

THE CLOSE CORPORATION IN FRENCH AND CONTINENTAL LAW

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In order to enable the Anglo-Saxon reader to understand this study in continental law, it is necessary to give a brief outline of the European law relating to corporations.

There are two prevailing systems in Europe: the German and the French. In this study we shall more especially deal with the solutions adopted by those legal systems and when going into detail, shall refer to the other European systems merely incidentally.

The two leading systems of continental law, *viz.*, the German and the French, admit the same kind of associations.

There is first a group of associations in which emphasis is laid on the personality of the partners (*intuitus personae*); they are known as personal associations.

There is further a group of associations in which stress is laid on the importance of money (*intuitus pecuniae*); they are known as capital associations.

Accordingly, business associations are arranged in the German and French legal systems as follows:

- I. Personal associations (*sociétés de personnes; Personalgesellschaften*)
 - A. Partnerships (*sociétés en nom collectif; offene Handelsgesellschaften*);
 - B. Limited partnerships (*sociétés en commandite simple; Kommanditgesellschaften*).
- II. Capital associations (*sociétés de capitaux; Kapitalgesellschaften*)
 - A. Companies in which some members are liable with, and at least one member without, limitation¹ (*sociétés en commandite par actions; Kommanditgesellschaften auf Aktien*);
 - B. Public limited companies (*sociétés par actions or sociétés anonymes; Aktiengesellschaften*).

German law approximates to the group of public limited companies another type of corporation, *viz.*, the private limited company (*Gesellschaft mit beschränkter Haftung*), but French law prefers to consider the private limited company (*société à responsabilité limitée*) as a type *sui generis*.

The liability of the members differs with every type of association and, in

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¹ This type of companies is unknown in English and American law.

Germany as in France, liability is the main criterion distinguishing these types of association. In personal associations the member is, on principle, personally liable for all debts of the corporation; conversely, in capital associations the member is, on principle, only liable for the amount of money which he has put, or undertaken to put, into the joint stock.

Every type of association has assets which consist of the contributions of the members. For his contribution, the member is given a share which represents his right in the association. In the personal associations, these shares are called *parts sociales*; *Kapitalanteile*. In the capital associations, they are called *actions*; *Aktien*. In the French private limited company they are likewise called *parts sociales* and in the German private limited company they are known as *Geschäftsanteile*.

Generally speaking, the possibility of transferring the member's share in the association is related to the question of liability.

As regards personal associations, a transfer of shares is, on principle, prohibited because the members of these associations wish to keep their ranks closed and to exclude the admission of strangers without their consent. They are compelled by statute to maintain the privity of their association. Conversely, in capital associations, the personality of the members is immaterial. The shares of the big companies are frequently anonymous in order to facilitate their free circulation among the public. They are made out to bearer and can often be bought at the stock exchange; anyone may purchase them for purposes of investment, speculation, gamble, in short, for financial reasons, and they are rarely purchased for the purposes of joining a particular enterprise unless it is intended to acquire a controlling interest in it. A public limited company such as the *Crédit Foncier de France* has about 60,000 members most of whom do not know one another; the management of such a large company must, of course, be independent of the constantly changing body of shareholders.

In the French and German private limited company the shares can be sold to strangers but, as will be seen later, their transfer and circulation is not as easy as that of the shares in a public limited company.

The fact that the transferability of the shares is the more easy the less the *intuitus personae* asserts itself, is of prime importance in discovering the true nature of the close corporation.

What is a close corporation? It is difficult to give a concise answer to that question because there is no precise definition of that type of association. Such a definition does not exist, either in the Anglo-American legal system or on the continent of Europe. However, it is not impossible to describe what is meant by a close corporation; it is a type of corporation which theoretically admits the free transfer of its shares but, for special reasons, "closes its door" and prevents strangers from acquiring its shares. Why do these corporations close their door? Because the members want to maintain the privity of their association and to protect themselves against the intrusion of undesirable outsiders.

Close corporateness is, thus, a self-defense reaction of the members of a company.

This description of the characteristics of close corporateness simplifies the task of the comparative lawyer. Indeed, every association which, by any means, prohibits the free transfer of its shares, falls under the concept of the close corporation. This applies, of course, to associations the very nature of which prohibits such free transfer, *viz.*, personal associations, as defined earlier;² no problem calling for legal analysis arises in connection with them; the members are statutorily prohibited from selling their shares and, in view of this prohibition, *cadit questio*.³ These associations, "close" by nature and definition, are of no interest in this present research; to examine them in detail here, would be like carrying coals to Newcastle.

In France and Germany, the concept of close corporateness can be materialized by the legal form of the public as well as the private limited company. Normally these companies admit the free transfer of their shares; exceptionally, however, they may prevent their members from transferring them. In these exceptional cases, these companies acquire the character of close corporations in the true sense of the word. It is intended to examine in the following paragraphs the measures which have to be adopted in continental law in order to give those types of companies the character of close corporations.

The close corporation concept can be carried into effect in two ways: either the members may protect themselves against the intrusion of strangers by inserting into the articles of association of the company restrictive clauses permissible under the act under which the company is incorporated or by which it is governed; these clauses will render it difficult or impossible to sell or transfer the shares. Or else, the act itself protects the members by imposing on them a statutory obligation to control the transfer of shares in their company.

It should be pointed out that in both cases the restrictions are ultimately derived from the act; but in the first case, the adoption of the restrictive clauses is *optional* while in the second case it is *obligatory*. It should also be borne in mind that the will of the members remains still important even when the members are obliged by the act to restrict the transfer of the shares. In practice, members always have discretion, within the act, to adopt such clauses as they like and to apply the control prescribed by the act more or less strictly.

I

THE CLOSE CORPORATION AS A CREATION OF THE MEMBERS

In France and Germany, the joint stock company came into existence towards the end of the nineteenth century. It is a by-product of the machine age. Considerable funds were needed to finance the construction of factories and railways and subscribers had to be attracted by the offer of shares which were easily transferable and could be readily realized by sale at the stock exchange or otherwise;

² See p. 546 *supra*.

³ In France, exceptionally the articles of a *société de personnes* may authorize a member to dispose of his share to a third party.

those acquainted with the history of company law know that the halcyon days of the company were, to a considerable extent, a time of financial speculation in shares and stock. Today it is well established that the joint stock company has been the main instrument of capitalism.⁴ It may, therefore, be surprising, at first sight, that that type of business organization should be utilized as a form of close corporation. The explanation for this phenomenon is that, apart from large public companies which issue prospectuses inviting the public to subscribe to their shares which are quoted on the stock exchange, there exist small corporate enterprises which, though being managed in the form of companies, exhibit all the characteristics of personal associations. Their shareholders want to associate only with relatives or friends; one of the main concerns of the members is to preserve here the intimate character of the association and to prevent the admission of strangers or competitors without their consent. These enterprises are, in fact, personal associations in the guise of *sociétés anonymes*.

It will be seen from the following observations that the statutory regulation applying to the German and French public limited company facilitates, in France, the adaptation of that form of business corporation for purposes of the close corporation, while in Germany the use of the public limited company for those purposes is discouraged and the private limited company (which, in German law, is constituted as a public limited company *en miniature*) is the most suitable form of a close corporation.

A. The French System: The Public Limited Company

In France, the public limited company was introduced by an Act of July 24, 1867. Article 23 of the Act lays down that the company cannot be validly constituted unless the required minimum number of seven members is reached. The Act contains no provision requiring a minimum capital. Consequently, seven persons of slender financial means may validly constitute a *société par actions*. In 1867, the advantages of such form of organization were readily appreciated for at that time the only types of business association recognized by French law were the partnership and the limited partnership. Both are personal associations in which every member has a considerable financial responsibility which is not limited to his contribution. The introduction of the public limited company enabled businessmen to limit their liability to the nominal value of the shares held by them. In view of these evident advantages, it is not surprising that the form of the public limited company became popular not only with large *entrepreneurs* but also with small business people. Since the introduction of the *société à responsabilité limitée* by an Act of March 7, 1925, it has become possible to attain the same economic objects by forming a private limited company; under the Act of 1925, the minimum number of members required for the formation of a private company is only two.⁵ However, the private company did not completely supersede the public company as

⁴ G. RIPERT, LES ASPECTS JURIDIQUES DU CAPITALISME MODERNE.

⁵ Art. 5.

a form of organization of small business in France; the small public company still exists and it is significant, in this connection, that the shares of many French public companies are not quoted at the stock exchange.⁶

It is, therefore, necessary to examine the provisions which the shareholders of a French public limited company may introduce in order to give it the character of a close corporation.

A preliminary remark is called for. As a rule, in the French public company, shares may have two different forms: they may be share certificates which are issued in the name of the shareholders, or they may be share warrants issued to bearer and negotiable by delivery. It is evident that the first step towards attaining close corporateness is to make the shares non-negotiable, *i.e.*, to issue share certificates in the name of the shareholders. The issue of share certificates, while making it possible to identify the member of the company for the time being, is not sufficient to confer the character of a close corporation on the company. The next step is to introduce measures prohibiting the transfer of the shares. Article 50 of the Act of July 24, 1867 is relevant here; that Article provides:

Les statuts de la société pourront donner, soit au conseil d'administration, soit à l'assemblée générale, le droit de s'opposer au transfert.

This provision authorizes the introduction, into the articles of association of a public company, of a clause known as the agreement clause (*clause d'agrément*) which provides that no transfer of shares shall be valid unless the board of directors or the general meeting has approved the transferee, but, as will be seen later, in French company law the agreement clause must necessarily be combined with a preëmption clause providing for the payment of a reasonable price for the shares.

The members of a French public company who wish to close their ranks against the admission of strangers will thus achieve their aim by inserting into the articles of association of their company an agreement clause which provides that if a member desires to sell his shares, the board of directors or the general meeting shall be entitled to agree to, or refuse, the admission of the proposed transferee as a member of the company. Such agreement clauses are used in companies of the family type which wish to preserve their character. These clauses are also found in companies of a semi-political character, *e.g.*, companies the objects of which are the publication of reviews or newspapers.⁷ The clause under discussion prevents the infiltration of competitors or other persons who might join the company for the purpose of obtaining information as regards its business or even attempting to disorganize it. The agreement clause is an efficient instrument enabling the company to "screen" proposed shareholders and to reject undesirables.

Where the directors or the general meeting accept the proposed transferee, there

⁶ In the Netherlands, where no form similar to the *société à responsabilité limitée* exists, the *société par actions* is often used as the form of organization of a close corporation.

⁷ Cf. for instance: Paris, Nov. 21, 1950, Rev. Soc. 172 (1951). In this case, the *Société des Journaux et Imprimeries de la Gironde* and the *Société Damour Publicité* were concerned.

is no difficulty whatsoever. But what happens if their decision is in the negative? The member will then be unable to leave the company. He is a prisoner of his share. Here a great principle of the French law of corporations comes into operation: the right of leaving the company by selling one's share is one of the *droits individuels* of which the member cannot be deprived.⁸ Such individual rights of membership are inviolable; they are the minimum protection to which the member is entitled.

Consequently, the French courts have rejected an agreement clause in its pure and unqualified form because it would, in fact, submit a member who wishes to quit the company to the arbitrary veto of the other shareholders.

It is, therefore, necessary, in the eyes of the French law of corporations, that provision should be made enabling the member to leave the company if he so desires. This is done by adding a *préemption* clause to the agreement clause. The *préemption* clause provides that the board of directors or the general meeting, if refusing to consent to the transfer of shares to the proposed transferee, shall nominate another person as transferee.

If a *préemption* clause is added, the right of the shareholder to leave the company is preserved. The French courts have further safeguarded the right of the shareholder by ruling that the *préemption* clause can be validly exercised only if the price which is payable to the transferor is a "just price," *i.e.*, a price corresponding to the actual value of the shares.⁹

B. The German System

In German law, capital associations are divided into two types, *viz.*, the public limited company (*Aktiengesellschaft*) and the younger form of the private limited company (*Gesellschaft mit beschränkter Haftung*); these types of companies closely correspond to those adopted by English company law.¹⁰

1. *The German Public Limited Company.* The German concept of the public company does not make it as easy as its French counterpart to realize the aim of close corporateness. The explanation is simple: in France, people of slender financial resources can constitute a public company since the Act of 1867 does not require a minimum capital; that, as has been seen, is the reason why many small public companies are in existence in this country. In Germany, on the other hand, the historical evolution of company law has made it impossible to form small public companies.

A German Act of July 5, 1934 (called the *Umwandlungsgesetz*) aimed at the conversion of companies into partnerships.

⁸ This right is founded on Arts. 1, 2, and 24 of the Act of 1867 and Arts. 35 and 36 of the Code de Commerce; cf. René David, *La protection des minorités dans les Sociétés par actions*, THÈSE PARIS, No. 114 (1928).

⁹ Cass. civ., Feb. 9, 1937 (2^o espèce), note, P. CORDONNIER, *JOUR. SOC.* 266 (1937). Cass. req. September 11, 1940 (D. C. 1942 I. 116); Cass. req. Nov. 16, 1943 (JCP 1944, II-2589, note Bastian); Paris, June 1, 1950 (JCP 1950-II-5687); Trib. Com. Seine, June 28, 1950 (JCP 1950-II-5772). Adde: J. Molierac, *Des clauses d'égalisation, d'agrément, de préemption*, *REV. SOC.* 241 (1949).

¹⁰ J. VON GIERKE, *HANDELSRECHT*, 6. Auflage, S. 357 (§50-III) and S. 227 (§39-IV).

This Act represents a reaction against the extraordinary growth of public companies in Germany in the period following the First World War. In spite of the reduction of her territory the number of public companies rose in Germany between 1913 and 1924 from 5,139 to 17,000.¹¹ In that period of political and economic instability, German business showed a marked tendency to limit its liability as far as possible. The Nazis did not favor this development of the capitalist mind and, in 1934, passed the *Umwandlungsgesetz* in order to induce public companies to convert their business into personal associations. But the Nazis went further: by the *Aktiengesetz* of January 30, 1937 the small public company was virtually eliminated by the requirement of a minimum capital of 500,000 RM¹² for companies incorporated under the Act and 100,000 RM for companies already in existence when the Act was passed. Small public companies trading with a capital below 100,000 RM were compelled either to convert their business into personal associations in accordance with the procedure laid down in the Act of 1934 or to wind up. The German Companies Act of 1937 thus pronounced sentence of death on the small companies.¹³

In the result, since 1937 it is extremely difficult to use the form of the public limited company in Germany for purposes of close corporateness. But a restriction of the free transferability of shares in public companies is still possible in Germany and is used when the controlling shareholders wish to perpetuate their controlling interest.

In Germany, the public company has two boards, *viz.*, the *Vorstand* which is the board of managing directors, and the *Aufsichtsrat* which is the supervisory organ of the company. Under the Act of 1937, a public company may insert into its articles a clause requiring the consent of the *Vorstand* or of the *Aufsichtsrat* to the transfer of the shares of the members.¹⁴ The consent may be given before or after the transfer¹⁵ and can be requested by the purchaser or the seller.

The restriction of the transfer of shares may be inserted in the original articles of association of the company or may be added later on by an alteration of the articles.¹⁶

Once given, the consent of the requisite board is irrevocable.¹⁷

The articles of association may provide that the consent to transfer the share's

¹¹ SCHLEGELBERGER, *DEUTSCHE JUSTIZ*, S. 1649 ff. (1936). Addc: BÖTTCHER-MEILICKE, *KURZER ÜBERBLICK ÜBER DIE UMWANDLUNGSGESETZGEBUNG*, II, 1.

¹² 500,000 DM since the revalorization of July 21, 1948.

¹³ ERNST BECHER, *AUFBAU, ORGANISATION UND UMWANDLUNG DER AKTIENGESELLSCHAFT NACH DEM AKTIENGESETZ VOM JAN. 30, 1937*, THÈSE KÖLN, 1938.

¹⁴ Sec. 61 AGs. III; the shares are then referred to as "gebundene Namensaktien" or "vinkulierte Namensaktien"; H. Küsters, in *BANK ARCH.* S. 175 (1937). W. HEFERMEHL, *DENKSCHRIFT ZUR REFORM DES AKTIENRECHTS* (S. 40), Düsseldorf (Nov. 1952).

¹⁵ See §182 ff. of the German Civil Code; 132 RGZ 157.

¹⁶ GADOW-HEINICHEN-E. SCHMIDT-W. SCHMIDT-WEIPERT, *KOMMENTAR ZUM AKTIENGESETZ*, §61 Anm. 10 (1939); RITTER, *KOMMENTAR ZUM AKTIENGESETZ*, §61 Anm. 5b (1939); *contra*: 68 RGZ 112; SCHLEGELBERGER-QUASSOWSKI-HERBIG-CESSLER-HEFERMEHL, *KOMMENTAR ZUM AKTIENGESETZ*, §61 Anm. 6 (3d ed. 1939).

¹⁷ RG in HRR 1933, 45.

can only be refused by the company on "serious grounds"; such grounds may be stated in the articles and a shareholder who intends to sell his shares may bring an action against the company if he thinks that the refusal of the company to the proposed transfer is unjustified.¹⁸

If the members of the German public company introduce clauses to that effect into the articles of association, the company would qualify as a close corporation.

2. *The German Private Limited Company.* The German private company is better suited to constitute a close corporation than the German public company. The German private limited company is, in fact, a small public company; it is called by German jurists an "*intimer Kapitalverein*." The shares are excluded from dealings at the stock exchange¹⁹ and the minimum capital is 20,000 DM.

The statutory provisions governing the transfer of shares in a German private limited company correspond to those applicable to the transfer of shares in public companies. The reason for this coincidence is that in German corporation theory the private company is derived from the public company.

On principle, the shares in the German private company are freely transferable but the Act of April 20, 1892 which created the German private company, provides in Section 15(5) that the articles may require the shares to be subject to the approval by the company:²⁰

Durch den Gesellschaftsvertrag kann die Abtretung der Geschäftsanteile an weitere Voraussetzungen geknüpft, insbesondere von der Genehmigung der Gesellschaft abhängig gemacht werden.

The articles may provide that the consent of the board of directors or of the general meeting shall be required for the transfer of the shares.²¹ It is for the company to decide which of these possibilities it prefers. If the transfer is refused, the member cannot bring an action against the company.²² The consent may be given before or after the transfer and is not subject to any formalities. In order to simplify the procedure, the articles may provide in what cases the transfer may be accepted or refused. The articles may make the transfer more difficult by requiring unanimity of the members for the consent. But the consent given by the *Board* is binding on the company even though the articles require the *members* to consent to the transfer of shares.²³ If the original articles of association do not contain provisions restricting the transferability of the shares, restrictive clauses can later be introduced by an alteration of the articles.²⁴ The articles may even completely exclude the transferability of the shares.²⁵

¹⁸ BAUMBACH-HUECK, KOMMENTAR ZUM ARTIENGESETZ, §62 Anhang. No. 1 (6th ed. 1949).

¹⁹ 149 RGZ 385.

²⁰ VOGEL, KOMMENTAR ZUM GMBH-GESETZ, §§86 and 87 (1950); BAUMBACH-HUECK, KOMMENTAR ZUM GESETZ BETREFFEND DIE GESELLSCHAFT MIT BESCHRÄNKTER HAFTUNG, §§60 to 63 (5th ed. 1951). Adde: SPINDLER, DER UNERWÜNSCHTE GESELLSCHAFTER, RUNDSCHAU FÜR GMBH, §165 (Nov. 15, 1951).

²¹ Some difficulties arise when the articles provide for the consent to the transfer to be given by the company without further specification: OGH Ziv. Band 3, §§90-97.

²² 88 RGZ 325.

²³ 104 RGZ 414.

²⁴ 68 RGZ 211.

²⁵ FEINE, GMBH, 377.

In Portugal,²⁶ Austria,²⁷ and Italy²⁸ the restrictions on the transfer of shares in the private company are governed by provisions similar to those applying to the German private company.

II

THE CLOSE CORPORATION AS A STATUTORY CREATION

A. The French Private Limited Company

In some countries the close corporation concept is directly created by obligatory statutory provisions and does not come into existence as the result of the discretion of the members who make use of facilities placed at their disposal by the relevant statute.

The prototype of this regulation is the French private limited company.

The private limited company was introduced in France by the Act of March 7, 1925. Article 22 of the Act provides with respect to the transfer of shares to persons other than members:

Les parts sociales ne peuvent être cédées à des tiers étrangers à la société qu'avec le consentement de la majorité des associés représentant au moins les trois quarts du capital social.

Under this Article the members are obliged to control the transfer of shares to a stranger. The French private limited company thus emphasizes the close corporateness concept strongly; this is understandable because it was the aim of the promoters of the Act that the *société à responsabilité limitée* should be used by family businesses or small traders who wished to avail themselves of the benefit of limited liability when combining in trade with their relatives or friends.²⁹ In practice, this type of company is very popular in France and widely used.³⁰ It is quite simple to form a private limited company in France: not more than two persons are required and the minimum registered capital is 50,000 francs (the value of a typewriter!). In most cases the members are relatives or friends and the provisions of Article 22 are regarded as very useful because they enable the members to prevent the intrusion of a stranger when one of the shareholders attempts to sell out his shares in order to leave the company.

The stipulations of Article 22 are compulsory for the members and cannot be abrogated or contracted out in the articles of the company or otherwise. The French courts have held that if the articles of the private limited company authorize a member to transfer his shares freely to strangers, the company ceases to be a private com-

²⁶ Act of 1901, Art. 6.

²⁷ Act of March 6, 1906, Art. 76.

²⁸ Civ. CODE, Art. 2476.

²⁹ CHAPSAL, J. SÉNAT., DÉBATS PARLEMENTAIRES 117 (1925).

³⁰ In 1949, in the area of the Department of the Seine, there were 7293 sociétés à responsabilité limitée out of 7805 associations created that year. In 1952 the statistics of associations created and registered at the office of the clerk of the Tribunal of Commerce at Bordeaux were the following:

sociétés en nom collectif	25
sociétés en commandite simple	2
sociétés en commandite par actions	0
sociétés anonymes	23
sociétés à responsabilité limitée	147

pany and would, in fact, be a public company; but since it does not comply with the provisions of the Act of 1867 which regulates public limited companies,³¹ such company is regarded as null and void in French law.³²

Close corporateness is thus so much stressed in the French private limited company that in certain cases a member may be compelled to remain in the company against his will; he is, in fact, "chained" to the company as the following example will show.

Article 22 requires a qualified majority for the consent to transfer the shares, *viz.*, a majority in numbers of the shareholders and a three-quarters majority of the registered capital of the company. Suppose, *e.g.*, that a private company has three members and that its capital is divided into 100 shares. If one member holds 90 shares and the two other members 5 shares each, the majority shareholder cannot sell his shares if the other two members refuse to consent; although the majority shareholder satisfies the second requirement, *viz.*, holds more than three-quarters of the registered share capital, he fails to satisfy the first requirement, *viz.*, he does not represent the majority in number of the members.³³ Article 22 thus provides an effective protection against the transfer of shares to a stranger contrary to the will of the majority of shareholders.

If the members refuse to agree to the transfer and are unwilling to purchase the shares themselves, their refusal is definite; it is not subject to appeal to a court or another authority and the member who wishes to sell out is obliged to remain in the company. He is truly in the shackles of the company. Article 22 operates as a statutory mechanism which turns the company into a close corporation; the door of the company is locked and bolted; it opens to a stranger only if it is quite plain that he is welcome to the majority of members.

While the member who desires to leave the company may be its reluctant prisoner, he has, on certain conditions, a drastic remedy at his disposal which enables him to carry out his plan: he may obtain a winding-up of the company. But he can do so only if the company has been constituted for an unlimited period of time and if he acts *bona fide*, *i.e.*, without any malicious intention to the other members (Articles 1869 and 1870 of the Civil Code).³⁴

These observations indicate that the close corporation character is so prominent in the French private limited company that it may lead to the extreme consequence of the liquidation of the company. But the courts still hesitate to wind-up a company in these circumstances and, in practice, the enforcement of Articles 1869 and 1870 gives rise to many difficulties.³⁵

The effect of Article 22 of the Act of 1925 is that a member can never introduce

³¹ See p. 549 *supra*.

³² Paris, Nov. 21, 1951, REV. SOC. 169 (1952).

³³ Cf. A. Peytel, *A propos de la cession des parts dans les sociétés à responsabilité limitée*, GAZ. PAL. 1950-I-Doctrine p. 3, No. VI.

³⁴ Paris, Dec. 9, 1932 (D. 1934-2-29); HOUPIN AND BOSVIEUX, *TRAITE DES SOCIETES*, T. II, No. 1618.

³⁵ Cf., for instance, Trib. com. Rochefort-sur-mer, July 8, 1932 (S. 1933-2-89); Trib. com. Valenciennes, September 5, 1950 (GAZ. PAL. 1950-II-380).

a stranger into a French private limited company by selling his shares to him if the other members object. In that contingency the French private limited company is hermetically sealed against outsiders.

The Swiss private limited company is likewise founded on the close corporation concept. It was introduced into Switzerland by an Act of December 18, 1936.³⁶ It is closer to the French type of private limited company than to the German type. As far as the transferability of shares in the Swiss private limited company is concerned, provisions apply similar to those governing the shares in its French counterpart: the transfer of shares to third persons must be authorized by a qualified majority of the members, *viz.*, by three-quarters of the members representing three-quarters of the capital.³⁷ Swiss law is, in that respect, even stricter than French law: in Swiss law the required majority in numbers of the members is three-quarters while in French law the consent of an ordinary majority of members is sufficient. Under the Swiss Act, the members may completely exclude the transferability of the shares by appropriate clauses in the articles of association of the company.³⁸

The *société à responsabilité limitée*³⁹ in Luxemburg and in Belgium the *société de personnes à responsabilité limitée*⁴⁰ are governed, with respect to the transferability of shares, by provisions similar to those applying to the French and Swiss private limited company.⁴¹ It is intended to introduce the French type of private limited company into the principality of Monaco.⁴²

In all these countries the private limited company strictly conforms to the concept of the close corporation.

III

The following conclusions emerge from this short study in comparative company law: in the legal systems of the continent of Europe the close corporation does not exist as a separate form of business organization. The concept of close corporation comes into existence at any time when a company limited by shares wants to protect itself against the intrusion of strangers. The technical means by which a company is entitled to turn itself into a close corporation is the same everywhere: the members are not allowed to transfer their shares freely.

Sometimes restrictions on the transfer of shares are optional: members may insert them into the articles of the company if they so desire; examples of this type are the French and German public limited company and the German private limited company. Sometimes those restrictions are compulsory: the members need not lay them down in the articles, they are already contained in obligatory provisions of the governing act; an example of this type is the French private limited company.

³⁶ OBLIGATIONENRECHT, Art. 772 ff.; GYSIN, FESTGABE FÜR WIELAND, S. 172 ff. (1934); WIDMER, DIE ORGANISATION DER GMBH NACH SCHWEIZERISCHEM RECHT, THÈSE ZÜRICH, 1945.

³⁷ OBLIGATIONENRECHT, Art. 791(2).

³⁸ OBLIGATIONENRECHT, Art. 791(3).

³⁹ Act of September 19, 1933, Art. 189.

⁴⁰ Act of July 9, 1935, Art. 126.

⁴¹ French Act of 1925, Art. 22; SWISS OBLIGATIONENRECHT, Art. 791.

⁴² Art. 18 of the proposed bill; REV. SOC. 189 *et seq.* (1952).

Between these two types of corporate organization, there exists an intermediate one: the English form. The English Companies Act, 1948, requires that the articles of a private limited company shall contain, *inter alia*, restrictions on the transfer of its shares but refrains from defining what restrictions are required.⁴³

The close corporation concept exists in Europe, England, and the United States but Anglo-American law is generally very different from continental law. The close corporation concept affects the law of business organizations in every country and it is not surprising that the same answers are given everywhere to the same practical problems and that the various national laws tend to produce similar solutions.

If one day the studies in comparative law are to lead to an internationalization of law, the movement will have to start in business law which is less particularized than family law or succession law where tradition and sentimental prejudice prevail and prevent the different countries from reaching uniform solutions.

⁴³ Companies Act, 1948, §28(1)(a), 11 & 12 GEO. VI, c. 38. PALMER'S COMPANY LAW 361-362 (19th ed. 1949). The same solution has been adopted in Canada; the Companies Act, 1934, 24 & 25 GEO. V, c. 33.