



1987

An Overview of the 1987 Arkansas Business Corporation Act

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AN OVERVIEW OF THE 1987 ARKANSAS
BUSINESS CORPORATION ACT

*Timothy D. Brewer**

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The 1987 General Assembly adopted a new Business Corporation Act.¹ The 1987 Act significantly changes the corporate law of Arkansas and, therefore, it will affect the advice given by attorneys to their clients.

The purpose of this article is to give an overview of the 1987 Act and the changes it makes in Arkansas' corporation law. This article also reviews treatment of certain major corporate transactions under the 1987 Act. Throughout this article, for comparative purposes, reference will be made to the codification of the old Act² as the "1965 Act" and to the codification of the new Act as the "1987 Act."

I. APPLICATION

The 1987 Act applies to all corporations incorporated in Arkansas after December 31, 1987.³ A corporation incorporated before Jan-

1. Act of Apr. 14, 1987, No. 958, 1987 Ark. Acts 3096 (Adv. Leg. Ser.) (codified at ARK. CODE ANN. §§ 4-27-101 to -1706 (Supp. 1987)).

2. Act of Mar. 30, 1965, No. 576, 1965 Ark. Acts 2094 (codified as amended at ARK. CODE ANN. §§ 4-26-101 to -1204 (1987 & Supp. 1987)).

3. ARK. CODE ANN. § 4-27-1701 (Supp. 1987).

uary 1, 1988 may elect to be governed by the 1987 Act by amending its articles of incorporation after December 31, 1987 to provide that it is governed by the 1987 Act. The election must be approved by two-thirds of the shares of each outstanding class of the corporation's capital stock. Once the election is made, it cannot be revoked.⁴

Lawyers must now bear in mind several critical and perhaps confusing factors while rendering advice to corporate clients. At least for the foreseeable future, two corporate codes (1965 and 1987) will need to be referred to by the practitioner depending upon the date of incorporation of the client, as well as whether the client has made the irrevocable election to be governed by the 1987 Act.

II. FORMATION

The basic procedure for forming a corporation is unchanged by the 1987 Act. What has changed, however, are the number of decisions that are required at the time of corporate formation.

The 1987 Act establishes simple and flexible corporate characteristics and requires the affirmative election of restrictive characteristics. The 1965 Act is considerably more prescriptive as to corporate characteristics.

A. Articles of Incorporation—Mandatory Provisions

The 1987 Act requires minimal information in the articles and allows the inclusion of optional provisions that fit the specific requirements of the individual corporation.⁵ The 1987 Act requires the inclusion of the following provisions in the articles:

1. *Name.* The allowable names are increased under the 1987 Act. In addition to "corporation," "incorporated," "company," or an abbreviation of one of those terms which the 1965 Act permits,⁶ the 1987 Act also allows the use of "limited" or its abbreviation, "ltd."⁷ Further, the 1965 Act prohibited the word "and" before the final word "company."⁸ This is no longer the case.⁹ The 1987 Act continues the prohibition of the 1965 Act¹⁰ against using a name that states or implies that the corporation is organized for any purpose not per-

4. *Id.*

5. *Id.* § 4-27-202.

6. *Id.* § 4-26-401(1) (1987).

7. *Id.* § 4-27-401.A.1 (Supp. 1987).

8. *Id.* § 4-26-401(1) (1987).

9. *Id.* § 4-27-401.A.1 (Supp. 1987).

10. *Id.* § 4-26-401(2) (1987).

mitted by law or its articles.¹¹

The 1965 Act prohibited names that were "the same as or confusingly similar" to "any [existing] domestic corporation . . . or any foreign corporation authorized to transact business in this state."¹² The 1987 Act requires that the name "be distinguishable upon the records of the Secretary of State from" that of any domestic or registered foreign corporation, a reserved or registered corporate name, an adopted fictitious name of a foreign corporation, or any non-profit corporation.¹³ Only time, the practices of the Secretary of State, and the courts will determine whether the standard for similar names has changed.

Even if the name is not "distinguishable" the 1987 Act allows its use if:

- (a) the other corporation consents and agrees to change its name;¹⁴
- (b) a court establishes the right for the applicant to use the name;¹⁵
- (c) the applicant has merged with the other corporation;¹⁶
- (d) the applicant is formed by a reorganization of the other corporation;¹⁷ or
- (e) the applicant has acquired substantially all the assets, including the corporate name, from the other corporation.¹⁸

2. *Authorized Capital Structure.* The 1987 Act requires the articles to state the number of authorized shares, the number of classes of shares, the number of shares in each class, a distinguishing designation for each class, and the par value of the shares of each class, or a statement that the shares are without par value.¹⁹ Unless the power to set preferences, limitations, and rights for classes of stock is delegated in the articles to the Board of Directors,²⁰ such matters must also be set forth in the articles.²¹

In establishing the capital structure, it should be kept in mind that there is no change in the manner of calculating franchise taxes,

11. *Id.* § 4-27-401.A.2 (Supp. 1987).

12. *Id.* § 4-26-401(3)(A) (1987).

13. *Id.* § 4-27-401.B (Supp. 1987).

14. *Id.* § 4-27-401.C.1.

15. *Id.* § 4-27-401.C.2.

16. *Id.* § 4-27-401.D.

17. *Id.*

18. *Id.*

19. *Id.* §§ 4-27-202.A.2, -601.

20. *Id.* § 4-27-602. See *infra* notes 40-42 and accompanying text.

21. ARK. CODE ANN. § 4-27-601 (Supp. 1987).

which are calculated based on the number of shares outstanding times the par value of each share.²² If shares have no par value, a par value of \$25.00 is assigned.²³

However, Act 19 of 1987²⁴ amended the procedure for paying the franchise tax in the year of incorporation. Prior to January 1, 1988 a corporation organizing before July 1 in any year was required to file a franchise tax report and make payment within sixty days of organizing. Those organizing after July 1 were not required to report or pay a franchise tax during the calendar year in which organized.²⁵

The new procedure, effective January 1, 1988, is for the organizing corporation to pay an initial franchise fee upon filing its articles with the Secretary of State. The amount due will equal a pro-rata portion of the annual franchise fee based upon the months left in the calendar year of organization.²⁶

The requirement of the 1965 Act of a minimum paid-in capital of \$300²⁷ has been eliminated in the 1987 Act.

3. *Street Address of Registered Office and Name of Registered Agent at That Office.*²⁸

4. *Name and Address of Incorporator.*²⁹ Under the 1987 Act an incorporator may be a corporation or other entity.³⁰ The 1965 Act required an incorporator to be a natural person age twenty-one or over.³¹

5. *Primary Purpose of the Corporation.* The articles may expressly restrict the purpose of the corporation if the client wishes. Otherwise, a corporation has the purpose of engaging in "any lawful business."³²

B. Articles of Incorporation—Optional Provisions

The articles may contain a number of optional provisions. Additionally, many options may be addressed in either the articles or the

22. *Id.* § 26-54-104 (1987).

23. *Id.* § 26-54-105(f).

24. Act of Feb. 9, 1987, No. 19, 1987 Ark. Acts 62 (Adv. Leg. Ser.) (codified as amended in various subsections at ARK. CODE ANN. §§ 26-54-101 to -113 (Supp. 1987)).

25. ARK. CODE ANN. § 26-54-105(d)(2) (1987).

26. *Id.* § 26-54-105(d)(1), (2) (Supp. 1987).

27. *Id.* § 4-26-206 (1987).

28. *Id.* § 4-27-202.A.3 (Supp. 1987).

29. *Id.* § 4-27-202.A.4.

30. *Id.* § 4-27-201; see also definitions of "person" and "entity," *id.* § 4-27-140.

31. *Id.* § 4-26-201 (1987).

32. *Id.* § 4-27-301 (Supp. 1987).

bylaws.³³ The following optional provisions should be considered in drafting the articles:

1. *The Name and Address of the Initial Board of Directors.*³⁴ If this is included, no organizational meeting of the incorporators is needed. The board may complete the organization of the corporation.³⁵

2. *Provisions Regulating the Corporation, Shareholders, or Directors.* The 1987 Act allows any provisions not inconsistent with the statutes. Personal liability may also, under this section, be imposed on shareholders to a specified extent and upon specified conditions.³⁶

3. *Limitation of Liability of Directors.* With some exceptions, the liability of directors to the corporation and its shareholders for monetary damages for breach of fiduciary duty may be eliminated or limited under the 1987 Act.³⁷ This alone may be reason enough to recommend to an existing corporation that it elect to be governed by the 1987 Act. This elimination of liability does not apply to:

- (a) breach of the director's duty of loyalty;
- (b) acts not in good faith;
- (c) intentional misconduct;
- (d) knowing violation of the law;
- (e) unlawful distributions;
- (f) improper personal benefit; or
- (g) any breach creating third party liability.³⁸

4. *Duration.* A corporation incorporated under the 1987 Act has perpetual duration, unless a shorter period is elected.³⁹

5. *Powers of Directors in Setting Preferences, Rights, and Limitations of Classes and Series of Stock.* The 1965 Act states that the preferences, rights, and limitations of classes of stock must be specified in the articles, and that the power to establish certain limited rights and preferences for series may be delegated to the board.⁴⁰ The 1987 Act, however, allows inclusion of a provision in the articles which gives the board the power to set the preferences, rights, and limitations of any class or series of stock before any shares of the class

33. See *infra* notes 65-96 and accompanying text.

34. ARK. CODE ANN. § 4-27-202.B.1 (Supp. 1987).

35. *Id.* § 4-27-205.

36. *Id.* § 4-27-202.B.2.

37. *Id.* § 4-27-202.B.3.

38. *Id.*

39. *Id.* § 4-27-302. The 1965 Act requires the duration to be stated in the articles. *Id.* § 4-26-202(a)(2) (1987).

40. *Id.* § 4-26-202(a)(6) (1987).

or series are issued.⁴¹ This power is exercised by filing with the Secretary of State articles of amendment, adopted without shareholder action.⁴²

6. *Preemptive Rights.* The 1987 Act denies shareholders' preemptive rights (*i.e.*, the right of existing shareholders to acquire newly-issued shares of stock) unless the articles specifically grant preemptive rights.⁴³ In contrast, the 1965 Act grants certain preemptive rights unless denied by the articles.⁴⁴

7. *Restrictions on Distributions.* The 1987 Act allows a corporation to elect in its articles to restrict its ability to make distributions.⁴⁵

8. *Quorum.* The 1987 Act,⁴⁶ like the 1965 Act,⁴⁷ provides that a quorum, for purposes of a shareholders' meeting, will be a majority of the shares entitled to vote unless the articles provide otherwise. The 1987 Act does not provide a minimum size for the quorum. The 1965 Act provides that the quorum may not be less than one-third of the shares entitled to vote.

9. *Cumulative Voting.* Cumulative voting is a method of voting for directors where each share entitled to vote is given as many votes as there are board positions being voted on; the votes may be "cumulated," or cast for a single position, rather than spread among the available positions. The 1987 Act does not allow shareholders to cumulate their votes for election of directors unless the articles of incorporation so provide.⁴⁸ This is contrary to the 1965 Act, which grants shareholders absolute cumulative voting rights.⁴⁹

10. *Dispensing with a Board of Directors.* The 1987 Act allows a corporation having fifty or fewer shareholders to dispense with or limit the authority of a board by describing in the articles who will perform the duties of the board.⁵⁰ Thus, a small corporation could dispense with the board of directors and allow the shareholders to directly exercise the powers normally exercised by the board.

11. *Terms for Directors.* The 1987 Act allows the terms of the

41. *Id.* § 4-27-602 (Supp. 1987).

42. *Id.*

43. *Id.* 4-27-630. This section also specifies what is meant by "preemptive rights" if the term is not otherwise defined in the articles. *Id.*

44. *Id.* § 4-26-711(c)(1) (1987).

45. *Id.* § 4-27-640 (Supp. 1987).

46. *Id.* § 4-27-725.

47. *Id.* § 4-26-705 (1987).

48. *Id.* § 4-27-728.B (Supp. 1987). See also *infra* notes 122-24 and accompanying text.

49. ARK. CODE ANN. § 4-26-708(d) (1987).

50. *Id.* § 4-27-801.C (Supp. 1987).

directors to be staggered so that either one-half or one-third, or as close thereto as possible, of the board is elected at the annual meeting, if the corporation has nine or more directors.⁵¹ If this option is chosen, one-half or one-third of the total board must be elected at each election, and the board members serve either two or three years. If staggered terms are not elected, board members serve one-year terms.⁵²

Even if cumulative voting is allowed in the articles, thereby giving minority shareholders some ability to elect a representative to the board, staggering the terms of the directors diminishes this ability. If the nine member board were elected in full each year, a minority shareholder having the right to cumulate his votes would have to have only eleven of a total of one hundred voting shares to be able to elect a director. However, if the terms of the directors are staggered so that only three directors are elected each year, a minority shareholder with the same cumulative voting right would have to hold twenty-six of a total of one hundred shares in order to be able to elect a director.

12. *Removal of Directors.* The 1987 Act allows the articles to provide that directors may be removed only for cause.⁵³ The 1965 Act does not allow such a limitation and provides that directors may be removed with or without cause by a majority of the shares entitled to vote.⁵⁴

13. *Vacancy on Board of Directors.* The 1987 Act provides that, unless the articles provide otherwise, any vacancy on the board may be filled by either the shareholders or the remaining directors.⁵⁵ This is a change from the 1965 Act, under which the remaining directors fill vacancies unless the articles provide otherwise.⁵⁶

14. *Amendment of Bylaws.* The 1987 Act provides that the articles may reserve to the shareholders the power to amend a corporation's bylaws. If the power is not so reserved, the board may amend the bylaws, but shareholders may not be excluded from the power to amend the bylaws.⁵⁷ The 1965 Act provides that the board of directors alone has the power to amend the bylaws, unless the articles reserve that power solely to the shareholders.⁵⁸

51. *Id.* § 4-27-806.

52. *Id.* § 4-27-805.

53. *Id.* § 4-27-808.

54. *Id.* § 4-26-804 (1987).

55. *Id.* § 4-27-810 (Supp. 1987).

56. *Id.* § 4-26-803 (1987).

57. *Id.* § 4-27-1020 (Supp. 1987).

58. *Id.* § 4-26-809(a)(2) (1987).

15. *Bylaw Increasing Quorum or Voting Requirements for Shareholders.* The 1987 Act allows the shareholders to adopt a bylaw that fixes a greater shareholder quorum or voting requirement than the statutory requirement if such a bylaw is authorized by the articles of incorporation.⁵⁹

16. *Voting to Adopt Merger.* The 1987 Act allows the articles to set a voting requirement for mergers which is greater than the statutory requirement of a majority of the votes entitled to be cast.⁶⁰

17. *Sale of Assets in Regular Course of Business and Mortgage of Assets.* Unless otherwise provided in the articles, the 1987 Act allows the board to act without shareholders' approval in the sale or other disposition of all, or substantially all, of the property of the corporation in the usual course of business or the mortgage of all or any of the corporation's property, whether or not in the usual course of business.⁶¹ However, the Arkansas Constitution still requires shareholders' authorization of "bonded indebtedness."⁶²

18. *Shares Without Certificates.* Unless prohibited by the articles or bylaws, the 1987 Act allows shares to be issued without being represented by certificates.⁶³ The 1965 Act requires that all shares be evidenced by certificates.⁶⁴

C. Bylaws

The 1987 Act, like the 1965 Act, uses the bylaws to set out the basic procedures governing the taking of action by the corporation. Neither the 1987 Act nor the 1965 Act requires the incorporation of any specific provision into the bylaws. However, both Acts allow the inclusion of a number of optional powers or restrictions on powers of the corporation, its shareholders, or its directors.

The 1987 Act establishes certain basic powers of the corporation, or procedures for exercising such powers, and then allows the statutory powers or procedures to be modified in either the articles or bylaws, or in both. The optional provisions which may be included in the bylaws are:

1. *Authorization to Sign Share Certificates.* The 1987 Act requires that each certificate representing ownership of a share of stock

59. *Id.* § 4-27-1021 (Supp. 1987).

60. *Id.* § 4-27-1103.E. The voting requirements for a merger are reviewed in more detail below. See *infra* notes 147-50 and accompanying text.

61. ARK. CODE ANN. § 4-27-1201 (Supp. 1987).

62. ARK. CONST. art. XII, § 8.

63. ARK. CODE ANN. § 4-27-626 (Supp. 1987).

64. *Id.* § 4-26-608(a)(1) (1987).

of the corporation be signed by two officers of the corporation designated in the bylaws or by the board.⁶⁵ The 1965 Act provides that the certificates shall be signed by the President or a Vice-President and the Secretary or an Assistant Secretary.⁶⁶

2. *Notice of Adjourned Meetings.* The 1987 Act provides that if a shareholders' meeting is adjourned to a different date, time, or place, notice of the new date, time, or place need not be given if the new date, time, or place is announced at the meeting before adjournment. However, the bylaws can require such notice.⁶⁷

The 1965 Act provides that notice of meetings which are adjourned for lack of a quorum need not be given if the adjournment is for less than thirty days.⁶⁸ If the adjournment is for more than thirty days, a fifteen day notice of the adjourned meeting must be given in writing.⁶⁹ The 1965 Act is silent as to whether notice need be given when a meeting is adjourned for a reason other than lack of a quorum.

3. *Record Date.* The 1987 Act,⁷⁰ as does the 1965 Act,⁷¹ allows the bylaws to provide the manner of fixing the record date to determine the shareholders entitled to notice of shareholders' meetings, to demand a special meeting, to vote, or to take any other action.⁷²

4. *Qualifications of Directors.* The 1987 Act allows the bylaws or the articles to prescribe qualifications for directors.⁷³

5. *Number of Directors.* The 1987 Act requires the number of directors, which may be one or more, to be specified in or fixed in accordance with the articles or bylaws.⁷⁴ The 1965 Act requires at least three directors, unless all the shares of the corporation are owned by one or two shareholders, in which case the number of directors may be one or two, but not less than the number of sharehold-

65. *Id.* § 4-27-625.D.(1) (Supp. 1987).

66. *Id.* § 4-26-608(a)(1) (1987).

67. *Id.* § 4-27-705.E (Supp. 1987).

68. *Id.* § 4-26-705(b)(2)(B) (1987).

69. *Id.* § 4-26-705(b)(2)(A).

70. *Id.* § 4-27-707 (Supp. 1987).

71. *Id.* § 4-26-702(b) (1987).

72. Under the 1987 Act, the record date may be no more than 70 days before the date of the action. *Id.* § 4-27-707.B (Supp. 1987). Under the 1965 Act, the record date may be no more than 65 nor, in case of a meeting of shareholders, less than 10 days before the date of the action. *Id.* § 4-26-702(a), (b) (1987).

73. *Id.* § 4-27-802 (Supp. 1987).

74. *Id.* § 4-27-803.A. The articles or bylaws may allow the directors to fix the number of directors, but they may not increase or decrease the number by more than 30% from the number last approved by the shareholders. *Id.* § 4-27-803.B.

ers.⁷⁵ The 1987 Act allows the bylaws to set a variable range for the size of the board of directors by fixing a minimum and maximum number of directors.⁷⁶ Within this variable range, the number of directors may be fixed by the shareholders or the board from time to time.

6. *Compensation of Directors.* The 1987 Act allows the articles or bylaws to contain a provision limiting the authority of the board to fix the compensation of directors.⁷⁷ The 1965 Act allows the board to set the compensation for directors unless prohibited by the articles of incorporation.⁷⁸

7. *Directors' Meetings by Telephone.* Unless prohibited by the articles or bylaws, the 1987 Act permits the board to meet by telephone conference.⁷⁹ There is no similar provision in the 1965 Act.

8. *Board Action Without Meeting.* The 1987 Act provides that, unless prohibited by the articles of incorporation or bylaws, the board may take action without a meeting if all directors consent to the action.⁸⁰ Under the 1965 Act, the power to take action without a meeting does not exist unless it is expressly granted by the articles or the bylaws.⁸¹

9. *Notice of Meetings of the Board of Directors.* The 1987 Act provides that no notice need be given of regular meetings of the board of directors unless the articles or bylaws require notice.⁸² The 1965 Act provides that the bylaws shall state whether or not notice of regular meetings is required.⁸³

Unless otherwise provide in the articles or bylaws, the 1987 Act requires at least two days notice of the date, time, and place of special meetings of the board of directors; this notice need not describe the purpose of the special meeting.⁸⁴ The 1965 Act provides for specification of the notice required for special meetings in the bylaws.⁸⁵

10. *Quorum of Board of Directors.* The 1987 Act allows the articles of incorporation or bylaws to set a quorum for board meetings, which may not be less than one-third of the fixed or prescribed

75. *Id.* § 4-26-802(a) (1987).

76. *Id.* § 4-27-803.C (Supp. 1987).

77. *Id.* § 4-27-811.

78. *Id.* § 4-26-801(c) (1987).

79. *Id.* § 4-27-820.B (Supp. 1987).

80. *Id.* § 4-27-821.A.

81. *Id.* § 4-26-807(b) (1987).

82. *Id.* § 4-27-822 (Supp. 1987).

83. *Id.* § 4-26-805(b)(1) (1987).

84. *Id.* § 4-27-822.B (Supp. 1987).

85. *Id.* § 4-26-805(b)(2) (1987).

number of directors.⁸⁶ Without such a provision, a majority of directors constitutes a quorum.⁸⁷

11. *Voting of Directors.* The 1987 Act⁸⁸ and the 1965 Act⁸⁹ provide that, unless the articles or bylaws of a corporation set a greater voting requirement, the affirmative vote of a majority of the directors present is the act of the board of directors.

12. *Committees of the Board.* The 1987 Act allows the board to create one or more committees which may exercise the authority of the board. However, committees may not authorize distributions, propose to shareholders actions requiring approval by shareholders, fill vacancies on the board, amend the articles or bylaws, approve a plan of merger, authorize reacquisition of the corporation's shares, or authorize the issuance of shares.⁹⁰ This power to form committees is broader than that allowed by the 1965 Act, which only authorizes the creation of an executive committee.⁹¹ The executive committee allowed by the 1965 Act may exercise any authority of the board other than certain enumerated powers similar to those denied under the 1987 Act.⁹²

13. *Officers.* The 1987 Act provides that the corporation shall have such officers as are described in the corporation's bylaws or appointed by the board in accordance with the bylaws.⁹³ The 1965 Act specifies what officers a corporation must have.⁹⁴ The 1987 Act allows an individual to simultaneously hold more than one office in the corporation,⁹⁵ while the 1965 Act allows one person to simultaneously hold more than one office, but prohibits one person from holding the offices of President and Secretary at the same time.⁹⁶

D. Organizational Meetings

The 1987 Act provides that, after incorporation, an organizational meeting must be held by the incorporators or the initial board of directors.⁹⁷ If initial directors are named in the articles, the initial

86. *Id.* § 4-27-824.B (Supp. 1987).

87. *Id.* § 4-27-824.A.

88. *Id.* § 4-27-824.C.

89. *Id.* § 4-26-807(a) (1987).

90. *Id.* § 4-27-825 (Supp. 1987).

91. *Id.* § 4-26-808 (1987).

92. *Id.*

93. *Id.* § 4-27-840.A (Supp. 1987).

94. *Id.* § 4-26-812(a) (1987).

95. *Id.* § 4-27-840.D (Supp. 1987).

96. *Id.* § 4-26-812(a)(3) (1987).

97. *Id.* § 4-27-205 (Supp. 1987).

directors shall hold the organizational meeting. Otherwise, the incorporators shall hold the organizational meeting.⁹⁸

III. MEETINGS OF SHAREHOLDERS AND DIRECTORS

A. Shareholders' Meetings

1. *Call of Meetings.* The 1987 Act requires that annual meetings of the shareholders be held at a time stated in or fixed in accordance with the bylaws.⁹⁹ However, the failure to hold such will not affect the validity of *any* corporate action.¹⁰⁰ The 1987 Act also provides for the holding of special meetings of the shareholders upon call,¹⁰¹ which is consistent with the 1965 Act. Special meetings of the shareholders may be called by the board or by the holders of at least ten percent of the votes entitled to be cast on any issue proposed for consideration at the meeting or by anyone authorized by the articles or bylaws.¹⁰² The 1965 Act provides that the president, the board, the holders of ten percent of all shares entitled to vote at the meeting, or any other person authorized by the articles or the bylaws may call a special meeting of the shareholders.¹⁰³

2. *Notice of Meetings.* The 1987 Act requires notice of the date, time, and place of each annual or special meeting of the shareholders.¹⁰⁴ If the meeting is to consider a proposal to increase the authorized capital stock or bonded indebtedness of the corporation, the notice must be given no fewer than sixty nor more than seventy-five days before the meeting date.¹⁰⁵ The 1965 Act has the same provision. Under the 1987 Act, in all other cases, the notice must be given no fewer than ten and no more than sixty days before the meeting date.¹⁰⁶ Under the 1965 Act notice could not be given more than fifty days prior to the meeting.¹⁰⁷

Under the 1987 Act, the notice of a shareholders' meeting need be given only to the shareholders entitled to vote at the meeting.¹⁰⁸ The articles may, however, require notice to all shareholders.¹⁰⁹

98. *Id.*

99. *Id.* § 4-27-701.A.

100. *Id.* § 4-27-701.C.

101. *Id.* § 4-27-702.

102. *Id.*

103. *Id.* § 4-26-701(c) (1987).

104. *Id.* § 4-27-705 (Supp. 1987).

105. *Id.*

106. *Id.*

107. *Id.* § 4-26-703 (1987).

108. *Id.* § 4-27-705 (Supp. 1987).

109. *Id.*

These provisions are consistent with the 1965 Act.

A notice of an annual meeting need not include a description of the purpose of the meeting, unless required by the articles.¹¹⁰ Notice of a special meeting must include a description of the purpose for which the meeting is called.¹¹¹ An annual meeting involving a proposal to increase the authorized capital stock or the bonded indebtedness of the corporation is deemed a special meeting requiring notice of the purpose for which the meeting is called.¹¹² Again, this is consistent with the 1965 Act.¹¹³

The 1987 Act,¹¹⁴ as does the 1965 Act,¹¹⁵ allows a shareholder to waive any notice required by the Act, the articles, or the bylaws, provided the waiver is in writing and delivered to the corporation.

3. *Proxies.* Like the 1965 Act,¹¹⁶ the 1987 Act¹¹⁷ allows a shareholder to vote by proxy. The procedural provisions for the exercise of proxies under the 1987 Act¹¹⁸ are the same as under the 1965 Act.¹¹⁹

4. *Voting.* The 1987 Act, unlike the 1965 Act, does not count abstaining votes in determining whether there are sufficient affirmative votes to approve a measure. The 1965 Act states that (unless a greater number is required by statute or by the articles) approval by shareholders takes the "affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter."¹²⁰ The 1987 Act, however, provides that the action is approved "if the votes cast within the voting group favoring the action exceed the votes cast opposing the action."¹²¹ On the surface these two provisions sound similar, but under the 1965 Act, abstention by a shareholder may be sufficient to prevent passage of a measure, while under the 1987 Act abstaining votes are not counted. For example, under the 1987 Act, if ninety-seven percent of the votes abstain, two percent vote in favor, and one percent vote opposed, the measure would be approved.

110. *Id.* § 4-27-705.B.

111. *Id.* § 4-27-705.C.

112. *Id.*

113. *Id.* § 4-26-703(b) (1987).

114. *Id.* § 4-27-706 (Supp. 1987).

115. *Id.* § 4-26-105 (1987).

116. *Id.* § 4-26-708.

117. *Id.* § 4-27-722 (Supp. 1987).

118. *Id.*

119. *Id.* § 4-26-708 (1987).

120. *Id.* § 4-26-705(a)(2).

121. *Id.* § 4-27-725.C (Supp. 1987).

Including a provision in the articles stating that the shareholders shall have the right to cumulate their votes for directors does not guarantee that shareholders will be allowed to exercise that right. Shares authorized to cumulate their votes under the articles may not cumulate their votes if the meeting notice does not state "conspicuously" that cumulative voting is authorized.¹²² The word "conspicuously" is defined in the 1987 Act as "so written that a reasonable person against whom the writing is to operate should have noticed it."¹²³ Examples of "conspicuous" given in the 1987 Act include: printing in italics, bold-faced, or contrasting color; typing in capitals; or underlined letters. Thus, if the notice simply states that cumulative voting will be allowed without making that statement conspicuous, the right to vote cumulatively may be denied. A shareholder may protect his right to cumulate his votes by giving notice to the corporation not less than forty-eight hours before the meeting of his intent to cumulate his votes during the meeting.¹²⁴ If this is done, all other shareholders in the same voting group are entitled to cumulate their vote without giving notice.

B. Board of Directors Meetings

The 1987 Act provides that directors may hold regular or special meetings in or out of this state.¹²⁵ The board of directors may hold regular meetings without notice, unless notice is required by the articles or the bylaws.¹²⁶ Special meetings of the board of directors require two days notice of the date, time, and place of the meeting, unless the articles or bylaws provide for a longer or shorter period of notice.¹²⁷ The notice of special meetings need not state the purpose of the meeting unless required by the articles or bylaws.¹²⁸ The directors may waive notice of a special meeting by executing a written waiver.¹²⁹ The provisions of the 1965 Act are basically the same as those of the 1987 Act except the 1965 Act requires notice of special meetings as prescribed in the corporation's bylaws.¹³⁰

122. *Id.* § 4-27-728.

123. *Id.* § 4-27-140.3.

124. *Id.* § 4-27-728.D.2.

125. *Id.* § 4-27-820.A.

126. *Id.* § 4-27-822.A.

127. *Id.* § 4-27-822.B.

128. *Id.*

129. *Id.* § 4-27-823.A. See also *id.* § 4-27-823.B, which provides that a director's participation in a meeting waives any required notice to each director at the meeting.

130. ARK. CODE ANN. § 4-26-805(b)(2) (1987).

IV. AMENDMENT OF ARTICLES OF INCORPORATION

The 1965 Act sets forth a single procedure for amending the articles of incorporation. The board must adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting.¹³¹ Proper notice of the shareholders' meeting is required, and the notice must set forth the proposed amendment or a summary of the changes it seeks to effect.¹³² At a meeting of the shareholders entitled to vote on the proposed amendment, the proposed amendment must be adopted by an affirmative vote of at least two-thirds of the outstanding shares entitled to vote.¹³³ If any class of shares is entitled to vote as a class, the proposed amendment must be adopted by an affirmative vote of the holders of at least two-thirds of the shares of each class of shares entitled to vote as a class and of the total shares entitled to vote.¹³⁴

The 1987 Act substantially changes this procedure. First, the board is authorized to adopt certain "housekeeping" amendments to the articles without shareholder approval, unless the articles provide otherwise.¹³⁵ The amendments the board may adopt in section 4-27-1002, are as follows:

1. To extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;
2. To delete the names and addresses of the initial directors;
3. To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Secretary of State;
4. To change each issued and unissued authorized share of an outstanding class into a greater number of whole shares if the corporation has only shares of that class outstanding [absent a simultaneous reduction in par value, a question arises as to whether this provision is in conflict with article XII, section 8 of the Arkansas Constitution];
5. To change the name of the corporation by substituting the word "corporation," "incorporated," "company," "limited," or the abbreviation "corp.," "inc.," "co.," or "Ltd." for a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution for the name; or

131. *Id.* § 4-26-302(a)(1).

132. *Id.* § 4-26-302(a)(2).

133. *Id.* § 4-26-302(a)(4).

134. *Id.* § 4-26-302(a)(4).

135. *Id.* § 4-27-1002 (Supp. 1987).

6. To make any other change [which the 1987 Act expressly permits] without shareholder action.¹³⁶

The incorporators or board are also permitted to adopt one or more amendments to the articles, if the corporation has not yet issued shares.¹³⁷

Except as stated above, a corporation's shareholders must approve any amendment to the corporation's articles.

The board of directors must recommend the amendment to the shareholders, unless the board determines that, due to a conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the shareholders along with the amendment.¹³⁸ Further, the board may condition its submission of the proposed amendment on any basis.¹³⁹

The corporation is required to notify each shareholder of the proposed shareholders' meeting, whether or not the shareholder is entitled to vote.¹⁴⁰ In addition to these notice requirements, the notice of meeting must state that the purpose of the meeting (or one of the purposes) is to consider the proposed amendment. The notice must also contain, or be accompanied by, a copy or a summary of the amendment.¹⁴¹

Unless the 1987 Act, the articles of incorporation, or the board, acting pursuant to its power, require a greater vote, the amendment must be approved by (i) a majority of votes entitled to be cast by any voting group with respect to which the amendment would create dissenters' rights, and (ii) each other voting group entitled to vote on the amendment by action taken at a meeting in which a quorum is present and at which the votes cast favoring the amendment exceed the votes cast opposing the amendment.¹⁴² Section 4-27-1004 specifies a number of instances in which the holders of the outstanding shares of a class are entitled to vote as a separate voting group (if shareholder voting is otherwise required by the 1987 Act) on a proposed amendment.¹⁴³

The articles of amendment which must be filed with the Secretary of State under the 1987 Act are substantially the same as re-

136. *Id.*

137. *Id.* § 4-27-1005.

138. *Id.* § 4-27-1003.B.1.

139. *Id.* § 4-27-1003.C.

140. *Id.* § 4-27-1003.D.

141. *Id.*

142. *Id.* § 4-27-1003.E.

143. *Id.* § 4-27-1004.

quired by the 1965 Act.¹⁴⁴ However, in keeping with the 1987 Act's elimination of consideration of capital accounts, the requirement that the amendment set forth a statement of change in stated capital has been deleted.

Under the 1987 Act, the board of directors, with or without shareholder action, may restate the corporation's articles of incorporation at any time.¹⁴⁵ Under the 1965 Act, restatement of the corporation's articles of incorporation requires compliance with the full amending procedure.¹⁴⁶

V. MERGER

A. Merger of Unrelated Corporations

The basic procedure for the merger of unrelated corporations is the same under the 1965 Act and the 1987 Act, but voting requirements vary substantially.¹⁴⁷ The board of each corporation must approve a plan of merger setting forth the details of the merger and then submit the plan for shareholder approval of each corporation. Under the 1965 Act, all shares are entitled to vote on the plan of merger whether or not the shares have voting rights under the articles of incorporation, and the plan must be adopted by a vote of two-thirds of all outstanding shares of stock of each corporation.¹⁴⁸ Under the 1987 Act, all shareholders must receive notice of the proposed merger, but only those shareholders entitled to vote pursuant to the articles are entitled to vote on the plan of merger.¹⁴⁹ Unless other provisions of the 1987 Act, the articles, or the board impose a greater requirement, merger requires only a majority vote for approval.¹⁵⁰

The 1987 Act dispenses with approval by the shareholders of the surviving corporation in certain circumstances. Such approval is not required if:

- (1) The articles of incorporation of the surviving corporation will not differ from its articles before the merger;
- (2) Each shareholder of the surviving corporation whose shares were outstanding immediately before the effective day of

144. Compare ARK. CODE ANN. § 4-27-1006 (Supp. 1987) with ARK. CODE ANN. § 4-26-304 (1987).

145. ARK. CODE ANN. § 4-27-1007 (Supp. 1987).

146. *Id.* § 4-26-306 (1987).

147. Compare ARK. CODE ANN. § 4-26-1001 to -1003 (1987) with ARK. CODE ANN. § 4-27-1101, -1103 (Supp. 1987).

148. ARK. CODE ANN. § 4-26-1003 (1987).

149. *Id.* § 4-27-1103 (Supp. 1987).

150. *Id.* § 4-27-1103.E.

the merger will hold the same number of shares, with identical rights;

(3) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issued as a result of the merger, will not exceed the total number of voting shares of the surviving corporation outstanding immediately before the merger by more than twenty percent; and

(4) The number of shares entitled to dividends outstanding immediately after the merger, plus the number of such shares issued as a result of the merger, will not exceed the total number of such shares outstanding immediately before the merger by more than twenty percent.¹⁵¹

Both the 1965 Act and the 1987 Act require the filing of articles of merger with the Secretary of State.¹⁵² The information required in the articles of merger are substantially the same. The effects of merger are essentially the same under the 1965 Act and the 1987 Act.¹⁵³

Under the original version of the 1965 Act, the above described procedure for merger provided only for the exchange of shares of securities or other obligations between two merging corporations.¹⁵⁴ Now, both the 1987 Act and the 1965 Act, as amended in 1985, allow a shareholder of a non-surviving corporation to receive shares, securities, or obligations from a third corporation (e.g., shares issued by the parent corporation of the surviving corporation) as consideration for the shares of the non-surviving corporation.¹⁵⁵ This method is sometimes referred to as a triangular merger.

B. Merger of Subsidiary

Both the 1965 Act and the 1987 Act provide a simplified procedure for merging a subsidiary into a parent corporation.¹⁵⁶ However, there are differences in those procedures. Under the 1987 Act, a subsidiary qualifies for the simplified procedure if the parent corporation owns ninety percent of the outstanding shares of each class of the subsidiary corporation.¹⁵⁷ Under the 1965 Act, the parent corporation must own ninety-five percent of the subsidiary's outstanding

151. *Id.* § 4-27-1103.G.

152. *Id.* § 4-26-1004 (1987); *id.* § 4-27-1105 (Supp. 1987).

153. *Id.* § 4-26-1005 (1987); *id.* § 4-27-1106 (Supp. 1987).

154. ARK. STAT. ANN. § 64-701 (1980) (amended 1985).

155. ARK. CODE ANN. § 4-26-1001 (1987); ARK. CODE ANN. § 4-27-1101 (Supp. 1987).

156. *Id.* § 4-26-1009 (1987); *id.* § 4-27-1104 (Supp. 1987).

157. *Id.* § 4-27-1104 (Supp. 1987).

shares.¹⁵⁸ Under both the 1965 Act and the 1987 Act, the board has the authority to approve the merger of the subsidiary into the parent. However, both the 1965 Act and the 1987 Act require that the shareholders receive notice of the merger. Under the 1987 Act, the notice must contain a copy or a summary of the plan of merger. The parent corporation may not file the articles of merger until at least thirty days after the date it mailed the notice of the merger to the shareholders.¹⁵⁹ Under the 1965 Act, the notice to the shareholders must set forth the full plan of merger.¹⁶⁰ The parent corporation may file the articles of merger thirty days after the mailing of the notice.¹⁶¹ The 1965 Act requires that the shareholders of the subsidiary receive a second notice within ten days after the date on which the articles of merger have been filed. This notice must contain a provision that the articles have been filed and must again set forth the terms and conditions of the merger.¹⁶²

C. Share Exchange

The 1987 Act establishes an additional means of consolidating corporations in the form of a share exchange.¹⁶³ Under a share exchange, the acquiring corporation exchanges its shares for all of the shares of another corporation. The plan of share exchange must be submitted to the shareholders in the same manner as the plan of merger for unrelated corporations.¹⁶⁴ The shareholders of the surviving corporation must approve a plan of share exchange in all cases.¹⁶⁵ The 1965 Act does not provide any equivalent procedure.

D. Merger with a Foreign Corporation

The procedure under both the 1965 Act and the 1987 Act for the merger of a domestic corporation with a foreign corporation is substantially the same.¹⁶⁶ The 1987 Act does, however, allow the use of a plan of share exchange for mergers with foreign corporations.¹⁶⁷

158. *Id.* § 4-26-1009 (1987).

159. *Id.* § 4-27-1104 (Supp. 1987).

160. *Id.* § 4-26-1009(a)(3) (1987).

161. *Id.* § 4-26-1009(c).

162. *Id.* § 4-26-1009(d).

163. *Id.* § 4-27-1102 (Supp. 1987).

164. *Id.* § 4-27-1103; *see supra* notes 147-50 and accompanying text.

165. ARK. CODE ANN. § 4-27-1103 (Supp. 1987).

166. Compare ARK. CODE ANN. § 4-26-1006 (1987) with ARK. CODE ANN. § 4-27-1107 (Supp. 1987).

167. ARK. CODE ANN. § 4-27-1107.A.2 (Supp. 1987).

VI. SALE AND MORTGAGE OF ASSETS

A. Mortgage

Both the 1965 Act¹⁶⁸ and the 1987 Act¹⁶⁹ authorize a board to mortgage all or any part of a corporation's assets without shareholder approval. However, under the 1987 Act, shareholder approval to mortgage assets may be required in the articles.¹⁷⁰

There is an interesting difference in the 1965 and 1987 Acts as they pertain to the authority to pledge assets. The 1965 Act allows the giving of mortgages "as security for any obligation(s) so incurred."¹⁷¹ This provision immediately follows a provision giving corporations authority to incur obligations, thereby limiting the pledging authority to pledges which secure corporate obligations.¹⁷² The 1987 Act, however, broadly authorizes a corporation to mortgage its assets for the repayment of indebtedness, without specifying that it must be the corporation's indebtedness.¹⁷³

As with the 1965 Act, the 1987 Act is limited by the Arkansas Constitution which requires shareholder authorization of the creation of any bonded indebtedness or the imposition of a lien securing bonded indebtedness.¹⁷⁴

B. Sale of Assets

1. *Regular Course of Business.* The 1987 Act allows a board, without shareholder approval, to authorize a sale of all or any part of the corporation's assets in the usual and regular course of business.¹⁷⁵ This is consistent with the 1965 Act.¹⁷⁶ The 1987 Act also allows a board, without shareholder approval, to transfer any or all of the corporation's property to another wholly owned subsidiary.¹⁷⁷ There is no similar provision under the 1965 Act.

2. *Other than Regular Course of Business.* Both the 1965 Act¹⁷⁸ and the 1987 Act¹⁷⁹ require shareholder approval of the sale, lease,

168. *Id.* § 4-26-901 (1987).

169. *Id.* § 4-27-1201 (Supp. 1987).

170. *Id.*

171. *Id.* § 4-26-901 (1987).

172. *Id.*

173. *Id.* § 4-27-1201.A.2 (Supp. 1987).

174. ARK. CONST. art. XII, § 8.

175. ARK. CODE ANN. § 4-27-1201.A.1 (Supp. 1987).

176. *Id.* § 4-26-902 (1987).

177. *Id.* § 4-27-1201.A.3 (Supp. 1987).

178. *Id.* § 4-26-903 (1987).

179. *Id.* § 4-27-1202 (Supp. 1987).

exchange, or other disposition of all or substantially all of the property of the corporation that takes place other than in the usual and regular course of business. The procedure under both laws for obtaining shareholder approval is substantially the same. The board adopts a resolution recommending the disposition of the assets. Under the 1987 Act, the board may submit the proposed transaction to the shareholders without a recommendation if a conflict of interest or other special circumstance warrants the board making no recommendation and the basis for the determination is disclosed to the shareholders.¹⁸⁰

Under the 1965 Act, the shareholders must approve the transaction by a vote of two-thirds of the outstanding shares of the corporation.¹⁸¹ All shareholders are entitled to vote, whether or not the shares held by them are authorized to vote under the articles.¹⁸²

Under the 1987 Act, only those shareholders whose shares are entitled to vote pursuant to the articles may vote.¹⁸³ A majority of all entitled votes must approve the transaction unless the voting requirement is increased by the articles or by the board.¹⁸⁴ The right of a shareholder to dissent from the transaction requiring shareholder authorization is preserved in the 1987 Act.¹⁸⁵

Under both Acts, the shareholder approved transaction may be abandoned by the board, subject to contractual right, without further shareholder approval.¹⁸⁶

VII. DISTRIBUTIONS

A. Dividends

1. *Cash Dividends.* The 1987 Act allows distributions if, after the distribution, the corporation will be able to pay its debts as they come due in the normal course of business and the corporation's assets will exceed its liabilities plus its liquidation preferences.¹⁸⁷ A corporation presumably could revalue its assets to determine whether it meets the solvency test. The 1965 Act greatly restricts the payment of dividends out of any funds other than profits, and in no event allows

180. *Id.*

181. *Id.* § 4-26-903(a)(3)(B) (1987).

182. *Id.* § 4-26-903(a)(3)(A).

183. *Id.* § 4-27-1202.B.2 (Supp. 1987).

184. *Id.* § 4-27-1202.E.

185. *Id.* § 4-27-1302.A.3.

186. *Id.* § 4-27-1202.F; *id.* § 4-26-903(b) (1987).

187. *Id.* § 4-27-640.C (Supp. 1987).

dividends to be paid out of "revaluation surplus."¹⁸⁸

2. *Share Dividends*. A corporation subject to the 1987 Act, unless restricted by its articles, may issue shares of a class, pro rata without consideration, to its shareholders of the same class as a share dividend.¹⁸⁹ The 1987 Act eliminates the 1965 Act's requirement¹⁹⁰ that share dividends be "paid" out of unreserved and unrestricted surplus, other than revaluation surplus.

B. Repurchase By a Corporation of Its Own Shares

As with distributions, a corporation governed by the 1987 Act may repurchase its own shares if, after the repurchase, it is able to pay its debts as they become due and it has assets in excess of the sum of its liabilities plus its liquidation preferences.¹⁹¹ As with dividends, a corporation could value its assets in an attempt to meet the post-repurchase solvency test. The 1965 Act, on the other hand, has very complex and limiting rules for such purchases.¹⁹² The more liberal repurchase rules may, in themselves, be a sufficient inducement for adoption of the 1987 Act by existing corporations, particularly corporations which face the prospect of a restructuring where one or more shareholders are to receive cash payments for their shares.

C. Redemptions

The 1987 Act has no special rules for redemptions, and the regular repurchase requirements of post-redemption solvency discussed above¹⁹³ would apply. The 1965 Act has special rules for redemptions and purchases of redeemable shares which are similar to, but more liberal than, its rules for repurchase of shares not subject to redemption.¹⁹⁴

VIII. RIGHTS OF DISSENTING SHAREHOLDERS

The 1987 Act takes a slightly different approach to the rights of dissenting shareholders than does the 1965 Act. The 1965 Act sets forth the rights of dissenting shareholders as part of the procedures for the various transactions giving rise to dissenters' rights. The 1987

188. *Id.* § 4-26-619 (1987).

189. *Id.* § 4-27-623 (Supp. 1987).

190. *Id.* § 4-26-618(a) (1987).

191. *Id.* § 4-27-631 (Supp. 1987); *id.* § 4-27-603.B.

192. *Id.* § 4-26-611 (1987). In addition to net asset and solvency tests, there are limitations on the funds which may be used for the purchase. *Id.*

193. See *supra* note 191 and accompanying text.

194. ARK. CODE ANN. § 4-26-613 (1987).

Act places all dissenters' rights together and gives all dissenting shareholders the same rights regardless of the type of transaction from which they dissent.

Under the 1987 Act, a shareholder is entitled to dissent from the following corporate actions:

(1) Consummation of a plan of merger to which the corporation is a party if shareholder approval is required or if the corporation is a subsidiary that is merged with its parent;

(2) Consummation of a plan of share exchange to which the corporation is a party and which requires shareholder approval;

(3) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business if shareholder approval is required;

(4) An amendment of the articles of incorporation that materially and adversely affects the rights of the dissenters' shares; or

(5) Any other corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, the bylaws, or a resolution of the board of directors provides that shareholders are entitled to dissent.¹⁹⁵

A nominee for several beneficial owners of a corporation's shares may also assert dissenter's rights as to fewer than all of the shares registered in the nominee's name only if the nominee dissents with respect to all shares beneficially owned by any one person for whom he is record shareholder.¹⁹⁶ Further, the nominee or beneficial owner must notify the corporation in writing of the name and address of each person on whose behalf he asserts dissenters' rights.¹⁹⁷ To assert a dissenter's rights as to shares held on his behalf, the beneficial shareholder must submit to the corporation the record shareholder's consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights. This action is required with respect to all shares of which he is the beneficial shareholder or over which he has the power to direct the vote.¹⁹⁸

If any proposed corporate action which would create dissenters' rights is submitted to shareholder vote, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights,

195. *Id.* § 4-27-1302.A (Supp. 1987).

196. *Id.* § 4-27-1303.A.

197. *Id.*

198. *Id.* § 4-27-1303.B.

and a copy of the 1987 Act must accompany the notice.¹⁹⁹ If corporate action which would create dissenters' rights is taken without a vote of shareholders, the corporation must notify all shareholders entitled to assert dissenters' rights that the action was taken and notify them of their dissenters' rights.²⁰⁰

In order to perfect his rights, a dissenting shareholder must deliver to the corporation, before the shareholder vote is taken on the corporate action, written notice of his intent to demand payment for his shares if the proposed action is effectuated and must not vote his shares in favor of the action.²⁰¹ If the shareholder violates either of these requirements he is not entitled to payment for his shares.²⁰²

If corporate action creating dissenters' rights is authorized at a shareholders' meeting, the corporation must deliver a written dissenters' notice to all shareholders who notified the corporation prior to the vote of their intent to demand payment and who did not vote in favor of the proposed action.²⁰³ The notice to the dissenters must be sent no later than ten days after the corporate action was taken.²⁰⁴ The notice must:

(1) State where the payment demand must be sent and where the share certificates must be deposited;

(2) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(3) Supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action;

(4) Set a date by which the corporation must receive the payment demand, which date may not be fewer than thirty and no more than sixty days after the date the notice is delivered; and

(5) Be accompanied by a copy of subchapter 13 (Dissenters' Rights) of the 1987 Act.²⁰⁵

A shareholder seeking dissenters' rights must demand payment, certify whether he acquired ownership of the shares before the date of the notice of the shareholders meeting, and deposit his certificates.²⁰⁶

199. *Id.* § 4-27-1320.A.

200. *Id.* § 4-27-1320.B.

201. *Id.* § 4-27-1321.A.

202. *Id.* § 4-27-1321.B.

203. *Id.* § 4-27-1322.A.

204. *Id.* § 4-27-1322.B.

205. *Id.*

206. *Id.* § 4-27-1323.A.

A shareholder who fails to do this by the date set forth in the dissenters' notice is not entitled to payment.²⁰⁷

The corporation may restrict the transfer of uncertificated shares from the date the demand for their payment is received until the proposed corporate action is taken or the restrictions are otherwise released.²⁰⁸ The persons for whom dissenters' rights are asserted as to uncertificated shares retain all other rights of a shareholder until these rights are cancelled or modified by the taking of the proposed corporate action.²⁰⁹

The corporation is required to pay each dissenter who complies with all requirements for exercising dissenters' rights the fair value of the dissenter's shares, plus accrued interest, as soon as the proposed corporate action is taken or upon receipt of a payment demand.²¹⁰ The payment must be accompanied by:

- (1) The corporation's balance sheet, income statement, and a statement of changes in the shareholder's equity;
 - (2) A statement of the corporation's estimate of the fair value of the shares;
 - (3) An explanation of how the interest was calculated;
 - (4) A statement of the dissenter's right to demand payment;
- and
- (5) A copy of subchapter 13 of the 1987 Act.²¹¹

If the corporation does not take the proposed action within sixty days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release the transfer restrictions imposed on uncertificated shares.²¹² If after returning deposited certificates and releasing transfer restrictions, the corporation takes the proposed action, it must send a new dissenters' notice and repeat the payment demand procedure.²¹³

A corporation may elect to withhold payment for a dissenter's shares unless he was the beneficial owner of the shares before the date set forth in the dissenters' notice.²¹⁴ To the extent the corporation so elects to withhold such payments, after taking the proposed corporate action, the corporation shall estimate the fair value of the shares, plus

207. *Id.* § 4-27-1323.C.

208. *Id.* § 4-27-1324.A.

209. *Id.* § 4-27-1324.B.

210. *Id.* § 4-27-1325.A.

211. *Id.* § 4-27-1325.B.

212. *Id.* § 4-27-1326.A.

213. *Id.* § 4-27-1326.B.

214. *Id.* § 4-27-1327.A.

accrued interest, and shall pay this amount to each dissenter who agrees to accept it in full satisfaction of his demand.²¹⁵ The corporation shall send with its offer a statement of its estimate of the fair value of the shares, an explanation of how the interest was calculated, and a statement of the dissenters' right to demand payment.²¹⁶

A shareholder may reject a corporation's offer and may notify the corporation in writing of his own estimate of the fair value of his shares: (1) if the dissenter believes the corporation's offer is less than the fair value of the dissenter's shares; (2) if the corporation fails to pay the dissenter the corporation's valuation of the dissenter's shares within sixty days after the date set for demanding payment; or (3) if the corporation, having failed to take the proposed action, does not return the deposited certificates to the dissenting shareholder or release the transfer restriction thereon within sixty days after the date for demanding payment.²¹⁷ This action must be taken within thirty days after the corporation made or offered payment for the shares.²¹⁸

If the corporation and the shareholder cannot settle upon a fair value for the shares, the corporation must commence in the circuit court of the county in which the corporation's principal office is located a proceeding within sixty days after receiving the payment demand, and it must petition the court to determine the fair value of the shares.²¹⁹ If the corporation does not commence the proceeding within this sixty day period, it shall pay each dissenter whose demand remains unsettled the amount demanded.²²⁰ The cost of the proceeding is charged to the corporation, unless the court finds that the dissenters acted arbitrarily, vexatiously, or not in good faith.²²¹ The court may also award attorney's fees to either party.²²²

IX. DISSOLUTION

A. Newly Formed Corporations

The 1987 Act provides a summary procedure to abort the existence of a newly formed corporation which has not issued any shares or has not yet commenced business. Dissolution of such a corporation may be authorized by the incorporators or by its initial board

215. *Id.* § 4-27-1327.B.

216. *Id.*

217. *Id.* § 4-27-1328.A.

218. *Id.* § 4-27-1328.B.

219. *Id.* § 4-27-1330.A, .B.

220. *Id.* § 4-27-1330.A.

221. *Id.* § 4-27-1331.A.

222. *Id.* § 4-27-1331.B, .C.

without the need for a meeting and vote of shareholders.²²³ A simple majority of the incorporators or the initial directors is all that is required to approve the dissolution.²²⁴ Under the 1965 Act a corporation, once in existence, could be dissolved only by a two-thirds vote of the shares entitled to vote thereon.²²⁵

B. Functioning Corporations

Once a corporation has issued shares or begins to conduct business, the 1987 Act requires that any voluntary dissolution must have shareholder approval. The procedure established by the 1987 Act is substantially the same as under the 1965 Act. The shareholders must approve the dissolution by vote of those shares entitled to vote thereon.²²⁶ Under the 1987 Act, a simple majority of the voting stock is required to approve the dissolution unless a greater vote or a vote by voting groups is required by the articles of incorporation or is made a condition of the dissolution as proposed by the board.²²⁷

Both the 1965 Act and the 1987 Act require that articles of dissolution be filed with the Secretary of State to effect an authorized dissolution. The information required in the articles is substantially the same under both laws.²²⁸

The 1987 Act provides that a dissolved corporation may revoke its articles of dissolution within 120 days of their effective date.²²⁹ The revocation must be approved in the same manner as the dissolution was originally authorized, unless revocation by action of the board alone is provided.²³⁰ The 1965 Act contains no similar procedure to revoke articles of dissolution once they become effective.

Both the 1965 Act and the 1987 Act contain similar provisions concerning the barring of claims against a dissolved corporation. Both require that written notice be given to any known claimants and that notice may be published in a newspaper of general circulation to provide notice to unknown claimants. A minimum period of 120 days for filing claims must be allowed. Claims which are not timely

223. *Id.* § 4-27-1401.

224. *Id.*

225. *Id.* § 4-26-1101 (1987).

226. *Id.* § 4-27-1402 (Supp. 1987).

227. *Id.*

228. *Compare* ARK. CODE ANN. § 4-27-1403 (Supp. 1987) *with* ARK. CODE ANN. § 4-26-1102 (1987).

229. ARK. CODE ANN. § 4-27-1404 (Supp. 1987).

230. *Id.*

presented to the dissolved corporation are thereafter barred.²³¹

C. Involuntary Dissolution

Both the 1965 Act and the 1987 Act make provision for the involuntary dissolution of a corporation by judicial action. The grounds for obtaining judicial dissolution are substantially the same. However, there are some significant differences. Under the 1965 Act, a shareholder may obtain dissolution if the directors are deadlocked in the management of the corporation, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is being suffered or is threatened.²³² The 1987 Act contains a similar provision but provides that there may be dissolution if there is irreparable injury or if the business of the corporation can no longer be conducted to the advantage of the shareholders because of the deadlock.²³³ This is a substantial reduction in the burden of proof required. Both the 1965 Act and the 1987 Act provide that a corporation may be dissolved if the directors or those in control have acted illegally, oppressively, or fraudulently, and both allow dissolution if the corporate assets are being misapplied or wasted.²³⁴

Both the 1965 Act and the 1987 Act allow a creditor to bring a proceeding to dissolve a corporation if the corporation has admitted in writing that it is insolvent, or if the creditor has attempted to execute on a judgment and the execution has been returned unsatisfied.²³⁵

X. RECORDS

A. Required Records

The 1987 Act significantly increases the records that a corporation must maintain. Like the 1965 Act,²³⁶ the 1987 Act requires that a corporation maintain, at its principal office, minutes, accounting records, proceedings of shareholders and directors, and a record of its shareholders, giving the names and addresses of all shareholders, and the number and class of shares held by each.²³⁷ In addition, the 1987 Act requires the corporation to maintain the following items at its principal office:

231. *Id.* §§ 4-27-1406, -1407; *id.* § 4-26-1105 (1987).

232. *Id.* § 4-26-1108 (1987).

233. *Id.* § 4-27-1430 (Supp. 1987).

234. *Id.* § 4-27-1430; *id.* § 4-26-1108 (1987).

235. *Id.* § 4-26-1108(a)(2) (1987); *id.* § 4-27-1430.3 (Supp. 1987).

236. *Id.* § 4-26-715(a) (1987).

237. *Id.* § 4-27-1601 (Supp. 1987).

- (1) A copy of the corporation's articles and bylaws, including all amendments;²³⁸
- (2) Resolutions regarding newly created shares;²³⁹
- (3) All written communications sent to shareholders during the past three years, including all financial statements;²⁴⁰
- (4) The names and business addresses of its current officers and directors;²⁴¹ and
- (5) Its most recent annual franchise tax report.²⁴²

B. Access to Records

Both the 1965 Act and 1987 Act require that shareholders be allowed access to review and copy the corporation's records. However, there are differences in the two Acts' provisions regarding qualifications for demanding access and regarding the procedure for demanding access.

The 1965 Act requires that a person be a shareholder for at least six months before he or she can insist upon access to the records.²⁴³ By contrast, the 1987 Act does not require the shareholder to own the shares for any specified length of time before demanding access.²⁴⁴

The 1965 Act provides that a qualified shareholder need only demand access to the records in writing.²⁴⁵ The 1987 Act is more restrictive, in that it requires the shareholder to demand access in writing at least five business days before he or she desires access.²⁴⁶ Moreover, the demand must be made in good faith, "for a proper purpose," and must describe with reasonable particularity the shareholder's purpose and the records to be inspected.²⁴⁷ Additionally, the records inspected must directly relate to the shareholder's stated purpose.²⁴⁸

Both the 1965 Act and the 1987 Act provide for court intervention if the corporation refuses to allow inspection of records by a qualified shareholder. Under both Acts, jurisdiction is in the circuit court,

238. *Id.* § 4-27-1601.E.1, .E.2.

239. *Id.* § 4-27-1601.E.3.

240. *Id.* § 4-27-1601.E.5.

241. *Id.* § 4-27-1601.E.6.

242. *Id.* § 4-27-1601.E.7. The items to be contained in the annual franchise tax report are set out at *id.* § 4-27-1622.

243. *Id.* § 4-26-715(b) (1987).

244. *Id.* § 4-27-1602.A (Supp. 1987).

245. *Id.* § 4-26-715(b) (1987).

246. *Id.* § 4-27-1602.A, .B (Supp. 1987).

247. *Id.* § 4-27-1602.C.

248. *Id.* § 4-27-1602.C.3.

and venue is in the county where the principal office is located or where the registered office is located.²⁴⁹ Both Acts empower the court to order, disallow, or restrict inspection.²⁵⁰ The only notable addition in the 1987 Act is the provision allowing the court to order the corporation to pay the shareholder's costs, including attorney's fees.²⁵¹

C. Financial Statements

The 1987 Act significantly changes the requirements regarding annual financial statements. Whereas the 1965 Act does not require the corporation to furnish financial statements unless a shareholder requests them in writing,²⁵² the 1987 Act requires the corporation to furnish each shareholder with an annual financial statement within 120 days of the end of each fiscal year.²⁵³ Under the 1987 Act, the financial statements must include a balance sheet, an income statement, and a statement of changes in shareholders' equity.²⁵⁴ If a public accountant reported the financial statements, the accountant's report must accompany the financial statement.²⁵⁵ If a public accountant did not report the financial statements, the president or other person responsible for account records must certify that the statements were prepared in accordance with generally accepted accounting principals.²⁵⁶ If the records were not prepared in accordance with generally accepted accounting principals, the president or other responsible person must describe the basis of the preparation.²⁵⁷ The certification must also describe any ways in which the current financial statements were prepared differently than the previous year's financial statements.²⁵⁸

XI. FOREIGN CORPORATIONS

Both the 1987 Act and the 1965 Act require foreign corporations "transacting business" in the state to obtain a "certificate of authority" from the Secretary of State,²⁵⁹ although neither defines what constitutes "transacting business." The 1987 Act, however, does list

249. *Id.* § 4-26-715(c)(1) (1987); *id.* § 4-27-1604.A (Supp. 1987).

250. *Id.* § 4-26-715(c)(3), (4) (1987); *id.* § 4-27-1604.C, .D (Supp. 1987).

251. *Id.* § 4-27-1604.C (Supp. 1987).

252. *Id.* § 4-26-715(d) (1987).

253. *Id.* § 4-27-1620.C (Supp. 1987).

254. *Id.* § 4-27-1620.A.

255. *Id.* § 4-27-1620.B.

256. *Id.* § 4-27-1620.B.1.

257. *Id.*

258. *Id.* § 4-27-1620.B.2.

259. *Id.* § 4-27-1501.A; *id.* § 4-27-104 (1987).

several activities which a foreign corporation may engage in and still not be considered as "transacting business" in this state.²⁶⁰ This sample list of activities, which is not exclusive or exhaustive,²⁶¹ includes:

- (1) Maintaining, defending, or settling any proceeding;
- (2) Holding directors' or shareholders' meetings or engaging in other matters as to internal corporate affairs;
- (3) Maintaining bank accounts;
- (4) Maintaining offices or agencies for handling the corporation's stock;
- (5) Selling through independent contractors;
- (6) Soliciting orders if the orders require acceptance outside the state before they become effective;
- (7) Acquiring indebtedness, and mortgage and security interests in property securing the indebtedness;
- (8) Securing or collecting indebtedness or enforcing mortgages or security interests;
- (9) Owning, without more, real or personal property;
- (10) Conducting an isolated transaction that is completed within thirty days and is not one in a course of repeated transactions of a like nature; and
- (11) Transacting business in interstate commerce.²⁶²

The 1987 Act greatly reduces the adverse consequences for the failure of foreign corporations to qualify to do business in Arkansas. The existing law, commonly known as the Wingo Act,²⁶³ prohibits a foreign corporation from enforcing in an Arkansas court a contract made while the foreign corporation was not qualified to do business in Arkansas. Subsequent qualification does not have the effect of validating the contract.²⁶⁴ The 1987 Act, however, significantly departs from prior law and only prevents the foreign corporation from enforcing the contract until it qualifies.²⁶⁵

It should be noted, however, that the information required in the applications to qualify is different. The 1965 Act requires the following information:

- (1) The number of authorized shares of authorized capital stock and the par value;

260. *Id.* § 4-27-1501.B (Supp. 1987).

261. *Id.* § 4-27-1501.C.

262. *Id.* § 4-27-1501.B.

263. *Id.* § 4-27-104 (1987).

264. *Id.*

265. *Id.* § 4-27-1502.B (Supp. 1987).

(2) The value of the property of the corporation located inside Arkansas and the value of that located outside Arkansas;

(3) The proportion of the capital to be employed in Arkansas;

(4) The total sales inside Arkansas and outside Arkansas; and

(5) The total payroll inside Arkansas and outside Arkansas.²⁶⁶

The 1987 Act requires:

(1) The corporation's name;

(2) The name of the state where the corporation is incorporated;

(3) The date of incorporation and period of duration;

(4) The street address of its principal office;

(5) The address of its registered office in Arkansas and the name of its Arkansas registered agent; and

(6) The number and par value of its shares owned by Arkansas residents.²⁶⁷

The 1987 Act applies automatically (*i.e.*, no new certificate of authority is required) to all foreign corporations authorized to transact business in Arkansas as of January 1, 1988.²⁶⁸

XII. CONCLUSION

As the foregoing comparison of the 1965 Act and the 1987 Act reveals, there are numerous differences between the two Acts, many of which are fundamental in nature. In rendering advice regarding corporations which have previously been established, one of the initial determinations that must be made by the practitioner is whether the corporation in question was created prior to January 1, 1988, and if so, whether or not it elected to be governed by the 1987 Act.

For pre-1987 Act corporations making the election, and for corporations created under the 1987 Act, it is important to remember that the 1987 Act provides additional flexibility in the structuring of a corporation that was not available under the 1965 Act. This increased flexibility can serve to expand the authority of the board of directors, but it can also serve to reduce certain rights that shareholders have under the 1965 Act.

266. *Id.* § 4-27-106 (1987).

267. *Id.* § 4-27-1503 (Supp. 1987).

268. *Id.* § 4-27-1702.

Director liability is also greatly reduced in certain instances under the 1987 Act. This provision alone may be reason enough for 1965 Act corporations to consider electing 1987 Act coverage.

It is impossible, at this point in time, to predict how many existing 1965 Act corporations may convert to the 1987 Act, or whether future legislation may eliminate the dual corporate code system in Arkansas. For now, the enactment of the 1987 Act creates a second corporate code, sometimes very different from the 1965 Act, with which practitioners must deal.