ON THE HISTORICAL ORIGINS OF PORTUGUESE COMPANY LAW

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I. INTRODUCTION

The Portuguese maritime enterprise during the fifteenth century culminated with Vasco da Gama's voyage to India, a major achievement with the most far-reaching consequences to the course of History. For the very first time in the history of mankind, East and West were linked by sea, event that brought about a revolution in the world trade, and opened the door of new territories for the expansion of European maritime powers.

During the next century the Portuguese crown explored, almost in a monopolistic way, the spice trade with the Far East through the much more profitable sea route. However, by the end of the sixteenth century, the Portuguese Crown progressively faced the challenge and competition of the fleets of the northern European countries, in particular from the United Provinces of Netherlands and from England.

The decline of the trade with the Far East, in the beginning of the seventeenth century, among other reasons, led to the creation of the *Portuguese East India Company* in 1628. The outcome of the Company's business cannot be considered a success, on the contrary. In fact, due to noteworthy problems of undercapitalization, the company did not endure as long as the period for which it was initially established. It was dissolved five years after its incorporation.

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However, the importance of the Portuguese East India Company cannot be judged only by its commercial success. In spite of its short life, the conception and subsequent incorporation of the Company represented a milestone in the historical origins of Portuguese companies and of Portuguese company law. Besides the fact that it is the first complete set of rules governing a company in Portugal – a landmark for the Portuguese corporate law[1] –, one should emphasize the importance of some of those rules, principally those related to the capital of the company, that was open for public subscription, as well as the ones that provided for a limitation of liability of its members.

The «foundational» charter of the Company is thus well worthy of a careful study. After a brief survey of the historical context that surrounded the creation of the Company, our analysis will primarily dwell upon the comprehensiveness of the document and upon the innovation brought by it to the evolution of the trade companies in Portugal.

II. THE HISTORICAL BACKGROUND

At the beginning of the sixteenth century Portugal was united with Spain. Not long after the defeat and disappearance of the King Dom Sebastião in the battle of Alcácer Kibir (Morocco) in 1578, King Filipe II of Spain took control of the Portuguese crown becoming Filipe I of Portugal. Between 1580 and 1640 Portugal and Spain were governed by the same kings though with different names (Filipe I, II and III of Portugal, respectively Filipe II, III and IV of Spain). That is to say that, over a period of sixty years, the same person wore the crows of Portugal and Spain. Given that the union of the two crowns was a personal one, Portugal and Spain were administered separately, as were their respective colonial empires[2].

[1] See also. Rui Marcos, *As Companhias Pombalinas, Contributo para a História das Sociedades por Acções em Portugal*, Almedina, Coimbra, 1997, p. 132.
[2] Cf. C. R. Boxer, *Four Centuries of Portuguese Expansion, 1415-1825: a Succinct Survey*, Witwatersrand University Press, Johannesburg, 1965, p. 45-47.

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Those sixty years under the command of three successive Spanish rulers turn out to be quite harmful for the Portuguese possessions and trade in the Orient. An immediate consequence was the hostility of the Dutch, given that they were engaged in a long-term war with Spain. Beginning in 1568, when seven of the Low Countries provinces rebelled from the Spanish Crown and later formed the Seven United Provinces of the Free Netherlands, until 1648, when the peace agreement was signed in Münster, by the United Provinces of Netherlands and by Spain, this long war between the two powers lasted eighty years.

The union through one king between Portugal and Spain from the year 1580 onwards, was the justification the Dutch needed to attack the Portuguese possessions, though the enemy was in fact the Spanish crown. In the Iberian colonial world the Portuguese were considered as the «weaker partner»[3] in the union, so the Dutch redirected the military action far more against the Portuguese settlements, with a considerably successful outcome, instead of the Spanish possessions where the difficulties proved to be greater than expected, and the failures were significant[4].

During this period of time, the most relevant and successful commercial organizations in the form of trade companies that controlled the trade with the East and West Indies during the seventeenth century came into existence [5]. At the dawn of the century, first the English and afterwards Dutch merchants agreed to pool together their resources and set up the early commercial companies with monopoly rights over the spice trade granted by their respective sovereigns.

The first commercial company to be created was the English *East India Company* (EIC)[6] through a charter granted on October 16, 1599, by Queen Elizabeth I of England, though its beginning is usually dated from the year 1600 onwards. However, the EIC was not, at the time of the foundation, a real corporation, but a mere

[3] Cf. C. R. Boxer, *Four Centuries, cit.*, p. 48.
[4] As were, for example, the «humiliating fiascos of their expeditions to the Philippines in 1610, 1617, and 1647-8». Cf. C. R. Boxer, *The Dutch Seaborne Empire 1600-1800*, London, 1965, p. 25.
[5] For a brief inventory of the main companies, see Tito Augusto de Carvalho, *As Companhias Portuguesas de Colonização*, Imprensa Nacional, Lisboa, 1902, p. 7 *et seq.*
[6] The complete name of the EIC is: «the Governor and Company of Merchants of London trading into the East India». Cf. Rui Marcos, *As Companhias Pombalinas*, Almedina, Coimbra, 1997, p. 55.

joint-stock undertaking. Merchants used to invest their money buying and equipping the ships for only one trip, and after the return of the fleet the value invested and the profits, if any, would be distributed among them[7]. Moreover, the partners of the company had the right to withdraw their contributions[8] whenever they wanted to.

To what the Portuguese trade is concerned, the Dutch companies were considerably more relevant. In the year 1602 was created the Dutch United East India Company (*Verenigde Oost-Indische Compagnie* – VOC). A few years later, in 1621, the West-India Company (*West-Indische Compagnie* – WIC) was established[9]. Both companies had a tremendous impact in the Portuguese colonial possessions, each with its own territorial area of exploitation, though the VOC was far more successful than the WIC in the fight against, and the conquest of, the Portuguese settlements and strongholds.

It must be stressed that the two Dutch companies were not only simple commercial companies but they had also military purposes, with the right to take part in wars for territorial conquest[10]. Namely, the *Hereen XVII*, the main directorial board of the VOC, was granted with the power to negotiate peace treaties, to enter into alliances, and to engage in «defensive wars»[11].

The VOC directed their attacks against the Indian Ocean Portuguese possessions. Between 1605, with the conquest of the Spice Islands, until the year of 1663, with the capture of Cochin and other Portuguese settlements on the Malabar Coast, numerous drawbacks were suffered by the Portuguese settlements at the hands of the powerful Dutch company[12]. On the other hand, the WIC threatened the Portuguese

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[7] *See* Fernand Braudel, *Civilização Material, Economia e Capitalismo, Séculos XV-XVIII, Os Jogos das Troca*s, tomo 2, Teorema, Lisboa, 1992, p. 398. Also Rui Marcos, *As Companhias Pombalinas, cit.*, p. 56.

[8] Fernand Braudel, *Civilização Material..., cit.*, p. 398. Only after the year 1658 the capital of the IEC became protected from the members' claims.

[9] See José Dalmo Fairbanks Belfort de Matos, *As Companhias Gerais do Comércio e a Soberania Delegada*, in Scientia Ivridica, tomo IV, 1954-1955, Braga, p. 270 *et seq.*

[10] C. R. Boxer, *The Dutch Seaborne…, cit.*, p. 24 and 94.

[11] C. R. Boxer, *The Dutch Seaborne…, cit.*, p. 24.

[12] See C. R. Boxer*, Four Centuries…, cit*., p. 49. The only Portuguese territories that resisted to the Dutch assault were the city of Macau and the remote islands of Flores, Solor and Timor belonging to the Lesser Sunda Group.

Atlantic colonies attacking Brazil, Angola, Cape Verde and the Gold Coast. However the Dutch failed to keep those conquests and were defeated in Luanda (Angola) in 1648 and expelled from Pernambuco (Brazil) in 1654[13]. The growth and expansion of the Dutch trade companies was mostly made at the expenses of the Portuguese colonial empire, even after a truce signed in June 1641 with the King D. João IV[14].

It was within this historical context, and the political and military circumstances discussed above, that, first the King Filipe II of Portugal in 1619 and subsequently the King Filipe III of Portugal in 1624 tried to establish a Portuguese company for the trade with the Orient, what finally happened under the rule of the former but only in the year 1628.

III. THE FOUNDATION OF THE PORTUGUESE EAST INDIA COMPANY

1. Early Developments

The first attempt to create a monopolistic commercial company in Portugal goes back to the sixteenth century, to the year 1587, when King Filipe I of Portugal proposed the establishment of a Portuguese Company for the East Indies. Nevertheless, this attempt did not succeed and almost no information on the failure to establish that company is available today[15].

A second attempt to create a trade company was made in the first quarter of the seventeenth century. The initial step was taken by the King Filipe II of Portugal through the issue of a Royal Charter (*Carta Régia*) dated from the 19th February 1619[16]. In this Charter, the King upheld the idea of establishing a company for the navigation and trade

[13] In West Africa the Dutch only kept the settlements conquered to the Portuguese in the Gold, Slave and Ivory Coasts. Cf. C. R. Boxer, *Four Centuries…, cit*., p. 50-51.
[14] C. R. Boxer, *The Dutch Seaborne…, cit.*, p. 86. The directors of the VOC and the WIC defended before the States-General the exemption of the Portuguese colonial world from the truce to be signed with the Portuguese Crown for Europe.
[15] Cf. Rui Marcos, *As Companhias Pombalinas, cit.*, p. 122-125. See also J. Borges de Macedo, *Companhias Comerciais*, in Dicionário de História de Portugal, Dir. Joel Serrão, Vol. I, Lisboa, 1971, p. 637.
[16] This royal Charter can be found in José Gentil da Silva, *Alegação a Favor da Companhia Portuguesa da Índia Oriental*, in «XIII Congresso Luso-Espanhol para o Progresso das Ciências», VIII, Lisboa, 1950, p. 485-486.

with India, following the example of foreign companies, a company which should be open to all persons, of whatever social condition, and also open to the cities and villages of the Kingdom[17]. This royal charter had little impact on the Portuguese society to whom it was addressed and the result was virtually null.

Not long after this frustrated royal initiative, a third attempt was undertaken. In the meantime a succession in the Portuguese throne took place, King Filipe III replaced King Filipe II, and restored the idea of establishing a trade company. For that purpose another Royal Charter (*Carta Régia*) of 10th of December 1624 was issued[18]. In this Charter, the King stressed the intention of setting up a company comparable to the ones existing in Netherlands and England («*do modo que o fazem as que ha em Olanda e Inglaterra*»[19]). It was specifically mentioned the damage caused by the foreigners from Europe in India and other Portuguese colonial possessions, and the purpose was to end that usurpation of navigation and trade[20]. Similar to the Royal Charter of 1619, this Charter called for the participation of all kind of persons, including ministers of the Kingdom and other officials, and once more urged the contribution of cities, as well as of other villages and communities. Lisbon, as the first city of the Kingdom, was asked to take part and thus to give an example to the other Portuguese municipalities[21].

The Royal Charter of 1624 also empowered Dom Jorge Mascarenhas, the Lisbon Mayor, and member of the King's Council, as the president of an "ad hoc" commission («*Junta*»)[22] to prepare the incorporation of the company. In order to persuade communities to invest, the King Filipe III of Portugal appointed by Royal Charter[23] Francisco Rebello Homem to travel around the Kingdom promoting the company[24].

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[17] Cf. Rui Marcos, *As Companhias Pombalinas, cit.*, p. 125-126.
[18] The document is transcripted in Eduardo Freire de Oliveira, *Elementos para a História do Município de Lisboa*, 1.ª parte, T. III, Lisboa, 1887, p. 129-131.
[19] Cf. Eduardo Freire de Oliveira, *Elementos..., cit*., p. 129.
[20] Cf. the text of the Charter, in Eduardo Freire de Oliveira, *Elementos..., cit.*, p. 129.
[21] Cf. Eduardo Freire de Oliveira, *Elementos..., cit*., p. 129.
[22] See A. R. Disney, *Twilight of the Pepper Empire, Portuguese Trade in Southwest India in the Early Seventeenth Century*, Harvard University Press, 1978, p. 76.
[23] A reference to this Royal Charter is included in José Justino de Andrade e Silva, *Collecção Chronologica da Legislação Portugueza*, 1620-1627, Lisboa, 1855, p. 137.
[24] See J. Borges de Macedo, *Companhias…, cit.*, p. 637.

With the aim of attracting the private and municipal contributions to the establishment of the company, a Royal notice dated of the same day, 10th of December 1624, guaranteed the safety and effectiveness of the investments made, assuring that the money would never be diverted to other purposes[25]. Notwithstanding this reassuring announcement, the enthusiasm to invest in the company was scarce and until the end of 1627 the effective subscriptions of capital were few. Only in 1628 the subscriptions started to increase in the Iberian Peninsula, finally allowing the incorporation of the Company[26].

2. Incorporation

Following a long and difficult process of organization, at last the Company came into daylight. The King Filipe III granted the constitutional document setting up the log-wished trade company. The Statutes (*Regimento*) of the Portuguese East India Company (hereinafter «the Company») are dated from the 27th day of August of the year 1628[27].

Thus the Company was created by Royal enterprise. Differently from the companies established in the Protestant powers, the foundational document was not based in an agreement between merchants. The VOC was created from a merger of six trade companies from various Provinces of the Netherlands. Similarly EIC was originated from a group of London merchants. In Portugal, King Filipe III undertook the organization of the Company, issued the *Regimento*, participated as a member, and subsequently through the concession of nobiliary privileges expected the voluntary involvement of many other private investors[28].

[25] Cf. José Justino de Andrade e Silva, *Collecção..., cit.*, p. 410. However, though the guarantees given in the Charter, in two different situations, and before the incorporation of the company, the money deposited had to be provided to equip an emergency fleet to go to help India. Cf. Rui Marcos, *As Companhias Pombalinas, cit.*, p. 129-130.

[26] Cf. Rui Marcos, *As Companhias Pombalinas, cit.*, p. 130-131.

[27] The original version of the *Regimento* is archived in the *Arquivo Nacional da Torre do Tombo, Manuscritos da Livraria, liv. 539, fls. 77-91*. It is also possible to find a transcription of that document in: José Gentil da Silva, *Alegação a Favor…, cit.*, p. 486-517.

[28] The preamble of the *Regimento* is quite clear about the King's intention to promote the Company urging all the communities and individuals to follow his example («[…] *donde serei Eu o primeiro que com cabedal proprio entre nella que a exemplo meu se escuse ninguém de o por* […]»)

It is important to mention that the *Regimento* was complemented by another royal decree («*Alvará*»)[29], issued on the same day, 27th of August 1628, where the King publicly announced a detailed inventory of revenues, rights, duties, and other sources of income to transfer to the Company in order to pay his promised contribution of 1,500,000 *cruzados*. The King also guaranteed in the *Alvará* that he would not take out its profits from the Company before the predetermined date, and the profits would be equally distributed according to the value of the investment made in the Company[30]. It is quite clear that with this proclamation the King intended to reassure potential investors that the Crown would take no advantage of its privileged status. To stress this purpose, the *Alvará* also contained a reference to the power of the administrators to govern the Company free from the intervention of the courts or the ministers of the Kingdom («*sem dependência de outros tribunaes e menistros*»)[31].

However, the principal document for the Company's establishment is naturally the *Regimento*. Taking into consideration that its is first foundational charter of a trade company ever made in Portugal, it should be emphazised that the *Regimento* is a extremely complete legal document which is divided into 68 Chapters[32] («*Capítulos*»). Of course, some failures and gaps in the regulation of the company's incorporation and organization are easily identified. And most probably the authors of the founding text had access to the charters of the contemporaneous foreign companies, or at least had some knowledge of the rules governing those companies. In any case, the *Regimento* constitutes undeniably an advanced legal text for the epoch and for state of evolution of the Portuguese commercial legal system.

The Company was incorporated having as the major contribution the King's abovementioned consideration of 1,500,000 *cruzados* and the additional *pro bono* payment of a total sum of 510,000 *cruzados* (Chapter 3), both to be paid during the

[29] The *Alvara* is also archived in the *Arquivo Nacional da Torre do Tombo*, *Manuscritos da Livraria, liv. 539, fls. 91v-92v.* A transcription of the document is found in the work of José Gentil da Silva, *Alegação a favor…, cit.*, p. 518-521.
[30] Cf. *Alvará* in José Gentil da Silva, *Alegação a Favor…, cit.*, p. 518. And Chandra Richard de Silva, *The Portuguese East India Company 1628-1633*, in Luso-Brazilian Review, IX, Winter, N.º 2, 1974, p. 161.
[31] See *Alvará* in José Gentil da Silva, *Alegação a Favor…, cit.*, p. 520. And Chandra Richard de Silva, *The Portuguese…, cit.*, p. 161.
[32] Corresponding to modern articles or provisions, but the terminology used in the *Regimento* was «Capítulos» (Chapters) and so we will keep it.

three years following the date of incorporation, divided in three equal fractions. The *pro bono* payment was intended to compensate part of the costs with the preparation of the first fleet to be sent to India. Also the town halls of the cities and villages of the Kingdom had the obligation to make a *pro bono* payment of 90,000 *cruzados*, following the same procedure as the King' contribution, divided in three equal fractions to be paid each year for the duration of three years.

3. Capital

Neither the text of the preamble nor the provisions of the *Regimento* determined a minimum value of capital for the Company to be incorporated with. The King as a member was legally bound to enter with 1,500,000 *cruzados* (Chapter 1). Nevertheless, the total amount effectively invested in the Company until 1633 only reached the feeble value of 533,259,571 *reis*[33] (approximately 1,333,149 *cruzados*[34]). That is to say that not only did the King fail to fulfil his own contribution, but also the Company was unable to attract private investors, as it had been desired. Instead, private contributions were scarce, and the Company did not manage to stimulate the enthusiasm of the Portuguese businessmen and municipalities.

The lack of interest shown in investing in the future Company, throughout all the period of its formation (since the King Filipe III's Royal Charter of 1624 until the date of incorporation in 1628), was somewhat a prediction about its future short life. The exact same difficulties in raising investments for the Company led to the undercapitalization that determined its premature end.

This situation could have only been avoided if the *Regimento* had imposed, by way of the inclusion of specific provisions, a minimum value of capital effectively invested as a precondition for its incorporation and to begin its own activities. That was

[33] Values referred by Chandra Richard de Silva, *The Portuguese…, cit.*, p. 197, that also presents the values invested in the other companies (p. 195-196). Roughly one can say that the amount invested in the five years of activity of the Portuguese East India Company corresponded to half of the value invested only in the year of 1602 in the VOC. And the EIC though having had a modest start, by the year 1617 had raised six times more money than the Portuguese Company during its five years of existence (p. 195).
[34] According to Chandra Richard de Silva, *The Portuguese…, cit.*, p. 197, 1 *cruzado* = 400 *reis*.

an important shortcoming in the regulation set forth for the Company, which was probably responsible for its early demise.

4. Duration

The Company was incorporated with a time frame of 12 years. Chapter 32 of the *Regimento* determined the period of 12 years during which the King and other members («*partícipes*») could not withdraw the share («*posto*») invested in the company. After the expiration of that duration, and after administrators had to render a final account of the Company's business, then the value of the shares plus the profits, if any, would be reimbursed proportionally to the investment made by the members.

Following the winding up of the Company, upon the expiration of the time specified in the Charter, and after the distribution of the residual assets among its members, a new company could be created with the members who could freely choose to reinvest part or all of the assets that were attributed to them at the end of the liquidation process (Chapter 35).

5. Privileges and Benefits

In order to make the Company attractive for private investors, the King granted the Company a set of privileges concerning the trade of some products coming from the East India carrier. The most important among them was the monopoly of the pepper trade («*estanque da pimenta*»), curiously included in the list of assets that were part of the consideration due by the King (Chapter 2). Other monopolies were given to the Company, to complement the pepper monopoly and to make it even more attractive for investors, like the monopoly of trade in coral, ebony and cowries («*estanques de coral, pao preto, e buzio*»), and if the Company was interested also the monopoly of the cinnamon («*estanque da canela*») – Chapter 19[35].

[35] Cf. Chandra Richard de Silva, *The Portuguese…, cit.*, p. 161.

To guarantee those privileges, Chapters 20 and 21 of the *Regimento* integrated provisions to harmonize the potential future existence of other trade companies with the East India Company. Future companies will have their own geographical areas to trade, without the possibility of trading directly products from other places that were included in the monopoly of this Company. To trade products granted in monopoly to the East India Company other companies would have to do it through the House of India («*Caza da India*»), whose duty rights belonged to the East India Company. This was the way found to assure that the monopolies, which constituted the core business of the Company, were kept in its sphere, even with the potential creation of other companies.

An appealing benefit awarded to the Company was related to the product of the conquests and pillages achieved by the Company's vessels. One fifth of the sack should have been distributed among the captains and soldiers («*excepto o quinto que ha de pertencer aos capitaens e soldados*»). The other four fifths of the value of the sack were property of the Company (Chapter 28). Territorial conquests made by the Company's fleets were considered as belonging to the Crown («*sem que fique para my mais que a terra que se ganhar*» – Chapter 28) This provision constituted a powerful incentive for a belligerent approach in relation to other ships and to the indigenous peoples[36].

IV. MEMBERS

1. Category of Members

King Filipe III of Portugal was the first subscriber and member of the Company. Even though the Company was created by royal initiative, its capital was open to public subscription, and the King participated as a mere shareholder devoid of his "ius imperium" of the Company, like any other private member who decided to join afterwards («*Sua Magestade entra nesta Companhia como companheiro particular desestindo de seu Real poder*» - Chapter 26).

[36] Cf. Chandra Richard de Silva, *The Portuguese…, cit.*, p. 162. The Company had the duty to transport, in each of its vessels («*naos*») sent to India, 300 hundred soldiers at its own expense (Chapter 6).

Apart from the King, every natural person could also be a first subscriber of the Company and to become a member. The capital of the Company was open to all the individuals, no matter their status, willing to invest their assets (Chapter 7), free from any of coercion (Chapter 8). Not only was the capital open to the «vassals» of the King («*vassalos meus*»), Portuguese and Spanish first of all, but also it was open to foreign investors coming from friendly or confederate nations (Chapter 14)[37]. Even the ministers of the King, the clergymen, and other persons legally forbidden to commerce were allowed to enter the Company. According to Chapter 12, the only persons prohibited from being mebrs of the Company were the ministers of the King's Commerce Council («*menistros do meu conselho de commercio*»), and the judges of the Lisbon Court of Appeal («*juises da Appellação em Lisboa*»)[38].

Finally, a third category of members, admitted to the Company, were local communities. Since the beginning of the process of foundation of the Company, a widespread campaign throughout the nation was put in place to convince cities, villages and other territorial communities to invest in it. In line with this the *Regimento* had a specific provision allowing the participation of cities, villages and other territorial communities («*cidades, villas e lugares poderão meter postos na Companhia*» – Chapter 13).

The admission of members raises, however, a question concerning its timeframe for which the *Regimento* do not provides an answer: had investors to join the Company at the time of its incorporation or were they allowed to joint to it anytime later? Apparently, the omission of the *Regimento* seems to point out in the latter direction, being the Company open to the admission of new investors even after incorporation[39].

[37] Following Chandra Richard de Silva, *The Portuguese…, cit.*, p. 162, this provision «opened the door to investment by Spanish, Flemish and Italian capitalists». We deem that the Spanish were considered in the category of «vassals» of the King Filipe III, and not included in the category of foreigners.

[38] See Rui Marcos, *As Companhias Pombalinas, cit.*, p. 136. This exclusion of the ministers of the King's Commerce Council has to do with the control competences granted to this Council upon the Administration Chamber (see below Section VI - 3). Likewise, the Lisbon Court of Appeal has jurisdiction over the appeals against the administrators. It is thus noteworthy the concern with the separation of powers intended between the Company and the bodies with supervisory powers over it.

[39] The Charter of the Dutch West India Company of 1621 (WIC), on the contrary, prescribed: «Section XVII. […] nor shall any new members be admitted [during the continuance of this charter].» Cf. the full text of the Charter in http//www.yale.edu/lawweb/avalon/westind.htm The WIC was created for the period of 24 years (Section XVI: «at the expiration of four and twenty years…»).

2. Contributions

Any person who wanted to become a member of the Company had to make a contribution either in cash or in kind. The *Regimento* stipulated a minimum value for the contribution of 100 *cruzados* (Chapter 15). In the case of persons that were unable to comply with the minimum amount required, there was the possibility of joining with other members and, as a syndicate, pooling together the contributions so as to achieve that necessary minimum value (Chapter 15)[40].

The rule for receipt of contributions in kind is quite generous, which made admissions to the company easier[41]. Even judicial deposits were allowed in the Company (Chapter 17). Nonetheless, the *Regimento* did not foresee any form of assessing or controlling the exact value of contributions to be paid in kind, as it did not determine when the considerations should be paid by member (that is to say, whether the considerations should be paid immediately or could be deferred to a later date).

3. Privileges Granted to the Members

The goal of collecting the highest possible value of considerations was so important to the project that the *Regimento* provides for a complete catalogue of privileges granted to the shareholders according to the amount invested and the length of the investment. From the Chapter 62 to the Chapter 68, it was outlined a rank in which the higher was the consideration, the more superior was the title[42]. Starting with 1,000 *cruzados*, the shareholder would have the title of nobleman («*Cavaleiro fidalgo*» – Chapter 63). On the other side, for an investment of 30,000 *cruzados* or more, for that reason to the shareholder would be granted the privilege of noblemen of the King's House, together with a household of 2.000 *reis* («*foro de fidalgo da Casa de Sua Majestade com dous mil reis de moradia*» – Chapter 66)[43].

[40] Cf. Rui Marcos, *As Companhias Pombalinas, cit.*, p. 137.
[41] In this sense, cf. Rui Marcos, *As Companhias Pombalinas, cit.*, p. 137.
[42] Cf. Rui Marcos, *As Companhias Pombalinas, cit.*, p. 137-138.
[43] See A. R. Disney, *Twilight of the…,cit.*, p. 82.

V. MEMBERSHIP STATUS

The *Regimento*, being the fundamental law of the Company, also provided for the rights and duties attributed to the members. As a matter of facto, the text of the *Regimento* has several provisions referring to members' rights and duties that, though in a non systematic form, are not difficult to identify.

1. Rights of Members

One of the typical rights of members of any commercial company is the right to profits. So it happened in the case of the Company, with an important distinctive feature. In fact, it was contemplated a right to a annual fixed dividend, in the amount of 4% of the value invested, to be paid from the second year onwards (Chapter 33 of the *Regimento*): this was thus a sort of guaranteed dividend, similar to an interest, paid independently from the profits obtained by the Company.

In addition to this annual fixed dividend, the Company could proceed to another allocation to the members after six years of activity. The administrators had the duty to prepare a balance and an account of all the businesses conducted by the Company up till that day[44]. And from the assets and profits accounted, if the economic situation of the Company allowed, the administrators could proceed to a distribution of assets among the members, but only if that distribution would not lead to the weakening of the Company (Chapter 34). Since the Company had been incorporated for a 12 years period, this benefit would constitute a mid-term distribution of spare assets.

Another economic right of the members upon the Company was the right to receive a proportionate part of the capital after the term of the company's expected lifetime. Established to last 12 years in the design of the authors of the *Regimento* a

[44] Curiously the Charter of the WIC in its Section XVI had a similar demand for the managers to make a general account within the same time period of six years: «XVI. That every six years they shall make a general account of all outfits and returns, together with all the gains and losses of the company». However, it was not foreseen a distribution of profits depending on the financial wealth of the company. *See* the Charter in *loc. cit.*

final account would have been made to determine the remaining assets and profits available to be divided among the members (Chapter 35). The Company would have been wound up and the leftovers distributed according to the investment («*que tocarem a cada um dos participes*»). After that the members were free to reinvest the amount reimbursed in a new company to be created to replace the one dissolved, or to keep the funds for themselves.

A rather essential right for a member is the right to divest from the Company. The consideration given could not be withdrawn from the Company for the whole 12 years that was supposed to be the life of the Company (Chapter 32)[45]. However, the *Regimento* authorized the members to transfer their share of capital *(«posto»*) owned in the Company (Chapter 18). This measure had the advantage of keeping stabilized and preserved the amount of the capital invested in the Company, and at the same time allowing the members to divest by selling their share in the Company. Although the members of the Company did not hold shares representing its investment to negotiate in a financial market, like the members of the VOC, there was the right to transfer the share as a whole («*posto*»), or, in other words, to transfer the status of shareholder. The scheme applied to transfer the share described in Chapter 18 is quite similar to the assignment of a credit. Furthermore, the transfer of the share had to be written in the books of the Company (Chapter 18). This obligation meant that there was a registry book where all the considerations paid by the members had to be registered.

Turning our attention to the category of the members' political rights in the Company, the *Regimento* conferred just a limited voting right. Only in one situation were the members called to vote: the election of the administrators of the General Administration Chamber («*Câmara da Geral Administração*»). And even this limited voting right was not a democratic one. To have the right to vote for the administration a member had to have invested no less than 1,000 *cruzados* (Chapter 39). Moreover, it seems that the *ratio* was one member-one vote, no matter the amount invested. All this duly considered means that the members of the Company exercised their voting right once every three years, and if the members by any chance were in Lisbon at the time of

[45] Similarly the Charter of the WIC established «XVII. No one shall, during the continuance of this charter, withdraw his capital, or sum advanced? From this company;». Cf. Charter in *loc. cit.*

the election («*os que ao tempo da eleição se acharem em Lisboa*» - Chapter 39). There was no obligation to hold annual general meetings with all the members.

2. Duties of the Members

Contrary to what happened with rights, the *Regimento* was scarce concerning the duties of the members. The main, in not only, obligation a a member of the Company consists in the duty to pay its contribution in cash or kind, corresponding to the nominal amount of the capital subscribed (on this contribution, *see* in detail above IV- 2).

VI. ORGANIZATION OF THE COMPANY

1. The Simplicity of the Company's Organization

When compared with the other foreign similar companies, the Portuguese Company had a very simple organization. In fact, the Company organization can be said to be composed of by a single organ, though with a complex composition. The *Regimento* mentions exclusively the General Administration Chamber («*Câmara da Geral Administração*»), and no reference to a general meeting of members is made. In spite that any form of assembly of the voting members should have taken place, at least every three years, to elect half of the administrators (Chapters 39 to 41), no specific name is given in the *Regimento* to this assembly, however.

The executive structure of the Company was outlined to be as much as possible independent from the King's external influence. The *Regimento* (Chapter 26) states that King either himself or indirectly through his ministers do not have any involvement in the government of the Company («*nem por mim, nem por meus ministros não hey de ter particular governo della*»). Of course, the King was the major contributor to the Company's capital, and in addition granted as privilege to the Company the lucrative trade monopolies that had been explored for more than one century by the Crown[46]. Nevertheless, while taking part in the Company, the King willingly accepted its

[46] See Chandra Richard de Silva, *The Portuguese.., cit.*, p. 163.

membership status and the rules that placed him in an equal, while proportionate to the contribution made, position in relation to the other members.

2. Composition of the General Administration Chamber

The General Administration Chamber («*Câmara da Geral Administração*») constitutes the sole body of the Company's administrative structure. Six administrators plus a President («*Presidente ou Protector*») composed this Chamber. In the terms of the Chapter 37, the King had the right to appoint the «President» among one of his Ministers, with the responsibility to preside over the administration of the Company. The only requirement put forth in the *Regimento* was that the Minister nominated couldn't be a shareholder nor have any kind of interest in the Company.

The six administrators were elected according to the following procedure: one elected by the municipalities who joined the Company, and the other five were elected by the private investors, but only by those who had invested at least 1,000 *cruzados* (Chapter 39). Three years was the length of the administrators' mandate In order to guarantee some continuity and stability in the administration board, only half of the administrators were replaced every three years (Chapter 41). Therefore, in the first elected group of six administrators, three would perform a mandate of six years.

Finally, the assignment as administrator was remunerated (Chapter 46). The six administrators were paid from the income of the Company' s business, earning each of them an annual sum of 160,000 *reis* (approximately 400 *cruzados*).

In addition to the six administrators, a panel of six councillors («*conciliarios*») with a double role were to be designated. Firstly to replace one of the administrators in case of need, such as death, absence or other definitive impediment, if to happen between elections (Chapter 45). In a situation like this, the most ancient – the most voted – councillor would replace the impeded administrator. Secondly, whenever the administration considered it necessary they had the power to call the councillors for

them to render an opinion and to vote on serious issues («*para cousas graves*» – Chapter 43).

In the very same election call-up to select the administrators, the councillors would also be elected. Actually, the six councillors shall be the six more voted persons after the six nominated administrators, in the very same election (Chapter 42). Once elected for a mandate of three years the councillors could not be re-elected for the following triennium (Chapter 43). The councillors were not paid to perform their functions (Chapter 46).

For the reason that the members of the Company had no power to supervise the administrators' management, the *Regimento* set as solution an external control granted to the Commerce Council («*Conselho de Comercio*»). After the term of their respective mandates, either the administrators, or the counsellors, had to be available to give an account of their activity («*hão de ser obrigados a dar residencia do que ouverem feito nella*») before a person nominated by the Commerce Council («*Conselho de Comercio*»), having the right to appeal the judgment («*appelaçoens que de suas sentençãas se interpuserem*») rendered by that person (Chapter 59). This control, coming from a King's council, certainly would lead to an intrusion in the independence and impartiality desired for the administrators and the counsellors.

3. Powers and Control of the General Administrative Chamber

One special competence given to the administration board was the exclusive jurisdiction over problems related to the Company's business and sphere of interests. Indeed the *Regimento* had empowered the Chamber to settle the disputes that might arise from the development of the Company' s businesses, as well as the disputes among its members and between the members and other persons (Chapter 48). Moreover, this exclusive jurisdiction granted to the Chamber was not only over civil cases but also over criminal offences (Chapter 49), like smuggling and other felonies committed by officials and ministries of the Company («*delictos que os offciaes e menistros da Companhia cometerem*»).

Intended to be as independent as possible from the King' influence, however the Company was under the control of the state's *longa manus*. In the terms of Chapter 25, the General Administration Chamber had to submit to the Commerce Council («*Conselho do Comercio*»), an advisory council of the King[47]. This Council also had the power, through a person appointed by it (Chapter 59), to assess the activity undertaken by the administrators at the end of their mandate. Furthermore, the Commerce Council was allowed to inspect the financial records («*cartas de pago*») of the Company (Chapter 57). These were the major competences, among others, granted to the Commerce Council, which revealed the dominant position of this Council over the Company's administration.

4. Legal Counsellor

At last, a legal counsellor («*ascessor letrado*») appointed by the Commerce Council («*Conselho de Comércio*»), with a seat in the Administration Chamber, was assigned the duty of conducting the legal action in the cases («*prossesar as causas*») within the jurisdiction of the Company. To fill this position, the *Regimento* required that the person had to be Portuguese by birth (Chapter 50).

VII. THE LEGAL PERSONALITY OF THE COMPANY

After having analysed the main topics and rules of the *Regimento* of the Company, a final key question is the following one: can the Company be considered as a sort of legal entity on its own? The question at stake is whether the Company can be considered a legal person distinct from its members, instead of a sort of partnership between the King and the individuals that took part in its creation.

First of all, one should bear in mind that, at the beginning of the seventeenth century, there were no established trade companies in Portugal, nor any type of legal document ruling the incorporation, life and winding up of a company. This render thus

[47] Chandra Richard de Silva, *The Portuguese..., cit.*, p. 163.

extremely difficult to admit that the Company was consciously intended to be organized as a separate and independent legal entity. However, considering the rules set forth in the *Regimento*, it is possible to assume that some sort of autonomy and separation between the assets of the Company and the personal assets of its members was envisaged.

In the case of private debts of a member, the creditor was not allowed to target the assets of the Company in order to get paid for its credit (Chapter 11). This rule was to be applied for the future, in relation to any potential creditors of the members. Chapter 11 exempted from that regime the debts assumed before the acquisition of the membership, as long as the creditor of the member claimed his credit within the three years counting from that date. Furthermore, the assets given as consideration could not be seized for any «crime of human nature» («*de Leza Magestade humana*»), unless it was a «crime of divine nature» («*de Leza Magestade divina*») but in this case the assets seized would be held in the Company and could only be claimed by the third generation of the offender's descendents (Chapter 10).

Moreover, the members could not ask for the refund of the contributions given as consideration (Chapter 32), since they lack any property rights over the Company' assets. As mentioned previously, for the whole period of its intended duration (12 years), the members could not withdraw the contributions made in cash or in kind to the Company, having only the possibility of transferring its membership status to third parties (*see* above Section V – 1).

Another important provision is the one foreseen in Chapter 5, dealing with the losses occurred with the fleets, which should be paid *pro rata* from the members' profits («*qualquer dos participles rata por cantidade, a respeito dos cabedaes, tirando o dos ganhos deles*»), and only if necessary would be paid through the King's treasury («*se ha de pagar por carta da minha fazenda o que lhe tocar* […] *e cazo que elles não bastem para inteira satisfação de outros effeitos*»). Although somewhat ambiguous, this is undeniably the most crucial provision for the question of determining the nature of the Company as a legal entity. According to it, the Company's losses were supposedly

cover by the profits of the members and, if necessary, the King's assets: in no circumstance the personal assets of the members could be held responsible for the Company's losses. Therefore, one may say that the members of the Company enjoyed in fact of a limited liability for company's debts, as only their profit rights could be used to compensate the Company's losses that might occur with the fleets. Furthermore, if the profits showed to be insufficient to cover the losses, only the King's treasury could be mobilized. The members would thus risk no more than their proportionate part on the profits to be distributed with the winding up of the Company. It is important to stress that until the winding up the members did not have any right over those profits, or, more accurately, future profits.

Accordingly, and even if it had not been in the mind of the «founding fathers» of the Company, an actual construction of the *Regimento* lead us to the conclusion that the Company was more close to the model of a corporation rather than of a partnership. In fact, would in fact the Company be designed as a partnership, then the members would own its assets and would be jointly responsible for its debts[48]. However, none of these conditions was met is this case: not only there was a separation between the Company' assets and members' assets (as the later could not claim from the former the reimbursement of the contributions made), but the members were not personally responsible for the Company's debts.

VIII. DISSOLUTION

Expected to last for the period of 12 years and with idealistic promises of majestic profits, the Portuguese East India Company came to a sudden end after less than five years of difficult existence. Quite far from the initial optimistic prospect of a massive public involvement, the Company struggled from the beginning with the scarcity of the capital that was needed to undertake its assignment. In that period of almost five years only fifteen ships were equipped and sent to the Orient. Out of these

[48] Cf. Ross Grantham/ Charles Rickett, *The Bookmaker's Legacy to Company Law Doctrine*, in: "Corporate Personality in the 20th Century", Ed. By Ross Grantham & Charles Rickett, Hart Publishing, Oxford, 1998, p. 2.

fifteen ships only seven completed the round trip to Lisbon[49]. This extremely poor performance led to the virtual bankruptcy of the Company. In 1633 the assets of the Company were calculated approximately as only 117,193,725 *reis* (around 292,285 *cruzados*), plus the five ships still in India. Bearing in mind that the full amount of investments in the company was to the total sum of 533,259,571 *reis* (approximately 1,333,149 *cruzados*) one easily can draw the conclusion that half of the capital invested in the Company had simply vanished[50].

Not long after the incorporation, came the end: the Company was dissolved on 13th of April of 1633, through a Royal Charter (*Carta Régia*)[51]. However, the *Regimento* did not contemplate any rules that could anticipate and regulate a premature dissolution of the Company. Together with the decision to dissolve the Company, the Royal Charter of 13th April 1933 ordered the absorption of the Company by the Treasury Council («*Conselho da Fazenda*»)[52].

IX. THE PORTUGUESE EAST INDIA COMPANY: PAST AND PRESENT

In concluding this journey on the historical origins of Portuguese company law, a final exercise can be tried: to draw a parallel between the charter rules of the Company and the legal provisions of modern Portuguese company law. Our purpose is simply to underline in a brief synopsis that, after several centuries, some of the original solutions found for the East India Company are still in force and binding for the contemporary corporations at present.

Of course, given the unique and dated characteristics of the Portuguese East India Company, it is almost impossible to make an exact correspondence to one of the types of companies admitted in the Portuguese company law. However, considering the four main types of companies regulated by the Portuguese "Companies Act" of 1986

[49]For a complete account of the fleets sent to India and its outcome, see Chandra Richard de Silva, *The Portuguese…, cit.*, p. 171-173.
[50] Values mentioned in Chandra Richard de Silva, *The Portuguese…, cit.*, p. 197.
[51] Cf. José Justino de Andrade e Silva, *Collecção Chronologica..., cit.*, p. 310.
[52] See Charles R. Boxer, *War and trade in the Indian Ocean and the South China Sea, 1600-1650*, in Portuguese Conquest and Commerce in Southern Asia, 1500-1750, Variorum Reprints, London, 1985, VI, p. 6.

«Código das Sociedades Comerciais"), hereinafter CA – the public corporation («*sociedade anónima*»), the private limited liability company («*sociedade por quotas*»), the general partnership (*«sociedade em nome coletivo»)* and the limited partnership («*sociedade em comandita*») –, the most closely resembling model of the Portuguese East India Company is undoubtedly, in nowadays, the public corporation («*sociedade anónima*»).

To start with, the method of incorporation of the Portuguese East India Company is similar to one of the forms provided for the incorporation of corporations: the incorporation by public subscription (Article 279 of CA, Article 13/1/a) of the Code of Securities Market). In short, the formation of the company is promoted by one or more persons, who subscribe and pay part of the capital as well as draft its articles of association, being then the remaining amount of that capital offered to investors by a public offer of the shares of the company. This specific form of incorporation resembles the one used in the East India Company, where the King performed the role of the promoter and the remaining members resembled to private investors in a subscription offer.

In contrast to modern corporations, the equity capital of Portuguese East India Company was not divided in shares («*acções*» - Article 271 CA) but the participation of each member had a global value equivalent to its contribution (called «*posto*»). This characteristic brings us closer to the model of private limited liability company («*sociedade por quotas*»), where each member holds a single share or fraction of capital («*quota*» - Article 219 CA). Likewise, concerning the transmission or negotiation of its membership status at the Portuguese East India Company, the members had to transfer their share («*posto*») as a whole, whilst in the limited liability companies this is attained via the transfer of the share or fraction («*quota*») of capital (Article 228 CA).

On the other hand, the managing board («*Camara da Geral Administração*») in the Portuguese East India Company, with its broad powers, looks closer to the Board of Directors of modern corporations («*Conselho de Administração*» - Article 406 CA).

Moreover, similarly to membership of corporations, the members of the Company have a rather residual role in the conduction of its business affairs.

Of crucial importance is the limited liability of the members of the Portuguese East India Company, which is also one of the "sacred cows" of modern corporations *(«responsabilidade limitada dos acionistas»*: Article 271 of CA). As noted above (see section VII), only the King and the royal Treasury might be ultimately held liable for the losses of the Company (Chapter 5), being the remaining individual members exempted from any personal liability beyond the amount of their investments (including profits resulting therefrom).

X. CONCLUSION

The colonial companies created during the seventeenth century are the predecessors of the modern large public corporations[53]. Those companies constituted a rather sophisticated financial and organizational model aiming at the collection of huge investments in maritime fleets of some European countries, including Portugal, in order to explore the trade business with the Far East, the demand for military backup to protect the fleets and settlements built, and the requirement of the royal sanction to explore in monopoly the trade of some products[54].

The Portuguese East India Company of 1628 was an attempt to accomplish those objectives, following closely the example of the leading trade companies, in particular the English and the Dutch. Nevertheless, the differences of dimension and commercial success between the English and the Dutch East India Companies, on the one side, and the Portuguese Company, on the other side, are overwhelming.

In fact, the Portuguese East India Company, which faced already significant problems at its incorporation process, had an unexpectedly short life, coming to dissolution by 1633. In the subsequent years, no company was formed to replace the

[53] *See* Gastone Cottino, *Il Diritto che Cambia: Dale Compagnie Coloniali alla Grande Società per Azioni*, in Rivista Trimestrale di Diritto e Procedura Civile, Anno XLIII, Milano, 1989, p. 495.
[54] Gastone Cottino, *Il diritto...,cit.*, p. 494-495.

East India[55]. The trade with the Orient returned to the Crown's control, and only in 1647 another colonial company was created in Portugal, after the restoration of the independence from Spain. But, this time, the new company was formed exclusively to trade with the western Portuguese possessions in Brazil: this was the "General Company for the State of Brazil" («*Companhia Geral para o Estado do Brasil*»)[56].

However, the importance of the Portuguese East India Company cannot be judged only by its commercial success. In spite of its short life, it remains today a milestone in the historical origins of modern Portuguese companies and of modern Portuguese company law.

[55] A new trade Company for India was only established by the end of the seventeenth century, in the year of 1693, long after the dissolution of the Portuguese East India Company of 1628. Cf. Rui Marcos, *As Companhias Pombalinas, cit.*, p. 137.

[56] For a full account, see Waldemar Ferreira, *A Companhia Geral para o Estado do Brasil e sua Natureza Jurídica*, in Scientia Ivridica, tomo IV, 1954-1955, Braga, p. 117- 150. The paper includes in appendix the complete text of the Company's statutes. See also Rui Marcos, *As Companhias Pombalinas, cit.*, p. 159 and on.