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## Corporations—Arbitration as an Incident to Winding Up

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*Beckerman*,<sup>9</sup> a New York case, Rothman and Schneider agreed to dissolve the corporation, and to place full control of the corporation's affairs in Schneider in the interim period. The Court of Appeals, after an express acknowledgment of this placement of control, then stated the holding relied on by the court in the present case, namely, "Where there has been no direct prohibition by the Board . . . the president has presumptive authority . . . to . . . prosecute suits in the name of the corporation."<sup>10</sup> In the present case, however, there was no such placement of control in the president, and therefore, the validity of the reliance, by the Court, on the holding of the *Rothman* case appears difficult to justify.

The third instance in which presidential authority to institute suits may be implied, arises when the president has been charged with special duties,<sup>11</sup> which by their nature, virtually require the institution of court proceedings, such as to dispose of corporate property,<sup>12</sup> this being practically impossible without implied authority to try the title thereto. Obviously, the *West Hills* case does not meet this criterion.

This discussion does not mean to imply that these are the only three instances in which such presidential authority may be implied. However, these authoritative groupings, along with Section 27 of the New York Stock Corporation Law, do tend to show that such authority will and should be implied only when the circumstances of the corporation are either very grave or quite exceptional. However, in the present case, the fact that the president was opposed by the other two stockholders appears to present circumstances which are neither grave nor exceptional. Therefore the dissent by two of the Justices seems to be more accurate than the decision of the majority.

#### ARBITRATION AS AN INCIDENT OF WINDING UP

A written agreement between a contractor and a corporate sub-contractor, contained a provision providing for the arbitration of all disputes arising thereunder. The contract also contained a clause prohibiting the sub-contractor from subletting, assigning or otherwise transferring the contract without the contractor's prior consent. This latter clause was to be non-arbitrable.

The Court in *Ehrlich v. Unit Frame and Door Co.*,<sup>13</sup> was confronted with a question as to whether the voluntary dissolution of the corporate sub-contractor, precluded such corporation from demanding arbitration. Ehrlich claimed, on a motion to stay arbitration, that such dissolution and distribution of the contract to the corporate shareholders for completion, without Ehrlich's consent, was a breach of the non-assignability clause, and that Unit Frame had thus lost its arbitration right.

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9. 2 N.Y.2d 493, 161 N.Y.S.2d 118 (1957).

10. *Id.*, at 497, 161 N.Y.S.2d 121 (1957).

11. *Supra* note 4, at 710.

12. *New York B.&E.R.R. Co. v. Motil*, 81 Conn. 466, 71 A. 563 (1908).

13. 5 N.Y.2d 275, 184 N.Y.S.2d 334 (1959).

The Court overturned the Appellate Division's decision,<sup>14</sup> and entered an order denying petitioner's motion to stay arbitration.

Under Section 29 of the New York General Corporation Law, and Section 105(8) of the New York Stock Corporation Law, a dissolved corporation continues in existence for the purpose of satisfying its existing obligations, collecting assets and debts due the corporation, and winding up its affairs. Unit Frame thus could not assign its existing obligations under the contract and remained liable for non-performance.<sup>15</sup> However, Section 105(7) of the Stock Corporation Law requires a distribution to stockholders of remaining assets, after adequately providing for the satisfaction of liabilities and obligations.<sup>16</sup> Here, the agreement with the stockholders of Unit Frame, called for the completion of the contract by them, hence an adequate provision for the satisfaction of the corporate obligation. Therefore the distribution of the corporate asset, *i.e.*, the right to payment under the contract, was not only a legitimate function of winding up, but also a statutory requirement.<sup>17</sup> This was not such a transfer or assignment, as was prohibited under the Ehrlich contract.

Had the stockholders failed to complete the contract, Unit Frame could not have claimed that its dissolution precluded Ehrlich from invoking the arbitration provision,<sup>18</sup> since it remained liable on the obligation. It follows that Ehrlich, after the completion of the contract, cannot avoid payment by invoking the same dissolution as a bar.

The Court was fortified in their articulation of the problem, by the fact that subsequently to the lower court's decision, Section 105(8) was amended to expressly include participation in arbitration proceedings, as an incident of dissolution. This amendment was viewed by the Court as merely declarative of existing law.<sup>19</sup>

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14. 5 A.D.2d 272, 171 N.Y.S.2d 502 (1st Dep't 1958). The apparent rationale in the Appellate Division was, that since Unit Frame had dissolved and distributed the contract to its stockholders, it no longer had an adequate interest therein. "The demand for arbitration or payment cannot be made by the corporate entity which no longer has an interest in the contract." at 275.

15. Matter of Delphi Mfg. Co., 15 Misc. 2d 337, 157 N.Y.S.2d 412 (Sup. Ct. 1956). The Court said, "I am persuaded that a voluntary dissolution of a corporation, . . . does not relieve it of its obligations or liabilities which had been incurred prior to dissolution . . . even if the dissolution had occurred prior to the service of the notice to arbitrate." at 338.

16. ". . . and after paying and adequately providing for the payment of such liabilities and obligations, to distribute the remainder of its assets among its stockholders. . . ."

17. *Supra* note 15, see also *Hudak v. Hornell Industries*, 304 N.Y. 207, 106 N.E.2d 609 (1952).

18. Matter of Kosoff, 276 App. Div. 621, 96 N.Y.S.2d 689 (1st Dep't 1950), *aff'd* 303 N.Y. 663, 102 N.E.2d 584, where it was said, "While it is true that a corporation is deemed to continue in existence for the purpose of suit and therefore, it might be said that the employer corporation should be deemed to continue for the purpose of arbitration . . .," however, no arbitrable dispute existed.

19. N.Y. Sess. LAWS 1958, ch. 483.