"Companies Incorporated in Foreign Countries- Argentine System of International Civil Law – Theories of Effective Headquarters and the Constitution of Companies".-

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Abstract

The aim of this paper is to analyze the regulations of the Argentine autonomous regime in connection with companies incorporated in foreign countries. We will illustrate how the theories of the constitution of companies and effective headquarters are reflected in the National Laws in force, given that the theory of the effective headquarters is an exception in the light of some of the existing situations.

Key Words: companies incorporated in foreign countries – Argentine Republic Regime – International Civil Law applicable to Companies

A)- Introduction

1. In order to assess the issue raised before, it is necessary to analyze the current legislation in the Argentine Republic regarding legal entities and companies incorporated in foreign countries. The regulatory framework is composed of the provisions contained in our independent source of law (Act 19550, hereinafter called CL; the Civil Code, the Code of Commerce; Act 19836 on Foundations, etc.), conventional sources with international treaties that are at a higher level in terms of hierarchy compared with the rule of law of Art. 75, paragraph 22 et seq. and cc of the National Constitution (specially the 1889 and 1940 Montevideo Treaties and ICICLII), and finally, the prevailing judicial criterion. We have to bear in mind that, beyond the adjustments made by the special legislation for each particular case, Art. 20 of the National Constitution must be first recognized; which establishes that [1]"*foreigners enjoy in the territory of the Nation the same civil rights as citizens.*" Although the analysis that follows has not been organized according to the legislation but in relation with the subjects under consideration (i.e. capacity and existence, isolated acts or habitual acts, central administration or effective headquarters, etc.) it is important to point out that the application of such regulations complies with the legal pyramid. Therefore, when dealing with international issues, the existence of agreements between the countries must be considered in the first place (in such cases the jurisprudence has established that the provisions of a later treaty will prevail over an earlier treaty; the application of ICICLII will prevail over the Montevideo Treaties), and in cases where there is no international agreement, the provisions of the autonomous regime of International Civil Law of the country will prevail.

B).- Corpus

1).- Reception of the Theory of Constitution of Companies

2. Firstly, it is important to highlight that the autonomous regime in Argentina is based on the theory of constitution of companies, in compliance with the regulations that will be analyzed below, but with the exception of companies incorporated in foreign countries which have their headquarters in Argentina or its principal activity is carried out there.

[1] Art. 20 NC

In such cases, the theory of effective headquarters applies, and thus, they have to comply with all the requirements imposed by the Argentine Law as regards constitution, reform and control. Consequently, given the casuistry, the system contains dual criteria, or rather mixed criteria, of theories of the constitution of companies and effective headquarters; although as a general rule and in the spirit of the regulations, it is inclined to reinforce the former.

3. Accordingly, it would be worthwhile analyzing the articles contained in section XV of the CL referring to companies incorporated in foreign countries, as well as pointing out their correlation with the existing provisions in the international treaties mentioned. We can say that the Argentine legislation is based on the theory of constitution as the general criterion to determine the "Lex societatis", which arises from Article 118 of the CL, which reads as follows, [2]*"Companies incorporated in foreign countries are governed, in terms of form and substance, by the Laws of the place of incorporation…"* Therefore, the theory that defines the form and substance of companies incorporated in foreign countries, on which the national legislation is based, has been described. There is doctrinal consensus regarding the interpretation of this regulation, according to Dr. Horacio Roitman, who commented on the article referred to, and claims that [3]*"our Corporate Law adopted the criterion of "incorporation", since it stipulates an indirect regulation in the first paragraph of Article 118 CL as a connecting point the place of incorporation to determine the Law that governs the form and substance of companies incorporated in foreign countries. The legal definition of "constitution" needs to be extracted from the legislation of the place of incorporation, since the legislation that governs is the one that defines. The Laws of the place of incorporation are the ones which belong to the jurisdiction where the company fulfilled the necessary formalities for its constitution and registration, which granted it legal entity, which does not mean the place where the constituent act was carried out. It may be the case that the constituent act is celebrated in country A and incorporated and registered in country B, which grants the company legal entity."*

In addition, the 1889 Montevideo Treaty on International Civil Law, applicable in Argentina depending on the case, reaffirms this position in Article No. 4, which stipulates that, [4]*"The substance and capacity of private legal entities are governed by the Laws of the country which have granted them legal status. Such character enables them to enjoy all the corresponding rights and obligations, independently of the place where the company was settled" and the 1940 Montevideo Treaty of Civil Law in the same article establishes that* [5]*"The substance and capacity of private legal entities are governed by the Laws of the country where they have their legal address. Such character enables them to enjoy all the corresponding rights and obligations, independently of the place where the company was settled. However, for acts occurring during the performance of the special purposes for which they were constituted, they will be subjected to the legislation of the State where such acts are carried out. The same rule applies to civil companies."* This was also reinforced by the **Second Inter-American Specialized Conference on International Civil Law (ICICL II)** regarding the "Inter-American Convention – Conflicting Laws – Business Companies", since it establishes in Articles 2 and 3 that [6]*"the substance, capacity, functioning and dissolution of companies are governed by the **Laws of the place of Constitution**. What is meant by the "Laws of the place of Constitution" is the legislation of the country where the entities comply with the necessary requirements for their creation of companies"* and that [7]*"companies which are duly constituted in one state will enjoy the same rights in the other states. The recognition of full legal rights does not imply the capacity of the state to require evidence of the substance of companies in compliance with the laws of the place of Constitution. The capacity recognized to companies incorporated in foreign countries may not under any circumstances be greater than the rights granted by the Laws of that state to the companies incorporated there."*

4. Furthermore, Article 118 CL demands different prior requirements for companies incorporated in foreign countries depending on whether their specific purposes are habitual or isolated.

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2 Art. 118 CL.-

3 "Ley de Sociedades Comerciales comentada y anotada" (Annotated Corporate Law)– Dr. Horacio Roitman – " La Ley" Publishing House, Year 2006, page 770 Volume II annex IV.-

4 Art. 4 1889 Montevideo Treaty on International Civil Law.-

5 Art. 4 1940 Montevideo Treaty on Civil Law.-

6 Art. 2 ICICL II.-

7 Art. 3 ICICL II.-

The applicable regime and necessary requirements for the companies to operate in the Argentine territory will be determined accordingly. The provisions of this Law also state that as regards ***"Isolated Acts",*** the companies incorporated in foreign countries [8] "*are authorized to perform isolated acts and to be party to judicial proceedings."* According to this, the legislator based on the theory of constitution discussed above has granted foreign companies with the capacity to perform isolated acts in Argentina as well as with procedural status to be party to legal proceedings. That is to say that foreign companies are recognized as legal entities (in their substance and form) if such rights have been granted by the Laws of the place of Constitution, and therefore, are authorized to perform isolated acts and to be party to judicial proceedings in Argentina. This has been reaffirmed by ruling of the Supreme Court of Justice of the Nation in the Case [9]"*Potosí vs. Coccaro"* of 31/07/1963. In addition to this, as currently in practice, prior to perform this kind of acts, the companies must register a Legal Representative at the Public Registry of Commerce and establish a legal address, which does not imply setting a location there.

On the other hand, this further tightens the rules in case companies perform habitual actions in Argentina. In this respect, it establishes that [10]"in order to exercise habitual actions, set up branches or appoint a resident representative companies must: 1) demonstrate that the entity exists in the venue where it was organized. 2) select a domicile of choice in Argentina, with the corresponding registration and publication as required by the Law for the companies that are incorporated in Argentina; 3) demonstrate the decision of the entity to create the agency in Argentina and appoint the person who will be responsible for the agency. In the case of a branch, the capital allocated shall also be determined, if applicable under special laws." As we can observe here, the determination of the company's substance and form in this case is still governed by the theory of constitution and accordingly, by the regulations of the place where the company was constituted. Nonetheless, since habitual acts are given more weight than isolated acts within the country, a domicile of choice in Argentina must be selected, a permanent representative must be appointed and a justification provided. These requirements must be submitted at the corresponding jurisdictional or controlling agency depending on the province. In addition, this should be published and registered at the Public Registry of Commerce. Finally, references are made to the capital allocated to the branch, if stipulated by special laws (as in the case of financial institutions, insurance companies, etc.) This position correlates with the 1889 and 1940 Montevideo Treaties on Civil Law (as well as in Art. 8 of the 1940 Montevideo Treaty on Commercial Law) in articles 4 respectively, which involve in both cases delegating the regulation of such acts to the local legislation. Thus, they both claim that [11]"*when foreign companies exercise acts which correspond to the special purposes of their constitution, such acts shall be subject to the provisions of the National Laws of the country where such acts are performed*". On the same lines, the ICICL II provides in Art. 4 that [12]"*when foreign companies exercise directly or indirectly acts which correspond to the special purposes of their constitution, they shall be governed by the laws of the country where such actions are performed. The same law applies to the control that a company which carries out business in certain country has over companies incorporated in other countries."*

5. That is moreover increased by the DIPr autonomous source, referring to foreign foundations described in Art. 7 of Act No. 19836, which stipulates that [13]"*the foundations duly constituted in foreign countries can operate in the national territory if they submit to the controlling authority (IGJ) the corresponding authorization, statutes and documentation. They must also accredit the names of the representatives appointed, their capacity and the requirements specified in Art. 9. Such representation shall remain valid until revocation of mandate is submitted and a new representative is appointed. Said foundations shall not operate until they have been authorized by the controlling body*. Local assets shall ensure compliance with the obligations they have entered into in Argentina on a preferential basis". That is to say that, in the same case as with foreign companies, the legal status and capacity of foreign foundations are recognized if they have submitted the necessary documentation to verify this to the controlling body.

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8 Art. 118 CL.-

9 SCJN decree in the Case "Potosí vs. Coccaro" of 31/07/1963 (www.csjn.gov.ar).-

10 Art. 118 CL.-

11 Arts. 4. 1889, 1940 Montevideo Treaties on Civil Law and Art. 8. 1940 Montevideo Treaty on Commercial Law.-

12 Art. 4. ICICL II.-

13 Art. 7. Act No. 19.836.-

6. In addition, it is important to highlight that in cases where the nature of the company incorporated in a foreign country, which operates in Argentina is unknown, the most rigorous regulations, which apply to public limited companies, will apply. Article 119 CL stipulates that [14] "Article 118 shall apply to companies incorporated in foreign countries whose nature is not defined by the Argentine Laws. The judge in charge of registration will determine the requirements companies must fulfill in each case, with the **utmost rigor** provided by this Law".

7. Finally, the CL is also based on the Theory of Constitution in the case of foreign companies willing to set up a company in Argentina. Accordingly, Art. 123 provides that [15]"*in order to set up a company in Argentina, foreign companies must accredit previously before the judge in charge of the Registry that they have been incorporated in compliance with the Laws of their respective countries and register their social contract, reforms and documentation, as well as the documentation of their legal representatives, at the Public Registry of Commerce and at the National Registry of Joint-stock Companies, as is the case."*

- Jurisprudence

I).- [16] "*The incapacity of Art. 30 of Act 19,550 (ADLA, XXXII-B, 1760), does not apply to public limited companies or limited joint-stock companies under foreign law. Thus a public limited company incorporated in Switzerland and governed by Swiss law (Art. 118, par. 1, Act 19,500), is not governed regarding its capacity to take part in an Argentinian limited liability company by any other law than that of its country of incorporation and not by Argentinian law."*-

II).- [17] *"Act 19,500 (ADLA, XXXII-B, 1760), does not forbid a limited liability company governed by Argentinian law to be owned by a public limited company subject to foreign law"* (ditto above). Note on ruling: For purposes of understanding the extract quoted above, it is worth noting that in Argentinian legislation public limited companies and limited joint-stock companies may only form part of joint stock companies (Art. 30 CL) and, hence the importance of this quotation, as the company's capacity is governed by the law of its incorporation to such an extent that a foreign limited liability company may be in partnership with a local public limited company if it is so authorized pursuant to its right.-

III).- [18] *"In agreement with the injured party. Indeed, the inscription that is alluded to places the actor injunctively in the first part of Art. 118 of the corporate law, in that it stipulates that its existence and form are determined by the "**laws of its place of incorporation**". Consequently, consistent with the hospitality criterion complying with this prevision, **the company referred to should be recognized as a legal entity, with sufficient capacity to be party to judicial proceedings** (this Hall in court order «Deliceland S.A. c/Cadehsur S.A. s/sumario», of 11/04/03; ditto, «Salt Card S.A. c/ Probursa Sociedad de Bolsa S.A. s/ ordinario» of 24/06/05)".*-

IV).- [19] *"The imposition of restrictions to foreign companies that intend to take part in a tender for public services – case in point, for garbage collection in the Municipality of Avellaneda – is in keeping with the constitutional principle of reasonableness if it is in proportion to the desired end – that is, the protection of the common good and national capitals – and does not undermine the principle of equality before the law and the rights of foreigners – Arts. 16 and 20. National Constitution – (from Dr. Frondizi's vote)".*-

V).- [20] *"the resolution that overrules the inscription of a statutory reform of a company incorporated in Argentina is in keeling with the law if the major shareholder, shareholding company, has not registered its statutes in the country's registry, whereas the contrary would mean breaching the provisions of Art. 123. Art. 123 comprises both the case of foundations and that of participation in an incorporated company.*

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14 Art. 119 LSC.-

15 Art. 123 LSC.-

16 Court order: Inval, S. R. L – Court of Appeals for Commercial Matters, hall C - LA LEY, 1982-D, 500, with a note by Manuel E. Malbrán - ED, 98-478.-

17 Court order: Inval, S. R. L – Court of Appeals for Commercial Matters, hall C - LA LEY, 1982-D, 500, with a note by Manuel E. Malbrán - ED, 98-478.-

18 Court order: OCTAVE-1 FUND LTD C/ PARQUE INDUSTRIAL AGUA PROFUNDA S.A. S/ Precautionary Measure - CNACom. – Hall C - File No. 20871.06 - Court No. 20 - Secretariat No. 40

19 Fomento de Construcciones y Contratas S.A. c. Municipality of Avellaneda - La Plata Appeals Court, hall II– 08/05/2001.-

20 CNCom., "SAAB Scania Argentina SA", 20/07/1978.-

The term incorporate used by the article cited comprises both "form a part of" and participate in an existing company in the republic and the truth is that, analyzing the legal nature of the company contract in broad terms, a company is incorporated both by whoever originally enters into partnership with another to found a company, and by whoever becomes associated with other persons already partners of an existing company."-

VI).- [21] *"The text of the general and special power of attorney brought by the plaintiff has acquired authenticity with the Apostille (the 1961 Hague Convention– Act* 23458), with certification of the document signee's signature and position. *From this view, a notary certification entered into abroad should not require deeds to be shown other than those deemed sufficient for the purpose by the laws of the land, where the notary's intervention creates the presumption of* "iuris tantum" *of its legality and compliance with the laws of the land, and this suffices to accredit the representative's legal status, pursuant to the Supreme Court's doctrine."-*

2).- Reception of the Theory of Effective Headquarters.-

8. Once the general criterion inspiring Arts. 118 and 123 CL, has been established, and the relevant distinctions made regarding the quality or character of the actions the foreign company intends to perform thus varying the applicable regime, the presumption should be dealt with that it is no longer lex societatis of the constitution and, on the contrary, the social entity's life is governed by the law of its commercial domicile, effective headquarters or the location of its headquarters.

In keeping with this, the aforementioned presumption is regulated by the different normative bodies mentioned but no substantial differences exist. As has already been mentioned, Art. 124 CL prescribes that [22] *"A company incorporated abroad that has its headquarters in the Republic or whose main objective is intended to be developed therein,* ***shall be considered a local company*** *for the purposes of compliance with the formalities of the Constitution or its reform and operational control."* The drafting of this norm clearly shows the inclination held in this presumption by the theory of effective headquarters. Thus, if the foreign company has its headquarters in the Republic or in the event that its main objective is intended to be developed there, it shall be considered a local company for the purposes of compliance with the formalities of the Constitution, reform and the operational control.

Dr. Horacio Roitman states in his comments on this norm that [23] *"There is no agreement on its legal nature. For some the purpose of the norm is to prevent fraud against the law, wherefore application of the norm requires, besides proof of the objective fact of the headquarters or main exploitation in the country, the existence of a subjective element consisting in fraudulent intent to alter the point of connection between international Private law and the exclusive aim of eluding the normally competent law…". "For others it is a police norm of our international private law, by virtue of which the vigorous and exclusive application of Argentinian law is defended, drawing away from the* ***general principal of the place of inc. in art 118 par. 1.*** *Consequently for the application of the norm it suffices to verify either of the two objective requisites, regardless of any subjective content of the parties' conduct. If it is understood that it is a police norm that protects our pubic order, it may be applied ex officio where Argentine law and not the company's place of incorporation is the basis which qualifies the terms headquarters and main object."*

8. Likewise, the 1940 Montevideo Treaty on Commercial Law does not stray from this criterion, whose articles seven and eight lay down that [24] ***"The content of the company contract; the legal relations between partners; between these and the company; and between the company and third parties, are governed by the law of the State where the company has its commercial domicile";*** *and that "Merchant companies shall be governed by the* ***laws of the State of its commercial domicile****; these shall be recognized with full rights in other contracting States and they shall be considered capable of performing acts of commerce and to appear in court."* It is clear from this that beyond the different ways of drafting them, the norms in question clarify that the law that governs a company's life (lex societatis) in this assumption is that of the country in which the company has its commercial domicile.

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21 *Rulings 48: 98 and 194: 232 cited en CNCP, Hall II, case No. 9046, reg.: 12.068, "Web Computación s/ recurso de casación, rta.:7/7/08".* "PC H. y L. R. C." – CNCRIM Y CORREC – 10/02/2010.-

22 Art. 124 CL.-

23 "Ley de Sociedades Comerciales comentada y anotada" – Dr. Horacio Roitman – ed. La Ley Ano 2006, pages 877; 878 and 879.-

24 Art. 7 Montivedeo Treaty of Commercial Law of 1940.-

9. Thus the theory of effective headquarters is materialized if we bear in mind the concept of commercial domicile established by this agreement, which in its third article defines that [25] "*Commercial domicile is the **place where the tradesman or company has the main headquarters of their business.** If, however, they incorporate establishments, branches or agencies in other States, their domiciles are considered to be in the place where they operate, and subject to the jurisdiction of the local authorities, with regard to the operations practiced there."* An identical criterion is materialized in the **1889 Treaty on Commercial Law** which stipulates in its fourth article that [26] "*The company contract is governed in both form and regarding the legal relations among partners, and between the company and third parties, by the law of the country in which it has its **commercial domicile**"* (criterion on which, in the writer's understanding, the Supreme Court of the Nation bases its grounding in court order 24/02/09, case Mihanovich, Ricardo L. regarding file for bankruptcy of Compañía General de Negocios). Later, and in keeping with this, the **CIDIP II** assumes in its fifth article that "*companies incorporated in one State that intend to establish the effective headquarters of their central administration in another State, may be obliged to comply with the requirements laid down in the latter's legislation."*

This question is not abstract and has been echoed in practice as expressed in the quotations set forth below, among which the sentences are ruled by the Supreme Court of Justice of Argentina in which the bankruptcies of both foreign companies were requested in Argentinian courts on the basis that they developed their activities in the country.

- Jurisprudence

I).- [27] *"art. 118 CL should be read and interpreted as an integrated whole with art. 124 CL which considers the problem of companies incorporated "in fraudem legis". This is so because the first part of art. 118 CL recognizes the existence of a foreign company, whereas art. 124 CL precisely does not do so – strictly speaking it does not recognize it as a foreign company – with regard to the assumption it legislates."* It also supports the ruling that "*in the assumptions considered in art. 124 CL, the Argentine Republic does not recognize the existence of the entity as a foreign company, it considers the entity as a local company and the law of the place of incorporation becomes inapplicable."-*

II).- [28] "*…given that the requested party's headquarters and its main activity were in the Argentine Republic, the case comes under the application of art. 124 of Act 19,550 which, in the face of fraud against the law, imposes that the foreign company shall be considered a local company."-*

III).- [29] "*individualization of the norms of domestic law that are applicable at sub examine require the consideration of similar factual and legal extremes, which were equally disregarded by the a quo. Indeed, art. 118 of Act 19,550 regulates the recognition of the foreign company, inasmuch as it adapts to the laws of the place of its incorporation, and **art. 124 of the same order – whose application the appellants request – individualizes the assumption in which the company incorporated abroad is not recognized as such, but rather as a local company. Such an assumption is configured when the headquarters or the company's main objective are located on national territory**, a hypothesis that imposes the application of the national legal order with the scope laid down in the norm itself. Consequently, the decision regarding the legal treatment which, in domestic law, corresponds to a company whose bankruptcy is requested is inseparably joined to the conclusion at which one arrives regarding the place in which it develops its main activity."-*

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25 Art. 3 Montivedeo Treaty of Commercial Law of 1940.-

26 Art. 4 Treaty of Commercial Law of 1889.-

27 Boskoop SA s/ bankruptcy s/appellation incident - CNCOM – HALL A - 18/04/2006.-

28 CSJN (Supreme Court), 24/02/09, Mihanovich, Ricardo L. case regarding request for bankruptcy of Compañía General de Negocios.-

29 CSJN (Supreme Court), 24/02/09, Mihanovich, Ricardo L. case regarding request for bankruptcy of Compañía General de Negocios.-

IV).- [30] *"In the event that the only activity reported about the foreign company is that it is the proprietor of a number of shares that allow it to control an Arg. Company, there seems to be no doubt that the situation is subsumable within the assumption of fact of art 124, whereby the regulations provided for national entities should be applied to the company affected, more so when the offshore involved has no other activity in the country in which it was incorporated or in third party countries, but rather acts exclusively in Argentina, which can be verified by means of the simple examination of its balance sheets."-*

C).- Conclusions

10. Following this criterion of analysis expressed at the outset and according to everything set forth, it is possible to rule that the Argentine Republic subscribes to a greater extent to the theory of the constitution after its regulations and, as an exception, receives the theory of effective headquarters in article 124 CL backed also by the international conventions cited. All the analysis is based on the relationship existing between articles 118 and 124 CL in order to determine the situation of a foreign company, since, as the second norm is applicable, the possibility of applying the first is automatically excluded. This does not imply that in practice in order to avoid perpetration of "fraud against the national law" or by application of the precept of a police norm for the protection of public order, application of Art. 124 CL is infrequent. It should be borne in mind that as an exception to the general criterion, the interpretation for application of the latter norm must necessarily be restrictive in nature. That said, the theory upon which the company system is primarily inspired is evident, as in all cases the theory of the constitution (Art. 118 to 123 CL) is applied with the exception of this assumption. The inclination towards the theory of the constitution as a general rule is crystallized even further if the case of a foreign company of the unknown type (art. 119) is taken into account, which is not rejected, but rather is allowed to act and its capacity is recognized albeit regulating applicable requisites (on account of legal safety and the defense of local interests). This is also seen in the inapplicability of the limitations contained in article 30 of CL (provides that joint stock companies may only be partners of joint stock companies) in the event that pursuant to constitution law the foreign company does not possess said restriction. Lastly, one final conceptualization of art. 124 as an exception to the rule is fitting, since it is on account of its clarity that in expounding the motives the CL says no explanation is needed. Thus the legislator concludes the motive that in this assumption the norm is in no conflict with Art. 118, that way regulating additively formalities to the incorporation of the foreign company that must be observed obligatorily and control its operation, considering it as a local company to these effects. All of this evidently for local interests in regard to having its headquarters in the republic and its main objective intended to be developed therein.

11. For the reasons set out above it is concluded that for Argentinian legislation it is indifferent that a company incorporated pursuant to the laws of one State should have its effective headquarters or central administration in another country, because it shall be governed in regard to its existence and capacity by the law of the constitution. This with the single reservation that when the main establishment is located in the Argentine Republic (fraud against the law is not necessary, rather it may act as a police norm protecting public order), an assumption for which the theory of effective headquarters or the reality contained in article 124 CL shall apply. The general criterion and its exception has therefore been established.

References

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[30] JCom 1 Ins N 16 Great Brands Inc s/bankruptcy proceedings 03/10/2002.-