1949 Amendments to the Business Corporation law

F. Eugene Reader

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation

Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol54/iss2/5

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.
The Act of May 23, 1949,1 makes a number of important amendments to the Pennsylvania Business Corporation Law.2 These amendments will be explained briefly herein and mere formal, clarifying changes will be disregarded.

Section 8, which deals with notice of meetings, was amended by adding two subsections dealing with separate situations. Where a written notice of a shareholders' meeting sets forth the exact language of a proposed resolution, the rule that no business can be transacted at a special meeting which is not specified in the call3 creates doubt as to whether any change in the language thereof could be adopted without a further notice and meeting. This has been clarified by a new subsection 8 D, which provides that the meeting may adopt the resolution with such amendments as do not enlarge its original purpose.

Article 16, section 7 of the Pennsylvania Constitution provides that "the stock and indebtedness of corporations shall not be increased . . . , without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting to be held after 60 days notice." The other new subsection, 8 E is an attempt to define what changes in the capital structure constitute an increase of the stock within this provision.4 It provides that a proposal to increase the authorized aggregate par value of all shares having par value or the aggregate number of shares without par value comes within such requirement; but that it shall not apply to an increase by which issued shares are changed into a greater, equal, or smaller number of shares by means of a share dividend or otherwise, provided that if the stated capital is thereby increased surplus equal thereto is transferred to stated capital, nor does such apply to a change of unissued but authorized shares with par value into an equal or smaller number of shares without par value, or the converse. This limits the application of the requirement to the situation where an increase in the authorized capital or an actual increase in the corporate assets is contemplated. The ultimate construction of this constitutional provision is, of course, for the courts and not the legislature. Sections 803 and 513 are also amend-

* Professor of Law, Dickinson School of Law.

---

1 Act of Assembly, No. 532.
2 Act of May 5, 1933, 15 P. S. §2852-1.
3 5 Fletcher, CYCLOPEDIA OF THE LAW OF CORPORATIONS, §2009.
4 As to what constitutes an increase of "indebtedness" within this provision see Note: Increase of Corporate Indebtedness Under Constitutional Provisions Requiring Consent of Stockholders, 44 DICK. L. REV. 307. Here the judicial interpretation was carried into the Business Corporation Law by the proviso in §309 that "nothing herein contained shall be construed to apply to indebtedness contracted in the usual course of corporate business."
ed to correspond with section 8 E. It should be noted that section 805, which permits adoption of such an amendment by approval of the holders of "a majority of the outstanding shares entitled to vote thereon," remains unamended, although seemingly in conflict with the constitutional requirement that those holding "the larger amount in value of the stock" must approve.

Section 202 literally precludes the use of the word "bank," "insurance," "public utility," or similar words, as a part of the corporate name, although the word "Commonwealth" or "United States" may be used provided such does not imply that the corporation is a governmental agency. This is amended to provide that these other words may be used also if they do not imply that the corporation is subject to banking, public utility, or insurance laws or regulations.

Several important changes are made in Section 204 relative to the contents of the articles of incorporation. The original Act, although permitting incorporation for any lawful purpose or purposes, required a "precise and accurate" statement of the purposes, which requirement was rather strictly construed and applied by the Department of State. The quoted phrase has been eliminated, so that incorporators may now draft their "purpose clause" in broader and more general language. Section 204 also required a statement of the amount of paid in capital with which the corporation will begin business and required that such be not less than "$500.00 in cash;" and Section 208 made the full payment thereof, plus filing of an affidavit that such payment had been made, a condition precedent to beginning business. This evidently was deemed objectionable in requiring cash, as distinguished from property, in the initial capital and in fixing any minimum. Further, the filing of such an affidavit was often inadvertently overlooked with the result of imposing a personal liability upon officers and directors for corporate debts. Accordingly Section 204 has been amended to eliminate any minimum capital requirement and to require merely a statement of the "value of property" with which the corporation will begin business, while Section 208 has been changed to eliminate the requirement of an affidavit and to require merely that the value of property, as stated, be received before any business is transacted. A further

---

6 §201. Under the Corporation Act of 1874, Act of April 29, 1874, P. L. 73, a corporation could be formed only for a single purpose. When other states began to permit incorporation for "any lawful purpose" Pennsylvania became an unpopular incorporation state. See the illuminating opinion of Mr. Justice Brandeis, dissenting, in L. K. Liggett Co. v. Lee, 288 U. S. 517, 548, 53 S. Ct. 481, 77 L.Ed. 929 (1933), in which he reviews the liberalizing of corporation laws by states competing for "traffic in charters," which "race was one not of diligence but of laxity." The instant amendment, as well as others hereinafter noted, no doubt was influenced by this competitive situation. Thus the Report of the Committee on Corporation Law of the Pennsylvania Bar Association comments on the fact that the 1949 amendments "should tend ... to the greater popularity of Pennsylvania as a state of incorporation." 20 Pa. Bar Ass'n. Q. 368, 371.

6 The Corporation Act of 1874, supra note 3, required ten per cent of the capital stock to be paid in cash as a condition precedent to incorporation; and, in practice, the Department of State required a minimum capitalization of $5,000.00. The Business Corporation Law, supra note 2, changed such payment to a condition precedent to doing business after incorporation was complete. The amendment, by virtually eliminating any minimum paid in capital requirement, puts Pennsylvania ahead of Delaware in liberality, that state requiring a minimum of $1,000.00. Delaware Corporation Law, §5(4).
amendment eliminates the need of stating the term of office of the first directors, the names of those who shall serve "until the first annual meeting," together with their addresses, including street and number, being now required. Sections 402 and 403 likewise have been changed so that the first directors need serve only until the first annual meeting, instead of for a term of at least one year.

Various sections of the Act (207, 210, 809, 906, 1005, and 1101) make the date of "issuance of the certificate" in question the focal date for the commencement of corporate existence, effective date of an amendment or merger or consolidation, authorized date for a foreign corporation to do business, and cessation of corporate existence on dissolution. This has been changed to make the date of "approval of the articles" in question the focal date, rather than the subsequent issuance of a certificate evidencing such approval. Section 406 is amended to vest in the board of directors the power to elect and fix the compensation of the officers and agents unless the articles or by-laws otherwise provide.

A new section has been added to Article 4 to permit a corporation to indemnify its directors or officers, or a person who served at its request as a director or officer of another corporation of which it is a shareholder or creditor, against expenses incurred in connection with the defense of any legal proceedings arising out of such services, unless they be adjudged in such proceedings to be liable for negligence or misconduct. This section is lifted from the Delaware statute. Section 508, providing that a corporation may vote shares it owns in another corporation by "its President," is amended to permit such vote "by any of its officers." Section 509 has been changed to eliminate the requirement that the record date for determining shareholders for the purpose of dividends, notice of meetings, etc. shall be "not less than ten days" prior to the payment, meeting, etc.

Sections 601 and 602B have been changed so as to make shares redeemable only pro rata or by lot or by such other equitable method as is selected by the directors and to permit re-acquired shares of one series to be changed into shares of another series. Amendments to Sections 705C and 706C remove the necessity for tax clearance certificate as a condition to redemption and cancellation of shares or reduction of stated capital without change in share structure.

Under the original Act no provision was made whereby the directors could cancel shares acquired by the corporation, except where such shares were issued subject to redemption and cancellation. A new section permits such in the case of treasury shares purchased out of surplus or taken in exchange for other shares; and sets out the procedure to be followed.

---

7 1410.
8 Delaware Corporation Law, §2(10).
9 §705.
10 §708.
With reference to the amendment of the articles a general clause stating "and in any and as many other respects as desired" was included in subsection (4) of Section 801, which dealt with changing the authorized capital structure. Proper construction would preclude this clause from permitting amendments for other than such capital structure purpose, thus limiting amendments to the four numbered kinds. This clause had now been set out as a fifth subsection, thus making it clear that the articles may be amended in any way. A further change, to Section 802, permits amendments to be proposed by holders of ten per cent of the voting shares or by resolution of the directors, the latter previously being a prerequisite; while Section 807 is amended to allow the advertising of an amendment either before or after its adoption.

Changes are made with respect to merger and consolidation to provide: that the plan shall be adopted by a foreign corporation involved according to the laws of its state of incorporation, instead of according to the provisions of Section 902;\(^1\) that if the surviving or new corporation is a foreign corporation the Secretary of the Commonwealth must be designated as its attorney upon whom service may be made in suits against it to enforce obligations of a constituent domestic corporation or obligations arising out of the merger or consolidation\(^2\) and its domiciliary state and registered office therein must be set forth in the articles;\(^3\) that only the domestic corporations involved need advertise their intention to file articles;\(^4\) that no tax clearance certificates need be filed by the surviving corporation to a merger;\(^5\) and that the legal effect given to the merger or consolidation, as provided in Section 907, and the rights given to a dissenting shareholder by Section 908 shall apply only to domestic corporations.\(^6\) As thus amended the provisions relative to foreign and domestic constituent corporations follow the pattern of the Delaware statute\(^7\) and conform to conflict of laws principles.

A new section\(^8\) is added to Article 9 providing for a procedure whereby a foreign corporation, holding a certificate of authority to do business in Pennsylvania, may become a domestic corporation by filing articles of domestication. Such requires a majority of the voting shareholders of said corporation to consent to the domestication and to renounce the original charter.\(^9\)

---

\(^1\) Subsection D added to §902.
\(^2\) Subsection (6) added to §903. §908B is correspondingly amended to cover suits by a dissenting shareholder in a domestic constituent against the surviving foreign corporation.
\(^3\) §904 (2).
\(^4\) §904.
\(^5\) §905.
\(^6\) §907 & 908.
\(^7\) Delaware Corporation Law, §59.
\(^8\) §909.
\(^9\) Query—what effect does this have upon its status in the state of incorporation? See Mitchell v. Union Bag & Paper Corporation, 75 Ga. App. 15, 42 S. E.2d 2d 137 (1947); Town of Bethel v. Atlantic Coast Line R. Co., 81 F.2d 60 (1936). As to domestication of foreign corporations in general see 17 Fletcher, supra note 3, §§8302-8313, pages 37-68.
With respect to foreign corporations the requisite contents of the purpose clause in the application and certificate of authority has been modified to require only a "brief statement of the business it proposes to do," in the former, and the nature of the business "or a summary thereof," in the latter. The requirement of a tax clearance certificate has been eliminated on applications for an amended certificate. Section 1011.1, providing for issuance of a subpoena duces tecum to a registered foreign corporation, has been extended to include civil as well as criminal proceedings.

20 §§1004 (7) and 1005 A.
21 §1007.