Chapter XIII

Company Law

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I. INTRODUCTION: DIFFERENT CATEGORIES OF COMPANIES

In principle, a corporation (*société*) is an agreement whereby two or more persons decide to organize something jointly, with a view to sharing in the profits that will result from doing so. Such an agreement gives rise to a new legal entity. Due to the corporation's dual contractual and institutional character, the legal regime governing corporations may be thought of as a compromise between the principle of freedom to contract, on the one hand, and the establishment of certain mandatory rules applicable to corporate entities with a view, *inter alia*, to protecting the interests of those who deal with those entities, on the other. However, it is more and more common for a sole shareholder to form a corporation. To that extent, the corporation is no longer a contract, due to the lack of any meeting of the minds of several persons. It is also possible for a corporation to be lacking in legal personality altogether.

Corporations were originally, and remain, the primary vehicle for assembling the funds necessary for the conduct of joint actions. To that end, shareholders bring to the corporation either money or other assets, and exceptionally their services, with the corporation then becoming the owner of these assets. Thanks to this pooling of assets, the corporation has at its disposal greater resources than

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individuals would ordinarily have, however wealthy they may be, and may achieve objectives that would not have been possible for persons to attain on their own. From this perspective, corporations (and, most notably, joint stock companies) have been the chief legal instrument enabling the development of modern capitalism.

The corporation's quest for resources may be conducted in two ways. One possibility is that the shareholders know and trust each other, and undertake to play an active role in the conduct of corporate business. Alternatively, the corporation may initiate a public offering to an anonymous investing public by issuing securities that can be purchased on regulated financial markets. In this second scenario, shareholders make an investment, but do not wish to become involved in the management of the corporation. These latter corporations are subject to stricter regulation and administrative supervision in the interest of protecting investors who are often mere individuals as lacking in means as the ordinary consumer.

Parties participate in a corporation for a reason. Usually the reason is to make a profit. If everything goes as planned, the corporation's exploitation of the assets put at its disposal generates a profit, which is then distributed among shareholders in the form of a cash dividend. More exceptionally, shareholders may only seek an economy, that is to say, they assemble common resources for the purpose of carrying on certain operations at a lower cost than would be the case if those projects were to be carried on by each of them individually. Such is the case notably of 'partnerships of means' (*sociétés de moyens*), which are formed among members of the liberal professions who continue to run their practices individually.

But establishing a corporation is also often the way to enter into commercial transactions while running only a limited risk. In fact, in many corporate forms, notably joint stock companies (*sociétés par actions*) and limited liability companies (*sociétés à responsabilité limitée*, or *SARLs*), the shareholders' exposure to liability is limited to the amount of their contribution. The worst that can happen to them is that they lose their investment, but in no event may corporate creditors seize the shareholders' personal assets. This limitation of liability explains why, starting quite recently, French law has permitted the formation of sole proprietorships. The intended goal is not the pooling of resources, but rather protection against the risks of commercial transactions. While an ordinary individual necessarily commits in his transactions the totality of his assets, including assets allocated to personal or family use, the corporate shareholder freely decides which assets to commit to this activity.

This variety of objectives results in a great array of corporate forms. Thus, French law recognizes both non-commercial and commercial corporations. The former may be found in the areas of real estate, agriculture and the liberal professions (as in companies of lawyers, doctors and accountants).

Commercial corporations are traditionally divided into two major groups. Some are 'open' corporations. Here, the personality of the shareholders is not taken into account and their exposure is always limited to the amount of their

contribution. These can be either joint stock companies (*sociétés anonymes* or *SAS*) or limited partnerships with shares (*sociétés en commandites par actions*). However, the second of these forms is infrequently used. Open corporations may publicly offer their shares or be listed on a stock exchange.

Then there are 'closed' corporations, formed on the basis of the personality of the shareholders, who often intend to play a more or less active role within the corporation. Sometimes the shareholders' liability for corporate debts is unlimited, as in the case of general partnerships (*sociétés en nom collectif*). Sometimes it is limited to the amount of contribution, as in *SARLs* and in simplified joint stock companies (*sociétés par actions simplifiées* or *SASs*). Finally, it is now possible to form European joint stock companies (*sociétés anonymes européennes*), which can freely transfer their seat to any other European Union Member State and merge with any corporation having its headquarters in one of these States.

Corporations may have several shareholders. More exceptionally, they can be formed with a single shareholder, notably as simplified sole-owner joint stock companies (*sociétés par actions simplifiées unipersonnelles*, or *SASUs*) or as sole proprietor *SARLs* (*SARLs unipersonnelles* or *EURLs*).

On the other hand, and rather curiously, French law does not draw all the consequences of the special rules imposed by securities laws on corporations whose shares are listed on a regulated stock exchange. Joint stock companies (*sociétés anonymes*) are subject, in principle, to the same rules, regardless of whether their shares are publicly listed. This failure of distinction is objectionable because it subjects certain corporations to strict rules when, due to the limited size of those corporations, greater statutory flexibility would have been desirable. To put the matter simply, securities laws impose ever-greater constraints on public corporations, notably in regard to public disclosure. One can thus surmise that, sooner or later, the major distinction under French law will be between joint stock companies, or *sociétés anonymes* (the only ones allowed to offer their shares publicly), and other corporations (in which the personality of shareholders will continue to be taken into consideration). The latter consist notably of closed joint stock companies (*sociétés anonymes fermées*), *SASs* and *SARLs*.

Some corporate forms have been in existence for a very long time, including non-commercial companies (*sociétés civiles*) and general partnerships (*sociétés en nom collectif*), the origins of which can be traced back to the Middle Ages, and which were already regulated by the Civil Code of 1804 and the Commercial Code of 1807. Other forms are more recent, such as the joint stock company (*sociétés anonymes* or *SAS*), which was introduced in France by the law of 24 July 1867, under the strong influence of English law, or the *SARL*, instituted by the law of 7 March 1925, through the inspiration of the German GmbH, or, most recently, the *SASs*, established by the law of 3 January 1994 to offer the business community a more flexible structure than traditional models offered. Separate mention should be made of economic interest groupings (*groupements d'intérêt économique* or *GIEs*), which were introduced in French law by an Ordinance of 23 September 1967. These legal entities are not properly speaking corporations since they do not have the purpose of sharing profits, but instead of developing the

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activity of their members. They are thus collections of resources and, from that perspective, more closely resemble cooperatives. *GIEs* have flexible structures, which nevertheless result in a general joint liability of their members. There also exist European economic interest groupings (*groupements européens d'intérêt économique* or *GEIEs*), which facilitate cooperation among corporations from several Member States of the European Union.

Corporations are currently regulated by two fundamental codes. Articles 1832 *et seq.* of the Civil Code, as adopted by the law of 4 January 1978, set out the rules applicable to all corporations as well as those peculiar to non-commercial corporations. Book II of the Commercial Code, which in 2000 codified previously applicable laws (notably the law of 24 July 1966), without changing them, deals exclusively with commercial corporations. This is a very unstable way of regulating. Endless modifications supplement or modify corporate law without much regard to coherence, resulting in real legal uncertainty.

This area of law has been strongly influenced by European Union directives and regulations, which, since 1968, have harmonized the laws applicable in the various States of the European Union, notably on the protection of shareholders and third parties. French corporate law is thus evolving in the direction of a federal system characterized by the co-existence of purely domestic law norms and European norms applicable to every case in which corporate law affects intra-European Union relationships. Likewise, at least as to public corporations, globalization requirements have led French law to embrace numerous techniques initially used in financial markets in the UK and in the US. Finally, even if a regulation is often binding and mandatory, the desires of the shareholders continue to play a non-negligible role in the organization and functioning of the corporation, as reflected in adjustments to the articles of incorporation or entry into supplemental agreements.

Lawmakers have been sensitive to this need. A law of 3 January 1994 has established the simplified joint stock company (*société par actions simplifiées* or *SAS*), which combines the efficiency resulting from legal personality and freedom of contract, on the one hand, with limitation of shareholders' liability to the amount of their contribution, on the other. Initially restricted to corporations having a share capital of at least EUR 225,000, *SASs* are, since the law of 12 July 1999, available to all individuals or legal entities without any particular conditions, and may even have only a single shareholder. They are thus particularly attractive, though they are still not permitted to go public.

Corporations are not the only legal entities whose existence is recognized by French law. There are also legal entities governed by public law, such as territorial authorities (like the State, regions, departments (*départements*) and municipalities (*communes*)), state-owned businesses, and legal entities governed by private law. Among the latter, there exist both groupings of assets (*groupements de biens*) – such as the foundations that are found in limited numbers in France – and groupings of persons (*groupements de personnes*). This category includes associations that are formed for a purpose other than the sharing of profits, economic interest groups (*groupements d'intérêt économique* or *GIEs*) designed

to promote the economic activity of their members who remain independent, and corporations. Differences among these three categories of legal entities are not always clear-cut, so that the parties involved may choose to conduct a good many activities under the hat of a corporation, a *GIE* or an association. It should be noted that the criterion of a corporation under French law (sharing of profits or realization of savings) is narrower than the criterion of the 'lucrative purpose' applied by the European Union. Some legal entities may therefore be considered as corporations under European law, even though they are not so considered under French law.

II. THE FORMATION OF CORPORATIONS

The formation of corporations is a more complex operation than the conclusion of a contract because a corporation is designed to last for a long time and to have consequences for third parties.

A. THE INSTRUMENT OF INCORPORATION

Because participation in a corporation is never coerced, incorporation is always based on some manifestation of assent. The shareholder (*associé*) subscribes to the articles of incorporation (*statuts*) by buying shares of corporate stock when they are issued or by buying from another shareholder shares of corporate stock that have already been issued.

A founding shareholder must first place something at the disposal of the corporation at the moment the latter is formed. In exchange for this contribution, the shareholder receives shares of stock issued by the corporation. The shareholder's contribution may consist of a sum of money (i.e. contribution in cash) that he pays immediately or promises to pay to the corporation when the latter has need. A contribution in cash, which confers the status of shareholder, must not be confused with a loan to the corporation, normally in the form of subscription to a corporate bond (*emprunt obligataire*). In the case of a corporate bond, the interested party only becomes a creditor of the corporation. However, we have recently witnessed the issuance of securities that enable a creditor to move to the status of a shareholder.

The contribution may also consist of transferring to the corporation complete ownership rights in, or the right to use, some asset, which can be real estate, business assets, patents, etc. In the case of the transfer of such rights, the value of the assets must be determined by an independent expert so as to ensure that they are not overvalued.

These two first categories of contribution – cash and property – form the corporation's share capital, which is key to the allocation of shareholders' rights and must remain assigned to the corporate business. In principle, the amount of share capital is set by the articles of incorporation as a function of the

corporation's level of activity. However, in joint stock companies (*sociétés anonymes*), the law ordinarily requires a minimum share capital of EUR 37,000, or EUR 225,000 if the corporation goes public. Since 2003, no minimum share capital has been required for *SARL*s.

In a certain number of corporations, shareholders can also contribute their services as a form of subscription. That is to say, they promise to put their labour or skills at the disposal of the corporation. These contributions are not part of the capital and they are evidenced by rights that differ from shares of stock. Such contributions have been, up to the present time, uncommon under French law. But things are evolving, notably in corporations whose purpose is the associated practice of certain liberal professions, and in some *SARL*s. In truth, the activity of shareholders generates greater profits than the money or assets, which they put at the disposal of the corporation.

The assent of the future shareholder manifests itself through adherence to the draft articles of incorporation (*statuts*), which determine the terms of corporate organization and the corporation's functioning. Still, since there are numerous mandatory provisions of law, the freedom of choice of the drafters of the articles is quite limited, particularly in joint stock companies that offer shares to the public. Shareholders may give assent in writing or during the incorporators' meeting. The corporation must then designate its future organs of management, notably its board of directors (*dirigeants*), and it must be registered in the Company Register, which confers on it a legal personality. In theory, this formality can be quickly accomplished. But, in practice, it often requires a good deal of time, because the clerk in charge of the Company Register must satisfy himself that the incorporation was accomplished in conformity with all legal and regulatory requirements. This preliminary review does not bar anyone from asserting afterwards the nullity of the corporation. But dissolution will be ordered only in very limited instances, and regularization is always a possibility, so that irregularities upon formation of the corporation are more often punished through the liability of the incorporators who committed the irregularities than by the nullity of the corporation itself.

B. The Legal Personality of the Corporation

Registration in the Company Register confers legal personality on the corporation, enabling it in principle to enjoy the same legal rights as those accorded to individuals. The corporation is thus entirely distinct from its shareholders. It has a form, a purpose, a title, a registered office, and a nationality of its own. The latter is determined according to the location of its registered office (*siège social*). French law governs any corporation having its registered office in France. Only under exceptional circumstances will French law apply the so-called 'control test', meaning that enjoyment of one right or another is reserved to corporations whose shareholders or managers are French or European Union nationals. The corporation also has its own patrimony. In principle, there is a clear wall between the patrimony of the corporation and that of its shareholders or managers. The latter

may not use corporate assets for the simple reason that they do not own them. Reciprocally, the corporation's creditors may not sue the shareholders, since the liability of the corporation is distinct from the personal debt of the shareholders. However, this rule is not absolute. In non-commercial corporations (*sociétés civiles*) and in general partnerships (*sociétés en nom collectif*, or *SNC*s), shareholders may be held personally liable for the corporate debt and therefore run an unlimited risk. Because it is a legal entity, the corporation may be subject to civil liability and even, in instances provided by law, criminal liability.

Enjoying a legal personality of its own is nevertheless not the essence of a corporation, since French law recognizes a particular form of corporation – undisclosed or silent partnerships (*sociétés en participation*) – which, not being registered in the Company Register, do not have legal personality. These corporations often have an undisclosed or a temporary character. Their utility is, however, limited because they do not directly exercise any legal rights, but must instead act in their manager's name.

III. The Organization and Functioning of Corporations

The organization and functioning of corporations are very diverse, as there is little similarity between a sole proprietorship (*société unipersonnelle*) or a family corporation which runs a modest business, on the one hand, and a multinational company listed on the stock exchange, on the other. There are, however, a few provisions of general application.

A. The Shareholders

The shareholders are essential figures. They are the ones who place at the disposal of the corporation the assets that enable the corporation to realize its objectives. They are the ones who make the crucial decisions.

1. The Shareholders Taken Individually

The shareholders enjoy pecuniary rights, notably that of participating in the profits realized by the corporation. The formula for allocating profits among shareholders is freely determined by the articles of incorporation. They may provide for an equal distribution among all shareholders or, more frequently, an allocation proportional to the amount of the contribution received. The profits are thus shared in proportion to shares held by each shareholder. The articles of incorporation may, however, provide for a right to an additional dividend that is reserved, for example, to shareholders with certain seniority. Simply put, the law treats as unenforceable (as a so-called *clause léonine*) a provision that would reserve the totality of corporate profits to a single shareholder, because in that case

the corporation could no longer be said to be formed around a common interest. Generally, such distribution takes place annually, at the end of each annual accounting period (*exercice*). But shareholders may also agree to place the profits in reserve in order to fund investments necessary for the development of the corporation and to distribute them only subsequently – at the latest, upon liquidation of the corporation.

Shareholders also have the right to vote, as they are the ones who collectively make the main decisions relevant to the corporation's business. Because of its importance, the right to vote is governed by statute, and any violation of statutory provisions renders the decision taken a nullity. Sometimes it is a personal right (i.e. one shareholder, one vote); sometimes it is a right proportional to the amount of contribution received or to the shares of capital held (i.e. one share, one vote). In joint stock companies (*sociétés anonymes*), where the regulation is more detailed and more restrictive, the one share, one vote rule must in principle be applied.

However, the articles of incorporation may accord cumulative voting rights to stable shareholders; conversely, certain shareholders may be deprived of their right to vote, either because of a conflict of interest that puts them at odds with the corporation or because they have not performed their legal duties – for example, if they do not disclose their acquisition of shares or if they fail to announce a public tender offer (*offre publique d'achat*, or *OPA*), or further, if they do not pay for the totality of the shares for which they have subscribed. However, such a deprivation of the right to vote must be authorized by a statutory provision; it may not merely be stated in the articles of incorporation.

To be exercised effectively, the right to vote is supplemented by a right to information. In closed corporations, this right is very extensive, enabling the shareholder to have direct access to corporate books and documents. In open corporations, this right is more restricted. The shareholder receives certain documents that are required to be sent to him by the corporation. He may also request the sending of additional information or go directly to the corporate headquarters to read or make a copy of documents which the law requires to be put at his disposal.

French law places a great emphasis on shareholder information because it considers that having such information is preferable to direct protection. Therefore, the information must be accurate, rapid, complete, and usable. The principal medium of information is the annual report drafted by the management. The information must be verified by an auditor (*commissaire aux comptes*), if there is one in the corporation, and when the corporation goes public, by the Financial Markets Authority (*Autorité des marchés financiers*, also known as *AMF*), an independent administrative authority that replaced the *Commission des opérations des bourses* (*COB*) in 2003.

The shareholder also has a right to transfer his shares. In order to ensure the fluidity of the market, shares in corporations listed on a stock exchange are negotiable. That is to say, they can be freely transferred to third parties, without time limitations or any particular formalities and only on payment of modest fees.

In corporations that are not listed, shares are also negotiable, but the articles of incorporation may decide that their transfer to third parties who are not already shareholders will be subject to approval of the buyer by the other shareholders. This right is matched by the duty of other shareholders or of the corporation to buy the transferor's shares, at a price determined by an expert, in case of disapproval of the transferee.

Finally, in the other forms of corporations, shares are only transferable, which means that their transfer is more complex and costly, and requires the approval of other shareholders. Approval is sometimes even necessary for transfers between persons who are already shareholders. It therefore can happen that the minority shareholder is the corporation's prisoner. To avoid this inconvenience, the shareholder sometimes enjoys a right of withdrawal, enabling him for legitimate reasons to compel his fellow shareholders or the corporation to buy back his shares. Still, such a right remains exceptional, even though the possibility of generalizing it is sometimes discussed.

In exchange for their rights, shareholders have duties. Vis-à-vis the corporation, these obligations are not many. The primary obligation consists of making the contribution promised, in cases where the payment of cash or the transfer of an asset to the corporation has been deferred. The shareholder must not personally use corporate assets, unless the articles of incorporation allow it. Finally, courts have increasingly held the shareholder subject to a duty to act in good faith vis-à-vis the corporation and other shareholders, which may go so far as to entail a duty not to compete. Violation of these duties is only exceptionally punished by exclusion from the corporation.

On the other hand, shareholders' duties vis-à-vis third parties are numerous. Their scope varies according to the form of the corporation. In some instances, notably in general partnerships (*sociétés en nom collectif*, or *SNC*s), shareholders are personally and jointly liable for the entirety of the corporate debt, to the extent the corporation is unable to pay. In other corporations, notably non-commercial corporations (*sociétés civiles*), shareholders are personally liable for corporate debt, but only pro rata to their shares. In *SARL*s and joint stock companies (*sociétés par actions*), shareholders are not liable beyond their contribution and, to that extent, are insulated from creditors' lawsuits. Finally, but very exceptionally, there are certain mixed situations, i.e. corporations in which the shareholder may be compelled to pay unpaid creditors a sum equivalent to, or possibly multiples of, the amount of the contribution he has already made. Such is the case with non-commercial real estate corporations that are listed on a stock exchange and with certain corporations having an agricultural purpose.

2. Shareholders as a Class

Under the French approach, the community of shareholders is the supreme body within the corporation. This community holds the most important powers, even though it may not always exercise them effectively. In fact, shareholders exercise most of their rights collectively. Their decisions may take several forms. The

simplest form is an instrument signed by all shareholders, useful in corporations in which shareholders are few in number and capable of reaching unanimous consent. It is equally possible to resort to written consultations. The manager submits draft resolutions to the shareholders, asking them to inform him of their vote and recording the result of the ballot in the minutes. But the usual method – usual because it alone permits a full exchange of views among the shareholders – is to call a meeting (*assemblée*) of the shareholders at a single location where they decide the corporation's major policies. A shareholders' meeting is mandatory in *SARL*s for approval of the corporation's financial statements; it is mandatory for all decisions in joint stock companies (*sociétés anonymes*). But even if a shareholders' meeting is required, shareholders may participate without being physically present, either by a proxy given to another shareholder or by a vote by correspondence. In order to facilitate voting by foreign shareholders, the law of 15 May 2001 allows issuance of proxies and voting through an electronic transmission system.

The Commercial Code lays down the conditions under which decisions may be adopted. Sometimes a quorum is required, meaning that a minimum number of shareholders or of shares must take part in order for the vote to be sufficiently representative. The quorum is degressive. That is to say, if a quorum is not met in a first meeting, a second meeting will be scheduled and made subject to a lower quorum, and possibly without a quorum at all. The Code also indicates whether the decision must be adopted by unanimity or by majority vote, and whether the votes are allocated to shareholders, to shares, or according to a mixed system. Some decisions require a majority both of shareholders and of shares.

The shareholders' meeting is most strictly regulated in joint stock companies (*sociétés anonymes*). The law determines which authorities are competent to call the meeting, so that shareholders may deliberate when necessary, but not excessively. Normally, meetings in corporations having single boards will be convened by the board of directors (*conseil d'administration*), and in corporations having dual boards either by the directorate (*le directoire*) or the supervisory board (*le conseil de surveillance*). But the meeting may also, subsidiarily, be called by the statutory auditor (*commissaire aux comptes*), by an agent appointed by the court at the request of minority shareholders, or by the employees' committee (*comité d'entreprise*). Notice of the meeting must be given at least fifteen days in advance, so as to enable shareholders to make arrangements to attend the meeting and above all to have time to sufficiently inform themselves.

The convocation must include the meeting agenda, i.e. the matters upon which the meeting will be called upon to deliberate and vote. This agenda has a mandatory character in the sense that the meeting may not validly deliberate upon a question not included on the agenda. However, as an exception to the rule, the meeting may decide in session to remove a director (*administrateur*) or a member of the supervisory board (*membre du conseil de surveillance*), and to replace him. The convocation is individually addressed to those shareholders holding registered shares, since their identity is known to the corporation. On the other hand, if the corporation has issued bearer shares (which is possible if the corporation is

listed on the stock exchange), notice of the convocation may only be given by publication of a notice in a legal journal (*journal d'annonces légales*), since the corporation does not know the identity of these shareholders. From the time of notice of meeting, the shareholder has a relatively extensive right to information, which enables him to intelligently assess and vote upon the issues that are presented to him.

The Commercial Code distinguishes between extraordinary and ordinary meetings. The former have the authority to amend all provisions of the articles of incorporation. Through successive reforms, the law has given these meetings ever-greater powers and has lowered quorum and majority thresholds so as to enable joint stock companies (*sociétés anonymes*) to adapt their articles of incorporation to a changing environment. Currently, the quorum is one-third of voting shares on the first convocation and one-quarter thereafter. The required voting majority is two-thirds of votes. As a result, a shareholder who has more than 66 per cent of voting rights has absolute control over the corporation. Below this percentage, he is exposed to the risk of running up against a blocking minority, i.e. a minority insufficient on its own to pass a resolution, but sufficient to prevent an amendment of the articles of incorporation. Although supreme in theory, extraordinary meetings may not increase the individual commitments of shareholders, except with the individual consent of the interested parties.

Ordinary general meetings are the usual ones. They must be held at least once a year, within six months of the closing date of the accounting period, to approve the statements of accounts and allocate the credit balance. But more generally, they have jurisdiction over all decisions other than those of day-by-day management, which is within the jurisdiction of the board of directors or management board, and other than amendment of the articles of incorporation, which must be decided upon by an extraordinary meeting. It is at ordinary meetings that most officers and directors are appointed and removed. But the articles of incorporation may extend the ordinary meeting's powers by authorizing it, for example, to approve the corporation's entry into certain important contracts. Such extensions are valid, provided they do not deprive management of all of its powers. But they are not enforceable against third parties, so that the corporation is bound even if such extensions have not been respected.

The required quorum on the first convocation is one-quarter of voting shares. No quorum is required afterwards because the meeting must be able to take decisions necessary for the proper functioning of corporate affairs, even if participants are few in number. A majority is half the votes plus one. Since the law of 15 May 2001, the articles of incorporation may provide for the meeting to be held by videoconference.

In simplified joint stock companies (*sociétés par actions simplifiées*), or *SAS*s, the articles of incorporation designate the decisions that must be taken collectively by the shareholders and the manner in which they are to be taken. It is thereby possible to indicate, for example, the meetings or written consultations required in order to decide whether a voting right should be allocated to each individual or, rather, in proportion of the share capital held, whether to fix a

quorum, or whether a majority should be required depending on the nature of the deliberation.

The Commercial Code allows shareholders' meetings to be annulled only very exceptionally. For deliberations that depart from the articles of incorporation, the restrictive principle of 'no nullity absent a statute' (*pas de nullité sans texte*) is applicable. For other deliberations, nullity results only if there has been a violation of a mandatory statutory provision. Nullity is not always required. The Commercial Code prefers regularization of irregularities or liability on the part of those responsible rather than the brutal sanction of nullification. However, courts do annul corporate resolutions in the case of 'majority oppression' (*abus de majorité*) that is, decisions contrary to the corporation's interest that are adopted for the sole purpose of favouring members of the majority at the expense of the minority. Similarly, minority shareholders who without good cause block the adoption of a resolution favouring the corporation's interest may be ordered to pay damages. A court may appoint an agent (*mandataire de justice*) to vote on behalf of the 'oppressive' minority shareholders.

B. The Management, Board of Directors, Supervisory Board and Management Board

History shows that, originally, all shareholders (*associés*) managed the corporation themselves. This situation still persists within general partnerships (*sociétés en nom collectif*) in which all shareholders are managers (*gérants*) unless the articles of incorporation provide otherwise. However, this method of direct management is unrealistic. Shareholders usually do not seek to play an active role in corporate affairs. Instead, they entrust that responsibility to a body especially named for that purpose, consisting of either shareholders or third parties. The result is that the community of shareholders becomes an intermittent body that makes the most important decisions only. Daily management of the corporation is assured by other bodies, which act under delegation by the shareholders. In this area, differences among the various corporate forms become particularly salient.

However, there are two common rules that ensure the protection of third parties, both of which were introduced into French law by an EU directive of 9 March 1968. On the one hand, the appointment of the corporation's legal representative is deemed lawful from the moment when it has been made public. The publicity mechanism is a simple and effective one, since third parties need only consult the Company Register to verify the status of the person with whom they are dealing. On the other hand, the corporation's legal representative always has the power, under any circumstance, to act in the name of the corporation. Provisions of the articles of incorporation that would restrict his powers are not enforceable against third parties, unless it is established that the latter were aware of those limitations. Moreover, in *SARL*s and joint stock companies (*sociétés par actions*), the legal representative binds the corporation even when acting outside

the scope of corporate purpose. Apart from these two rules, however, corporate management varies considerably according to the form of the corporation.

Non-commercial corporations (*sociétés civiles*), general partnerships (*sociétés en nom collectif* or *SNC*s) and *SARL*s have one or more managers. There are only a few mandatory provisions, and shareholders have greater freedom in determining how to conduct their management. The manager will be designated by the articles of incorporation, or by the shareholders as a whole. He can be removed only in case of fault or if he is unable to perform his functions, and either of these findings must be voted by a majority of shareholders. Except in *SARL*s, the manager may be either an individual or a legal entity. Where the manager is a legal entity, its directors are subject to the same requirements and duties, and may be liable to the same extent as if they were managers in their own name. The manager may be either a shareholder or a third party, and may be compensated or work for free. A manager performs his duties either on his own or in association with other managers who allocate among themselves different areas of management or, instead, jointly take their decisions within a management committee.

In joint stock companies (*sociétés anonymes*), the regulation is more complex and restrictive, even if the corporation does not go public. Shareholders have the option between two modes of organization.

In the classic organization, still called the 'monist' formula, there is a board of directors and officers. The board of directors (*conseil d'administration*) is a collegial body, composed of three to 18 shareholders elected by the general meeting for a duration that cannot exceed six accounting periods. Directors (*administrateurs*) may be removed by the meeting without cause, without notice and without severance pay. The board of directors has general authority over the management of the corporation. It defines corporate objectives and makes essential decisions on economic, financial and technological matters. It may also on its own initiative examine any question relevant to the proper functioning of the corporation and decide to enter into any agreements. In addition, the board of directors convenes the general meeting, prepares annual statements of accounts, and designates its chairman or chief executive officer.

For a long time, boards of directors have stayed in the background. But the situation is changing under the influence of the 'corporate governance' doctrine, which invites boards to play a more active role, to exercise their powers to the full extent, and to provide better review of management. By virtue of that same doctrine, boards should not be composed only of directors representing majority shareholders, but also consist of independent directors. For the management and the legal representation of the corporation, two solutions are possible. Under one, the same person simultaneously chairs the board of directors and holds the general management of the corporation. Such a person is thus called 'the chairman/CEO' (*président-directeur général*, or *P. D-G*). This combination of positions in one person is burdensome for him, especially in large corporations, even though the chairman/CEO may be assisted by associate directors (*directeurs délégués*). Alternatively, the chairman of the board may be separated from the general management of the corporation. This form of organization was introduced into

French law by the law of 15 May 2001. In such corporations, the corporation is both managed and represented by a CEO (*directeur général*), who will not necessarily be a member of the board of directors. The CEO is appointed by the board, which may also terminate his duties for cause. Associate directors too may assist him. The separation of the chairmanship of the board from the general management introduces some flexibility into the organization of joint stock companies. However, it entails a risk of bureaucratic excess, since power will effectively be vested in a CEO who is not appointed by shareholders.

Joint stock companies may also adopt a 'dual-type' organization, inspired by German law. Here, management is lodged in a collegial body, the directorate (*directoire*), composed of at most seven members who are appointed by the supervisory board (*conseil de surveillance*) and need not be shareholders. The members of the directorate enjoy a certain functional independence, since they may be dismissed only for just cause by the shareholders' meeting or, if the articles of incorporation so provide, by the supervisory board. The directorate is vested with very extensive powers to act under any circumstance in the name of the corporation, and its chairman is the corporation's legal representative.

The supervisory board has a composition similar to that of the board of directors, but its duties are different. Chiefly, its mission is to monitor the directorate's management of the corporation on an ongoing basis. Such supervision focuses on both the lawfulness and the opportuneness of decisions made by the directorate. But the supervisory board may also play a more active role by setting the objectives that the directorate must achieve or by requiring its own assent prior to the directorate's entering into certain contracts or conducting certain operations. The dual corporation model is not widespread in France. However, it presents many advantages, notably a centralization of objectives (which remains the duty of the supervisory board), combined with a decentralization of the governing bodies (achieved by the directorate, which itself is a collegial body). This model also permits a more balanced allocation of powers among shareholder groups within the corporation.

It thus appears that the management or direction of a joint stock company (*société anonyme*) may be organized in three ways: (i) centralized management in corporations where a single individual holds concurrently the positions of chairman of the board (*président* du *conseil d'administration*) and CEO (*directeur général*); (ii) semi-decentralized management in corporations where the chairmanship of the board and the general management are separated; and (iii) decentralized management in a corporation having a directorate (*directoire*).

In simplified joint stock companies (*sociétés par actions simplifiées* or *SAS*), the regulations tend to be more flexible, since it is the articles of incorporation that set the ground rules on the basis of which the corporation is managed. Here we find only one mandatory rule. The corporation must have a chairman, possessing all powers of representation of the corporation vis-à-vis third parties. Apart from that, organizational freedom is almost unlimited. The articles of incorporation will establish requirements for managers and determine the manner of their appointment and removal. The articles of incorporation also organize the

functions of the corporation's bodies: the single-person manager (as in a *SARL*), a board of directors (as in 'monist' joint stock companies), and co-existing management and supervisory bodies. Such plasticity constitutes the main advantage of the *SAS*.

C. Monitoring Bodies

An auditor (*commissaire aux comptes*) is required to be found in all joint stock companies (*sociétés par actions*) and in all corporations having another form where they have attained a certain minimum size. In principle, one auditor is sufficient. However, if the corporation establishes consolidated accounts, because it is in control of a conglomerate of entities, it must appoint two auditors.

Auditors are appointed by the shareholders as a group from among accounting professionals figuring on an official list established by the relevant public authority and having the highest qualifications in accounting and legal fields. The term of their office is six accounting periods. Only a court order may prematurely dismiss an auditor for wrongdoing or incapacity. The law has taken many precautions to ensure the independence of auditors vis-à-vis the inspected corporation and its managers. In particular, the auditor must hold no interest in the corporation that it is inspecting, and may not give the latter any advice, opinion or recommendation outside the scope of his statutory duties. The auditor enjoys extensive powers of investigation, but in turn is subject to a duty of confidentiality.

The auditor's principal task is to inspect the corporation's books and financial disclosures and, under certain circumstances, those of its subsidiaries, and then to certify that they are in compliance with the law and honest, and also give a reliable representation of the corporate business. But the auditor has lately been assigned other tasks that are more legal than purely accounting in nature, such as disclosure of agreements entered into between the corporation and its managers, reporting to the public prosecutor (*Procureur de la République*) criminal offences committed within the corporation, and initiating warning procedures if there is an occurrence likely to compromise the continuity of the business or respect for the principle of shareholder equality. The auditor thus tends to be an essential corporate figure and a guarantor of investor protection.

When a corporation goes public, the auditor will be supervised by the Financial Markets Authority (*Autorité des marchés financiers*, or *AMF*), an independent administrative authority that, in 2003, replaced the *Commission des opérations de bourse*, or *COB*. This agency plays an essential role in protecting the savings that are invested in financial instruments, in informing investors generally, and in ensuring the proper functioning of financial markets. It enjoys the power to enjoin and to impose sanctions.

D. EMPLOYEES

Under the classical view, employees are not corporate bodies. They are linked to the corporation by an employment contract that places them in a position of subordination. They receive a salary that is not tied to the profit that the corporation makes and they are not involved in management. For a long time employees' unions as well as employers' unions were hostile to any participation by workers in the share capital or in management. Such participation thus occurred only in public sector corporations where boards were composed of State officials, employees and certain qualified persons. But under the influence of European authorities, the situation has evolved, above all in joint stock companies (*sociétés anonymes*). The involvement of employees in management has now become a reality, and is manifested in three principal ways.

First, employees are given certain information regarding the situation of the corporation. This information is given to them by the employees' committee (*comité d'entreprise*), which must be formed as soon as the corporation employs more than fifty workers. The committee must be informed and consulted about questions relating to the organization, management, and overall conduct of the corporation. In addition, representatives of the employees' committee attend, without deliberative powers, meetings of the board of directors and of the supervisory board. The committee may also request the appointment by a court of an expert if it suspects that the corporation is not well managed, and it may initiate warning proceedings (*procédure d'alerte*) if it has knowledge of any facts likely to unsettle the enterprise's economic situation.

Second, employees receive a fraction of the profits realized by the corporation and are encouraged through various mechanisms to subscribe to or buy additional shares issued by the corporation. Usually, shares held by employees are collectively managed through corporate investment funds (*fonds commun de placement d'entreprise*).

Finally, employees may sit on the board of directors or on the supervisory board, taking part in deliberations. Generally, such participation is optional, in the sense that it requires a specific provision in the articles of incorporation. But as of the moment that employees hold more than three per cent of the share capital, such participation becomes mandatory. Depending on the case, directors representing employees are elected either by the shareholders' meeting or by a special committee comprising the employees as a group.

We can thus conclude that, at least in joint stock companies listed on the stock exchange, employees represent a real corporate body.

IV. THE FUNCTIONING OF CORPORATIONS

A corporation has as its objective the pooling of resources with a view to the sharing of profits. This raises questions as to what the means of financing are and how profits will be allocated among shareholders. But any simple regime can also be disrupted by various factors that can unsettle corporate affairs.

A. CORPORATE FINANCE AND THE ISSUANCE OF SECURITIES

The financing of non-commercial corporations (*sociétés civiles*), general partnerships (*sociétés en nom collectif*), and *SARLs* do not raise any particular difficulties from a legal perspective. If a corporation needs money to fund its activities, shareholders may be invited to make new contributions by subscribing, if they so wish, to an increase in shared capital. On the contrary, in joint stock companies (*sociétés par actions*), the situation is more complex, because these legal entities may fund themselves through the issuance of a much more diversified range of securities.

1. Issuing New Shares of Stock

The corporation may first acquire financing by issuing new shares of stock. The decision to increase the share capital is within the exclusive competence of the 'extraordinary' meeting of shareholders. Several techniques are available. The increase may be carried out by new cash contributions, this being the most frequent means. Shareholders have a preemptive subscription right, which allows them to participate in the increase proportionately to the amount of their previous participation in the share capital and thus protects them from marginalization. However, they are never obligated to participate in the increase and may not be excluded from the corporation if they refuse to subscribe. The meeting may decide to eliminate the preemptive right so as to reserve the increase to a specific investor or to facilitate a public offering. When a corporation that increases its share capital has reserve profits, the market value of the stock is higher than its nominal value. In that case, the subscriber is asked to pay an admission fee, called an issuance premium (*prime d'émission*), designed to make up the difference between these two values. The meeting can limit itself to settling on the principle of having such an increase and delegate to the board of directors or to the directorate the power to carry it out at the most opportune moment.

The capital increase may also be realized through a contribution in kind. For example, when the corporation wishes to acquire a business or real property, the owner may agree not to sell it but rather to contribute it to the corporation of which he will then become a shareholder.

The share increase may also occur through a conversion of debt (in which case the creditor becomes a shareholder), by incorporation of the reserves into the share capital, or by decision of a shareholder not to receive his dividends, but instead have the latter incorporated into the share capital.

2. Issuing Bonds

The corporation may also fund itself by issuing debt securities (*titres de créance*), that is bonds (*obligations*). These are securities evidencing a long- or medium-term loan made to the corporation and giving their holders the same rights for a nominal amount. Bondholders (*obligataires*) are entitled to a stated interest, untied to profits realized by the corporation, as well as to the repayment at maturity of the nominal amount of the loan. Although they are creditors or shareholders, bondholders are involved in the conduct of corporate affairs. Assembled as a class, they are entitled to give their opinions about corporate decisions capable of reducing their rights or their security. Bonds are safe investments as long as the issuing corporation is solvent. However, they have the disadvantage of not hedging against the risk of inflation.

3. Issuing Composite Securities

More recently, various composite securities (*valeurs mobilières mixtes*) have appeared which give their holders certain, though not all, shareholder prerogatives. These securities holders find themselves in an unusual position. They are, strictly speaking, neither shareholders, bondholders nor creditors. These hybrid securities arise from combining, splitting or adapting traditional forms of securities.

A first group consists of composite equities (*titres mixtes*), which combine the features of both stocks and bonds. Thus, the corporation may issue preferred stock (*actions à dividende prioritaire*) without voting rights. The holders of these securities have all the rights of shareholders except the right to vote. However, they acquire the latter if dividends are not paid to them for three accounting periods. More original are investment certificates (*certificats d'investissement*) which entail a radical dissociation between the right to vote, which is given to the holder of a certificate with the right to vote, on the one hand, and shareholder monetary rights, which are given to the holder of an investment certificate, on the other. The latter is not a shareholder, but nevertheless is consulted before certain important corporate decisions are made. A final form of security is still further removed from conventional stocks. This is the participation certificate (*titre participatif*), which consists of subordinated debt (*créances de dernier rang*), more exposed to corporate risk than are bonds. This is because they are repaid only after the bonds are paid off, and often only upon dissolution of the corporation.

The second category of composite securities comprises securities that give deferred access to the corporation's share capital. These are debt securities (*titres de créance*) that may, by conversion, exchange or presentation of a coupon, enable their holder to become a shareholder. The issuing corporation makes a commitment to increase its share capital by a determined amount by a certain date and to give holders of these securities priority in such an issuance under pre-established conditions. The security holder does not make any commitment. He may or may not subscribe to the share capital increase, depending on whether he thinks it will be financially advantageous for him to do so. The most remarkable security in this area is the convertible bond (*obligation avec bon de souscription*) or the bond with an attached warrant (*obligation à warrant*), which entitles its holder to a multitude of options upon the note's maturity date. These include both subscribing to the share of stock and remaining a bondholder; subscribing to the share of stock and selling the bond; selling the subscribed share of stock and keeping the bond; or selling both the bond and the share of stock. These mechanisms are made even more complex by the fact that a subsidiary may issue debt securities that can be converted to, substituted by or reimbursed with the parent company's shares of stock, which become a means of collateralizing one's debt securities.

B. The Sharing of Profits and Corporate Taxation

At the end of each accounting period, the shareholders approve the corporate accounts that have been prepared by managers and, as required, certified by auditors. If these accounts reveal the existence of distributable profits, the shareholders collectively decide on their allocation. They may opt for putting them into reserves, which will allow the corporation to self-finance its development or to cope with unforeseen difficulties. They may decide to distribute all or part of the profits, in the form of dividends allocated to shareholders. Unlike the right to vote, which is mandatory in nature, the right to dividends is freely determined by the articles of incorporation, which can provide that some shareholders shall receive higher dividends than others. Only in the event of silence of the articles of incorporation will profits be allocated in proportion to contributions.

Taxation of profits realized by corporations is subject to two different regimes. In so-called *sociétés de personnes* ('personal corporations'), a category consisting of non-commercial corporations (*sociétés civiles*) and general partnerships (*sociétés en nom collectif*), profits realized by the corporation are directly taxable to the shareholders under a system known as 'fiscal transparency'. The drawback to this is that the shareholder pays the tax even on the profits that have been put into reserves. The advantage, however, is that he can deduct from his taxable income losses incurred by the corporation. In a category of *sociétés dites de capitaux* ('capital corporations'), consisting of joint stock companies (*sociétés par actions*) and *SARLs*, profits are subject to a special corporate tax, which is at a theoretical rate of 33 per cent, regardless of realized profits. That tax is payable by the corporation. Dividends are again taxable to the shareholders who received them. But such double taxation is in principle offset by the grant of a tax credit equal to half of the dividend. The shareholder deducts such a tax credit from the amount of his own tax liability or, if he has no tax liability, may get a refund. Moreover, shareholders with a modest income receive a tax allowance on the amount of dividends they receive.

C. Setbacks during Corporate Life

More or less serious setbacks can disturb the functioning of a corporation. Shareholders may then seek to hold managers liable on the ground that the latter have committed wrongs that were damaging to the corporation. Where shareholders as a group sustain the loss, the corporation itself must bring any lawsuit, since it is deemed to be the victim. However, as corporate legal representatives are not very often willing to sue themselves, the law allows a shareholder to step forward to defend the common cause and thus sue on behalf of the corporation in place of its delinquent managers. Where an individual shareholder who has been the victim of wrongful acts incurs the damage, he as an individual has standing to sue. In France, holding managers liable in civil courts is relatively exceptional, because victims generally prefer criminal proceedings, which are broadly available due to the existence of a specific criminal offence of misuse of corporate assets (*abus de biens scoriae*), which has a very wide scope.

For a long time, courts strictly applied the principle of majority rule, so that minority shareholders always had to accept decisions adopted by the majority. This practice facilitated the functioning of the corporation, but also could produce results contrary to the common interest within the corporation. The situation began to change, starting in 1960. The courts first annulled resolutions that they found to have been passed in violation of the corporation's overall interest and with the sole purpose of favouring members of the majority at the expense of the minority. This was especially the case when profits were systematically put into reserves without this being justified by the necessity of corporate self-funding or when abusive support was given to a subsidiary in which the majority shareholders had a preponderant personal interest. More recently, the notion of majority oppression (*abus de majorité*) has been supplemented by recognition of a notion of minority oppression (*abus de minorité*), by which minority shareholders may be held liable for harassing the management or systematically obstructing the adoption of resolutions necessary for the survival of the corporation. This dual development has led to an immersion of the courts in the functioning of corporations. Still, up to now, courts have limited themselves to ensuring the proper functioning of the corporation, while avoiding judgments about the wisdom or advisability (*opportunité*) of management decisions.

Finally, a court may, at the request of minority shareholders or certain public officials, appoint an agent to prepare a report on specific transactions that may be contrary to the corporation's interest. If the corporation is going through a serious crisis, the court may also appoint a trustee (*administrateur judiciaire*) to manage the business of the corporation in place of the managers whom the shareholders had appointed, until a solution has been found.

D. Bankruptcy

A corporation that cannot pay its outstanding debt with available assets (and is thus insolvent) may be subject to bankruptcy proceedings at the request either of its legal representatives or of its creditors. The proceedings begin with a period of scrutiny (*période d'observation*), during which the corporation is represented, managed, and reviewed by a specialized court-appointed expert and during which all proceedings against the corporation by its creditors are stayed. The expert prepares an economic, financial and employment report on the enterprise, taking into consideration in particular the relationship between its assets and its liabilities, as well as its reorganization prospects.

In light of this report, the court has a choice among three solutions. It may decide to pursue a 'continuation' plan, if the corporation will be able to pay all its creditors if given additional time for repayment. The court may also decide to sell the corporation's assets to a purchaser, the price paid by the latter being used to repay creditors in whole or in part. Finally, if a recovery is not foreseeable, the court may order liquidation of the corporation. In that event, all assets are sold and the proceeds used to repay creditors.

Managers who have committed faults in management may be ordered to personally repay all or part of the unpaid debt. Those who have misappropriated funds may be brought into the bankruptcy proceedings initiated against the corporation.

V. Corporate Groups and Mergers

The Commercial Code functions on the premise of the independence of corporations. However, the concentration of corporations has led to the formation of numerous and often very large corporate groups. Although the notion of group is difficult to define, one may consider it as referring to a set of corporations, which, while legally independent from one another, are in fact part of a single economic decision-making unit. There is thus an opposition between the situation *de jure* (corporate separateness) and the situation *de facto* (convergence of objectives and centralization of decisional power). While the corporate group is an enterprise, it is not a legal entity. Under French law, corporate groups as such are not regulated, but they are subject to occasional legislation and to a relatively abundant case law.

A. The Structure of Groups

Strictly speaking, groups rely on connections in share capital among two or more corporations. This presupposes two elements. First, one corporation must hold a significant fraction of the shares of another corporation's stock. Second, such participation must not be made for the simple purpose of investment, but in order to exercise, if not dominance, then at least influence over the corporation that has issued the shares. The simplest case is where one corporation holds more than half of the share capital of another. The former is thus called the 'parent' company (*société mere*) of the latter, which is its subsidiary (*filiale*). But the linkage may

exist even where the parent company holds less than half of its subsidiary's shares of stock. It is sufficient that the parent is able, in law or in fact, to exercise a dominant influence over the latter by determining decisions taken during the latter's general meetings or by choosing its managers. Sometimes a corporation finds itself under the joint control of several corporations that are acting in concert. Such a corporation is called a joint subsidiary.

French law also acknowledges the existence of 'personal groups' (*groupes personnels*), meaning a group of corporations whose unity in decision-making results solely from the existence of a community of shareholders or managers. Corporations that are controlled by the same shareholders are commonly termed 'sister' corporations (*sociétés soeurs*). But the consequences of a mere community of shareholders are less complete than those resulting from the existence of a linkage in share capital.

Finally, and much more exceptionally, a group may be based solely on agreements entered into among a number of corporations, linking them sufficiently tightly that their legal independence is put into question.

B. The Formation of Groups

Where stock is not listed on the stock exchange, the linkage comes about by the over-the-counter purchase (*l'achat de gré à gré*) of a sufficient number of shares of stock to enable the purchaser to take over control of the issuing corporation. Such transfers of control are not subject to any statutory regulation. These transfers relate to stock, and not directly to the assets held by the corporation; those assets remain the corporation's property, and the transfer of control does not jeopardize the separate legal personality of the corporation whose shares have been transferred. The principal difficulty consists of determining what security the transferee of these shares will receive. Generally, transferors protect transferees against the unexpected appearance of corporate debt, which arose prior to the transfer, but to which the transferees remain exposed, since it is the corporation that remains the debtor, despite the change in shareholders. Another difficulty arises where the transfer of control does not cover all of corporate shares. Nothing obliges the transferee of the majority of shares to purchase the minority shares or to buy them at the same price as that agreed upon with the transferors. In fact, the shares that enable a corporation to obtain control of another corporation are deemed to have greater value than the others.

The situation is different where the transfer of control involves shares of public corporations. Here, securities laws prescribe complex rules designed to protect the interests of minority shareholders. Thus, any person who happens to hold more than one-third of the share capital or voting rights of a public corporation must announce a takeover bid (*offre publique d'acquisition*, or *OPA*) for the residual shares. In the case of a failure to announce such a bid, the shares held by the interested party in excess of this one-third will be deprived of voting rights. Any person may make a competing offer at a higher price than that set by

the initial offeror, who in turn may respond to it with a higher bid (*surenchère*). Any competing bid or overbid results in the nullity of earlier acceptances, so that the shareholder may, until the last moment, take advantage of the most attractive bid. Corporations may attempt to shield themselves against hostile takeover bids by all sorts of techniques, to which French law is relatively open.

C. The Functioning of Groups

It is a still-recognized principle of French law that each corporation within a group (parent or subsidiary) has a legal existence of its own, as complete as if it was economically independent. The group denotes a *de facto* situation. Two main consequences flow from that. First, each corporation within the group has full legal personality and all the attributes and features resulting from that, no matter how great its degree of dependence on the parent company. Second, corporations within the same group must be considered as third parties vis-à-vis one another. Thus, for example, the legal representative of the parent corporation does not have the power to act on behalf of the subsidiary, and the parent company is not bound to perform its subsidiary's contractual obligations, or vice versa. This splendid separation among the companies within a group is consistent with the legal orthodoxy, though it does not always reflect the reality.

Accordingly, in exceptional cases, which are becoming more and more numerous, the law takes account of the existence of a real linkage. This may facilitate financial relationships among corporations within the same group. Case law thus recognizes the validity of cash advances between corporations having share capital linkages, provided such disbursements (i) are dictated by a common economic, social, or financial interests, as assessed from the perspective of a coherent group policy, (ii) are not made in the absence of consideration, and (iii) do not exceed the resources of the company which is making them. At the same time, the Commercial Code provides certain measures for the protection of the minority within such groups. Thus, shareholders are kept abreast of the functioning of the group through consolidated accounts prepared by the parent company, which will represent the synthesis of the accounts of all corporations that are members of the group. Likewise, minority shareholders of the parent company may request from a court the appointment of an expert charged with auditing the business operations of a subsidiary. Finally, courts sometimes, on the ground of fault by the parent company, or the intermingling of assets, or the creation of misleading appearances, order the parent company to pay all or part of the debt of a subsidiary in financial difficulty.

Other branches of law draw more systematic consequences from the existence of corporate groups. Notably, labour law and competition law take into consideration the enterprise resulting from the group and not the various, ostensibly separate, corporations that compose it. Tax law adopts the same stance. Subsidiaries, 95 per cent of whose shares are held by a parent company, may see their financial results integrated into those of the parent company, which in turn

enables the latter to deduct its subsidiaries' losses from its own profits. The so-called special regime of worldwide profits (*bénéfice mondial*) may, upon administrative approval, be applied to corporations having subsidiaries overseas.

D. MERGERS

A merger (*fusion*) is a combination of at least two pre-existing corporations. The usual scenario consists of a merger and absorption (*fusion absorption*), manifesting itself in the dissolution of the merged corporation, which disappears as a distinct legal entity, and the universal transfer of its assets to the surviving corporation. The shareholders of the merged corporation become shareholders of the surviving corporation through an exchange of shares.

A merger may occur between corporations having different forms, provided they are subject to French law. The merger will be preceded by the signing of a merger agreement which evaluates the assets of the corporations that are parties to the operation, and deducts therefrom the parity of the exchange of shares (*la parité d'échange*), i.e. the number of shares of the surviving corporation that shareholders of the merged corporation will receive. This parity is determined by a merger agent (*commissaire à la fusion*) appointed for that purpose by the court. The merger itself is achieved by dissolution of the merged corporation (which disappears without liquidation), and by an increase in the surviving corporation's share capital. All the assets and liabilities of the merged corporation are transmitted as a matter of law to the surviving corporation. Publicity formalities are necessary prior to the completion of the merger, so as to safeguard the rights of the creditors of both corporations.

The tax treatment of mergers is modest because mergers do not generate any cash flow and do not entail any cessation of corporate activities. However, latent profits will be taxed in the case of a transfer by the surviving corporation of assets contributed by the merged corporation. Mergers require, therefore, complex formalities, which enable the French Internal Revenue Service to satisfy itself that no disguised transfer of assets has occurred. Large mergers are subject to an administrative review by the European Commission or by the French Competition Council (*Conseil de la concurrence*) so as to avoid the creation of monopolies.

A merger should not be confused with a partial contribution of assets in exchange for stock (*apport partiel d'actifs*), i.e. an operation by which a corporation, which continues to exist, contributes a whole line of business to another corporation, which increases its share capital and gives the former shares of its own stock in exchange. However, corporations that are parties to the operation may agree to subject the operation to the merger regime, which facilitates the transfer of liabilities encumbering the contributed assets. It is preferable to use this method whenever the partial contribution of assets, on account of its magnitude, results in a modification of the purpose of the participating corporations.

VI. DISSOLUTION AND LIQUIDATION

Corporations must be formed for a duration to be specified in the articles of incorporation, but which may not exceed 99 years. They definitively cease to exist as a matter of law upon the arrival of the term that has been fixed. However, this is not an inevitable consequence, since the shareholders may always decide to prolong the existence of the corporation. Corporations may also be dissolved when their purpose has been fully realized or extinguished, or at the conclusion of judicial liquidation proceedings initiated against a corporation which has become insolvent. Shareholders may also decide on an early dissolution, if the corporate business is in deficit or is no longer of interest to them. However, the ground for dissolution that presents the greatest difficulties is the dissolution judicially requested by a shareholder for cause. Most often, this cause will be a disagreement among shareholders resulting in paralysis of the corporation. Courts appear to be quite strict about this, because they deem that a shareholder has the duty to overlook his grievances when maintaining the corporation in existence would serve the common interest. Judicial dissolution thus has a very subsidiary character. It may be ordered only if there are absolutely no other means of restoring a normal corporate existence.

The dissolution of a corporation is published in the Company Register and mentioned in the corporation's business documents, and results in the corporation's liquidation. However, the latter is useless where the assets of the dissolved corporation are transferred as a whole to a new holder, a situation that occurs in the case of a merger or dissolution of a corporation having only a single shareholder. The liquidation consists of selling corporate assets to pay the corporation's creditors. When such sales are not sufficient to pay liabilities in full, the corporation's creditors may recover on the personal assets of the shareholders if, due to the corporation's form, the latter are personally liable for the corporation's liabilities. Once creditors are repaid, shareholders recover their contributions, i.e. they are reimbursed in the amount of the nominal value of their shares. Recovering such contributions in kind is possible when the assets contributed to the corporation remain among the assets of the corporation upon liquidation. If, after those two operations, there still remain assets, the latter can only represent profits realized by the corporation that were not allocated to shareholders during the lifetime of the corporation. Such a remainder – a so-called 'liquidation surplus' (*boni de liquidation*) – will be divided among the shareholders in the same proportion as their participation in the profits.

The liquidation is facilitated by maintaining the legal personality of the dissolved corporation for purposes of carrying out the liquidation. The corporation will thereafter be represented by a new body, viz., the liquidator, appointed by the shareholders or, failing that, by court order. The closing of the liquidation is declared by the shareholders and is notified to the public through the Company Register. The corporation, from this moment, completely and permanently ceases to exist.

The tax regime of corporate dissolutions is a very burdensome one, since it involves imposing a tax liability on latent profits. Therefore, most corporations seek to avoid dissolution by modifying their activities or by merging into another corporation.

To conclude this chapter, one may state that French corporate law, though modernized in recent years - notably with the institution of simplified joint stock companies (*sociétés par actions simplifiées*) – is not satisfactory. It is unnecessarily complex and formalistic. Many rules have no logic and should be repealed. For example, it is not clear why a joint stock company (*société anonyme*) must have at least seven shareholders or why the duration of a corporation may not exceed 99 years. French law is thus too rigid, considering the needs of enterprises, which are subject to ever-tougher international business competition. It is true that business people try to relax the regime by supplementing the articles of incorporation with shareholder agreements (*pactes d'actionnaires*), but the validity of many of these modifications is not guaranteed. Finally, corporate law is unstable. Reforms follow one another in a disorderly fashion without regard to the overall framework. Legal considerations fade in the face of tax and financial law constraints. In the end, one gets the impression that French corporate law has become too susceptible to short-term economic conditions (*conjoncturel*) to discharge the energizing role that it ought to play.

Note: This chapter was probably the last study written by late Yves Guyon to whom the editors express their sincerest gratitude. It has not been brought completely up to date, as have been the other chapters, to July 2007.

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ANNEX 1: COMPARATIVE TABLE OF MAJOR CORPORATE FORMS

ANNEX 2: ORGANIZATION SCHEMES OF THE JOINT STOCK COMPANY (*SOCIÉTÉ ANONYME*)

Annex 1

Comparative Table of Major Corporate Forms

Corporate Form	Minimum Capital	Exposure of Shareholders	Minimum Number of Shareholders	Management	Corporate Tax Regime
Société civile (non-commercial company)	No minimum	Unlimited and joint	2	Manager may be shareholder or not; may be a natural or legal person	Tax transparency
Société en nom collectif (general partnership)	No minimum	Unlimited and joint and several	2	Manager may be shareholder or not; may be a natural or legal person	Tax transparency
Société à responsabilité limitee (*SARL*) (limited liability company)	EUR 1	Limited to the amount of the contribution	2[1]	Manager may be shareholder or not; must be a natural person	Corporate tax (33.33% of profits)[2]

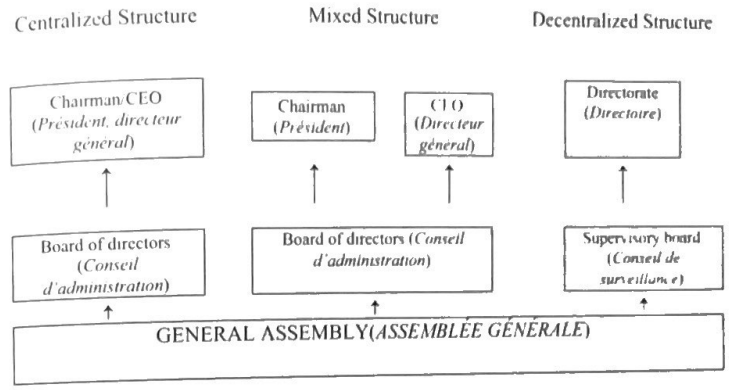
1. Shareholder only in the case of a sole proprietor limited liability company (*SARL unipersonnelle*, or *EURL*) or of a simplified sole-owner joint stock company (*société par actions simplifiée unipersonnelles*, or *SASU*).
2. Since 1995, this tax has undergone an ostensibly temporary increase of 3 per cent. There is a system of tax transparency for family *SARLs* and *EURLs*.

Corporate Form	Minimum Capital	Exposure of Shareholders	Minimum Number of Shareholders	Management	Corporate Tax Regime
Société anonyme (*SA*) (joint stock company)	EUR 37,000 (ordinary case) or EUR 225,000 (if publicly offered)	Limited to the amount of the contribution	7	Board of directors and chair (*Conseil d'administration et président*) or directorate and supervisory board (*directoire et conseil de surveillance*)	Corporate tax (33.33% of profits)
Société par actions simplifiées (*SAS*) (simplified joint stock company)	EUR 37,000	Limited to the amount of the contribution	2[3]	President may be shareholder or not; may be a natural or legal person	Corporate tax (33.33% of profits)

3. Shareholder only in the case of a sole proprietor limited liability company (*SARL unipersonnelle* or *EURL*) or of a simplified sole-owner joint stock company (*société par actions simplifiée unipersonnelles*, or *SASU*).

Annex 2

Organization Scheme of the Joint Stock Company (*société anonyme*)



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