Report

on possible applications in civil law countries of

certain institutions related to the Anglo-American Trust

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CHAPTER 1st

VOTING TRUSTS
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Introduction

The present Report concisely restates the results of the study made by this Reporter, pursuant to the mandate given to him by the Secretary General of the Institute, of the law and practice relating to the application of certain principles of trust in common law countries and of the corresponding legal institutions and practices in civil law countries. Thus, it presupposes and implements the Report submitted by Professor Geoffrey Hornsey and the Memorandum concerning the introduction of some principles of trust into the "Civil Law Legislations" (1).

In conformity with the mandate received, this Reporter's attempt has been that of ascertaining, as far as means of information permitted him to do so, the actual practice of the mentioned institutions. The same pragmatic and functional approach has been adopted in the consideration of the problem of the possible introduction of the common law institution into civil law legislations. As a consequence thereof, it has been necessary in the preparation of the Report to stress the factual and functional elements as contrasted to the formal traits of the legal institutions.

The second Chapter relating to Trustees for Bondholders is more in the nature of an interlocutory report for reasons which are therein Stated.

A bibliography is appended to each chapter of the Report. This Reporter regrets that it has not been possible at this stage to include also a systematic list of the cases used in the preparation of the Report.

1. **Definition**

A characteristic of the development of modern corporate enterprise is the separation of ownership from control. Industrial concentration and mass production, the necessity of huge financing and the ensuing diffusion of stock ownership, have altered the traditional parallelism between economical risk and power, between ownership and control. The paradigms of corporation law have become to a great extent theoretical. Thus, e.g., the problem of protecting the minorities in a corporation has really become that of protecting ... the majority of unorganized shareholders from the attacks, both from the inside and from the outside, of a small group aiming at control of the corporate management. Legal devices and institutions originally created in order to preserve a shareholders' democracy within the corporation have been deprived of substance or used to achieve the opposite ends of corporate control.

This reality is well known to economists and lawyers and need not be stressed here. It has been the subject of writings both on the Continent and in the United States; foremost among such writings is the classic work by BERLE and MEANS\(^{(1)}\).

In more recent times, other factors, such as state participation in the ownership of enterprises and social participation of workers in the management (Mitbestimmungsrecht), have contributed to the above mentioned divorcement of ownership and control.

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\(^{(1)}\) *The Modern Corporation and Private Property*, 1932.
General types of sources and means of control may be variedly classified. Among the legal devices developed in the U.S.\(^1\) for the purpose of achieving control of a corporation and of its management by a group of shareholders, voting trusts find their place in the middle of an ideal line whose extremes are represented respectively by voting agreements and holding companies. Voting trusts bear functional and structural resemblances to both of the types of control devices already mentioned.

A voting trust can be comprehensively defined as "one created by an agreement between a group of the stockholders of a corporation and the trustee, or by a group of identical agreements between individual stockholders and a common trustee, whereby it is provided that for a term of years, or for a period contingent upon a certain event, or until the agreement is terminated, control over the stock owned by such stockholders, either for certain purposes or for all, shall be lodged in the trustee, either with or without a reservation to the owners or persons designated by them of the power to direct how such control shall be used"\(^2\).

Other doctrinal or judicial definitions of the voting trust, while pointing out the particular purpose for which the trust device may be employed, uniformly tend to emphasize on the one hand its nature as a stock-pooling agreement, on the other its instrumental use for securing control and management of a corporation in a desired manner\(^3\).

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\(^{1}\) As it is known, voting trusts do not exist in Great Britain. See: GOWER, p. 230, p. 482 n. 8.

\(^{2}\) 3 FLETCHER, p. 2871.

2. Legal structure of voting trusts

There is no uniformity among voting trust agreements, but they greatly vary according to the situation of the parties and to the object to be attained(1). However, characteristic of a true voting trust agreement is the transfer by stockholders to trustees of legal title to their shares; in return therefor, stockholders receive voting trust certificates representing an equitable interest in the shares and entitling them to all dividends and other profits deriving from ownership of the stock. As an effect of such transfer, which is recorded on the books of the corporation, transferors cease to be stockholders of record and lose their voting rights; they may also be deprived of rights of inspection or information and of other vital safeguards provided by law for the protection of their interests.

Sometimes voting trusts are created by the promoters of a new corporation, who offer to the public only voting trust certificates. Thus, with a small or no investment, the promoters retain control of management for the desired time.

The duration of a voting trust in that determined under the agreement(2), and may not be extended by voting trustees. During such period of validity, it is generally held

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(1) Forms of typical voting agreements can be seen in FLETCHER, Corporation Forms, p. 879 sqq.; 6 BOGERT, p. 3517 sqq.

(2) Where statutes regulate voting trusts, the statutory period of validity is generally ten years: N.Y. Stock Corporation Law, § 50. Similar provisions in Ark., Del., Idaho, Fla., Ill., Ind., La., Md., Mich., Ohio, Pa., Wash.. In New Mexico the statutory limit is five years, in Nevada and Minnesota fifteen, in Cal. 21 years.
that a voting trust cannot be revoked by a shareholder who has assented to it. Several grounds have been advanced for such holdings, asserting that revocation would amount to a breach of contract, or that the power of the trustee is not revocable because coupled with an interest, or that as an active trust it cannot be revoked without the consent of the other beneficiaries.

Despite functional and structural analogies, voting trusts must be distinguished from other corporate control devices, such as irrevocable proxies or various stockholders' agreements regarding the methods for voting stock at the meetings, and from holding companies, where the latter are used for conquering and crystallizing corporate control.

Briefly, a proxy holder is an agent of the stockholders, who retain beneficial and legal ownership of the stock; under a valid voting trust agreement, the trustee becomes the legal owner of the stock and exercises all rights of ownership subject to the terms of the trust. The vesting of legal ownership in the trustee distinguishes a voting trust from other stock pooling agreements, where the power to vote is only incidentally and temporarily taken away from the real owner or where the parties to the agreement merely undertake to take a joint action in the meeting.

There is no separation of legal from equitable ownership in a holding company; in addition, a holding company is a separate corporate entity. Both these elements serve to distinguish it from a voting trust. However, it may be interesting to note the structural similarities between the two legal devices. Voting trust certificates represent new securities
issued by the trustees "as a kind of association or holding company ... which holds the underlying securities issued by the corporation . ... The voting trust certificates represent shares in such association, and the transfer thereof is taxable"(1). The statutes in some States provide that voting trust certificates shall be transferable in the same manner and with the same effect as certificates of stock under the Uniform Stock Transfer Act. It may also be interesting to note that a holding company has been held to be standing in a fiduciary relationship to shareholders as well as to creditors(2). Thus, one of the peculiar traits of a voting trust, viz. the fiduciary nature of the trustees' obligation, becomes common to other control devices. (See infra).

3. *Origin of voting trusts*

Voting trusts are a comparatively recent device. One of the first recorded cases is that of the Pacific Mail Steamship Company in 1864. An early case of railroad voting trusts is that

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(1) BALLANTINE, p. 432.

of the Atlantic and Great Western in 1868. Voting trusts were frequently used towards the end of the 19th century, notably in connection with railroad reorganizations.

Historically, voting trusts were most commonly created as a part of the reorganization plan of a bankrupt corporation. Stockholders and creditors would enter a voting trust agreement to secure themselves the control of management for the protection of their interests.

However, the great development of voting trusts was in connection with organized efforts for the purpose of maintaining control of corporate enterprises. In the late nineteen twenties, voting trusts were used by strongly entrenched directorates of public utility companies, owning only a small percentage of the stock, for the purpose of maintaining control of the companies and defending themselves (e.g., their salaries, management contracts, etc.) from the attacks of outside holding companies, at a time when stock of public utilities was particularly profitable (1).

From a legal viewpoint, the limitations inherent in the delegation of voting power by a proxy were the main cause of the fortunes of the voting trust device. At common law and under the statutes providing for voting by proxy, a proxy, though in terms irrevocable, was revocable at any time, unless coupled with an interest (2). The determination of what is a sufficient interest in the shares to make the proxy irrevocable was rather controversial (3).

(1) This practice was extensively used by Massachusetts utilities. For details, see DEWING, p. 112 sqq.
(2) Ann. 15 A.L.R. 1139.
And in some jurisdictions, for example in New York, even if coupled with an interest, a proxy must be for a limited purpose. Besides, a proxy did not confer the same amount of powers with respect to stock as a voting trust and was a less effective means of control. As a renowned practitioner and writer said, "To achieve irrevocable proxies the voting trust was developed"(1).

4. **Functions of voting trusts**

It is difficult to describe all the purposes for which a voting trust may be used. However, they may be grouped into four general categories(2).

As mentioned above, voting trusts can be used in promotion procedures to secure continuity of management of new corporations and control thereof by promoters and bankers, without making any substantial stock investment or without recourse to other procedures, such as the issue of a great quantity of common shares or the like, which would entail disadvantages on the securities market, especially in consideration of the fact that the corporation has not yet had any opportunity to prove the financial soundness and earning power of its stock. Through the use of the trust device, promoter-bankers can sell the stock and retain control at the same time. The famous voting trust agreement of International Harvester Company, entered approximately thirty years ago, was created by the use of such procedure.

(1) ROHRLICH, Law and Practice in Corporate Control, p. 69.
(2) DEWING, p. 109.
The historically most important use of the voting trust, and one which performed useful services, was in connection with corporate reorganization procedures and the protection of creditors' interests, also in the initial and subsequent financing of the corporation. Stockholders, whose investment was reduced to little more than an equity of insignificant value but who had a vital interest in the recovery of the corporation and in avoiding clever speculations by outsiders, and bondholders and creditors would agree on the creation of a voting trust appointing a reliable management for the necessary period of time. Most reorganizations of railroads in the eighteen nineties and in the nineteen forties were made through the use of voting trusts. The device was extensively used during the years of the depression\(^1\).

Voting trusts have frequently been created for the advantage of foreign shareholders. In order to avoid cumbersome registration of each individual foreign stock owner, bankers—both on the Continent and in the U.S. —registered shares in their own name and issued voting trust certificates to the foreign investors. A similar practice has been used in connection with the "American shares" of European corporations: the actual shares are deposited with an American trust company, which issues certificates in the deposited shares.

A common use of our device — and probably its best known use — is represented by the organization of a group of shareholders for the purpose of pooling their votes and

\(^{(1)}\) Such giants as the present Bethlehem Steel Company are the result of similar reorganization procedures.
exerting a greater influence on the corporation. While designed also to give unrepresented shareholders a possibility to protect their interests against a majority group in control, as a matter of fact voting trusts have been used and are used more frequently by minority groups as a means of conquering and crystallizing corporate control. This reality—so different from the descriptions of voting trust supporters—has caused courts to condemn severely on several occasions the voting trust device, and legislatures to adopt corrective measures to reduce the possibility of abuses.(1)

Sometimes, under the provisions of a statute or of a court's decree, the administration of a corporation is required to be carried on by "public" trustees: this has often been the case in connection with public utilities or with liquidation procedures. In such instances, voting trusts have been used. The importance of such cases is that they provided the challenged voting trust device with the blessing of judicial or statutory sanction.

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(1) The real use and function of voting trusts are described not only by such doctrinal works as the mentioned book by BERLE and MEANS and the writings by BRANDERIS, VELENE, RIPLEY etc.; they are documented by statistics, judicial records and such reliable accounts as the Reports of the Security and Exchange Commission and of the Temporary National Economic Committee. See LOSS, p. 7 sqq.
5. **Legal status of voting trusts: at common law and under the statutes.**

At common law, early decisions denied the validity of voting trusts, irrespectively of their object. It was said that voting trusts were contrary to the common law rule that all votes at corporate meetings should be given in person; that they operated as restraints upon alienation of personal property; that they were against public policy. The main contention was that they were contrary to the basic principle of corporation law, under which the voting power is not an assignable right and may not be separated from beneficial ownership of the shares. As it appears, some of the grounds upon which was declared the invalidity of irrevocable proxies were employed to sanction the illegality of voting trusts. A divided New Jersey court, in the leading case of **Warren v. Pim** (1), defined a voting trust as "a masterpiece of professional ingenuity which confides absolute and uncontrolled discretion to a group whose personal stake in the success of the company is so insignificant that it may be is regarded entirely ...... a sham owner vested with a colorable and fictitious title for the sole purpose of voting upon stock that he does not own" (2).

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(2) Other important decisions holding voting trusts to be illegal are: Shepaung Voting Trust Cases, 60 Conn. 553, 24 Atl. 32 (1890); Harvey, Trustee v. Linville Improvement Co., 118 N.C. 693, 24 S.E. 489 (1896); Sheppard v. Rockingham Power Co., 150 N.C. 776, 64 S.E. 894 (1909); Bridgers v. First Nat. Bank, 152 N.C. 293, 67 S.E. 770 (1910). See also WORMSER, The Legality, etc., cit.; SMITH, Limitations, etc., cit.; BALLANTINE, Voting Trusts, etc., cit.)
And this general attitude inimical to voting trusts was reflected in the official report of the Pujo Committee of the House of Representatives, published immediately before the outbreak of the first world war(1).

Public attitude towards voting trusts, as reflected in decisions of courts, changed by the time of the first world war. The prevailing judicial opinion is now in favor of the recognition of the usefulness and validity of the voting trust, subject to an examination of the legality of the purpose for which the device is used in the individual case(2). Distinctions have been drawn between legal and illegal purposes. With respect to the former, voting trusts have been upheld where used in reorganization procedures, in connection with financing operations of the corporation or where employed as an adequate protection of bondholders and creditors; where actually used to protect minorities, either by entrusting an impartial body with the appointment of management or by securing such minorities with a representation; and in general where it could be shown that the trust device was beneficial to the company and in the best interest of all stockholders. On the other


hand, voting trusts have been declared void where designed to establish minority control for a long period, or to maintain indefinitely in office an entrenched management and to preserve its privileges; where trustees discretion was too broad or where the device was created for the personal benefit of promoters and investment bankers; where it was part of a plan aimed at establishing a monopoly, restraining competition or trade; and in general where it was used for the exclusive benefit of part of the stockholders or in order to enable outsiders to gain control of the corporation without due regard for the interest of its stockholders and creditors.

Thus, it seems obvious that the courts' recognition of the voting trust as not being illegal per se, has drawn a firm line between the various functions of the device, as above described, subjecting it to a strict examination of legality where it was used as a means to gain or maintain control of a corporation. It may be said that the voting trust in its prominent and common function as a control device is still looked upon with distrust by judicial opinion.

The legislatures of over half the States\(^1\) have enacted provisions, contained either in the general corporation law or in separate statutes, establishing the validity of voting trusts and subjecting them to regulation\(^2\). Such provisions differ with respect to the duration of the trust, its extension, termination, rights of stockholders to join the agreement, forma-

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\(^1\) Beginning with New York in 1901.

\(^2\) For a standard type of provision, see § 29 of the Model Business Corporation Act, 9 U.L.A. 82.
lities of voting by trustees, issue and transfer of voting trust certificates, etc.\(^{(1)}\). Some statutes expressly except banking corporations from the general authorization of voting trusts.

The statutes settled the question as to whether voting trusts are contrary to public policy\(^{(2)}\). But in all other important respects, the statutes have only made a choice between the conflicting rules of the common law and do not authorize voting trusts aimed at achieving purposes which would be considered illegal under the majority common law rules governing voting agreements. The determination of the legality of the purpose of a voting trust is left with the courts, which are not precluded from making such an examination by the existence of a statute\(^{(3)}\).

The Federal Government, too, has indirectly regulated the field to some extent, within the limits of its legislative authority. On the one hand, the importance of voting trusts in connection with reorganization procedures was reflected in the requirement, under the revised Bankruptcy Act of 1938, § 216, div. 11, that the courts approve the manner in which the trustees are selected. On the other hand, the similarity between voting trust certificates and shares or other securities subjects such certificates to the same registration requirements.

\(^{(1)}\) For details, see DODD and BAKER, p. 260 sqq.

\(^{(2)}\) In Re Morse: Bank of America, 247 N.Y. 290, 160 N.E. 374 (1928), per Pound, J.

\(^{(3)}\) BALLANTINE, p. 427-8.
under the Securities Exchange Act of 1934(1). The Securities and Exchange Commission acts in an advisory capacity to the courts in reorganization procedures under the Bankruptcy Act, Chapter X(2).


A voting trust, in its typical formulation, reflects the structure of a trust relationship and is governed by the principles of the law of trusts.

However, in fact the terms of a voting trust agreement substantially govern the relationship, unless they be contrary to a statutory rule or show an illegal purpose. Under such terms, trustees have often powers which exceed their normal scope and do not have all the duties incumbent upon trustees. The courts have generally declared the invalidity of voting trusts, where the trustee was totally exonerated from responsibility, but have upheld others, where the trustee's powers were not so extensive even though broader than usual.

It was already said that a stockholder who enters a voting trust agreement ceases to be a stockholder of record and

(1) See LOSS, p. 224, 477; 68-69, 301-304.

(2) "The Commission has generally opposed the control device of a voting trust except when its use has been justified by the special circumstances of the case; and, when adopted, the Commission has sought to have the voting trust agreement contain appropriate provisions in the interest of the investors": 14th Annual Report, SEC 90 (1948), quoted by DODD and BAKER, p. 259.
is also deprived of several legal rights pertaining to the status of stockholder\(^1\). He is said to have in fact the status of a tenant in common of the mass of shares with a contractual right to receive dividends and to a transfer back of the shares upon termination of the trust\(^2\).

Mention was also made of the similarity, both structural and functional, between a voting trust and a holding company, and of the fact that the fiduciary character of the trust relationship has been extended to other groups exercising control over a corporation.

On the other hand, where the trustee's powers are very narrowly limited, he acts almost as an agent of the stockholders and the relationship resembles that created by an irrevocable proxy.

As a result of these contrasting tendencies, a voting trust in practice resembles more a contract relationship than the traditional trust.

7. **Theory and reality of voting trusts. Their uses and abuses.**

It is hoped that this summary exposition has served the purpose of conveying to the reader an idea of the real im-

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\(^1\) E.g., he has no right to obtain inspection of corporate books and records by mandamus, since this is a legal remedy: State ex rel. Crowder v. Sperry Corporation, 41 Del. 84, 15 Atl. 2d 661 (1940). The court so defined his status: "In law he is a stranger to the corporation. His rights arise from contract and are limited by its terms".

\(^2\) BALLANTINE, p. 431.
portance and use of voting trusts and of their regulation, both at common law and under the statutes.

Voting trusts have often been used to achieve useful purposes. Their great development is explainable especially in an economic system where shareholders are gradually losing their traditional status in order to acquire that of investors at large. But their abuses, notably in connection with the control of a corporation, seem to have obscured their uses (1). Courts and legislatures, in subjecting them to control and regulation, have kept in mind the possibility of frequent abuse.

Among control devices, the voting trust is the one which involves a "more complete surrender of legal rights and remedies by the shareholders". The vesting of legal ownership in persons other than the shareholders has contributed to that extreme divorce of ownership from control, which in the opinion of its supporters the voting trust was designed to remedy. Such a complete surrender is not deemed to be necessary nor desirable, and eminent writers and authoritative agencies have expressed their opinion against the voting trust device. Alternative proposals have been made, such as statutory authorization of irrevocable proxies or a revival of the proxy system in general.

(1) BALLAINTINE, Voting Trusts, Their Abuse and Regulation, cit. For a case in which abuse by voting trustees caused a loss of over $100,000,000 to the owners of voting trust certificates, see: Overfield v. Pennrood Corporation, (E.D.Pa.), 42 F. Supp. 586 (1941), rev'd (C.C.A. 3rd) 146 F. 2d 889 (1944).
As it appears, the problem of corporate democracy has not been solved by the voting trust, on the contrary it has been rendered more acute by it. Theory and reality of the voting trust, too, show different faces.
CIVIL LAW SUBSTITUTES OF THE VOTING TRUST

Having identified the voting trust as a corporate control device and having described its various functions, for the purpose of this analysis the following elements may be indicated as being peculiar of it:

a) a stock-pooling agreement by which an irrevocable power to vote is conferred by the shareholders to a common representative for a fixed time;

b) the separation of legal from equitable ownership in the shares;

c) its nature as an "association", further characterised by the issue of certificates representing the corporation's shares.

The following countries have been chosen for the purpose of this research, their corporation laws being representative of the most significant and influential trends in the civil law: Belgium, France, Germany, Italy, Spain, Switzerland.

The general area of investigation is that of voting agreements. Within this area, as it shall be seen, the civil law devices which most resemble functionally and structurally voting trusts are the s.c. shareholders' syndicates (Syndicats de blocage, sindacati azionari, sindicatos de accionistas, Schutzhintermannschaften).
1. **GERMANY**

Among the countries taken in consideration, Germany is the one which presents the most varied and complex development of corporate control devices and voting agreements, whether regulated directly by law or created under the pressure of the practical exigencies of a highly concentrated economic system.

Under the German corporation law on January 30, 1937 (**Aktiengesetz**), the general meeting of shareholders has lost the position of **obерstes Organ** which it traditionally held. As it was noted, this is not only the result of the political circumstances under which the new **Aktiengesetz** was enacted and of the influence exercised upon it by the **Führerprinzip**, but corresponded to a development whose beginnings are to be found in the time preceding the rise of National Socialism\(^1\). **Vorstand** and **Aufsichtsrat** become the leading organs of a corporation, which in turn is often dominated by the presence of a few **Grossaktionäre** and by an intricate network of agreements binding together several enterprises (**Konzerne**)\(^2\).

The right to vote at the general meeting belongs to every shareholder. But the corporation law expressly provides that a proxy may be appointed for the exercise of the right of vote (§ 114 (3) ). The possibility of conferring a written mandate (**Vollmacht**) to a third person has given rise to the practice of appointing banks as representatives at general meetings. The limitations imposed by the law in such cases

\(^1\) **FISCHER**, *Rechtsschein und Wirklichkeit, etc.*, cit., p.106 sqq.

\(^2\) Approximately 75% of all German corporations are bound by such Konzern relations. See **FISCHER**, *op.cit.*, p.94, 115 sqq.
are that the Vollmach be written; that it be
given to a specified bank; that it be complete and separate
from any other statement (e.g., it may not be included in the
genral conditions of banking contracts); that it be conferred
for a maximum period of fifteen months; that it be revocable
at any time.

The legal device which gave the greater impulse
to the development of the s.c. Bankenstimmrecht (or
Depotstimmrecht) is the Legitimationsübertragung. Its develop-
ment precedes the enactment of the Aktiengesetz, but finds its
first express recognition in § 110 of the same. By the
Legitimationsübertragung, an "authorization" (Ermächtigung)
is given to a third person to exercise the voting rights of
a shareholder. The s.c. Legitimationsaktionär by taking
possession of the shares, if they are bearer shares) or by
registering himself in the corporate books (Aktienbuch)
(if the shares are nominative) acquires the position of a
shareholder of record for the purpose of voting at the general
meeting. He is required by law (§ 110) to indicate the capacity
in which he votes and the amount and class of shares which
he represents: this duty of disclosure is strengthened by penal
sanctions provided for in § 300.

The Legitimationsaktionär is not an agent of the
shareholder. He votes in his own name. He is not a fiduciary
(Treuhändler). Through a fiduciary transfer (fiduziariische
Uebersiegung) all the rights pertaining to the ownership of
shares are acquired by the fiduciary transferee; by the
Legitimationsübertragung, only the "external" position of
shareholder, viz. the right to vote, is transferred.
He has no obligation to vote, nor is he bound by any instructions of the shareholder. In the exercise of the voting rights, he acts in his own interest (1).

The elasticity of the device of the Legitimationsübertragung, through which is operated a separation of ownership in the shares from the right to vote, the absence of shareholders from general meetings and the fact that in Germany shares are generally bearer instruments, easily explain its vast application in connection with the Bankenstimmrecht and its preferential status as compared to the mandate to vote (Vollmacht). Thus banks are given the possibility to exercise in their own interest voting rights pertaining to the shares deposited with them by their clients.

In such connection, banks ask their clients for instructions prior to the meeting, as provided for by the rules of the Federal Association of Private Banks (Bundesverband des privaten Bankgewerbes). Practically, such requirement becomes a mere formality, if one keeps in mind that instructions most often are never given by clients, who have already shown their lack of interest for the corporate business by transferring the right to vote. Nor seems to be an efficient limitation upon banks the further requirement that they exercise the vote according to what appears to be the interest of the shareholder, owing to the great discretion left to the banks in the determination of such interest. Moreover, banks exercise the right to vote with respect to all the shares deposited with them; their duty of disclosure does not include the indication of

(1) GODIN-WILHELM, p. 497-498, 527-528.
the names of the individual shareholders. Under such conditions, it is clear that the determination of the shareholder's interest is even more difficult.

The Bankenstimmrecht, when exercised by effect of a Legitimationsübertragung, represents a surrender by the shareholders of their voting rights; as such, it is similar in a limited respect to a voting trust. As a possible source of abuses and of conflict-of-interest situations, it has been harshly criticized by authoritative corporation law writers. It should, however, be kept in mind that the Bankenstimmrecht has arisen as a remedy to the absence of shareholders from general meetings. In consideration thereof, the prevailing doctrinal and judicial opinion has been in favour of the device; the judicial administration of the Aktiengesetz has imposed some general limits to its abuses, consisting in an extension of the duty of faithfulness (Treupflicht) and of the boundaries of the concept of contrariness to the guten Sitten (Sittenwidrigkeit)(1)

The Legitimationsübertragung may be the means through which a voting agreement operates.

Voting agreements (Abstimmungsvereinbarungen) are held to be valid on the ground of the general freedom of contract provided that they be not against the principles of corporation law or the guten Sitten (§ 138 BGB) and that they do not constitute an illegal sale of the vote (Stimmenkauf). § 299 of the Aktiengesetz sanctions with criminal punishment the sale of votes by which any shareholder undertakes not to vote or to vote in a fixed manner at a general meeting in consideration of special advantages of which he would not

(1) See HEROLD, Das Depotstimmrecht, etc., cit.; HUECK, p.146.
ordinarily benefit. Equal punishment is provided for any person who promises such advantages in consideration of a similar undertaking (1). They bind only the parties thereto and not the corporation; in case of breach of the agreement, an action for damages is available (2).

A particular type of stock-pooling agreements are s.c. Schutzgemeinschaftsverträge (3). They can be entered by a group of Grossaktionäre or by shareholders of a certain class or, as in the case of a Familiengesellschaft or of a Soziengesellschaft, by all the shareholders; they can be used for various purposes, such as the imposition of limitations on the transfer of shares or the creation of mere voting agreements or the undertaking of common action with regard to the management of the corporation; they can bind all or part of the shares of one or more corporations; they can also be combined with

(1) GODIN-WILHELM, p. 1149-1150.
(2) On voting agreements in general see: FRIEDLÄNDER, p. 94-99, where also an extensive review of cases is made; HUECK, p. 147; GODIN-WILHELM, p. 50 sqq.; PETTERS, Die Erwirnbarkeit, etc., cit.
(3) There is a rich and varied terminology to describe this type of agreements and the organizations thereby created. The more usual terms are Konsortialverträge or Schutzgemeinschaften; other terms in use are Stimmkonsortien or Poolverträge, less frequently Syndikatsverträge or Syndikate. Subdistinctions are employed by some authors depending on the particular purpose of the agreement, e.g., whether it is aimed at the formation of a majority or at the protection of a minority of shareholders, or on the class of shares it refers to. On the subject see in general: FRIEDLÄNDER, p. 84 sqq.; GODIN-WILHELM, p. 50 sqq.)
other types of organizations\(^{(1)}\); in the last cases, they become means to and part of cartel agreements (Konzerne). While **Schutzgemeinschaftsverträge** usually have a broader scope, mere voting agreements are typical contents thereof.

The organization created through this type of agreement is called a **Schutzgemeinschaft**. Its legal nature is that of a s.c. civil association (Gesellschaft des bürgerlichen Rechts), and as such is subject to the provisions of §§ 705 sqq. of the BGB; among these, of particular importance is § 723, under which any member (Gesellschafter) may withdraw from the association at any time, provided that there be an important ground therefor.

Ordinarily, organs of a **Schutzgemeinschaft** are a managing group (Leitung) and the meeting (Mitgliederversammlung). The Leitung (generally represented by a Grossaktionär or by a bank or by the chairman of the Aufsichtsrat) has the rights and duties of an agent and represents the **Schutzgemeinschaft**, of which it is the foremost organ. The Mitgliederversammlung usually takes place before the general meeting of the corporation and determines the course of action to be followed there.

Thus, an association is created within or beside a corporation by a group of shareholders who pool their votes for the purpose of achieving a more effective representation in the management or a firmer control thereof. When a **Legitimationübertragung** is conferred to the Leitung, the functional analogy between a voting trust and a **Schutzgemeinschaft** becomes even clearer\(^{(2)}\).

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\(^{(1)}\) FRIEDLÄNDER, p. 85-86.

\(^{(2)}\) FRIEDLÄNDER, p. 84, expressly compares the two institutions.
As it was said at the beginning of this section, Germany is the country which presents the most varied development of corporate control devices on the Continent. Indeed, the description contained in the preceding pages is only a schematization, required by the purposes of this Report, of very complex practices developed in the field of German corporation law. Especially Schutzgemeinschaften, as some of the cases show, are often combined with other organizational devices in such a way that it is not an easy task for the interpreter to distinguish the factual situations.

The climate of German corporate economy has fostered greatly such a growth, which finds no other limits in German law than the concepts of Treupflicht and Sittenwidrigkeit.

However, the problem of the reform of German corporation law has been raised in recent years by authoritative writers, important industrial organizations and associations of jurists. It may here suffice to mention that, among the proposals advanced for the revival of the Selbstverwaltung in corporate life, some contemplate a limitation of the Bankenstimmrecht and are centered on a fundamental regulation of the problems of Konzerne, among which is that of the Schutzgemeinschaften

(1) For details, see FISCHER, Die Reform, etc., cit.; SCHILLING L'evoluzione, etc., cit.; LIBONATI, Recenti tendenze, etc., cit.

(2) A situation substantially similar to the German one is to be found in Austria, where the German Aktiengesetz or 1937 is still in effect. On the new project of Austrian corporation law, see: DEMELIUS, cit., KASTNER, cit.
2. SWITZERLAND

Under Swiss corporation law, the shareholders' meeting is the supreme organ of a corporation. The board of directors is subordinated to it and the democratic rule of the Debatte-recht is not controversial. However, in Switzerland also, even if to a much lesser extent than in Germany (owing primarily to the different corporate climate in the two countries), the problems of minority representation and corporate control are present(1).

Every shareholder has a vested right to at least one vote. The vote is determined in proportion to the total par value of the shares owned. However, provision is made for the issue of privileged voting shares, i.e. shares entitled to one vote, irrespective of their par value (s.c. Stimmrechtsaktien)(2). He may appoint a proxy to represent him at the general meeting, subject to any limitations imposed by the bylaws(3). As in Germany, representatives to vote may be appointed by means of a Legitimationsübertragung and of a fiduciary transfer. As a result thereof, there has been a similar development of the Bankenstimmrecht.

Stock-pooling agreements are held to be valid on the ground of the general freedom of contract.

However, while technical legal devices are substantially the same as in Germany, the different climate and the preva-

(1) On corporate control in general see: SCHMID, cit.
(2) See STEIGER, p. 55 sqq.
(3) Art. 689 (2), OR.
lence of democratic principles in Swiss corporation law, evidenced by the position secured to the meeting as the oberstes Organ, have not led to the same growth of organizations of shareholders outside the corporation and to the abuses existing in Germany(1).

3. FRANCE

One of the basic principles of French corporation law is the right of shareholders to participate in the administration of the corporation by voting at the general meetings. Each shareholder has a right to vote, which he may not waive in any manner; nor may the bylaws suppress it directly or indirectly(2). Non-voting shares are not foreseen.

But the "grande illusion des actionnaires"(3) to be owners of their corporation does not find complete correspondence in reality. The democratic conception of the corporation has given way to economic necessities.

The practice of delegating the voting power, either to shareholders or to non-shareholders, and of entering voting agreements was very developed in France. The legislature, by a sudden decree-law of August 31, 1937 (amending Art. 3 of the law of November 13, 1933) intervened in the field in a way

(1) See SCHLUET, cit. p. 133 sqq.
(3) RIFERT, Aspects, p. 87.
defined by some writers as being brutal. Article 10 of the
decree provides that: "Sont nulles et de nul effet dans leurs
dispositions, principales et accessoires, les clauses ayant
pour objet ou pour effet de porter atteinte au libre exercice
du droit de vote dans les assemblées générales des sociétés
commerciales". However, despite the drastic formulation of
the law, distinctions have been introduced in its application;
the problem of the validity of voting agreement has remained
to a great extent one for the courts to solve.

Even prior to the decree-law of 1937, French courts
held that the assignment (cession) of the right to vote separately
from the ownership of the shares was void. A distinction was
made between a mandate and an assignment, the former being con-
sidered valid if revocable(1). An irrevocable mandate was con-
sidered as being equivalent to an assignment of the right to
vote and as such was held to be invalid(2).

From the application of the decree-law is excluded
the practice of conferring incomplete proxies (pouvoirs or
mandats en blanc). This system, not infrequent in other
countries, is adopted by management and banks in the solici-
tation of proxies to vote at the general meetings, and its
usefulness is made greater by the requirement of a quorum for

(1) Trib. com., Seine, March 8, 1928, Journ. soc., 1928,
p. 670.

(2) Trib. com. Seine, January 11, 1938, Journ. soc. 1938, 301:
this judgement was rendered in the known case concerning
the newspaper Œuvre. Prior to 1937 there has been no
clear decision on the point: Paris, November 28, 1924,
Sirey, 1924.2.49 (the Franco-Wyoming case). See FREYRIA,
Étude, cit., p. 424.
the validity of the meetings. Even though this practice may be as grave a source of abuse as the direct assignment of the voting right, from the legal viewpoint the revocability of the mandate is considered the basis of its validity(1).

As to voting agreements containing an engagement to vote in a predetermined sense, they were held valid before the decree-law of 1937(2). After 1937, distinctions were introduced as to the purpose of the agreement, the time at which it was entered, etc.: the general criterion being that posed by the law of the "atteinte au libre exercice du droit de vote"(3).

By a particular type of agreement an organization of shareholders for purpose of pooling stock at the meeting can be created: the so called syndicat de blocage. By it, shareholders transfer possession of their shares to the syndicat with a power - generally irrevocable - to exercise the voting rights. The syndicat holds an assembly prior to the meeting in which the majority decides the course of action to be followed at the meeting itself. In such a way an organization parallel to that of the corporation is created, whose functions resemble very much that of a voting trust and whose structure is not dissimilar from that of a Schutzgemeinschaft.

(1) HAMEL and LAGARDE, p. 656.

(2) Seine co., December 9, 1920, Journ. Soc., 1924, 516; Seine co., March 8, 1928, Sirey, 1930.2.21; Rennes, October 28, 1931, Sirey, 1932.2.20).

(3) FREYRIA, cit.; RIPERT, Traité, n. 1111; HAMEL and LAGARDE, p. 656-7.
The attitude of courts, when confronted with a syndicat, has been to invalidate it if the means used was an irrevocable mandate, or if it limited the freedom to vote by imposing to the shareholders to abide by the decision of the syndicat. Therefore, as a general statement, after the enactment of the decree-law of 1937, majority syndicates are to be considered as illicit. It should be added that the requirement that bearer securities be deposited in a current account make the use of the syndicat more difficult.

In general, the decree law has been interpreted restrictively. For example, it has been held that it does not apply to votes taken by the board of directors, nor to business associations other than the sociétés par actions. Its application has been rather limited\(^{(1)}\).

4. \textbf{BELGIUM}

The situation in Belgium is not dissimilar from that already found in France.

In particular, as to the legal regulation of shareholders' representation and voting agreements, the following should be said:

Incomplete proxies (mandats en blanc) are held to be valid. The validity of irrevocable mandates is controversial among legal writers. The "Cour de cassation" held that a mandate conferred for a limited time and for a determined purpose is not invalid. It seems, therefore, arguing a\(\textit{a contrario}\), that an irrevocable mandate would not be valid if unlimited as to time and scope\(^{(2)}\).

\(\text{(1)}\) FREYRIA, cit., p. 436.
Voting agreements by which shareholders undertake to vote in a predetermined sense are held to be invalid. This applies in particular to agreements constituting a *syndicat*, where the decision to vote is taken in a previous assembly within the *syndicat* itself. The principle that the decisions of the corporation must be taken by and within the general meeting is considered to be an obstacle to the recognition of the *syndicat*.

It is, however, controversial whether an agreement to vote in a determined sense in a specific case is valid; e.g., an agreement entered by shareholders for the election of the members of the board of directors(1).

Mention should also be made of several provisions of law aimed at preventing that the meeting be controlled by groups of shareholders(2).

5. **ITALY**

The democratic rule by which the "corporate will" is expressed by the general meeting governs Italian corporation law. But the practice of corporations shows divergent developments.

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(2) See VAN RYN, Principes, I, p. 440-1. In general see: ID., p. 433 sqq., 442; FREDERICO, Traité, V, 594 sqq.
The Italian Civil Code of 1942 expressly provides for the representation of shareholders at the general meeting (Art. 2372). The practice of appointing banks as proxies to vote, especially in relation to shares deposited with them (Art. 1838), is very developed and presents problems similar to those encountered in other countries.

Nothing is said about voting agreements or other similar devices.

The problem was present to the legislators in 1942, owing to the great development of such agreements in the practice of corporations, and had often been considered by courts and legal writers. The several projects of reform of the commercial code contained express provisions on voting agreements. Their recognition, subject to certain conditions, was contained in the ministerial project of 1940, Art. 226. This provision was not carried over into the Civil Code. The explanation for its exclusion, according to the Relazione to the Code, was that the problem was more one for the courts than for the legislature, owing to the extreme variety of fact situations involved in such agreements.

The type of voting agreement which is of interest to this investigation is the so called sindacato azionario. This expression, in turn, covers two different agreements, even though their provisions may be combined in a single context. By sindacato di blocco is meant an agreement entered by shareholders limiting the transfer of shares; there is no question as to its validity under Italian law. By sindacato di gestione is meant an agreement entered by shareholders by which they bind themselves to follow a common action at the meeting and
to appoint a common representative with the power to vote at such meeting. By the same expression is indicated the organization thereby created. In this Report, the term sindacati azionari shall be used only to indicate the latter type of agreement.

Sindacati azionari can be further classified according to their structure and rules of functioning.

Sindacati azionari have had a great development in practice; their creation has sometimes been prompted by government controlled groups, such as I.R.I. Their use is not dissimilar from the devices developed in other countries and already considered in this Report; e.g., in financing operations; as a means to attain representation by minority shareholders; as an instrument to achieve and crystallize corporate control. While it is not controversial that their effects are limited to the parties to the agreement and do not bind in any way the corporation nor exercise any influence upon the validity of the decisions taken by the meeting, their enforceability, until now, rests on their nature as gentlemen's agreements.

Prior to the enactment of the Civil Code, courts almost uniformly held voting agreement and sindacati azionari to be void (1).

In the same sense was the prevailing doctrine (1).

The main issues related to the problem of the validity of the sindacato are: a) whether ownership in the stock may be separated from the right to vote; b) whether it is admissible that the "corporate will" be formed before and outside the shareholders' meeting; c) whether the right to vote is conferred in the interest of the single shareholder or of the corporation as a whole.

Under the new Code, the position of courts has remained almost unaltered (2).

(continuation from footnote at preceding page)


(1) VIVANTE, Trattato, cit., II, pag. 231; A. SCIALOJA, Foro it., 1912, I, 181, SQUI, cit.; ASCARELLI, Appunti, cit., p.157 sqq. Contra: WEILLER, Oggetto, etc., cit.; SALANDRA, Liceità, etc., cit.; GOLDSCHMIDT, Su' vincoli, etc., cit.; DE GREGORIO, Delle Società, etc., cit. p. 421 sqq. distinguishing the purposes of the sindacato.

Doctrinal writers, on the other hand, are more inclined to recognize the validity of sindacati azionari, at least in some cases (1).

The legislature has been urged to regulate the problem by amending the Civil Code. According to some authoritative opinions, this regulation should be part of a general reform of corporation law (2).

The organs of a sindacato are usually a director and the meeting. Structurally, it resembles an association (Associazione).

The general patterns of organization of a sindacato may be distinguished as follows:

1. Shareholders agree to vote in the manner determined by a majority of them, or to appoint a common representative to vote in such manner.

(1) WEILLER, In tema, cit.; BRUNETTI, Trattato, cit., II, 420-421; VENDITTI, Validità, cit.; FERRI, Validità, cit.; ID., Potere, cit.; GRAZIANI, p. 175; DE GREGORIO, Corso, p. 282-283; FRE, SpA, cit., p. 297-300. Contra: PAZZAGLIA, Invalidità, cit.; A peculiar position is that of ASCARELLI, Limiti, etc., cit., who distinguishes the situations according to whether there is a majority or unanimity syndacte, or whether the obligation undertaken by the shareholders is limited as to duration and object, etc.

(2) See the project prepared by the Centro Italiano di Studi Giuridici, in La disciplina, cit., and the one published in Rivista delle Società, 1956, 599 sqq. (by ASCARELLI); see also COTTINO, Le convenzioni, cit., p. 289 sqq. ASCARELLI, I problemi, cit., p. 32; FERRI, Potere, cit., 52.
2. Shareholders agree to vote in the manner determined by them unanimously, or to appoint a common representative to vote in such a manner.

3. Shareholders agree to pool their shares and appoint a common representative with a discretionary power to vote as he deems best. The appointment can be irrevocable. In this case, the shareholders can decide to transfer their shares fiduciarily to the common representative.

In the last hypothesis, a sindacato bears a strong functional resemblance to a voting trust.

6. **SPAIN**

The same practices described in other continental countries are in effect in Spain. In this paragraph, only the distinctive traits of the important recent Spanish legislation shall be considered (*Ley de régimen jurídico de las sociedades anónimas*, of July 17, 1951).

The right to vote is not expressly guaranteed to every shareholder, but results from the substantive regulation of general meetings. And a general prohibition of the assignment (*cesión*) of this right is implicit in several provisions of the corporation law (Art. 51, 58, 59, 64).

However, the right to participate in the meetings is not considered as being inherent in the status of shareholder. Thus, bylaws may provide that shareholders must possess a minimum number of shares in order to be admitted to the meeting (Art. 38). This provision, which implicitly encourages share-
holders' agreements and voting by proxy, must be read together with Art. 60, by which the right of shareholders to be represented at the meeting may be excluded by the bylaws except in the case in which a shareholders' agreement is necessary under Art. 38.

Art. 60 further provides that a mandate to represent shareholders at the meeting must be in writing and especially given for each meeting; it may not be conferred to a juristic person nor to the natural persons designed to represent such juristic person. This provision is aimed at restraining the widespread practice of incomplete proxies (poderes en blanco) given to banks with respect to deposited shares, and the ensuing abuses. As a matter of fact, it is admitted that the provision does not have a great effect, since it can be, and is, easily circumvented by the simple device of the non-disclosure by the individual proxy of his representative capacity towards the bank.

The practice of conferring the power to vote by a s.c. cesión legitimadora - equivalent to the German Legitimationsübertragung - is known, but apparently less frequent than the representation by mandate. Its validity is controversial, it being asserted that it substantially corresponds to a sheer assignment of the vote\(^{(1)}\).

Sindicatos de accionistas, having the same structural and functional characteristics as the corresponding French or Italian shareholders' organizations, are a flourishing practice in Spain\(^{(2)}\). Their validity depends on the type of organization

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adopted. Thus, the undertaking by a shareholder to vote at the meeting in the manner determined by the syndicate is held to be valid. But where shareholders transfer the possession of the shares to the syndicate and confer to the director an irrevocable mandate to vote at the meetings, the agreement is invalid insofar as it conflicts with the revocable nature of the mandate and with the above mentioned provision of Art. 60, by which a power may be conferred only especially for each meeting. This substantive regulation constitutes a legal obstacle to the most stable and practicable type of syndicate: De jure condendo, a suggestion has been authoritatively made(1) for two alternatives:

a) to transfer the shares fiduciarily to the director, so as to avoid the limitations of Art. 60; b) to organize the syndicate under the form of a holding company. But the disadvantages deriving from any such solution, in terms of possible abuses, and the obstacles which may be represented by the taxation legislation, are not concealed.

(1) GARRIGUES, op. cit.
CONCLUSIONS

The preceding review of Continental experience in the area of stock-pooling agreements shows that the functions of the voting trust are substantially fulfilled by legal institutions and practices developed within the domain of the civil law. There are obvious differences in the technical means adopted as well as in the economical and political backgrounds of the individual countries.

The same problems of separation of ownership from control exist in all capitalistic economies. The common goal today is said to be that of reestablishing the shareholders' democracy. It is, therefore, quite explainable that a solution to the same exigencies has been sought in all countries.

However, the difference in the technical means employed raises the question whether the introduction of a device similar to the voting trust would contribute to a better solution to such exigencies.

None of the stock-pooling devices encountered on the Continent presents the peculiar characteristics of a voting trust: in particular, the separation of legal from equitable ownership, and its more marked nature as an association with issue of certificates circulating like shares.

With regard to the latter of such characteristics, it was previously pointed out that a voting trust resembles a holding company. The functional analogy between voting syndicates and holding companies has been noted on the Continent, where the suggestion has also been made that a
syndicate might be organized under the form of a holding company\(^1\). But the problems which would thus be raised are different from those considered here: this reporter feels that the examination of this suggestion would go beyond the scope and purpose of the Report. Some among the differences between a voting trust and a holding company have already been mentioned. Here it should be added that such peculiar structure of a voting trust is perhaps a consequence of the particular development of the securities market in the U.S. and of the stronger tendency there for shareholders to change their status into that of creditors of the corporation. From this viewpoint, an analogy between voting trust certificates and investment trust certificates might not be too daring. One further observation should be made: the organization of a syndicate under a form similar to that of a holding company\(^2\) would not be likely to yield the same advantages, especially in countries where shares are required to be nominative, as e.g. in Italy.

With regard to the other mentioned characteristic of a voting trust, what might be suggested is the introduction of the fiduciary principle (the separation of the two types of ownership being something hardly achievable under the civil law). This reporter shall not indulge in the examination of the problems relating to the general question of the possibility of introducing the trust into the civil law, which have

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\(^1\) GARRIGUES, Sindicatos, cit.

\(^2\) Indeed, if the organization were exactly that of a holding company, the problem would not be "solved" but simply — and artificially — erased.
been the subject of previous studies. He submits the opinion that the question, as specifically related to the voting trust, should be separately considered for each country: e.g., the existence of institutes like the Treuhand or the Legitimationsübertragung substantially changes the perspective.

It seems that a notable degree of elasticity in the functioning of the device would be attained by attributing to the common representative of the shareholders the status of a fiduciary. On the other hand, this would require conferring a greater amount of powers upon the representative and might be a grave source of abuse. Perhaps, one should not overlook the partly negative experience of the voting trust in the United States, namely in the legal and social environment in which it was born. A sociological rather than a legal observation might be more suited to this type of research.

This reporter takes the liberty of pointing out that the tendency both in the United States and on the Continent is that of limiting the powers of voting trustees or of directors of the syndicate. In the former, the alternative proposal is that of giving a new regulation to irrevocable proxies. In the latter, the suggestions are to introduce a stricter discipline; or, where the syndicate is not recognized, proposals to validate it are based on the imposition of several restrictions upon it. Briefly, the trend seems to be more towards the pattern of agency or mandate than towards that of trust or fiducia.
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CHAPTER II

TRUSTEES FOR BONDHOLDERS
THE ORGANIZATION OF BONDHOLDERS

The importance of bond issues as a means of capitalization or permanent financing of a corporation, the peculiar features of this type of indebtedness and of the ensuing factual economic and legal relations between the debtor and the creditors, the extension over a long period of time of the relation, the different positions in which debtor and creditors find themselves, the community of interests among the creditors, all these elements are at the origin of the various forms of organization of bondholders. While conventional groupings of creditors can be found even in the early history of corporations, during the last decades a legal regulation - either partial or complete - has been given to the organization of bondholders in most countries. It may concisely be said that two systems or types of regulation emerge: a) the trustee for bondholders, b) the grouping of bondholders into an association, a mass, a community or a syndicate according to the various terminologies. The former is characteristic of the common law countries, though not exclusive of them; the latter is the typical solution found in the civil law countries.

In the following pages, the peculiar and most salient aspects of the mentioned types of organization shall be examined.

(1) Owing to the different terminology in use in England and in the United States in order to define the indebtedness of a corporation in the section relating to each country the terms peculiar of it shall be employed. Otherwise, the American terms "bonds" and "bondholders" shall be used in the Report without their peculiar connotation.
TRUSTEES FOR BONDDHOLDERS IN THE COMMON LAW COUNTRIES

In England and in the United States, the common practice in connection with a bond issue is to appoint a trustee for the representation of bondholders. Thus, there are two parts to a bond issue:

a) the instruments representing the indebtedness, s.c. bonds or debentures,

b) the supplementary agreement between the issuer and the trustee, in which the terms governing the issue are described in detail, generally called trust deed or trust indenture. The contract runs between the corporation and the trustee, who has legal title to the security; the bondholders have the status of beneficiaries under said agreement between the corporation and the trustee.

In general and abstract terms, the use of the trust device in connection with a bond issue offers the following distinctive advantages:

a) vesting in the trustee of legal title to the security makes it possible to avoid the inconveniences - both practical and legal - arising in vesting title in a great number of scattered and changing bondholders, while assuring their credit an effective protection;

b) the appointment of a fiduciary representative permits permanent, unitary and prompt action for the protection of said body of scattered and changing bondholders.

The different experience and regulation of trust indentures in England and in the United States requires a brief separate treatment for each country.
1. England

Debentures and debenture stock are normally secured by a fixed charge on the company's property — generally a legal mortgage — and/or by an equitable floating charge on the rest of the assets. Theoretically, an effective security could be achieved only by vesting title in thousands of debenture-holders and by splitting up the deeds among them. This would not only be highly impracticable, but would also be contrary to the rule of law under which a legal estate in land cannot be vested in more than four persons. By a trust deed, such obstacles are avoided. Legal title to the security is vested in the trustee who keeps it for the benefit of the debenture-holders and who also retains the deeds.

A trust deed contains several clauses defining the conditions under which the security becomes enforceable, specifying the powers of the trustee, providing for his remuneration, imposing on the company several obligations such as the submission of information and the like. It also provides for the remedies open to the debenture-holders and in general states the terms to which is subject the security.

Of particular importance are clauses providing for meetings of debenture-holders at which stated majorities may take decisions binding all the holders, such as assenting to modifications of their rights and to changes of the original terms of the deed in order, e.g., to enable the company to delay payment of interest or to issue a new series of debentures having equal rank.
There are also contained a number of special clauses regulating the particular conditions of the specific issue. Frequently enough, clauses are inserted by which trustees are exempted from liability for breach of trust. Such clauses have been a source of abuses on the part of trustees, who under their shield have often limited their function to that of passive recipients of their remuneration. Such abuses in England were also recognised by the Cohen Committee; the Committee, however, rejected suggestions to propose legislation in conflict-of-interest situations and to introduce institutional trustees. Its recommendations are contained in Sec. 86 of the Companies Act, 1948, under which any provision contained in a trust deed having the effect of exempting the trustee or indemnifying him against liability for breach of trust, where he fails to show the degree of care and diligence required of him as a trustee, is void.

The function of trustee is now generally undertaken by trust corporations, owing to the greater facilities of which they dispose in carrying out their responsibilities. It should also be added that the intervention of a reputable trust corporation as a trustee for an issue of debentures increases the possibility of a successful floating. Frequently banks used to intervene as trustees; however, the possibility of conflict-of-interest situations to which attention was drawn by the courts(1) has made them less anxious to assume such

(1) Ro Dorman Long and Co. (1934) 1 Ch. 635. In this case, the trustees were also bankers and creditors of the company.
undertakings. Other trust corporations generally operate as trustees, not infrequently separate trust companies formed by banks.

While the terms of the trust deed are controlling, in general the principles and rules of the law of trusts govern the relation between trustees and debenture-holders.

2. United States

The use of trust deeds or, as they are more commonly called, trust indentures, in connection with a bond issue is much more expanded in the United States than in England. This may also probably be due to the greater development there of trust companies and to the more frequent resort to this type of financing by corporations.

The practice of trust indentures is over a hundred years old. The first recorded case is that of the Morris Canal and Banking Company in 1830, in which a trust deed was executed to one Willink as an "agent and trustee of the several subscribers". It was a common practice in early times to appoint one or more individuals, often officers of the corporation, to act as trustees and to transfer to them title to the security. The reason for such a device was the impracticability of transferring the security to the numerous and scattered bondholders. Though called "trustees", such persons were little more than stakeholders. Their powers and duties were very limited and they were not held to the traditional responsibility of a fiduciary. In the course of time, with the growth in recourse to funded indebtedness and the inclusion of underwriters and
bankers in the operation, it became the custom to appoint banks and trust companies to act as trustees, not infrequently in order to secure the prestige of their presence in the eyes of the prospective investors.

Thus, the trustee becomes an important structural element in the mechanism by which a corporation issues a series of bonds. The bonds usually refer to the indenture, in which are spelled out in great detail the conditions of the corporate contract. The indenture becomes an elaborate legal instrument whose length is not infrequently over 60-70 pages. This growth is not accompanied by a similar development of judicial clarification of the numerous and complex clauses of the indenture. When confronted with the instrument, the court said that this use of the trust device was so new that little light could be gained from an analogy to other trusts and hold that the fiduciary responsibility peculiar of the family trust should attach to the relation by judicial implication. The effect of this case was to foster the inclusion in the indenture of exculpatory clauses relieving the trustees from responsibility except for "wilful misconduct and gross negligence".

The further judicial construction of trust indentures developed along two lines of thought which found correspondence also in opposing opinions of legal writers and interested parties. Such conflicting lines may be briefly indicated as the "contract" and the "trust" theories. According to the former, the duties of a trustee depend wholly upon the terms of the indenture and he is not held to be subject to the rules governing family trusts. In one of the cases in which this view is

represented the court expressly said: "The trustee under a corporate indenture ... has his rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement. His status is more that of a stakeholder than one of a trustee..."(1). And the trust companies further contend that the small fees they receive for their services do not justify the grave responsibility arising from a normal deed of trust. According to the latter theory, a corporate trustee should be held to the responsibility under the principles which govern a family trust. Decisions following this line of thought have unmistakably struck down exculpatory clauses(2).

In actual practice, it is admitted that the trustee under an indenture has little more than clerical duties, while it has broad discretionary powers to take action and determine policies on behalf of the bondholders who have no opportunity to determine the terms of the instrument and practically no voice in shaping the policies of their "representative". In particular, the indenture limits the rights of the individual bondholders who can act against the corporation only through the trustee. The study made by the Securities and Exchange Commission under the direction of the present Mr. Justice Douglas of the U.S. Supreme Court showed the divergent developments of the theory of trust indentures and the practice of the "so-called trustee" for bond-

(2) For a review of decisions see: 57 A.L.R. 468; 71 A.L.R. 1413.
holders\(^{(1)}\). It also showed the frequency with which trustees are in conflict-of-interest situations, being affiliated with the corporation or tied to it by other friendly relations. It pointed out the abuses caused by s.c. protective committees, formed by leading bondholders or bankers in order to dominate the meetings of the security holders and determine the decisions therein taken.

Largely as a result of the Douglas Report, the Federal Government adopted in 1939 the Trust Indenture Act, regulating and subjecting to the Security and Exchange Commission's control the relationship arising from a trust indenture.

The main provisions of the Act seek to assure the presence of a competent and independent trustee. At least one of the trustees ("the institutional trustee") must be an American corporation with capital and surplus of not less than $ 150,000. If the trustee has any conflicting interest, it must either resign or eliminate the conflicting interest or allow the bondholders to remove it: what constitutes a conflicting interest is specified by indicating nine relationships with the debtor or an underwriter. The trustee must provide the bondholders with an annual report describing the situation of the security and other matters and must notify them of all known defaults of principal of interest or sinking

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fund payments and of any other default. If a default occurs, the trustee shall thereafter exercise its defined powers with the same degree of care and skill which a prudent man would exercise in the conduct of his own affairs. The Act further requires that the corporation furnish the trustee annual reports similar to those required by the Security and Exchange Commission from corporations whose securities are listed on an exchange; the corporation must also periodically furnish a list of bondholders to be made available to bondholders at any time. Indentures must be filed with the Commission as a part of the registration statements when bonds are sold. In addition to other exemptions, it is provided that these requirements do not apply to bond issues whose total principal amount does not exceed $1,000,000 under the indenture.

Exculpatory clauses are invalidated and majority clauses are regulated so as not to indiscriminately deprive bondholders of their rights.

In conclusion, the Act regulates the trust relationship as it is created by the indenture, but leaves the general policing power to the bondholders. However, it is admitted that little is done in order to protect their interests at the time these interests are defined. The facts show that trust indentures often contain provisions which attempt to restrict the trustee's duties, since nobody effectively represents the interests of the bondholders at the time the instruments are drafted. Judicial recognition that the indenture trustee should be held to the principles which govern family trusts, sometimes even regardless of the language of the instrument, has not yet been fully attained.
TRUSTEES FOR BONDHOLDERS IN THE CIVIL LAW COUNTRIES

The institution of "trustees" for the representation and protection of bondholders is not unknown in some civil law countries.

Thus in Holland, following the British pattern, the practice developed of appointing a "trustee" to safeguard the common interests of bondholders, before and outside the scope of the law of May 13, 1934, governing meetings of security holders. Generally, trust companies chosen by the obligor undertake the duties of "trustee" by signing a contract with the former. In such instrument are defined the powers and duties of the "trustee".

In fact it seems that such rights and duties rest entirely on contractual grounds. The reproach is often made that "trustees" are too content to restrict their function to a merely passive one and not infrequently find themselves in conflict-of-interest situations.

In some Latin American states the dependency on the financial markets of the United States has caused a tendency to assimilate the existing institutions of representation of the bondholders to the Anglo-American trust. While performing similar functions, in reality such representatives - called fideicomisarios - are substantially governed by the rules of mandate(1).

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(1) See, e.g., the Argentinian Law 8875 of 1912.
A peculiar case is that of Israel. Section 198 sqq. of the Draft Companies Bill for the State of Israel of 1957 expressly provide for the appointment of trustees in whom may be vested title to the security in favour of the debenture-holders. The provision is obviously derived from English law. But the following Section 201 providing for a meeting of debenture-holders is avowedly based on the laws of Switzerland and Spain.

(1) Indeed, its law cannot be defined as a "civil law" system.
THE ORGANIZATION OF BONDHOLDERS IN THE CIVIL LAW COUNTRIES

1. General remarks

In the following pages there shall be briefly examined the distinguishing features of the legal organization of bondholders in some European countries. Such organization dates back in some cases to the second part of the last century, as, for example, the Austrian legislation providing for the appointment by the court of a special curator of the bondholders' interests. In other cases, e.g. in Spain and in Italy, it is quite recent and shows the traces of experiences made in other countries.

In general, the civil law organizations are characterized by the grouping of bondholders into a sort of association, whose organs are a general meeting and one or more common representatives. The latter have generally the status of revocable agents and are not attributed the powers and duties of fiduciaries. These organizations differ with regard to the nature of the attributions of their organs, to their character as a necessary element of the bond issue or not, to the extent of the intervention of courts, etc.

The elements on which these organizations are centered and the relations between the common representative and the bondholders shall be particularly enhanced in the following survey.
2. Germany

In Germany, the general regulation of the organization of bondholders is to be found in the Law of December 4, 1899 (Gesetz betreffend die gemeinsamen Rechte der Besitzer von Schuldverschreibungen) as amended by the Law of May 14, 1914, the Ordinance of September 24, 1932 and the Law of July 20, 1933. But provisions of a special nature are contained in other enactments and in the legislation of some Länder.

The Law organizes bondholders having common interests into a body whose decisions are binding on all the creditors of the same class. This body of bondholders is not granted legal personality nor any special legal form; it operates through a meeting and — though not necessarily — through a common representative (§ 1).

The limits within which the decisions of the meeting are valid are fixed by the Law. Thus, the meeting may not validly pass a decision imposing upon the bondholders obligations (§ 1), nor one by which their rights to the capital payment are waived (§ 12). Otherwise, the decisions taken by a stated majority are binding on all the class and the powers conferred by the Law to the meeting or to the representative may not be limited or avoided by the terms of the corporate contract (§ 20).

The meeting is called by the obligor. However, the representative, where there is one, or a group of bondholders representing 1/20th of the outstanding issue, may request that the meeting be called. Should their request not be complied with, the court (Amtsgericht) having territorial jurisdiction over the obligor is empowered to call the meeting.
Generally, decisions taken by the meeting are valid if passed by a simple majority vote calculated on the basis of the amount of the bonds represented ($10). However, decisions of a particular importance involving the limitation of the rights of the holders, such as, e.g., a reduction of the rate of interest or the concession of a delay, may only be taken when they are necessary to avoid the default or bankruptcy of the obligor. It is further provided that such decisions must be approved by a majority of at least 3/4 of the votes, corresponding to 1/2 or 2/3 of the nominal value of the outstanding bonds, depending on whether the total amount of the issue is below or above 12 million DM; if such an amount is between 12 and 16 million DM, the required majority must correspond to 8 million DM ($11).

Of great importance is the possibility for the meeting to appoint a representative, since obviously through him a more effective protection of the bondholders' rights can be achieved. The powers of the representative must be determined by the meeting at the time of his appointment. The meeting may also decide to confer upon him an exclusive power to enforce the rights of the holders. But he may not waive their rights unless especially authorized by a decision of the meeting taken in accordance with the requirements of §§ 11-13.

It is recognized by the leading doctrinal and judicial opinion that the representative is an agent (Vertreter) of the bondholders, in whose name he acts, and not a fiduciary (Treuhand). His independence is further guaranteed by provisions introduced in 1932 directed at preventing the possibility that he may find himself in a conflict-of-interest
situation, or at disqualifying him in such a case through the intervention of the court requested by a stated number of holders.

Of equally great importance is the provision of § 15, as amended in 1932, conferring upon the representative of a class of holders of bonds issued by a corporation or other juristic person the right to participate in the meetings of the obligor and to receive all the information which is given to the associates. The representative is also given a general right of inspection over the enterprise of the obligor, in order to be able to better protect the interests of the holders he represents and to suggest the decisions which should be taken by the meeting. It has been authoritatively said that such provision respects the principle of the non-intervention of the creditors in the management of the obligor enterprise. However, it should, be most important to ascertain what have been the practical effects of the rule.

The representative can be revoked at any time by the meeting, subject to the fulfillment of certain procedural requirements.

Briefly, it may be said that the German Law is characterized by the purpose of securing the bondholders a protection of their common interests, preventing the possibility that a group may unduly prevail upon another. The initiative of such protection is left to the bondholders themselves or to their representative, whose independence it is the aim of the Law to guarantee. A balanced and limited intervention of the courts is foreseen in order to strengthen the said protection.
3. Switzerland

The legal discipline of the organization of bondholders is contained in Art. 1157 to Art. 1186 of the Obligationenrecht.

Precedents of the present rules are to be found in special legislation enacted as early as 1874 (Bundesgesetz über die Verpfändung und Zwangsliquidation von Eisenbahnen of June 24, 1874). The legislator of 1881 omitted to include in the Obligationenrecht any provision on bond issues. During the first world war, making the use of the powers granted to it at the beginning of hostilities, the Federal Council issued an Ordinance organizing bondholders in a community (Verordnung betreffend die Gläubigergemeinschaft bei Anleihensobligationen of February 20, 1918). This ordinance, based on a projet prepared by Prof. Eugen Huber, followed substantially the German pattern. It was successively amended, and new special legislation was enacted later on. At the time of the revision of the Obligationenrecht in 1936, a new projet prepared by the Federal Council's member Hoffmann was substantially adopted, but its provisions were not given effect. After the second world war a Federal Law was passed and its provisions became part of the Obligationenrecht (Bundesgesetz betreffend Abänderung der Vorschriften des Obligationenrechts über die Gläubigergemeinschaft bei Anleihensobligationen of April 1, 1949). An Ordinance of November 9, 1949 governs the procedure in the meetings of the community (Verordnung über die Gläubigergemeinschaft bei Anleihensobligationen).
Bondholders are organized **one legis** in a community without legal personality, whose decisions are binding on the whole class. If several issues are made, the holders of each issue constitute a separate community (Art. 1157).

Organs of the community are the meeting and one or more representatives (**Vertreter**), if any are appointed by the community or under the terms of the bond issue (Art. 1158). The powers conferred by the law to the meeting or to the representative may not be limited or avoided by the terms of the corporate contract nor by any agreement entered between the obligor and the holders (Art. 1186).

The decisions taken by the meeting are generally valid if passed by a majority calculated on the basis of the nominal amount of the bonds represented (Art. 1181). But all decisions involving a limitation of the rights of bondholders or imposing upon them obligations require a majority of at least 2/3 of the outstanding bonds (Art. 1170. But **cfr. Art. 1173**). Their validity is also subject to judicial control (Art. 1176-1179). Whenever a decision is validly taken by the meeting, the individual holders may not enforce their rights autonomously: the community is granted the powers to protect the common interests of the bondholders and to take any measure required under the circumstances (Art. 1164).

The meeting is called by the obligor, generally upon written request of the representative or of a group of holders representing at least 1/20 of the outstanding capital. If the request is not complied with, the court may authorize the applicant to call the meeting (Art. 1165-1159).
The representative's powers are determined by the law, the terms of the corporate contract or the meeting. As said above, he has the right to request the obligor to call the meeting; he carries out any decision therein taken and has a general power of representation of the community. If he is given the power to enforce the rights of the holders, the latter may not take any individual action (Art. 1159). He can ask the obligor to furnish him all relevant information. If the obligor is a company organized under the form of an Aktiengesellschaft, Kommanditaktiengesellschaft, Gesellschaft mit beschränkter Haftung or Genossenschaft, he is given the right to participate with a consultative vote in the meetings of the organs of the obligor which concern the interests of the holders (Art. 1160). He may be revoked at any time by a vote of the meeting representing at least 1/2 of the outstanding capital; the same majority is required to modify the powers granted to him under the terms of the bond issue (Art. 1180).

If the obligor becomes bankrupt, the representative - or one especially appointed for the purpose - is empowered to protect the holders' rights in the bankruptcy proceedings (Art. 1183).

4. France

A general reform of the law governing the organization of bondholders was introduced by the Decree-Law of October 30, 1935.

The Decree-Law organizes the bondholders of the same issue into a mass. The group is given legal personality,
essentially for the purpose of being represented in judicial proceedings (Art. 10). The mass is formed *ope logis*, notwithstanding any stipulation to the contrary (Art. 11).

Organs of the mass are the general meeting and the common representative, where one is appointed. The meeting, in the case of domestic companies, can be called by the obligor by the representative or upon request by a group of holders representing 1/30 of the amount of the bonds issued or introduced in France or 1/20 of the amount of the outstanding bonds (Art. 12). Its decisions are binding on all the holders belonging to the mass (Art. 18).

The powers of the meeting are defined by the Decree-Law. A distinction is generally made between ordinary and extraordinary decisions. Among the former are those affecting the protection of the holders (Art. 19). A quorum of 1/3 is required at the first call and the decisions must be approved by an absolute majority of the members who are present or represented (Art. 22, 23). Among the latter are decisions modifying the rights of holders. A quorum of 3/4 is required at the first call, one of 1/2 at the second and one of 1/4 at the third; the decisions must be approved by a majority of 2/3 (Art. 22, 23). Extraordinary decisions are also subject to court's approval (*homologation*) (Art. 24). A distinctive and important feature of this control is the fact that the court passes judgment not only upon the formal validity of the decisions, but also upon their merits and convenience. It is recognized that the distinction between ordinary and extraordinary decisions and the enumeration of the Decree-Law is unsatisfactory and a source of controversies.
Among other things, it is also provided that a meeting may not increase the obligations of the holders nor discriminate among holders of the same mass. The conversion of bonds into shares is also forbidden (Art. 21).

The representative - generally more than one - is normally appointed by the meeting. His status is that of a revocable agent (mandataire révocable). The appointment is subject to the court's approval. The Decree-Law further establishes the qualifications of the representative in order to guarantee that he be independent from the obligor (Art. 25, 26).

His powers are determined by the meeting. He can call the meeting and has the power to execute its decisions. He also has a general power to take all action (actes de gestion) required in the common interest of the holders (Art. 29). He has an exclusive right to bring and to defend an action in the interest of the community of holders (Art. 30). He represents the mass in case of bankruptcy or receivership of the obligor (Art. 31).

5. Belgium

The Law of May 25, 1913 regulates the organization of bondholders. Its provisions now form part of Title IX of Book I of the Code de Commerce.

Bondholders are organized into a mass, whose organ is the general meeting. But such a meeting is not a permanent element in the life of the corporation, nor does it have sufficient powers to achieve an effective protection
of the holders. Indeed, the creation by the Law of 1913 of bondholders' meetings was essentially done in the interest of the obligor. This character is reflected in several provisions of the law.

The meeting can be called by the board of directors or by the auditors or upon request made by a group of bondholders representing 1/5 of the outstanding securities (Art. 91). It has the power to accept modifications of the security both in the interest of and against the holders; to grant the obligor one or more delays, to assent to a reduction of the interest rate or to a modification of the conditions of payment; to take protective measures in the common interest; to appoint one or more agents (mandataires) for the execution of its decisions and to represent the mass of holders; to accept the replacement of bonds with shares of the obligor (Art. 92). The last attribution is particularly grave. At the first call a quorum of 1/2 of the outstanding issue is required; but at the second call a vote is valid independently of any quorum. A decision is valid only if adopted by a majority of 3/4 of the votes representing at least 1/3 of the outstanding bonds. If the last condition is not met, court's approval (homologation) is required (Art. 94). It should be noted that the meeting has no right of initiative, but is called to vote on proposals introduced by the directors of the obligor corporation.
6. Italy

The legal organization of bondholders has been introduced by the 1942 Civil Code, which developed into a general system a provision of special and limited application contained in the Law of May 24, 1903, n. 197, Art. 25 sqq., relating to receiverships.

Bondholders are organized into a group whose organs are the meeting and the common representative.

The meeting is called by the administrators of the corporation or by the common representative, when they deem it necessary or upon request of a group of holders representing 1/20 of the outstanding bonds. Among its powers are those to appoint or revoke the common representative; to take all decisions regarding the common interests of bondholders; to pass upon the modification of the bond issue. The last mentioned one constitutes the most important attribution of the meeting. In this case, a majority of holders representing one half of the outstanding bonds is required also at the second call; the other decisions of the meeting are governed by the rules relating to the extraordinary meetings of shareholders (Art. 2415).

The decisions taken by the meeting are binding on all bondholders. But individual holders have the right to challenge the validity of decisions which are not taken in conformity with the law, bringing an action before the competent tribunal; the common representative is a necessary party to the action (Art. 2416).

Individual bondholders may exercise any action in their own interest, provided it does not conflict with decisions validly taken by the meeting (Art. 2419).
The common representative is a necessary organ of the holders' organisations. He is appointed by the meeting; otherwise, the President of the Tribunal, upon request of one or more bondholders or of the administrators, appoints him. The law further requires that he be an independent person and establishes conditions for his qualification (Art. 2417).

The powers of the representative are fixed by the law. His status is that of an agent of the holders; he has the duty to carry out the decisions of the meeting and to protect the common interests of the bondholders, whom he represents in all judicial and bankruptcy proceedings. He has the right to be present at the meeting of the shareholders (Art. 2418).

7. Spain

A very elaborate regulation of the organization of bondholders is contained in the Spanish corporation law (Ley de régimen jurídico de las sociedades anónimas of July 17, 1951).

The distinctive feature thereof is the requirement that a "representative" of the bondholders be appointed as a condition of the bond issue in order to protect their interests at the time the terms of the issue are determined. The representative (comisario) together with the meeting constitutes a necessary element of the organization; the group is constituted under a form resembling that of an association (sindicato) (Art. 113). He is the pivot around which is constructed the discipline given by the law.
The *comisario* is appointed by the corporation. His powers are defined by the terms of the issue or by the meeting of the holders. The law attributes to him the legal representation of the *sindicato*; he is the organ of liaison between the corporation and the *sindicato* and has the right to be present at the meetings of the former and to receive all the information he requires in the interest of the holders. In general, he has the power and duty to protect the common interests of the bondholders (Art. 118). The law does not establish any conditions of independence, though some may be derived by way of implication from the spirit of the law. If the issue is guaranteed by a security, in case of default of the corporation in the payment of interests lasting longer than six months, he may levy execution upon the security, subject to the approval by the meeting of bondholders (Art. 120). Much greater powers he has in the case of an unsecured issue. Then, he has the right to inspect the corporate books and to be present at the meetings of the board of directors. If the default lasts longer than six months, he may propose to the board to replace one or more directors or, in case his request is not complied with, to call the shareholders' meeting (Art. 119). The law does not define his responsibility, which can be determined by analogy to that of the directors.

The *sindicato* is constituted among the holders as soon as they receive the instruments (Art. 121). Subscribing the instruments implies for the holders a ratification of the terms of the issue and their participation in the *sindicato* (Art. 117).
The obligor corporation must sustain the expenses of the **sindicato**, which may not exceed the amount of 2% of the yearly interests of the issue (Art. 121).

The other organ of the **sindicato** is the bondholders' meeting. It is called by the directors of the corporation or by the **comisario**. The latter must call it upon request by bondholders representing at least 1/20 of the outstanding bonds. The first meeting confirms the first **comisario** or appoints a new one. If the internal regulation of the **sindicato** has not been established by the terms of the issue, it adopts it (Art. 125). The powers of the meeting are all those necessary to protect the interests of the holders; it appoints or revokes the **comisario**, authorizes the exercise of judicial actions by the latter. It has the power to agree to modifications of the security of the issue (Art. 122). At the first call, a quorum of 2/3 of the outstanding bonds is required and decisions must be passed by an absolute majority; at the second call, however, no quorum is required and the absolute majority of the votes is sufficient. The decisions of the meeting are binding on all the holders. These may, however, challenge the validity of any decision subject to the provisions regulating the validity of the decisions of the shareholders' meeting (Art. 124). Individual holders may bring an action separately only when it does not conflict with the decisions of the meeting or the powers of the **sindicato** (Art. 123).

Briefly, the interesting aspects of the Spanish law are the presence of a representative of the holders from the beginning, that is to say before the issue is floated. The powers given to the **comisario**, especially with regard to his inter-
vention in the corporate life, are very extensive. On the other hand, the determination of his responsibility, the conditions of his independence and, in general, the powers of the sindicato are not spelled out with sufficient detail, as in some of the other legislations which have been examined.
CONCLUSIONS

The organization of bondholders - of which a sketchy outline was given in the preceding pages - is but a part of the larger and more complex problem of the protection of bondholders. An investigation of the actual experience relating to the legal organizations of bondholders would require a much more thorough and extended research than it has been possible to do in drafting this Report. It is here submitted that such an investigation could not be profitably conducted unless within the framework of the general problem of the protection of bondholders, namely in connection with, and on the basis of, a study of the substantive rules and practices governing bond issues and the rights of bondholders, also regarding their participation in, or control of, the management of the corporation.

However, for the purpose of concluding this interlocutory Report, the following may be said:

The peculiar differences between the common law indenture trustee and the civil law organizations of bondholders derive from the application in the former case of the separation of titles and of the fiduciary responsibility characteristic of the trust. Besides this, it may be important to note other differences. In England and more notably in the United States (for many purposes it may be useful or even necessary to distinguish the British from the American experience), trustees for bondholders were created not for the specific purpose of protecting the corporation's creditors, but as an element in the mechanics of the bond issue. Thus, originally they were officers of the company; even now, trustees are appointed by the
obligor corporation. While they were said to be representative of the bondholders, their presence was sought for the purpose of ensuring a successful floating of the issue.

This feature is reflected in the development of the rules governing the powers and duties of the trustees and is the reason for the several holdings – particularly in the United States – that they are nothing more than mere agents or stakeholders, or representatives at the same time of the obligor and the bondholders. This feature is also at the root of the corrective legislation enacted in the United States.

Briefly, it may perhaps be said that the most distinctive element of the indenture trustee – if considered from the viewpoint of the organization of bondholders and not from that of the legal techniques employed – is the trilateral structure which it imparts to the relation arising from a bond issue: 1) obligor, 2) trustee (trust company), 3) bondholders. In the United States, particularly, until the courts or the legislature intervened in order to condemn conflict-of-interest situations, sometimes the corporate trustee absolved functions which were not too dissimilar from those of a financial syndicate constituted for the purpose of floating the issue.

On the Continent, it may be said that the legal organizations of bondholders were created for the protection of the bond issue. Generally, such protection consisted in the protection of bondholders themselves; in a few instances, legislation was enacted in times of crisis in order to provide protection for the obligor. But the resulting organization retains the character of one exclusively created for the protection of the bond issue.
This reporter shall not take any stand on the problem of the possibility or desirability of introducing into the civil law legislations the principle of trust in connection with the organization of bondholders. He feels that only a thorough investigation as the one suggested at the beginning of this section could furnish the basis for an answer. As a hypothesis, such an investigation might also prove that a more efficient protection of bondholders is attained under some continental system than under the common law trust.

He may, however, make one observation. A larger attribution of powers to the bondholders' representative as would derive from giving him the status of a trustee would by necessity be followed by the determination of stricter criteria of responsibility. It is doubtful that this heavier responsibility would or could be undertaken by individual trustees. The introduction of corporate trustees - banks or trust companies - would require, at least in some countries, a modification of the present structure of the banking system and amendments of the legislation governing the functions of banks and the control thereof.
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