or motive is shown."[4] Even more settled is the proposition that they are valid, at least so far as public policy is concerned, when established in conformity with specific statutory requirements.[5]

The "old" Iowa corporation statute[6] contains no provision regarding voting trusts. One section of the "old" law does contain a provision enabling a trustee to vote shares of stock in his hands.[7] This, however, does not purport to be a statutory authorization for the creation of a voting trust. It would seem logical that it could be considered a legislative enactment which would defeat the argument that the separation of the voting rights from the beneficial interests of stock is against public policy. No case in Iowa is found which rules on the validity of a voting trust. One case is found in which the Iowa Court recognized the issue and the split of authority stating:

> The cases are not in harmony on the question as to whether such an agreement is illegal. Some hold that, whether there is a statute on the subject or not, such an agreement is invalid because against public policy, and because it deprives the owner of the stock of the right to vote it. Others hold that, in the absence of a statute, it is not invalid.[8]

It is fortunate that the Court decided the case on another issue as its brief explanation of the split of authority seems not entirely correct. No case is found where a voting trust authorized by statute was ruled invalid as "against public policy," or "because it deprives the owner of the stock of the right and duty to vote it." In the first place, when the legislature has adopted a statute authorizing the creation of a voting trust, the public policy argument goes out the window.[9] The purpose for which the agreement was entered into may be against "public policy" but the agreement itself is not. Secondly, the owner of stock is being deprived of nothing because he doesn't have to enter into the voting trust agreement or purchase a voting trust certificate if he doesn't want to do so.

STATUTORY ENACTMENTS

Voting trust statutes have been enacted in thirty-seven states, including Iowa, and also in Puerto Rico and the District of Columbia. This section

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[4] Ballantine, *Voting Trusts, Their Abuses and Regulation*. 21 TEX. L. REV. 139, 149 (1942); Burke, *Voting Trusts Currently Observed*, 24 MINN. L. REV. 347 (1940); Wormser, *The Legality of Corporate Voting Trusts and Pooling Agreements*, 18 COL. L. REV. 123 (1918); see Anno. 105 A.L.R. 123 (1936) for collection of cases regarding validity of voting trust agreement.

[5] Maricopa County Municipal Water Conservation Dist. v. La Prade, 45 Ariz. 61, 40 P. 2d 94 (1935); Chandler v. Bellanca Aircraft Corp., 19 Del. Ch. 57, 162 Atl. 63 (Ch. 1932).

[6] IOWA CODE ch. 491 (1958).

[7] *Id.* § 491.55.

[8] *In re* Selway Steel Post & Fence Co., 198 Iowa 950, 956, 200 N.W. 621, 624 (1924)

[9] *In re* Morse, 247 N.Y. 290, 298, 160 N.E. 374, 376 (1928): "In New York voting trusts do not stand or fall on common-law theories of public policy. They are recognized and regulated by statute. Whether they would be valid at common law in the absence of a statute defining and regulating them is immaterial. Public policy in regard thereto is defined by the Legislature. Between the conflicting rules of the common law, a choice has been made. No voting trust not within the terms of the statute is legal, and any such trust, so long as its purpose is legitimate, coming within its terms, is legal. The test of validity is the rule of the statute. When the field was entered by the Legislature, it was fully occupied and no place was left for other voting trusts." See also note 5, *supra*.

discusses cases from various jurisdictions on the interpretation of statutes authorizing and setting out the requirements of voting trusts, as they may indicate how the Iowa Court will react to voting trust agreements among stockholders of corporations incorporated under the "new" law.[10]

The new provision is as follows:

> Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the rights to vote or otherwise represent their shares, for a period of not to exceed twenty years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing a counterpart of the agreement with the corporation at its registered office, and by transferring their shares to such trustee or trustees for the purposes of the agreement. The counterpart of the voting trust agreement so deposited with the corporation shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent or attorney, as are the books and records of the corporation, and shall be subject to examination by any holder of a beneficial interest in the voting trust, either in person or by agent or attorney, at any reasonable time for any proper purpose.[11]

The I.B.C.A. was adapted from the Model Business Corporation Act [M.B.C.A.],[12] and the sections regarding voting trusts, in the two acts, are identical except for the allowable duration of the agreement.[13] The M.B.C.A. specifies a duration of ten years. Thirteen other jurisdictions have adopted this section from the M.B.C.A. in toto or in substance.[14] There is as yet no Iowa decision concerning voting trusts created under this section; few decisions have been reported from the other thirteen jurisdictions; but for guidance in interpretation of the Iowa statute it is possible to consider as helpful those decisions from other jurisdictions whose provisions are similar in many significant respects.

The effect of adoption of the new Iowa statute upon common-law voting trusts already in existence in this state is unclear. The general view appears to be that where a legislature has entered the field the only valid voting trust is one which conforms to the requirements of the statute, and attempts to create common-law voting trusts thereafter are unsuccessful.[15] But there is no Iowa decision determining that voting trusts were valid before the statute; if they were, as the I.B.C.A. applies only to new corpora-

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[10] The Iowa legislature did not repeal the former corporation statute when it enacted the I.B.C.A., and both are in effect. Since the I.B.C.A. contains a section regarding voting trusts and the "old" law does not, the only Iowa corporations in which shareholders have statutory authority to enter into a voting trust agreement are those incorporated under the "new" law or I.B.C.A.

[11] I.B.C.A. § 33

[12] MODEL BUS. CORP. ACT (1953), hereinafter referred to as M.B.C.A.

[13] *Id.* § 32.

[14] ALA. CODE ANN. tit. 10, § 21(54) (Supp. 1959); ALASKA COMP. LAWS ANN. § 36-2A-40 (Supp 1958); Colo. Laws ch. 32, § 33 (1958); Colo. Laws ch. 83, § 7 (1959); D.C. CODE ANN. § 29-914 (1961); GA. CODE ANN. § 22-1863.1 (Supp. 1961); ILL. REV. STAT. c.32, § 157.30a (1957); MD. ANN. CODE art. 23, § 45 (1959); N.C. GEN. STAT. § 55-72 (1960); N.D. REV. CODE § 10-1935 (Supp. 1957); ORE. REV. STAT. § 57.175 (1961); TEX. BUS. CORP. ACT art. 2.30 (1955); VA. CODE ANN. § 13.1-34 (1956); and WIS. STAT. ANN. § 180.27 (1959).

[15] Abercrombie v. Davies, 130 A.2d 338 (Del. 1957); Smith v. Biggs Boiler Works Co., 33 Del. Ch. 183, 91 A.2d 193 (Ch. 1952); Perry v. Missouri-Kan. Pipe Line Co., 22 Del. Ch. 33, 191 Atl. 823 (Ch. 1937); Williams v. Fredericks, 187 La. 987, 175 So. 642 (1937); *In re* Morse, 247 N.Y. 290, 160 N.E. 374 (1928).

tions, or those old ones choosing to come under its provisions, there may be some corporations not subject to the act whose stock is in a voting trust.

REQUIRED PROVISIONS

It is important when creating a voting trust under a statute that each step required by the statute be followed to the letter. The I.B.C.A. requires the agreement to be in writing, and to specify the terms and conditions of the trust—does this include its purposes? A counterpart of the agreement must be deposited at the registered office of the corporation. The shares of the beneficiaries must be transferred to the trustees for the purposes of the agreement. The duration of the trust must not exceed twenty years. These requirements will be examined in detail.

Requiring the voting trust agreement to be in writing is essential to alleviate the suspicion of secret voting trusts.[16] A voting trust is a true trust[17] and, whereas it might not be necessary in all cases to have a trust agreement in writing, it is of particular importance in the case of a voting trust, if for no other reason than to make it possible for a counterpart of the agreement to be deposited with the corporation for the inspection of other shareholders as required by the statute.

The terms and conditions of the trust should be set out in full. Included therein should be provisions indicating the parties to the agreement. A corporation can be a party to a voting trust made up of shareholders of that corporation but not a beneficiary therein. A patent prerequisite to becoming a beneficiary of a voting trust is the ownership of voting stock. Since a corporation is not entitled to vote its own stock under the I.B.C.A.,[18] it could not do indirectly what it cannot do directly by transferring the shares to a voting trustee. Such an attempt has been held to render the entire agreement invalid.[19] A corporation may become a party to a voting trust agreement involving shares held in another corporation.[20] This is subject to exceptions, however, as, for example, where the shares held in the other corporation are the sole asset of the transferring corporation. The business of the corporation is to be managed by its board of directors,[21] and by creating and transferring those shares to a voting trust the directors are delegating their major duty, to exercise their best judgment in voting the shares.[22]

The purpose of the trust, though not specifically required by the statute to be included, unless it be interpreted as one of the terms and conditions,

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16 Abercrombie v. Davies, 130 A.2d 338 (Del. 1957); see note 2, *supra*.

17 Smith v. Biggs Boiler Works Co., 33 Del. Ch. 183, 91 A.2d 193, 34 A.L.R.2d 1125 (Ch. 1952); Gose, *Legal Characteristics and Consequences of Voting Trusts*, 20 WASH. L. REV. 129, 139 (1945); *cf.* Application of Bacon, 287 N.Y. 1, 38 N.E.2d 105 (1941); National Liberty Ins. Co. v. Bank of America, 126 Misc. 753, 214 N.Y.S. 643 (Sup. Ct. 1926).

18 I.B.C.A. § 32.

19 Overfield v. Pennroad Corp., 42 F. Supp. (E.D. Pa. 1941), *modified*, 146 F.2d 889 (3d Cir. 1944); Clarke v. Central R. R. & Banking Co., 50 Fed. 338 (C.C.S.D. Ga. 1892).

20 Day v. Hecla Mining Co., 126 Wash. 50, 217 Pac. 1 (1923).

21 I.B.C.A. § 34.

22 Knickerbocker Inv. Co. v. Voorhees, 100 App. Div. 414, 91 N.Y. Supp. 816 (1st Dep't 1905); *cf.* Adams v. Clearance Corp., 35 Del. Ch. 459, 121 A.2d 302 (Ch. 1956).

should be set out in the agreement. The statute does not imply that a voting trust will be considered valid for any purpose, nor have the decisions in other jurisdictions been to this effect. The general policy is that the purpose of the trust must be a legitimate business purpose.[23] How far the voting trust agreement must go in setting out this legitimate business purpose is mostly a matter of conjecture.[24] In all probability a general statement to the effect that the shareholders are joining for the purpose of providing "continuity in management of the Corporation to secure the continuance of its business policies and to safeguard the interests of the Corporation and its Shareholders,"[25] will be sufficient and appropriate terminology for the agreement.

Since a counterpart of the agreement must be deposited with the corporation, it would be well to include this as a term of the agreement. The counterpart of the agreement so deposited should be exactly like the original. One case in which a duplicate copy of the agreement was filed with the corporation held the requirement was not satisfied by filing a photostatic copy of the text which did not bear the signatures of the subscribers.[26] Failure to file a counterpart of the instrument with the cor-

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[23] Ballantine, *supra*, note 4, at 152, "Among the purposes, usually regarded as legitimate, for which voting trusts may be employed are the following: (1) To aid in reorganization plans and adjustments with creditors in bankruptcy or financial difficulty; (2) to assist financing, to procure loans, and to protect bondholders and preferred shareholders; (3) to accomplish some definite plan or policy for the benefit of the company and to assure stability and continuity of management for this purpose; (4) to prevent rival concerns or competitors from gaining control; (5) to apportion representation and protect minority interests or those with balanced holdings, as in corporations to exploit a patent, by putting the selection of directors in impartial hands; (6) in connection with mergers, consolidations or purchase of a business, in order that the predecessors or constituents, though in the minority, may have representation.

"Purposes improper or of questionable propriety are (1) a 'sign away your rights trust,' a scheme to establish alien or minority control for a long period, with unrestrained discretionary powers, and without any definite obligations or beneficial purposes, as for the individual benefit of promoters and investment bankers; (2) to secure employment, salaries, contracts, and other individual benefits from a controlled management, or to freeze the control of a group in office as an end in itself." cf. Perry v. Missouri-Kan. Pipe Line Co., 22 Del. Ch. 33, 191 Atl. 823 (Ch. 1937). See HENN, CORPORATIONS § 199 (1961); LATTIN, CORPORATIONS 321-323, 326 (1959).

[24] Wormser, *The Legality of Corporate Voting Trusts and Pooling Agreements*, 18 COL. L. REV. 123, 136 (1918), maintains the good purpose for entering into the agreement should affirmatively appear, indicating that if no purpose is shown in the agreement it could conceivably be invalid for that reason alone. See criticism in Burke, *Voting Trusts Currenty Observed*, 24 MINN. L. REV. 347, 352 (1940). See also BALLANTINE, CORPORATIONS 428 n. 15 (Rev. ed. 1946) indicating, "The burden of proof of wrongful purpose will no doubt be placed on the attacker in ordinary judicial proceedings, particularly where created under voting trust statutes."

[25] Lynch, *Control and Management of Corporation*, LEGAL INSTITUTE ON THE SMALL CORPORATION AND THE NEW IOWA BUSINESS CORPORATION ACT, 34 (1959).

[26] State v. Keystone Life Ins. Co, 93 So. 2d 565 (La. 1957). This case held the requirement had not been fulfilled inasmuch as one of the reasons for requiring the duplicate copy to be filed was to allow other shareholders an opportunity to sign the agreement and become a party thereto which they could not do by signing a mere copy which would not have the validity of a duplicate original. Another reason for filing the counterpart of the agreement with the corporation is to enable other shareholders to inspect it. If the signatures are not shown on such copy the inspecting shareholders will not be able to adequately determine who are parties to the agreement.

poration has been held to invalidate the trust[27] or render it inoperative until so deposited.[28]

A provision for the transfer of the shares of the beneficiaries to the trustees should be included in the instrument. In exchange for this transfer, the beneficiaries will usually receive voting trust certificates.[29] In order to preserve the benefit of any preemptive rights or first option agreements to the beneficiaries, the instrument should set out the manner in which the trustees shall exercise these rights on behalf of the beneficiaries. If there are restrictions on the sale or exchange of shares of the corporation, these should be set out on the face of the voting trust certificates or otherwise subsequent purchasers may take free of such restrictions. It may be desirable to provide a first option to the original beneficiaries of the voting trust agreement for the purchase of voting trust certificates, which should be set out on the face of the certificates as well as in the instrument.

The I.B.C.A. limits the life of the voting trust to twenty years. Differing limits of life can be found, but all other jurisdictions, except Wisconsin, which have modeled their voting trust provisions after the M.B.C.A. have incorporated its limitation of ten years. Wisconsin originally limited the period to twenty years, but later removed all limitations upon its duration.[30] The failure to limit the duration of the trust under a statuory provision similar to that of the I.B.C.A. has been held to render the trust void *ab initio*.[31] It would seem to be an easy proposition to determine when the twenty years were over and declare the trust invalid as of that time, but in the interests of good draftsmanship, a provision should be included in the instrument limiting its life for a specific period, not more than twenty years.

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[27] Abercrombie v. Davies, 130 A.2d 338 (Del. 1957).

[28] DeMarco v. Paramount Ice Corp., 102 N.Y.S.2d 692 (Sup. Ct. 1950).

[29] Voting trust certificates are required by some statutes. It is customary for the trustees to issue such certificates to the beneficiaries when the stock is transferred to them. The voting trust certificates are evidence of a beneficial interest and are alienable in the same manner as the stock of the corporation. Since the certificates are issued by the trustees and are not of record in the corporation, the corporation may have no knowledge of the true identity of the beneficial owners. Thus, certificates should be issued in all cases to enable the holder thereof, among other reasons, to have proof of his right to inspect the copy of the agreement deposited with the corporation. Voting trust certificates are generally covered by Blue Sky Laws and should be issued in compliance therewith. The Iowa Blue Sky Laws are contained in Iowa Code ch. 502 (1958).

[30] In 1951, Wisconsin adopted the M.B.C.A. section regarding voting trusts in the same form as the present I.B.C.A. In 1953, the legislature amended the section by eliminating any time limitation. The Revision Committee Note, 1953, stated thus: "Study indicates that the 20-year limitation of the 1951 statute is not essential to the validity of voting trusts and that an arbitrary time limitation could defeat proper purposes of a voting trust as a beneficial means of working out relative rights of security holders on corporate reorganizations, carrying out estate planning and voluntary settlement of relative rights of stockholder groups. The remedy for any illegitimate use of such a trust should be left to the courts, regardless of term." WIS. STAT. ANN. § 180.27 (1959).

Among jurisdictions not following or adapting the M.B.C.A. provision, ten years is by far the most commonly provided duration, but California, which specifies a period of 21 years, permits the longest life. California will also allow a majority of certificate holders to terminate before the expiration of the specified period. CAL. CORP. CODE ANN. §§ 2230-2231 (West 1954). Some others permit only a five year limit. LATTIN, CORPORATIONS 326 (1959). See HENN, CORPORATIONS 316 (1961).

[31] Perry v. Missouri-Kan. Pipe Line Co., 22 Del. Ch. 33, 191 Atl. 823 (Ch. 1937).

When does the twenty-year period begin? It should start at the creation of the trust, but when is the trust actually created? This could be the time when the last act was completed which enabled the trust to function. Although this would generally seem to be the depositing of the counterpart of the agreement with the corporation, it has been held that the voting trust comes into existence when the stock is transferred in trust.[32] Limiting the duration of the trust to a period of twenty years or less from the signing of the agreement will resolve this problem, as the signing of the agreement will always precede the deposit and almost invariably precede the transfer.

Any attempt before expiration to extend the life of the trust beyond the twenty year period would probably be invalid. It generally will not render the entire agreement void but merely the extension.[33] This does not restrict the parties from entering into a new agreement after the original agreement expires as dissenting members would have the right to drop out and have their shares of stock returned.[34] An attempt to enter into a new and separate agreement before the expiration of the first agreement would probably be invalid because of the impossibility of the beneficiaries being able to transfer their shares to the trustees since they are already tied up in the former voting trust. Whether a beneficiary who became a party to a voting trust after its initial creation, under an open end provision, might be allowed to extend the trust as far as he is concerned for a period up to twenty years from the time he became a party, is a question which has not been decided.

EFFECT OF TRUST ON PARTIES TO THE AGREEMENT

Parties to a voting trust agreement are the shareholder-beneficiaries who deposited their shares, beneficiaries who later acquire certificates of beneficial interest, the trustees, and possibly the corporation whose shares are involved. Can any beneficiary revoke the agreement, or withdraw the shares represented by his certificate? Does a beneficiary retain any aspect of his former shareholder status? What are the powers of the trustee over the shares in the trust? What are the grounds and extent of trustees liability?

In the absence of provisions to the contrary, the voting trust agreement ordinarily cannot be revoked by a single beneficiary at his fancy. The reason for this is the same as in any other pooling agreement, that others may have taken action on reliance that the voting trust would continue.[35] Where the purpose for the trust has failed, it may be possible

[32] De Marco v. Paramount Ice Corp., 102 N.Y.S.2d 692 (Sup. Ct. 1950).

[33] Belle Isle Corp. v. Corcoran, 29 Del. Ch. 554, 49 A.2d 1 (Sup. Ct. 1946); Kittinger v. Churchill Evangelistic Ass'n, 151 Misc. 350, 271 N.Y.S. 510 (Sup. Ct. 1934), *affirmed*, 244 App. Div. 876, 281 N.Y.S. 680, *rearg. den.* 245 App. Div. 805, 281 N.Y.S. 409 (4th Dept. 1935).

[34] Mannheimer v. Keehn, 41 N.Y.S.2d 542 (Sup. Ct. 1943), *modified*, 268 App. Div. 813, 49 N.Y.S.2d 304, *amended*, 268 App. Div. 845, 51 N.Y.S.2d 750 (4th Dept. 1944).

[35] Thomas v. Kliesen, 166 Kan. 337, 201 P.2d 663 (1949); Boyer v. Nesbitt, 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 890 (1910); Alderman v. Alderman, 178 S.C. 9, 181 S. E. 897, 105 A.L.R. 102 (1935).

for a beneficiary to bring about revocation.[36]

The effect of transfering the shares of the beneficiaries to the trustees is often held to remove the benficiaries from the status of stockholders.[37] Although there have been many cases to the contrary, this seems by far the better view.[38] That portion of the Iowa statute dealing with the right to inspect the voting trust agreement seems clearly to distinguish between the rights of the shareholders of the corporation and the rights of the beneficiaries of the trust. The right to inspect the voting trust agreement on file with the corporation is, however, specifically reserved for the beneficiary. The fact that the beneficiary in the agreement may limit the power of the trustee to exercise the rights incident to stock ownership should not give the beneficiary the power to exercise these rights, because the shareholders of record on the books of the corporation are the trustees. If the voting trust is to be considered a true trust, then the beneficiary who has severed his relationship to the corporation should look to the trustee for his remedy.

In the absence of specific limitations in the trust instrument, the trustee generally has the right to exercise all rights incident to stock ownership which would not frustrate the purposes of the trust.[39] It may often be desirable to limit the authority of the trustees in their exercise of the rights concerning the stock transferred to them. The powers and limitations imposed upon the trustees should be specifically spelled out. If the rights of the trustees are limited, the instrument should contain a provision enabling the trustees to obtain the consent of the beneficiaries to act on such matters. This may be done by providing for the calling of a meeting of the certificate holders at which a vote may be taken to determine the will of the majority. The provision would be similar to one in the

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[36] H. M. Byllesby & Co. v. Doriot, 25 Del. Ch. 46, 12 A.2d 603 (Ch. 1940) (sole depositing shareholder).

[37] *Cf.* Chandler v. Bellanca Aircraft Corp., 19 Del. Ch. 57, 162 Atl. 63 (1932); John W. Cooney Co. v. Arlington Hotel Co., 11 Del. Ch. 286, 101 Atl. 879, *modified*, 11 Del. Ch. 430, 106 Atl. 39, 7 A.L.R. 955 (1917); State Tax Comm'n v. Commissioners of Baltimore County, 138 Md. 668, 114 Atl. 717 (1921); O'Grady v. United States Independent Tel. Co., 75 N.J. Eq. 301, 71 Atl. 1040 (1909); Hayman v. Morris, 36 N.Y.S.2d 756 (Sup. Ct. 1942); Application of Bacon, 287 N.Y. 1, 38 N.E. 2d 105 (1941); Smith v. Bramwell, 146 Ore. 611, 31 P. 2d 647 (1934).

[38] Gose, *Legal Characteristics and Consequences of Voting Trusts*, 20 WASH. L. REV. 129, 139-147 (1945). The writer distinguishes most of the cases cited in note 32, *supra*, on the grounds that true trust principles were not being applied or construction of a particular statute called for such an interpretation. See also: Scott v. Arden Farms Co., 26 Del. Ch. 283, 28 A.2d 81 (1942); State *ex. rel.* Crowder v. Sperry Corp., 2 Terry (Del.) 84, 15 A.2d 661 (Super. Ct. 1940). See HENN, CORPORATIONS 317 (1961). *But see:* LATTIN, CORPORATIONS 328-330 (1959).

[39] See Anno. 159 A.L.R. 1067 (1945). The trustee has the right to receive dividends, and to vote the stock on any matter a shareholder may vote. This includes voting upon mergers, consolidations, charter amendments and sale of assets. The right to sell the stock in his hands is dependent upon the purposes of the trust. If a purpose can be implied that the stock is to be returned in specie at the expiration of the trust, it may well be a breach of fiduciary duty for the trustee to sell the shares held in trust. The remedy of the beneficiary in such a case would, applying true trust principles, appear to be against the trustee for damages only. It is conceivable that if the limitations are spelled out in the agreement and the agreement is deposited with the corporation that the beneficiaries could enjoin the transfer of the stock on the corporate records on the basis that the corporation had notice of the trustees' limited authority to act in such a manner. See also HENN, CORPORATIONS 316 (1961).

articles of incorporation, whereby the board of directors call a special meeting of the shareholders and should set out the quorum and voting prerequisites.

Upon determining the will of the majority in such a case, the trustees may vote all of the shares held by the voting trust in accord with such consent.[40] If a dissenting beneficiary is to have any adequate means of protection it must be provided in the instrument. This may be done by allowing the dissenting beneficiary to surrender his trust certificates in exchange for their representative shares held by the trustees. He could then obtain appraisal of his shares by dissenting at the shareholders' meeting.[41] Before such a provision is incorporated into the instrument, serious consideration should be given to its consequences. If the provision is adopted, it is conceivable that the purpose of the voting trust would be defeated. If a beneficiary is entitled to have his shares returned by the trustees, the voting power of the trust is naturally diminished.

The liability of the trustees is based upon customary fiduciary principles. Therefore, in the absence of specific limitations and duties imposed in the instrument, the trustees will normally be liable only for conduct in excess of mere negligence. They may, however, be liable to the corporation for abuse of their position as "control."[42]

ADDITIONAL PROBLEMS AND USEFUL PROVISIONS

There are a number of additional problems for which the draftsman may wish to provide a solution in the voting trust agreement. The law of what state will govern the voting trust? Can additional parties deposit shares in the trust? How should disputes between trustees be resolved? How should successor trustees be selected? How should the distributable income of the trust be calculated, and how and when should it be distributed? Are there any other provisions which should be considered?

The general view is that a voting trust will be governed by the law of the state in which the affected corporation was incorporated.[43] It is conceivable that the conflict of laws issue could be determined by applying the law of the jurisdiction having the greatest connection with the voting trust. In any event, it appears that there would be no objection to setting out in the instrument what laws are to govern the voting trust. The choice of laws, of course, must be those having a substantial connection with the voting trust.

Another provision which may be desired is the manner in which additional parties may become beneficiaries of the voting trust. This open end

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[40] Scott v. Arden Farms, 26 Del. Ch. 283, 28 A.2d 81 (Del. Ch. 1942).

[41] To be of any valid effect the entire transaction would have to take place before the transfer books of the corporation are closed. I.B.C.A. § 29 allows the board of directors to establish the record date for the determination of shareholders entitled to vote at a shareholders meeting at a time not more than fifty nor less than ten days prior to the meeting. Under such circumstances, it might be necessary to insure that the transfer takes place at least fifty days before the shareholders' meeting or the remedy would be of no benefit to the beneficiary.

[42] See LATTIN, CORPORATIONS 325 (1959); 2 SCOTT, TRUSTS 1457-68 (2d ed. 1956).

[43] *In re* O'Gara Coal Co., 260 Fed. 742 (7th Cir. 1919); Simms v. Garrett, 114 W.Va. 19, 170 S.E. 423 (1933); see discussion in Burke, *Voting Trusts Currently Observed*, 24 MINN. L. REV. 369-373 (1940).

provision is required by the statutes of some states.[44] This is not so under the I.B.C.A. However, if such a situation is desired, the manner of performance should be set out.

A provision for settling disputes among the trustees is advisable. This may be done by majority rule or if there are an equal number of trustees, a method of arbitration may be prescribed. One method which may be used is a special meeting of the beneficiaries to resolve the dispute. This may not be advisable if the beneficiaries are widely scattered, for the reason that it would take time to assemble the beneficiaries and conduct the meeting. It is conceivable that the dispute could arise only a short time before or during a shareholders' meeting, and an expeditious settlement would be required in order to allow the trustees to vote.

Provisions should be made for the selection of successor trustees in the event one becomes unable to perform. In the event there are multiple trustees, this may be done by allowing the remaining trustees to select a replacement. If the voting trust is managed by a single trustee, this method would naturally be inadequate. In such instance, if no provision is made in the instrument, the courts, applying general trust principles, can appoint a new trustee,[45] unless it appears that the intention was to appoint a personal trustee who should not be replaced.[46] To eliminate the conflict that could arise, the instrument should designate the manner in which successor trustees shall qualify. This may be done, for example, by providing that a majority of the beneficiaries shall select the new trustee or by designating those individuals who shall succeed.

Since the trustees are entitled to the receipt of dividends for the shares held by them, the agreement should provide for the distribution of the dividends so received among the holders of the trust certificates. Provisions should also be made for the manner in which the trustees are to be reimbursed for the payment of expenses incurred by the trust. This may be done either by deducting a pro rata amount from the dividends received before further distribution to the beneficiaries or by assessing the beneficiaries when the expenses have been paid. If the trustees are to be entitled to any compensation for their services, the instrument should so recite. The manner of payment could be the same as for other expenses. In addition, the instrument should contain a provision for the indemnity of the trustees by the beneficiaries on any matters which they may become liable in their capacity as stockholders.

Other provisions which may be desired are the method in which the voting trust agreement may be amended, a requirement that the trustees keep books and records for the voting trust, allowing the holders of voting trust certificates to inspection thereof, and a statement to the effect that

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[44] The Uniform Business Corporation Act so provided. See Burke, *Voting Trusts Currently Observed*, 24 MINN. L. REV. 347, 357, 363 (1940), for a discussion of the desirability of such a clause. Notable also is the fact that Maryland which has since adopted substantially the M.B.C.A. provision has retained its open end provision contained in its prior statute. See also HENN, CORPORATIONS 317 (1961); LATTIN, CORPORATIONS 328 (1959).

[45] RESTATEMENT, SECOND, TRUSTS § 108 (1959).

[46] Id. § 101(b).

partial invalidity of the instrument will not render the entire agreement invalid.

CONCLUSION

This article has not dealt exhaustively with all of the matters which may be included in a voting trust agreement. Particular provisions may be desired by different groups of shareholders to effect a certain purpose. As long as the provisions are fair to all parties to the agreement without substantially infringing upon the rights of those shareholders not a party to the agreement and as long as they are for a valid business purpose, they will generally be upheld. The statute does not set out in detail the relationship of the parties to the voting trust agreement. As the instrument will be a primary source for determining this relationship, the draftsman should be explicit in his description of the duties and limitations imposed upon the respective parties. In the absence of specific provisions in the agreement general trust law should be controlling.

ROBERT C. LANDESS (June 1962)