed by managers. The companies had capital fixed in advance and had their own seal. In this period, company members did not yet have limited liability.[73]

The development of Scottish company law in the Middle Ages was closer to the European continental development – primarily thanks to the French influence – than the English one.[74] Scottish legal practice recognised independent legal personality. The perpetual existence of a company was acknowledged, the separate management from the members, as well as the unlimited transferability of shares and the handling of company liabilities separately from members' assets.[75] The first joint stock companies appeared in the 17th century, such as the *Darien Company* in 1695 for trade to African and Indian nations, or the *Bank of Scotland* in the same year, as well as the *African Company* in 1707.[76]

The Isle of Man was ruled by the Scots after the Celtic and Norman period, between 1266 and 1333, and by the English between 1333 and 1765. From 1765 until 1866 it was part of the British Empire, and from 1866 it was connected to the British crown by constitution.[77]

The Channel Isles – comprising three smaller islands (Alderney, Sark and Herm) and many small islands besides Jersey and Guernsey – have a special legal system as they manage their affairs independently, while Great Britain acts in their external relations. They have a special relationship with the European Union as well, as they enjoy financial autonomy, yet the free trade as part of the Union applies to them also.

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66 *"…the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given. The king's implied consent is to be found in corporations which exist by force of the common law, to which our former kings are supposed to have given their concurrence; common law being nothing else but custom, arising from the universal agreement of the whole community"* (Blackstone: op. cit. p. 460.).

67 *"These five powers are inseparably incident to every corporation"* (Blackstone: op. cit. p. 464.).

68 Blackstone: op. cit. p.463.

69 See e.g. Paisley Abbey in 1488, the old university in Aberdeen in 1497, the Prior of St. Andrews in 1513, etc. (Walker, D. M.: A Legal History of Scotland. Vol. III. Edinburgh, 1995. vol. III. p. 700.)

70 At the proposal of King Charles I in 1630 the Fishing Company was established, followed by the Linen Companies Act in 1661. (Walker: op. cit. vol. IV. p. 687.)

71 An application for the establishment of the company had to be submitted to the Commercial Council, and it was evaluated by the commercial board of the *Privy Council*, granting the possibility to present opposing opinions. If the application was accepted, the birth of the given company was included in a law.

72 Foreign Trade Act 1693 (A.P.S. IX. 314, c. 50.).

73 Walker: op. cit. vol. III. p. 689.

74 Christie, J. R.: Joint Stock Enterprise in Scotland Before the Companies Acts. The Judicial Review 21 (1909) p. 129.

75 Christie: op. cit. p.129.

76 Christie: op. cit. p.134.

77 Solley, M.: Government and Law in the Isle of Man. Castletown, 1994, 99. ff.

There are two types of company on the Channel Isles: the *limited liability company* and the *partnership*. Companies with members' liability cannot be established.[78]

The development of company law regulation drew the attention of jurists. The 18th century brought significant growth to English commercial law, with more and more independent works being published on the issue of company law. In 1718, the full work of Giles Jacob, *Lex Mercatoria: or the Merchants' Companies,* was published, and it dealt with the legal status of merchants at sea, offering a summary of this field. The work of Wyndham Beawes, *Lex mercatoria Rediviva, or the Merchants' Directory*, published in 1751 also stands out, which covered the entire legal scope of commercial and colonial companies, starting from the establishment of the companies through their operation to termination. The work of Joseph Chitty published in 1820 under the title *A Treatise on the Law of Commerce and Manufactures* was also important, presenting commercial contracts, including articles of association. This work bore the express features of a legal book, as opposed to the previous works outlined above which offered a mixed presentation of legal, economic and often practical issues of commercial life.[79]

In England, the shareholders were not liable for company debts, but the company charter could grant the company the right to stipulate contributions (*leviations*) from the members. By making reference to this, in order to settle accounts, creditors could demand that the company oblige the members to pay the promised contributions.[80] Companies attempted to avoid such regulations. The joint stock company had full legal powers. Representatives of the company could make legal representations only by using the company seal. In the 17th century, stock exchanges emerged and brokers started their activities in England, Scotland, France and the Netherlands.

According to Holdsworth the reasons for the rise in joint stock companies in the 17th century can be found in the advantages of this form of company. One positive aspect of stock companies without doubt was that as a company with legal personality – unless established for a fixed period of time – it functioned as a permanent organisation which was not terminated by the death or withdrawal of a member. As a legal entity, it could sue third parties and its own members more easily. The common seal certified the legal actions of the company and distinguished it from the members' own legal actions. The decisions of the majority were mandatory for the minority as well, as opposed to a *partnership*. In joint stock companies the continuity of the operative management of the company could be secured more easily than in case of associations of persons, as it was not affected directly by changes in the company membership. Some joint stock companies (such as the *New River Company*) also obtained public law licences. Shares were freely transferable. The company liability was separate from the liability of the members, and involved a better definition of the members' liability against company creditors and the company itself. The decline of privilege-based foreign trade companies that dominated the 17th century was caused by them gradually losing their exclusivity. Thus free competition emerged by the early 18th century.[81] The East Indian Company lost its commercial monopoly for India in 1813 and for China in 1833. The *South-Sea Company* lost its privilege in 1815.

78 For details see Deloitte & Touche: Channel Islands. Tohmatsu International. New York, 1994. 21. ff.

79 HOLDSWORTH: op. cit. vol. XII. p. 387.

80 See *Salmon v. The Hamborough Company (1671) 1 Ch. Cas.* This practically implied that the members' limited liability was established even when the members could omit contributions payable for losses – additional contributions in modern parlance – or set the level thereof (Holdsworth: op. cit. vol. VIII. p. 204.). At the same time, these companies were not established for the purpose of creating the unlimited liability of the members, but to obtain royal privileges. HORROWITZ, W.: Historical Development of Company Law. Law Quarterly Review 62 (1946) p. 375.

81 HOLDSWORTH: A History of English Law. vol. XI. 439. ff.

The *Sierra Leone Company* was terminated in 1824, as was the *Levant Company* in 1825.[82] The void created by the companies losing their privileges was filled with new, freely competitive companies. These operated as *deed of settlement* companies in an *unincorporated* form, i.e. as a *partnership*, and by using the opportunities granted by the legal institution of *trust*.[83] The economy functioning in the spirit of *laissez faire* gradually established the framework of modern company law.[84]

In England, a clear distinction between incorporated companies with legal personality and the *unincorporated companies* started to appear in the latter part of the 17[th] century. Many joint stock companies were created by mere agreement, as an unincorporated company, granting a common seal[85] and ensuring that participations in the venture could be exchanged for shares. Shares were more or less freely transferable according to the provisions of the contract.[86] The companies set up their by-laws which were rooted in the model of the guilds.[87] The *by-laws* primarily regulated the members' activities in order to achieve the goals of the company, but often they provided for property or liability issues as well.[88] However, these companies did not provide limited liability for their members, even though this was the image they endeavoured to convey in external relations.[89]

82 HOLDSWORTH: A History of English Law. vol. XIII. p. 365.

83 HOLDSWORTH: A History of English Law. vol. XIII. p. 368.

84 HOLDSWORTH: A History of English Law. vol. XV. p. 4.

85 The companies used the common seal only for the major contracts, i.e. legally representing the company in writing did not require the use of the seal to be valid (e.g. the Bank of England, and the East Indian Company did not place their seal on their invoices). For details on the use of seals see WILLISTON: op. cit. 211. ff.

86 Participation in the company was certified by the issuance of shares of a certain nominal value which embodied the rights and obligations of the members in the company. The issuance of the shares terminated the earlier concept according to which the members could have direct ownership of the company assets, thus the members *cestuis que trust* as co-proprietors assigned only the administration of the property to the company, and the company did not act as a proprietor but as a *trustee*. For details see WILLISTON: op. cit. 217. ff.

87 WILLISTON: op. cit. 215. ff.

88 In the *Child v Hudson's Bay Company* case (2 P. Wms. 207.) the court determined in principle that the by-laws could provide for everything serving commercial interests, except if the rule is unreasonable or unjust. *"...all by-laws for the benefit and advantage of trade are good unless such by-laws be unreasonable or unjust"*. Thus, in this case it was possible for the company to rightfully mortgage the members' shares in the event of their insolvency.

89 A contrary view is held by Holdsworth: *"as early as the fifteenth century it was clear that an individual corporator was not personally liable for the debts of the corporation; and after some hesitation, this conclusion was ultimately accepted in the latter part of the seventeenth century"* (HOLDSWORTH: op. cit. vol. VIII. p. 203.).
This view is supported by the fact that the company contracts provided for *leviation*, which could be enforced by creditors, that is – albeit indirectly – they could enforce their claims against the company members as well [see *Salmon v. The Hamborough Company* (1671) I Ch. Cass. At pp. 206, 207.].
At the same time, members could omit the regulation of their leviation obligation from the company charter. Therefore, *"this opened the door to the possibility of limiting the liability of members of the company by a contract between the members of the company and the company, which provided that the members should not be liable to be called upon to pay more than a fixed sum"* (Holdsworth: op. cit. vol. VIII. 204. ff.)..

The constraint of administering state debt in England justified the exceptional utility of the joint stock company form.[90] The *South-Sea Company* was created (1717) when there was significant outstanding state debt.[91] Creditors were placed in a common company which was granted a monopoly to trade to South America. The government undertook to pay interest of 6 percent per annum on the loan, and to repay it fully by 1716. The company was so successful that in 1719 it took over the entire state debt, except the parts owed to the *Bank of England* and the East Indian Company. The creditors were bought up or the credit was converted into company shares. The debt was paid, and after 1727 the interest was decreased from 5 percent to 4 percent. This proved that the joint stock company was an exceptional way to support new industries and mobilise the national debt.[92]

At the same time, it became evident that the joint stock company was appropriate for deceiving large masses, and to encourage wild speculation and gambling with shares.[93] In 1692 John Houghton published a newspaper[94] in which he disclosed the prices of shares. This launched stock exchange trading, as well as speculation. Data related to the financial positions of companies was often falsified, thus increasing the value of their shares. English legislation unsuccessfully attempted to regulate broker activity in 1696–1697.

The issue was rooted in legal shortcomings.[95] The difference between companies with legal personality and those without was ignored. Often companies were established without having a charter, which provided the legal personality, furthermore, the scope of activity of companies with legal personality under charter was not clearly defined either. If a company received a *charter*, its managers considered that the company could perform any sort of business.[96] As a result, entrepreneurs who wished to obtain legal personality obtained a cheap charter for a company with a certain activity, then they ran their own business though this. In 1720, the *South-Sea Company* sued these companies, which resulted in the withdrawal of many charters. This gave rise to the rule that company activities were limited to the scope established in the charter. Another issue was the irregular keeping of business accounts, the protection of equity was unknown, thus dividends were often paid from capital. Furthermore, the possibility for enforcing claims against companies under liquidation, solvent liquidation, or against consolidating and merging companies was not regulated either. The situation of companies without legal personality was no more satisfactory, although the courts established certain basic principles.

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90 Carr, C. T.: The General Principles of the Law of Corporateness. Cambridge, 1905. Geldart, W. M.: Legal Personality. Law Quarterly Review 27 (1911), Girvin, S. D.: The Antecedents of South African Company Law. The Journal of Legal History 13 (1992).; Hart, H. L. A.: Definition and Theory in Jurisprudence. Law Quarterly Review 70 (1954); Hunt, C.: The Development of Business Corporation in England 1800-1867. New York, 1926. Instone, R.: The Archaeology of the Companies Acts. The Modern Law Review 25 (1962).; Pickering, M. A.: The Company As a Separate Legal Entity. The Modern law Review 31 (1968);, Santuari, A.: The Joint Stock Company in Nineteenth Century England and France: "King v Dodd" and the "Code de Commerce". The Journal of Legal History 14 (1993).

91 According to Gower's Principles of Modern Company Law. p.28. 38 million pounds. According to Holdsworth: op. cit. VIII. vol. p.212. 9 million pounds.

92 *"During the latter part of the seventeenth century there was a movement in favour of greater freedom of trade. Monopolistic joint stock companies were successfully attacked"* (Holdsworth: op. cit. VIII. p. 209.).

93 *"… joint stock companies were widely associated with fraud, speculation, monopoly and inefficiency, and not generally looked upon in a favourable light"* (Ireland: op. cit. p. 43.).

94 *A Collection for the Improvement of Husbandry and Trade*.

95 Holdsworth: op. cit. vol. VIII. p. 215.

96 For example in 1691 the *York Buildings Company* was established for water supply in London, but performed real estate transactions starting from 1719.

For example, in the event of one member's bankruptcy, the joint and individual property of the associates served as a guarantee; furthermore the *ius accrescendi inter mercatores locum non habet* principle was applied to the associates.[97] Thus the associates were sort of agents for each other and their legal actions were binding.

Significant progress in resolving the issue was made with the *Bubble Act* (6 Geo. I. c. 18.) of 1719, which condemned and rendered illegal the establishment of unincorporated companies, by which the founders obtained money from investors without having any legal grounds for doing so.[98] In this period, companies with legal personality and transferable shares could not be established without the consent of the English parliament or the king's *charter*. Those who breached this provision were personally liable for the damages caused. Brokers who traded such shares were fined to the tune of five hundred pounds. The scope of the law did not cover companies established before 24 June 1718. However, law enforcers did not make much effort to execute the *Bubble Act*. For 87 years, practically no proceedings were launched to sanction the prohibitions of the *Bubble Act*. In 1808, in a specific case (*The King v Dodd*)[99] prosecutor Lord Ellenborogh considered the provisions of the law useless.[100] The *Bubble Act* – although it radically limited abuses – basically hindered the development of joint stock companies and so it was repealed in 1825. The *Bubble Act* was a reaction of the *House of Commons* to the speculative transactions of companies, intentionally making it more difficult to establish companies, which was harshly criticised by Holdsworth. This law which is a landmark in the development of English company law had the one advantage that the Crown could then expressly prescribe the limited liability of the company members by charter.[101] This is when companies created by the individual laws of the parliament spread, primarily for the purpose of facilitating sewer construction.[102]

Joint stock companies did not disappear as a result of the *Bubble Act*, on the contrary, many *regulated companies* and some unincorporated companies survived this period, justifying the advantages of the joint stock company. As the form of incorporated companies encountered difficulties, unincorporated companies continued to flourish. Thus with this strict law, legisla-

97 This meant the surviving company member could sue the company's debtor, and at the same time could be sued by the company's creditor without joining the executor of the deceased associate's legacy. The legacy executor was entitled to the deceased associate's share in the company assets, and was thus obliged to honour the deceased person's debts against the company.

98 This was based on the resolution of the House of Commons on 27 April 1720, which without any further examination condemned companies functioning without permission that endangered the reliability of commercial processes. (Gower's Principles of Modern Company Law. p. 29., Hahlo, H. R. – Farrar, J. H.: Hahlo's Cases and Materials On Company Laws. London, 1987. p. 5.). This resolution was substantiated as follows: *"That for some time past several large subscriptions having been made by great numbers of persons in the city of London to carry on public undertakings, upon which the subscribers have paid in small proportions of their respective subscriptions, though amounting on the whole to great sums of money; and that the subscribers having acted as corporate bodies without any legal authority for their so doing, and thereby drawn in several unwary persons with unwarrantable undertakings, the said practices manifestly tend to the prejudices of the public trade and commerce of the kingdom"* (Journals of the House of Commons XIX.. p.351.).

99 *The King v Dodd* (1808) 9 East 516.

100 *"The long period which had intervened since the passing of law, and the little use which appeared to have been made of it, might perhaps afford some excuse for this party, and for others who of late may have been engaged in similar projects, if it should appear that they had fallen unawares into the commission of an offence"* [The King v Dodd (1808) 9 East 516.]. See also Manchester: op. cit. p. 351.

101 Gower's Principles of Modern Company Law. p. 39.

102 Hunt: op. cit. 10. ff. Otherwise it was general practice for the parliament to deny the granting of legal personality. (Hunt: op. cit. 12. ff.)

tion produced exactly the opposite effect than originally desired.[103] Under these circumstances, investors replaced incorporation by using the institution of *trust*, creating the *deed of settlement company.*[104] *Deed of settlement companies* – regardless of the difficulties created by the Bubble Act – were quite popular in the 18th century and the early 19th century. As a result of the industrial revolution, entrepreneurs tried to achieve their business goals, pool capital and limit liability by association. At the same time, the high costs of companies created by the parliament were an issue. Consequently *partnerships* were established that approximated the advantages of *incorporated companies* most closely. As a result of this process, the *unincorporated company* appeared, the antecedent of the company regulated by the *Companies Act*,.[105] The *deed of settlement* was a mix of joint stock company *articles of association* and the *debenture trust deed* based on shares. The *deed of settlement* served as the basis for founding members to establish an unincorporated company, and as shareholders they undertook the obligation vis-à-vis one or more *trustees* to respect the provisions of the deed of foundation. According to the deed of foundation, the shareholders formed a company which functioned under a certain name, with certain capital and a scope of activities according to by-laws set in advance. The deed of foundation often considered the shares transferable. Company administration was performed by the company management (*committee of directors*), who acted as trustees in the relationships with the other members. Their purpose in this respect was to approximate the legal structure of an incorporated company as closely as possible (perpetual existence of the company, transferable shares etc.), but at the same time this company form qualified from a legal perspective as a *partnership,* with all the related characteristics.

Unincorporated companies had several disadvantages,[106] of which the most important was that the company could not sue or be sued in its own name. Thus, instead of the entire company, only its members could be sued, which was greatly hindered by changes occurring in the meantime in the scope of shareholders. Another significant drawback was the unlimited liability of the company members, regardless of the attempts made to limit it with by-laws. This company form existed until 1844 when the *Joint Stock Companies Act* was adopted, following which only the establishment of incorporated companies was permitted by the English parliament.

4. Companies with Limited Liability in the Light of the Codifications

The codification of company law brought about a new situation. Generally speaking, codes were elaborated parallel to the codification of commercial law. Company law was part of commercial law.

In the late 19th century, private law not only included civil law in the traditional sense of the word but also a general field of organisation law.[107] The development of the joint stock

103 *"… the Bubble Act in the end caused a rebirth of the very type of association which it had sought to destroy"* (Gower's Principles of Modern Company Law. p. 32.).

104 See for example The British Plate Glass Company (1773), Cotton and Linen Cloth Manufactory (1779). Hunt: op. cit. p. 11.

105 According to Santuari, in English law there is no such thing as "unincorporated company", but only *corporation* and sole trader. Thus the unincorporated company accordingly qualified as a *partnership* (Santuari: op. cit. p. 40.).

106 Gower's Principles of Modern Company Law. p. 35.

107 Coing, H.: Europäisches Privatrecht. I. vol. p. 95.

company form can be traced back to the 19th century, while the limited liability company, the cooperative and the association also appeared in that period. The primarily economic reasons for the perfection of the joint stock company form are attributable to the fact that economic life demanded a type of organisation which possessed its own property, where member participations were independently negotiable, membership rights depended on shares, and the liability of members for company debts was limited. The medieval antecedents of the joint stock company form, the companies established by privileges from the monarch, were revived mainly on account of the demands of distance trading. In the 19th century, economic sectors with high capital demands developed as a result of the industrial revolution. Such included the establishment of railway companies in the 1830s-1840s, as well as certain financial institutions, such as banks. These branches could be boosted in two ways: by financing in the form of loans, and by establishing a form of organisation where the members of the organisation provided the capital necessary to perform the activities, and their participation in the company was embodied by shares.

Associations of persons also played a role of course, besides capital companies, thus the general partnerships (*offene Handelsgesellschaft*) and limited partnerships (*Kommanditgesellschaft*) prevailed. The disadvantage of associations of persons as opposed to capital companies resides in the unlimited liability of internal members as well as in the limitation of transferring company participations. Limited partnerships (*Kommanditgesellschaft*) in Germany were a frequent company form in the times before industrialisation. The number of external members in a limited partnership was often quite high, which led to the emergence of so-called partnerships limited by shares (*Kommanditgesellschaft auf Aktien*). Such was the case in England. English law just recognised the general partnership (*partnership*), and limited partnerships were established only later, towards the end of the 19th century. General theories for the legal regulation of companies had not yet been elaborated at this time in continental or Anglo-Saxon law.

The French *Code de Commerce* in 1807 brought about a breakthrough in company law. The French code was the first to legally regulate individual company forms thoroughly. This code served as an example for all the codifications of company law in the 19th century. The *Code de Commerce* had two major features. It specified so-called capital companies, and regulated two types: the joint stock company, and the partnership limited by shares. The latter was classified within the category of limited partnerships, in that the legal background was provided by the provisions governing limited partnerships. In the case of joint stock companies it followed the principle of concession, i.e. joint stock companies could be established only with the permission of the government. This created an intermediate situation. On the one hand, it implied progress compared to the earlier companies established based on privileges, however, it did not yet create freedom of association for private individuals. The primary reason for this was to grant the same legal protection to creditors and shareholders. The third part of the *Code de Commerce* regulated the *société anonyme*, thus raising a practice of two centuries to the level of written law. One rule of practice and now raised to the status of an act was, for example, the fixed amount of share capital, divided into shares of identical value (§ 34), limited liability as a basic principle, the limitation of shareholders' contributions (§ 33), the presentation of the company under a company name, the mandatory inclusion of the term "inc." in the company name, as well as the negotiability of bearer and registered shares embodying the company rights (§§ 35–36). The introduction of the concession system replaced the *octroi* system was a revolutionary step (§§ 37, 40 and 45), which created the grounds for the freedom of entrepreneurship as a result of the French revolution. In the case of the joint stock companies regulated by the *Code de Commerce,* a clear distinction was made between the general meeting representing all shareholders, and the function of persons acting on behalf of the company. The *Code de Commerce* stipulated the limited liability of shareholders and allowed for the issuance of registered and bearer shares, whilst regulating the transfer of shares too. The *Code de Commerce* applied engagement rules for joint stock company representation. The company was represented by so-called *administrateurs*, who had no personal liability for contracts made on behalf of the company as such were obligations for the company. The code had no further provisions regarding the status of shareholders and representation in the general meeting, these issues could be regulated freely in the articles of association. The *Code de Commerce* treated company establishment[108] as an act of public law, and considered the articles of association as public acts (*acte public*). The French code contained several provisions protecting persons entering into contractual relationships with a joint stock company, which demonstrates that the *société anonyme* was not an association of persons, but a capital company with limited liability.

After the 1820s the number of joint stock companies increased significantly in France and Belgium, and from 1840 in Germany as well. The concession principle was adopted all across Europe in accordance with the French regulation. The state authorities granting the concessions established a system whereby the approval of incorporation for certain companies was based on general rules. These were called normative prescriptions in Prussia. The *Code de Commerce* was later followed by codes in all the European states.[109] The achievements of the French commercial code reflected general political changes by declaring freedom of the individual, the equality of citizens and the foundations of democracy. The state structure founded on these principles was followed by the structure of joint stock companies, raising the issue of the democracy of capital. Shareholders with greater capital and contributions could essentially direct the entire functioning of the company alone, to the detriment of the smaller investors, which later raised the question of a more extensive regulation of minority rights.

In Germany, the legal regulation of joint stock companies was a longer process. As early as 1607 the emperor decided to establish competitive companies against the Dutch. This was followed by the Brandenburg Africa Company. In Germany, the establishment of a joint stock company depended on the approval of the squire, which indicated strong state involvement. This was complemented by the historical peculiarity that Germany consisted of politically sep-

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108 The establishment of companies with legal personality in the concession system can be traced back to Roman rules in many 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. p. 131.).

109 See for example Wetboek van Koophandel (1838), Art. 36 ss., Gesetz über die Aktiengesellschaften, 9. 11. 1843, GS für die Königlichen Preußischen Staaten 1843, Nr. 31, p. 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, p. 94 ff., Gesetz betr. die Kommanditgesellschaften auf Aktien und Aktiengesellschaften, 11. 6. 1870, BGB1. des Norddeutschen Bundes 1870, Nr. 21, p. 375 ff., Loi contenant le titre IX, livre I^er^ du Code de Commerce relatif aux sociétés, 18. 5. 1873, Pasinomie 1873, Nr. 157, p. 150 ff., Schweizerisches Obligationenrecht (aOR 1881), Art. 612 ff., Codice di commercio 1882, art. 121 ff., Código de comercio 1885, art. 151 ff., Loi modifiant la loi du 18 mai 1873 sur les sociétés commerciales, 22. 5. 1886, Pasinomie 1886, Nr. 156, p. 259 ff., Código commercial 1888, art. 162 ff., Verordnung, 20. 9. 1899, mit welcher ein Regulativ für die Errichtung und Umbildung von Actiengesellschaften auf dem Gebiete der Industrie und des Handels verlautbart wird (Aktienregulativ), RGB1. 1899, Nr. 175, p. 839–858.

arate dukedoms, thus the elaboration of a standard model of regulation, similar to the French example, faced difficulties. Accordingly, the *ALR* in 1794 did not contain a regulation on commercial companies, but only provided for companies other than commercial companies (§§ 6, 25). Thanks to the absence of regulation the founders of certain joint stock companies essentially enjoyed complete freedom in establishing the internal operations of the company. The general regulation models were thus shaped by the players in practice.

It is worth mentioning the name of David HANSEMANN (1790–1864) – the founder and leader of the first German railway company – who in 1837 drafted a proposal regarding the functioning of joint stock companies. Hansemann's concept was based on a model of a joint stock company which functioned democratically, where the voting rights of majority shareholders were limited, thus they could not rule the general meeting of the company exclusively, and the role of minor shareholders could not be devalued. The proposal stipulated the necessity of an absolute majority in decision making at general meetings. At the same time, the authority of the general meeting was limited to the election of the senior management, the board of directors and the supervisory board, as well as to certain corporate issues – changes in the capital structure, contracting new loans or the construction of new railways, in the case of railway companies. In Hansemann's view, the company management was concentrated in the hands of the directors who were to ensure the continuity of company representation, and the employees involved in business operations could function under their leadership. Camphauesen, the founder of the Rhenish Railway Company considered the general meeting to be the supreme body of the company. However, he defined the rights of certain shareholders not on the basis of their contribution but on professional competence. In his view, the directors had to be independent from the majority shareholders and the supervisory body, and were obliged to report only to the general meeting, thus increasing their personal liability as well. In Germany, the possibilities for the first legal regulation of joint stock companies were provided by the Prussian railway act (1838), which leaned significantly on the French commercial code. The railway act also followed the concession system, however, it did not reject the intervention of the state, as decisions with regard to raising capital (§ 6), purchasing real estate (§ 7) and other important issues continued to be subject to state approval.

This was followed by the joint stock company act in Prussia.[110] This act did not contain specific provisions on the internal organisation of joint stock companies; it only stipulated (§ 19) that the board of directors (*Vorstand*) was to act on behalf of the company. The subsequent sections provided detailed regulations on the powers of the board of directors. The act was significant in that it declared the joint stock company a legal entity which could purchase property and undertake liabilities in its own name (§§ 8–9). This reflects the influences of Savigny, who acted as legislative minister in the Prussian cabinet at the time the act was elaborated.

Camphausen as prime minister and Hansemann as finance minister, taking office as a result of the revolution in 1848, dissolved the previous regulation and introduced the concession system. Consequently, the number of joint stock companies increased significantly. It became general practice to have three main bodies in joint stock companies: the board of directors, the general meeting, and the supervisory board (*Verwaltungsrat* or *Aufsichtsrat*). Joint stock company regulation was extended throughout the entire German Empire, thus by the elaboration of the *ADHGB* in 1861 it was already applied as standard throughout German territories. The *ADHGB* followed the concession system, which individual states could deviate from (§ 249). The board of directors (§ 227), and the general meeting (§ 224) were rendered mandatory, while the establishment of a supervisory board was optional (§ 225). Pursuant to § 224 paragraph (2) of the act, all shares were granted one vote which endowed the holder with the right to

110 Gesetz über Aktiengesellschaften vom 9. Nov. 1843.

participate in the general meeting. At the same time, the authority of the general meeting was significantly expanded. The *ADHGB* opened the way to democratic development.

In English company law, similarly to Germany and France, not only economic but also political factors paved the way for development from the *octroi* system to the concession system. In medieval England, companies were established by royal charters, and Acts of Parliament. Besides these companies, common law companies also functioned, which were the so-called unincorporated companies. Initially these were considered worthless, later they gained recognition with the unlimited liability of members. The *Bubble Act* of 1720 banned the establishment of these companies. In the 1800s, several acts were elaborated to regulate English joint stock company law (1856, 1857 and 1862). English codification ensued later compared to the German and French regions, thanks not only to political and economic factors but also to the particularities of English law. In fact, English law is essentially an uncodified law. Nevertheless, there were attempts in the 18th century to regulate certain fields of company law. Such were the so-called *Trent Navigation Act* (1766), the *Companies Clauses Consolidation Act* (1845), as well as the *Railway Clauses Act*. The *Bubble Act* was repealed in 1825, which gave way to the unhindered development of joint stock companies. Since this strengthened speculative intentions, in 1826 it became inevitable to stipulate the obligation of incorporation for companies, which in 1844 was also comprised in the laws. The establishment of general meetings as the main management body of the company became general practice.

5. Final Remarks

As we can experience the progenitors of the phenomenon of limited liability emerged in the ancient laws, especially in the Roman law, even if its rules were not completely worked out according to partnerships. In the medieval ages the commenda wore the features of the companies with mixed liability structures as the forerunner of the modern limited partnership. We may state that the emergence of the joint stock companies established the most important rules of the modern company law. The companies providing their members with limited liability played a central role during the codification of company law in the frame of the commercial law codification waves. Upon the historical antecedents it is predictable that the companies which ensure limited liability to their members according to the debts of the companies in direction of third persons are the real and most important engines of the economy.

Zusammenfassung

Der Autor untersucht in seiner Studie, auf was für Prämissen die Entstehung der beschränkte Gesellschafterhaftung sichernden gesellschaftlichen juristischen Konstruktion zurückzuführen ist. Man kann feststellen, dass die beschränkte Haftung zustande bringenden Rechtsverhältnisse bereits im antiken römischen Recht zu finden waren, die dennoch im Falle von Societas praktisch nicht verwirklicht wurden. Der Ursprung der im modernen Gesellschaftsrecht bekannten – neben der beschränkten Gesellschafterhaftung funktionierenden – Gesellschaftstypen kann hauptsächlich auf die Gesellschaften zurückgeführt werden, die am Anfang des 17. Jahrhunderts im Überseehandel entstanden. Die Konzeption der gemischten d.h. mit sowohl beschränkter als auch unbeschränkter Gesellschafterhaftung funktionierenden Gesellschaften – in erster Linie die moderne Kommanditgesellschaft – lässt sich auf die mittelalterliche Kommenda zurückführen. Die Fachliteratur teilt sich darin, ob die Kommenda altertümliche Prämissen hatte, aber es gab auch mehrere juristische Konstruktionen, die ihre Hintergründe bildeten.