

METHODS OF OPERATION IN FRANCE

SAMUEL V. GOEKJIAN*

I. INTRODUCTION

Since the end of World War II, and particularly in the past decade, there has been an influx of investment, in the form of money, goods, and technical and business know-how, by the American private sector into the economic and business structure of France.¹ This article intends to discuss, in a limited way, the legal system within which this investment has been made, and to what extent the nature, scope and limitations of that system have created problems for the American investor. The article will, therefore, first discuss the general corporate and business laws that affect the American investor, and then analyze some of the special problems that have arisen over the years to determine in what manner these problems can be resolved.

The degree to which the laws of France may restrict the operations of an American company planning a venture in France depends to some extent upon the objectives of the American company, but to a much greater extent upon the type and mode of operation of the proposed venture.

By virtue of the Treaty of Establishment between the United States and France signed in Paris on November 25, 1959, Americans have the right to establish plants and other physical facilities in France required in connection with their business, organize and manage companies under the laws of France, acquire ownership in and manage French companies, and establish and maintain offices, branches and agencies. Each country, however, reserved the right to determine the extent to which nationals of the other could invest in and manage such enterprises.

The French authorities have established a ranking of businesses or enterprises with respect to the extent of investment or participation therein, ranging from those which are prohibited to those where no prior approval is required. In all cases, however, some form of re-

* Partner, Surrey, Karasik, Gould and Greene, Washington, D.C. Member of the bars of New York and the District of Columbia. Assistant Professorial Lecturer on International Transactions, George Washington University Graduate School of Public Law.

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¹ In the decade 1950-1959, direct investments by United States companies in France exceeded \$400 million. See U.S. Dep't of Commerce, *U.S. Business Investments in Foreign Countries* 92 (1960).

porting to and control by the authorities of such investment or participation, and the obtaining of certain work and other special permits for Americans desiring to work in France, is still required.

The enterprises in which American investment or participation is not permitted include those subject to French Government monopoly, such as manufacture of tobacco products, nationalized industries such as railroads, tele-communications, radio and television, utilities, and certain types of extractive industries. The enterprises which require special prior authorizations include national defense industries, insurance companies, banks, and aircraft and motion picture companies. All other enterprises, except certain professional activities,² may be carried on by Americans without prior authorization.

However, while this is so in theory, since all transactions involving the movement of foreign exchange in and out of France require the approval of the French Exchange Control authorities, in practice all investments in enterprises in France require prior approval. To reduce administrative tie-ups, the Exchange Control authorities have established, by regulation,³ blanket approvals or authorizations for certain types of investments, which include the purchase of or subscription to securities quoted on French stock exchanges,⁴ and granting of loans of less than \$400,000 repayable over five years or less at an interest rate of not more than five percent. The only requirement is that the investment be reported to the Exchange Control authorities for review. All other types of investments, particularly the acquisition of an existing French business, the contribution of machinery and equipment, the licensing of patents and the establishment of a branch or subsidiary in France, require the prior authorization of Exchange Control authorities.

While ostensibly the review of the Exchange Control authorities is intended to ensure compliance with foreign exchange regulations in force in France, its decision is often based on the usefulness of the investment to the French economy.

Assuming that the proposed venture is one which does not fall within the prohibited class of enterprises and would be useful to the French economy, an American company is faced with making a choice as to the vehicle to be utilized in carrying out the proposed business venture. There are a number of such vehicles available to the American company. One is to establish a branch in France; another is to establish

² The fields of law, pharmacy, architecture and accountancy are restricted to French nationals; the fields of medicine, dentistry and journalism may be entered by aliens only with special authorization.

³ Avis No. 669 of Jan. 21, 1959, as amended.

⁴ Avis No. 763 of Sept. 1, 1963, limited this exemption somewhat by excluding purchases of quoted securities at a negotiated price different from the current stock exchange prices.

a domestic subsidiary which either establishes a branch in France or qualifies to do business there; a third is to establish a subsidiary in a third country—the so-called “base company”—which operates either directly or through a branch in France; and finally, to establish a local entity in France of one of six types generally utilized as vehicles for business or commercial operations. A decision as to which of these vehicles to use can only be made after an analysis of the special facts, circumstances and requirements of the proposed venture.

The area of choice between these vehicles is often narrowed by the particular requirements of the general category of enterprise into which the venture falls, as distinguished from the requirements of the specific venture. Most ventures will fall into one of four major categories—manufacturing, banking and finance, sales and distribution of goods, and servicing. As a general rule, it would be impractical to carry on a manufacturing enterprise of any major scope through a branch operation; on the other hand, it is often found that the most desirable vehicle for conducting a servicing enterprise, such as an engineering firm, is the branch. The same is true of the field of banking and finance.⁵

Moreover, one can narrow down the choices further because of inherent disabilities in certain of the vehicles that have undesirable business implications. Carrying on a venture in France through a branch of the American company, except one falling in one of the categories mentioned earlier, is not generally recommended because of the possible exposure of the assets of the parent company to claims and judgments against the branch, the requirement of reporting all of the parent company's assets and earnings, and the possible imposition of income and other taxes on the basis of the entire earnings or assets of the parent company, rather than on those of the branch.

These disadvantages may be outweighed, and are in fact outweighed in the categories of servicing enterprises and banking and finance, by such advantages as control and flexibility of operation by the parent, ease in complying with minimum capital requirements, and less control by local governmental authorities over financial policy, such as in setting aside legal reserves and in payment of dividends.

A number of the disadvantages may be eliminated by establishing either a United States or a foreign subsidiary as a buffer between the American parent and the branch, *i.e.*, establish a branch of the subsidiary rather than of the American parent. Once the point of setting up a subsidiary for conducting the venture in France is reached,

⁵ The goodwill and general reputation inherent in the name of the parent plays a large role in the success of a newly established branch. In addition, minimum capital requirements for such enterprises are fairly high and they can be more easily met where branches are established.

however, there remain few reasons, other than tax reasons, for not utilizing a locally established entity. Until the Internal Revenue Code was amended in 1962, these tax reasons were controlling; but since that time, they have ceased to play an important role in the choice of vehicle, and the most commonly adopted vehicle has now become the locally organized business entity.

II. TYPES OF FRENCH BUSINESS ENTITIES

There are six principal entities in France that are utilized for conducting a business enterprise.⁶ These are: (1) the *Société en Nom Collectif*, (2) the *Société en Commandite Simple*, (3) the *Société en Commandite par Actions*, (4) the *Association en Participation*, (5) the *Société à Responsabilité Limitée*, and (6) the *Société Anonyme*.

1. The *Société en Nom Collectif* is equivalent to a general partnership in the United States.⁷ Its principal characteristic, as in the United States, is the unlimited and joint liability of all the partners and is utilized under similar circumstances. Each partner may bind the partnership by his acts, and the name of each must be entered in the local Register of Commerce. It retains its French nationality even if all the partners are aliens. The name of the partnership must include the name of at least one partner.

2. The *Société en Commandite Simple* is equivalent to a limited partnership, with general partners who have unlimited and joint liability, but with limited partners whose liability is limited to their capital contributions, which must be expressly set forth in the partnership agreement.⁸ The limited partners may not participate in the management of the company.

3. The *Société en Commandite par Actions* has no real equivalent in the United States. It is a limited partnership where the interests of the limited partners are represented by shares of stock which are freely transferable.⁹ The general partners continue to have unlimited and joint liability, but in most other respects, it is treated, and is subject to the same laws, as a *Société Anonyme*.

4. The *Association en Participation* is equivalent to a joint venture, but with typical Gallic flourishes. It is an organization to which participants contribute assets for a common purpose, and share in the profits and losses in proportion to their contributions. It is fully recognized by the law, is formed, administered and dissolved like other business entities,¹⁰ but has no legal identity or capacity of its own,

⁶ French law distinguishes between civil and commercial companies. This article will limit itself to commercial companies. For a detailed discussion of civil companies, see Church, *Business Associations under French Law* (1960).

⁷ Code de Commerce arts. 20-22 (Fr. 60th ed. Dalloz 1961).

⁸ Code de Commerce arts. 23-28.

⁹ Code de Commerce art. 38.

¹⁰ Act of June 24, 1921, Code de Commerce arts. 47-50.

and its existence is often not even disclosed to third parties. It is most commonly used for financial and underwriting syndicates.

5. The *Société à Responsabilité Limitée* (SARL) is essentially a partnership in which all the partners have limited liability. Authorized for the first time in 1925,¹¹ its closest counterpart in the English-speaking world is the "private company" permitted under the English Companies Law. It is utilized generally under circumstances which in the United States would characterize a corporation as a "close corporation." It has found favor because it is easy to organize and may be operated without the formalities inherent in a *Société Anonyme*. Consequently, many American companies wishing to establish a closely held or wholly owned company in France give serious consideration to the SARL form. Its major advantages over the *Société Anonyme* are that it may be formed with a minimum of two persons, need not have a board of directors, but may be managed by one or more managers, and there need not be any meetings of shareholders unless there are more than twenty shareholders. On the other hand, a SARL may not make a public offering of its shares or *parts*; moreover, its shares are not freely transferable to persons who are not shareholders in the SARL.¹²

There are two basic steps in the organization of a SARL: (1) the charter and by-laws of the SARL must be prepared and executed, either in the form of a private contract or as prepared, executed and authenticated by a notary,¹³ and (2) the total amount of the capital must be subscribed to, whether in cash or in property, and must be paid in full.¹⁴

The charter and by-laws of a SARL are contained in a single document, called the *Statuts*. The *Statuts* may be prepared and executed as a private document between the parties organizing the SARL. However, where there is subscription in real property, the *Statuts* must either be executed and authenticated by a notary or, if prepared and executed as a private contract, a copy thereof must be deposited with a notary.¹⁵ The SARL does not come into existence, however, until the subscription is fully paid in. Consequently, it is the practice to

¹¹ The SARL was authorized by the Act of March 7, 1925, Code de Commerce art. 46, which was based on the limited liability company, or *Gesellschaft mit beschränkter Haftung*, which had existed in Germany since 1892. After World War I, when France reacquired Alsace and Lorraine, it was felt necessary to authorize a similar type of company in France to permit these GmbH's to transform themselves, with minimum inconvenience, into French companies.

¹² Act of March 7, 1925, art. 21, Code de Commerce art. 46.

¹³ The notary, or *notaire*, in France is a public official whose acts have official standing and is not merely, as in the United States, a witness to the execution of a sworn statement.

¹⁴ Act of March 7, 1925, art. 7, Code de Commerce art. 46.

¹⁵ Decree of Jan. 4, 1955, art. 4.

deposit the money in payment of subscriptions in cash in a bank account in the name of the SARL at or prior to the time of the execution of the *Statuts*.

After the *Statuts* have been executed, and the subscriptions fully paid in, the SARL is considered in existence and may commence business, provided that, within one month thereafter, two original copies of the *Statuts*, or two copies of the notarized version of the *Statuts*, are deposited with the Clerk of the Tribunal of Commerce in the department where the SARL has its principal office. In addition, extracts from the *Statuts* must be published in certain specified legal journals. Within two months, the SARL must be registered in the Commercial Register in the department where it has its principal office.¹⁶

The minimum capital of a SARL is set by law at 10,000 francs, and the minimum stated value of each share at 50 francs.¹⁷ All shares must by law have the same stated value, and none of the shares may be in negotiable form. As stated previously, it is not customary in France to issue share certificates in any form; generally, each shareholder or associate receives an original or a certified copy of the *Statuts*, which indicates the extent of his ownership and the nature of his rights.

The SARL is managed by one or more managers, or *gerants*, who need not be individuals, shareholders, or of French nationality.¹⁸ The scope of authority and the term of office of the managers are usually specified in the *Statuts*; however, whatever the limitations of the authority provided in the *Statuts*, the managers' acts bind the company even if they acted beyond the limits of the authority granted in the *Statuts*, and even if the third parties with whom they dealt were aware of these limitations.¹⁹ Unless the *Statuts* so provide, a manager may not be dismissed without cause; consequently, it is customary to provide in the *Statuts* that the manager or managers can be dismissed, at will and without cause, by a simple majority of the shareholders or associates.

Where a SARL has less than twenty shareholders or associates, there is no legal requirement of a board of directors or of shareholders meetings. However, it is possible to provide in the *Statuts* for a board of some type to supervise the managers' activities, or for periodic meetings of shareholders to approve these activities. Where there are more than twenty shareholders or associates, whether when initially organized or later during the existence of the SARL, it is mandatory

¹⁶ Act of March 7, 1925, arts. 12, 13, 20, Code de Commerce art. 46.

¹⁷ Act of March 7, 1925, art. 6, Code de Commerce art. 46.

¹⁸ Act of March 7, 1925, art. 24, Code de Commerce art. 46.

¹⁹ Becker, *The Société Anonyme and The Société à Responsabilité Limitée in France*, 38 N.Y.U.L. Rev. 844 (1963).

that a supervisory board, or *conseil de surveillance*, be appointed from among the shareholders or associates, which has the power to inspect and examine the books of a SARL and report to the annual meeting of the shareholders.²⁰ The law also requires that the *Statuts* of the SARL provide for periodic meetings of shareholders, to be called by the managers or, in the event they fail to do so, by the supervisory board or by the shareholders representing half the capital.²¹

At such meetings, ordinary decisions are taken by majority vote, *i.e.*, the vote of shareholders or associates representing more than one-half of the capital. Each shareholder or associate is entitled to one vote for each share he holds. If, however, the plurality obtained does not represent half the capital, a subsequent vote may be taken, and a mere plurality of the votes cast would then be controlling, unless the *Statuts* impose a stricter requirement.²² Amendments of the *Statuts*, however, require a vote of more than half the number of shareholders or associates and three-fourths of the capital of the SARL. In other words, the number of shareholders or associates voting in favor of an amendment must be more than half of all the shareholders or associates, and must own at least three-fourths of the capital of the SARL.²³

There are two problems with the SARL which have limited its usefulness to American companies. The first is the broad authority granted by law to the managers to commit the SARL, authority which an American company is often unwilling to grant to its chief executive officer in the United States. Even if it were willing to grant such authority to one of its officers which it assigns to France, French authorities require that the manager of a SARL be a resident of France²⁴ and secure a residence permit, or *carte de séjour*, as well as the special permit, or *carte de commerçant*, required of all aliens who occupy the position of manager of a SARL or of the president-director general of a *Société Anonyme*.²⁵ The process of obtaining these permits is very time-consuming, and quite often the American company may be compelled to appoint a French national either on an interim or permanent basis, with the consequent risk of loss of control.

Consequently, most American companies find the *Société Anonyme* more useful as a vehicle for carrying out a venture in France, despite its complexities.

²⁰ Act of March 7, 1925, art. 32, Code de Commerce art. 46

²¹ Act of March 7, 1925, art. 29, Code de Commerce art. 46.

²² Act of March 7, 1925, arts. 27, 28, Code de Commerce art. 46. Shareholders of a SARL may also vote by mail, except at the annual meeting required by law where there are more than twenty shareholders.

²³ Act of March 7, 1925, art. 31, Code de Commerce art. 46.

²⁴ See Becker, *supra* note 19, at 883.

²⁵ *Ibid.*

III. THE SOCIÉTÉ ANONYME

The *Société Anonyme* (SA) is the equivalent of the corporation in the United States, and is the form of business entity favored by the great majority of businessmen. It is formed, administered and dissolved pursuant to detailed provisions of law,²⁶ and has the principal characteristics of limited liability and capital represented by shares which are freely transferable. Its major difference from the United States corporation is that it is not chartered by the State, but is formed by a contract between the incorporators, which requires no prior approval from any governmental authority.

The SA, in the form in which it presently exists in France, was born in 1867, when the Act of July 24, 1867, was adopted. Prior to that time, business entities with limited liability had to be chartered by the State, as in the United States and Britain, except for a four-year period immediately preceding the adoption of the Act of July 24, 1867, when certain special companies with limited liability could be established without the prior approval of the State.²⁷ This Act, as amended from time to time since then, continues to be the basic law governing the formation and operation of the SA.

A. Organization

There are three basic steps in the organization of an SA: (1) the drafting of the *Statuts*, (2) the issuance of the capital stock, and (3) the holding of an organizational meeting of shareholders, in that order.

The *Statuts* of an SA are in effect a contract between the incorporators which sets forth the manner in which the SA will be operated and managed. It may be prepared and executed by the incorporators, or it may be prepared, executed and authenticated by a notary in accordance with the wishes of the incorporators.

As in the case of a United States corporation, the *Statuts* must meet certain minimal requirements as to subject matter. They must expressly state that the company is to be an SA; they must set forth the purposes or objectives of the SA;²⁸ they must set forth the name of the company, which may not contain the name of any incorporators or other individuals associated with the company and may not be similar to that of an existing SA;²⁹ they must identify the principal office, or *siege social*, of the SA, which determines its legal domicile;

²⁶ Act of July 24, 1867, Code de Commerce art. 46.

²⁷ Act of May 23, 1863, which was superseded by the Act of July 24, 1867, Code de Commerce art. 46.

²⁸ These are not described as broadly as in the United States, however, since the doctrine of *ultra vires* does not exist in France.

²⁹ As in the United States, it is possible to clear the name in advance by checking with the Institut National de la Propriété Industrielle and the Registre de Commerce.

they must specify the duration of its corporate life;³⁰ they must state the amount of the capital and the number, class, value and form of the shares, as well as the requirements for increasing or decreasing the capital;³¹ and, finally, they must state the circumstances for dissolution or liquidation and consequent distribution of assets.

The *Statuts* also cover those matters which in the United States would be found only in the by-laws, such as the procedure for meetings of shareholders and directors, the size and functions of the board of directors, the keeping of books and records, and the declaration and payment of dividends.

The first step of organization is completed when the draft *Statuts* are executed by the incorporators, or executed and authenticated by the notary, and filed with the Clerk of the Tribunal of Commerce in the department where the SA has its principal office.³² Upon such filing, the organizers can proceed with the issuance of the capital stock.

The issuance of the capital stock may be divided into three phases. The first is the act of subscription—the execution by all of the subscribers of a contract called the *bulletin de souscription*.³³ This document sets forth the purposes of the SA, the amount of its capital and the form of the share certificates, and acknowledges the subscriptions to the capital stock of the SA. The second phase is the payment of part of the subscription price, which may not be less than twenty-five percent.³⁴ Where the subscription is in kind,³⁵ all of the property must be delivered at this time.³⁶ The subscription payments are deposited with the *Caisse des Dépôts et Consignations*,³⁷ a special public agency authorized to hold such payments, or with a notary. The third phase is the issuance of the Certificate of Subscription and Payment. The incorporators have to appear before a notary and certify that the capital of the SA has been fully subscribed³⁸ and that at least

³⁰ French law does not permit an SA to have perpetual existence. The duration commonly adopted ranges between 50 and 100 years.

³¹ The par or stated value of a share may not be less than 100 francs. There is no minimum capital requirement for the SA, except to the extent that the SA must have a minimum of seven shareholders, each of whom must own at least one share whose stated value cannot be less than 100 francs; it is the general practice, however, to set the capital of an SA at no less than the minimum capital for a SARL, which is set by law at 10,000 francs. This capital, at whatever amount it is set, may not be increased or decreased thereafter except by two-thirds vote of the shareholders present, in person or by proxy, at an extraordinary meeting of shareholders.

³² Act of July 24, 1867, art. 1, Code de Commerce art. 46.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Services, however, may not be contributed for shares.

³⁶ Act of July 24, 1867, art. 3, Code de Commerce art. 46.

³⁷ Act of July 24, 1867, art. 1, Code de Commerce art. 46.

³⁸ Under French law, all authorized shares must be issued; this requirement cannot be fulfilled unless all the original capital is subscribed to before the SA is organized.

twenty-five percent of the capital subscribed has been paid in. The notary, after having satisfied himself that this is in fact the case by reviewing the *bulletins de souscription* and the receipts from the *Caisse des Dépôts et Consignations* (or the notary) presented to him by the incorporators, prepares the Certificate of Subscription and Payment in the form of a notarial *acte* and has it executed by the incorporators.

The third and final step for the organization of an SA is the organizational meeting, or *assemblée constitutive*.³⁹ Where all the capital is subscribed to in cash, only one such meeting is required. Where there have been subscriptions in kind, or where preferential rights are to be given to some shareholders,⁴⁰ two organizational meetings are required. The organizational meeting is called by the incorporators, who also preside at the meeting. Its purpose is to verify the Certificate of Subscription and Payment and to elect the board of directors and the comptrollers.⁴¹ All resolutions must be adopted by two-thirds of the shares represented at the meeting and entitled to vote.⁴² To have a quorum, at least one-half of the capital stock must be represented. If a quorum is lacking, a second meeting may be called, at which one-third of the capital stock must be represented. If a third meeting is required, the quorum falls to one-quarter of the capital stock.⁴³ The three items of business are then transacted, the verification of the Certificate of Subscription and Payment being done by inspection and acceptance thereof by a resolution.⁴⁴ The election of the directors and comptrollers is not deemed final until they formally accept their offices. It is the general practice, therefore, to note their acceptances in the minutes of the organizational meeting and to obtain and attach to the minutes written acceptances from them. The organizational meeting is then concluded with the adoption of a resolution proclaiming the organization of the SA.

Where two organizational meetings are required, the first meeting limits its actions to the verification of the Certificate of Subscription and Payment and to the appointment of special appraisers who must appraise the value of the property being contributed in kind or of the services or other contributions for which preferential rights are being given, and prepare a report which must be made available to the share-

³⁹ Act of July 24, 1867, art. 1, Code de Commerce art. 46.

⁴⁰ For a fuller discussion of the nature of such preferential rights, see *infra* notes 51-52 and accompanying text.

⁴¹ Act of July 24, 1867, arts. 24, 25, Code de Commerce art. 46. There is no counterpart to the comptrollers in the United States. While officers of the company, they are independent of management; their responsibility is to audit the operations of the company and its management and report directly to the shareholders.

⁴² By law, no shareholder may cast more than ten votes, regardless of how many shares he holds or represents. Act of July 24, 1867, art. 27, Code de Commerce art. 46.

⁴³ Act of July 24, 1867, art. 31, Code de Commerce art. 46.

⁴⁴ *Ibid.*

holders at least five days prior to the second organizational meeting. Stockholders who are subscribing in kind and those receiving preferential rights may not vote on the appointment of these appraisers and their shares may not be included in determining whether a quorum exists.⁴⁵ At the second organizational meeting, if the report is approved by two-thirds of the shares represented at the meeting and entitled to vote (the shares subscribed to in kind and those carrying preferential rights would not be entitled to vote on this question), the other two items of business, *i.e.*, the election of directors and of comptrollers, are transacted and the organization of the SA completed in the same manner as where a single organizational meeting is required.

Within one month after the organizational meeting or meetings, two original copies of the *Statuts*, two copies of the Certificate and Subscription of Payment and two certified copies of the minutes of the organizational meetings, together with the appraisers' report, if any, must be filed in the office of the Tribunal of Commerce in the department where the SA has its principal office.⁴⁶ Legal announcements must also be inserted in newspapers in the cities where the principal and branch offices of the SA are located, which set forth the form of the corporation, its purposes, duration, amount of capital, stated value of shares, and the names and occupations of its directors and comptrollers.⁴⁷ Within two months after the organization of the SA, the SA must be registered in the Register of Commerce in the department where it has its principal office.⁴⁸

B. *Capital Stock*

An SA may have several types or classes of shares. The most common types of shares are the ordinary shares,⁴⁹ which are equivalent to the common shares of a United States corporation. In general, each holder of an ordinary share is entitled to one vote per share owned by him, except that votes may also be weighted by the stated value of the shares. In other words, if an SA has two classes of ordinary shares, one with a par or stated value of 100 francs and the other a stated value of 200 francs, the holder of the share with the stated value of 200 francs would have twice as many votes per share as the holder of the share valued at 100 francs.⁵⁰ Certain limitations can be placed upon the right to vote. The *Statuts* may prescribe a maxi-

⁴⁵ Act of July 24, 1867, art. 7, Code de Commerce art. 46.

⁴⁶ Act of July 24, 1867, art. 55, Code de Commerce art. 46.

⁴⁷ Act of July 24, 1867, arts. 56, 57, Code de Commerce art. 46.

⁴⁸ Decree of December 27, 1958, art. 70, Code de Commerce art. 46.

⁴⁹ Act of July 24, 1867, art. 1, Code de Commerce art. 46; Act of November 16, 1903, Code de Commerce art. 34. Ordinary shares are of two classes—those issued for contributions in cash (actions de numéraires) and those issued for contributions in kind (actions d'apport).

⁵⁰ Act of November 13, 1933, art. 1, Code de Commerce art. 46.

mum number of votes that may be cast by any single shareholder, as long as the limitation is uniformly applied to all shares of that type.

The second principal class of shares are preferred shares (*actions de priorité* and *actions privilégiée*), which generally accord to the holder of such shares a preference with respect to the payment of dividends or the distribution of the assets of the SA upon dissolution.⁵¹ Generally, preferred shares can be created at any time during the corporate life of the SA where an increase in capital is being carried out. Occasionally, preferred shares are given the right to nominate a certain number of directors. Under very limited circumstances, it is also possible to grant to a particular class of shares the right to more than one vote per share.⁵²

There is a third class of shares which do not have any counterpart in the United States. These are not shares as much as they are interests or rights of participation, in that they do not represent any ownership of the assets of the SA, but are merely claims to a share in the profits of the SA. Holders of such interests are not considered shareholders for purposes of meetings of shareholders and participation in management, although they do have limited voting rights on questions where their interests are involved.⁵³

The principal types of such interests are founders' shares, or *parts de fondateur*,⁵⁴ and profit participation shares, or *parts bénéficiaires*.⁵⁵ Founders' shares are generally issued at the time of the organization of an SA as remuneration for services rendered by promoters and others which are of value to the SA but for which ordinary or preferred shares could not by law be issued. Profit participation shares may be issued either at the time of organization of the SA or during the corporate life of the SA. They may be issued, at the time of organization, to give the original shareholders a preferred position in the distribution of earnings over new shareholders who might in the future come in upon the increase of capital. Profit participation shares may also be given from time to time during the life of the SA as additional compensation for special services or for contributing property whose value may be difficult to determine. Usually, the amount of the profits of the SA in which the holders of such interests may participate is provided for in the *Statuts*.

Generally, all shares of an SA are freely transferable.⁵⁶ A note-

⁵¹ Act of November 16, 1903, art. 34, Code de Commerce art. 46.

⁵² Act of November 13, 1933, Code de Commerce art. 46.

⁵³ Ibid.

⁵⁴ Act of January 23, 1929, Code de Commerce art. 46.

⁵⁵ Ibid.

⁵⁶ French law grants to shareholders of an SA a pre-emptive right to subscribe to any new issues of stock in proportion to their holdings of that class of shares. Such pre-emptive rights may be sold or assigned, but may not be waived without the approval

worthy exception are the shares issued for contributions in kind. These shares, or *actions d'apport*, for a period of two years, must be in registered form, may not be transferred, and may not even be detached from the stock book.⁵⁷ After the two-year period is over, these shares become freely transferable and may even be issued in bearer form.

C. Management

Subject to the general supervision and inspection of shareholders, and except for certain matters wherein the decision is reserved to the shareholders, the SA is directed and managed by its board of directors, or *conseil d'administration*. As in the United States, the powers of the board of directors are broad, and include all the powers required to carry on the purposes of the SA, but not the power to terminate or seriously curtail its operations.⁵⁸

The directors of an SA have considerably broader personal liability than do their counterparts in the United States. They may be found both civilly and criminally liable for mismanagement, and suit may be brought against them individually or as a group in the name of the SA and by the shareholders, the Government or third parties. Moreover, where mismanagement is proved, a director may lose the protection of limited liability which he would ordinarily have as a shareholder.

Directors are generally elected to the board for a period of six years, which is the maximum permitted by the law,⁵⁹ but may be removed at will and without cause by a simple majority vote of shareholders.⁶⁰ Directors have to be shareholders and, except in the case of the chairman of the board, need not be individuals.⁶¹ Besides paying them a fee for attending board meetings and reimbursing them for their expenses, it is the practice in France to give the board as a body a limited participation in profits, but provision for such additional compensation must be expressly made in the *Statuts*.⁶² Directors do not meet as frequently in France as they do in the United States. Meetings are called either by the chairman or at the request of one-

of an extraordinary meeting of shareholders. Decree-Law of August 8, 1935, arts. 1, 5-7, Code de Commerce art. 46.

⁵⁷ Act of July 24, 1867, art. 3, Code de Commerce art. 46.

⁵⁸ French law merely provides that an SA be administered by a board, but does not specify its powers. These powers are generally set forth in detail in the *Statuts*. Act of November 16, 1940, art. 1, Code de Commerce art. 46.

⁵⁹ Act of July 24, 1867, art. 25, Code de Commerce art. 46.

⁶⁰ Act of July 24, 1867, art. 22, Code de Commerce art. 46.

⁶¹ Consequently, it is common practice to elect other SA's and foreign corporations as directors; this can be very useful to American companies, as it permits them to put the corporation and its subsidiaries on the board, and transfer ownership of the necessary qualifying shares to their subsidiaries without worry—also the corporation and subsidiaries can be represented by any officers then in France.

⁶² Act of March 4, 1943, art. 11, Code de Commerce art. 46.

half of the board; the necessary quorum for a meeting is usually also set at one-half. Decisions are generally taken by majority vote, with the chairman frequently being given an additional vote in case of a tie.⁶³

While the board of directors has responsibility for overall management of an SA, the actual day-to-day management and operation is carried on by the person who occupies the position of president-director general (*président-directeur général*), a position which has no exact counterpart in the United States. The president-director general functions as both the chairman of the board and as the general manager. His authority is considerably greater than the authority granted to the "chief executive officer" of a United States corporation. It is the practice generally in France for the board to delegate nearly all its powers to him, so that he becomes in effect the agent of the board in managing the SA.⁶⁴ However, he is subject to removal at any time without cause, by the board.⁶⁵ As a director, he is also subject to removal without cause by the shareholders.⁶⁶

The president-director general appoints all other officers of the SA, except for the deputy general manager (*directeur général adjoint*), who is nominated by the president-director general but appointed by the board of directors. The deputy general manager need not be a director or a shareholder; his powers, compensation and term of office are determined by the board, and he, like his immediate superior, is removable at will.⁶⁷

The third element of management in an SA consists of the comptrollers. As mentioned earlier, one or more comptrollers⁶⁸ must be elected by the shareholders at the organizational meeting, which ordinarily is for the first year of operation; thereafter, the comptrollers are generally appointed for three-year terms, during which time they are not removable except for cause.

The comptrollers have the responsibility to submit to the shareholders an annual report in writing on the activities of management.⁶⁹ They are entitled to inspect and examine all corporate books, records

⁶³ Since there are no provisions in French law covering board meetings, these matters must all be set forth in the Statuts.

⁶⁴ Act of March 4, 1943, art. 12, Code de Commerce art. 46.

⁶⁵ Ibid.

⁶⁶ See the discussion on removal of directors without cause, *supra* notes 58-63 and accompanying text.

⁶⁷ If either the president-director general or the deputy general manager is an American, i.e., an alien, a special permit or card (*carte de commerçant*) must be obtained. This card should be distinguished from the work permit (*carte de travail*) which all aliens employed in France must obtain.

⁶⁸ Act of July 24, 1867, arts. 25, 32, Code de Commerce art. 46. The law requires a minimum of one comptroller. Most Statuts provide for a body of three comptrollers.

⁶⁹ Act of July 24, 1867, art. 34, Code de Commerce art. 46.

and accounts at any time,⁷⁰ and they must expressly state in their report to the shareholders, if such is the case, that their examination did not disclose any irregularities or improprieties by management, and that the financial statements presented by the board to the shareholders are correct to the best of their knowledge.⁷¹ This report must be prepared and available for inspection by shareholders at least fifteen days prior to the annual meeting of shareholders.

D. Meetings of Shareholders

As in the United States, shareholders supervise the activities of the management of an SA through the approval of the reports submitted by the board of directors at annual meetings, or at such extraordinary or special meetings as may be called in accordance with the provisions of French law and the *Statuts* of the SA.

Regular meetings of shareholders, or *assemblées générales*, are required by law, but the *Statuts* specify when and how they are to be called. Generally, the *Statuts* provide that the board of directors must call for a regular meeting within a specified time after the end of each fiscal year, and, if not called by them, the meeting may be called by the holders of a specified number of shares. Fifteen days prior notice must be given to all registered shareholders. Where there are bearer shares, there must be an announcement in the newspapers in the city in which the SA is located fifteen days prior to the meeting.⁷²

To constitute a quorum, there must be present, or represented by proxy, holders of not less than one-quarter of the capital stock. If not attained at this meeting, a second meeting may be called for which there will be no requirement as to quorum.⁷³ The meeting is conducted by a committee, or *bureau*, which is usually chaired by the president-director general, and includes two vote tellers selected by the shareholders and a secretary to draw up the minutes and prepare the attendance sheet.⁷⁴ Each shareholder⁷⁵ present is entitled to one

⁷⁰ Act of July 24, 1867, art. 32, Code de Commerce art. 46.

⁷¹ While French law provides many safeguards to insure that comptrollers will be truly independent, such as disqualification for relationship with directors or shareholders through blood, marriage or business or remuneration arrangements, and for being directors or shareholders of the SA themselves, Code de Commerce arts. 42-44, most American investors prefer to retain in addition independent certified public accountants to act as their financial advisors.

⁷² The fifteen-day notice is not expressly provided for in the law, but is derived from the fact that shareholders must be given fifteen days to study the financial statements and the comptrollers' report before being asked to approve the year's operations. Code de Commerce art. 45.

⁷³ Act of July 24, 1867, art. 30, Code de Commerce art. 46.

⁷⁴ The attendance sheet contains the names, addresses and number of shares owned or represented by each shareholder present; it is then signed by each of them and certified as correct by the bureau. Act of July 24, 1867, art. 28, Code de Commerce art. 46.

⁷⁵ The Statuts of an SA generally provide that proxy holders at regular meetings be themselves shareholders.

vote for each share he owns or represents by proxy, if all shares have identical stated values, or, if not, a vote per share proportional to the amount of capital each share represents.⁷⁶

Three matters are generally on the agenda of regular meetings. The first relates to the election, resignation or dismissal of directors or comptrollers; the second is the ratification, after examination of the financial statements and the comptrollers' report, of the actions of the board of directors for the year; and, finally, the allocation of the profits for the year. In contrast to the practice in the United States, the amount and time of payment of dividends are determined by the shareholders after they have made the necessary allocations to reserves as required by law. The board of directors may, however, recommend to the shareholders what proportion of the profits should be paid out in dividends.

In addition to the requirement of regular meetings, French law requires that extraordinary meetings of shareholders, or *assemblées extraordinaires*, be called whenever action is required on certain fundamental matters affecting the SA, among which are included amendment of the *Statuts*, an increase or decrease of the capital of the SA, and dissolution or sale of assets which would prevent the continued operation of the business of the SA.⁷⁷

The quorum requirement for an extraordinary meeting is more rigorous than for a regular meeting. At least half the capital stock must be represented at the meeting, and if this is not attained, at least one-third must be represented at the subsequent meeting, and one-fourth if the meeting has to be called a third time.⁷⁸ All shareholders may attend and vote at an extraordinary meeting; however, French law permits the *Statuts* to limit the number of votes any one shareholder or proxy may cast.⁷⁹

Matters taken up at extraordinary meetings require a two-thirds vote of those present and entitled to vote,⁸⁰ except that a unanimous vote is required where an amendment to the *Statuts* increases the financial obligation of a shareholder or where it changes the nationality of the SA by moving the financial office of the SA outside France.⁸¹

⁷⁶ French law permits the *Statuts* to set a minimum as to the number of shares one must hold or represent before he is allowed to vote in a regular meeting, provided the minimum is less than twenty. Code de Commerce art. 37.

⁷⁷ Act of July 24, 1867, art. 31, Code de Commerce art. 46.

⁷⁸ Ibid.

⁷⁹ Act of November 13, 1933, art. 1, Code de Commerce art. 46.

⁸⁰ The law does not permit that the *Statuts* require that proxies at extraordinary meetings be given only to shareholders.

⁸¹ Act of July 24, 1867, art. 31, Code de Commerce art. 46.

E. *Dissolution*

A short discussion of the special rules for the dissolution of an SA is called for at this point, as they differ in many respects from the rules for the dissolution of a United States corporation. Since a number of these rules operate automatically, it becomes important that an American company establishing an SA be familiar with them.⁸²

An SA is automatically dissolved upon the happening of one of three events: (1) expiration of the term of duration specified in the *Statuts*,⁸³ (2) elimination of the purpose for which the SA was established,⁸⁴ and (3) ownership of all the shares of the SA being passed on to one person.⁸⁵

In addition, an SA is dissolved upon the adoption of a vote for dissolution at an extraordinary meeting of shareholders⁸⁶ and by judicial decision for certain peremptory reasons, such as reduction of the number of shareholders below four, the bankruptcy of a company beyond hope of recovery, and a deadlock between two strong factions of shareholders which prevents the carrying out of the purposes of the SA.⁸⁷ Other reasons for judicial dissolution of an SA include the reduction of the number of shareholders below seven during the period of a year, or a shareholder's request at an extraordinary meeting of shareholders for dissolution because of loss of at least three-quarters of the capital of the SA.⁸⁸ In the former case, a creditor may demand dissolution, but the court has discretionary authority as to whether to order such a dissolution. In the latter case, directors of an SA must call an extraordinary meeting of shareholders as soon as the losses have reached three-quarters of the capital.⁸⁹ If the directors do not call such a meeting, the comptrollers, a shareholder or a creditor may call for such a meeting.

Upon dissolution, a liquidator or liquidators are designated, either by the extraordinary meeting of shareholders which approves the dissolution, or by judicial appointment. The *Statuts* of an SA often provide that where dissolution takes place automatically or by request of an extraordinary meeting of shareholders, the president-director general shall automatically act as the liquidator; in some instances, the board of directors is designated to act as a board of liquidators.

⁸² Bankruptcy and judicial liquidation are not considered as forms of dissolution under French law.

⁸³ Code Civile art. 1865 (Fr. 60th ed. Dalloz 1961).

⁸⁴ Code Civile arts. 1865, 1867.

⁸⁵ See Church, *supra* note 6, at 517-18.

⁸⁶ Once such a vote is adopted, it is not revocable, but may be annulled by court decision. See Church, *supra* note 6, at 517.

⁸⁷ See Church, *supra* note 6, at 518-19.

⁸⁸ Act of July 24, 1867, arts. 37-38, Code de Commerce art. 46.

⁸⁹ The *Statuts* may set the amount of the loss at less than three-quarters, in which event the extraordinary meeting must be called when that amount of loss is reached.

IV. SPECIAL PROBLEMS

Past experience by American companies with investments in France, where SA's have been utilized as the vehicle, has indicated that most of the problems arise in the area of allocation of management control, which consequently requires close examination and special planning.

Most American companies invest in France in order to obtain or maintain access to the Common Market. This often requires that they establish a manufacturing facility in France. While they would prefer in most instances to establish a wholly owned subsidiary to construct and operate such a facility, they often find that for business reasons doing so is neither practical nor desirable. In some cases, the capital cost of setting up a subsidiary is prohibitive, and thus a local company or group of investors is sought in order to defray part of these capital costs, either by additional financial contribution or by contribution of existing facilities. In other cases, it is found necessary to obtain the assistance of a local associate who could provide knowledge of local conditions, marketing practices and desirable business relationships. In the latter case, the American company is likely to approach a French company with which it has had previous business association in some form, usually as the importer of its products or as a distributor in France for such products.

Where a wholly owned subsidiary is not established, there are three possible patterns of ownership within which the question of allocation of management control arises.⁹⁰ The first is where the American company owns more than fifty-one percent of the company, and offers the balance to one or more French companies or individuals in order to obtain the necessary financial or business assistance; what problems exist in this area relate only to the maintenance of the control that their majority ownership naturally provides. The second is where the American company owns more than thirty-three and one-third percent, but less than fifty-one percent, or, in other words, where it is a substantial minority shareholder; the problems in this area arise out of the need to obtain and maintain management control or, in the alternative, maintain the influence to which its substantial minority ownership entitles it. Finally, the third is where the American company owns less than thirty-three and one-third percent; the problems here arise in ensuring the protection of the American company's minority rights.

If the vehicle utilized were the SARL, ordinarily there would be

⁹⁰ Management control is desired primarily in order to maintain control over technical and process utilization, quality standards of the product manufactured, and finally, financial policy.

no problem of management control, since it would be possible to incorporate in the *Statuts* of the SARL the arrangements with respect to management control that were agreeable to all the shareholders or associates of the SARL. However, as discussed earlier in this article, the extremely broad authority which is granted by law to the manager of a SARL, as well as the difficulties of obtaining the necessary permits to appoint an American to the position of manager, have made the SARL not as useful as it might otherwise have been.⁹¹ Consequently, these problems have to be resolved within the framework of the SA.

Many of the devices utilized in the United States to obtain and maintain management control are not available under French law. French law does not recognize non-voting shares,⁹² nor is it possible to provide in the *Statuts* of an SA for cumulative voting.⁹³ Moreover, since French law prohibits the curtailment of the right to vote or the transfer of the vote of one person to another, voting trusts and irrevocable proxies are not enforceable.⁹⁴ On the other hand, there are certain devices available solely under French law which might, when appropriately utilized, achieve essentially the same results, such as shares with multiple voting rights,⁹⁵ limitations on the total number of shares that a single shareholder may vote at a shareholders' meeting,⁹⁶ and the designation of directors in the *Statuts*.⁹⁷

The usefulness, as well as the limitations, of these devices and others common in both France and the United States can best be demonstrated in analyzing the manner in which they can be used to resolve the problems of management control created in the three patterns of corporate ownership discussed earlier.

In the case of the first pattern, *i.e.*, where the American company owns more than fifty-one percent of the shares of an SA, management control is inherent in the ownership pattern. The main task would lie, therefore, in guarding against management control being lost or made illusory through the use by the minority shareholders of the devices mentioned earlier. The *Statuts* must also be carefully checked

⁹¹ See supra notes 24-25 and accompanying text.

⁹² This is deduced from the fact that art. 1 of the Act of November 13, 1933, as amended by Decree-Law of October 30, 1935, Code de Commerce art. 46, expressly provides that "each share gives the right to at least one vote in shareholders' meetings."

⁹³ While there is no express provision in the French law prohibiting cumulative voting, the principles of "one share, one vote," and "equal capital, equal voting power" appear to have been interpreted as insuperable barriers to its utilization.

⁹⁴ Act of November 13, 1933, art. 4, as amended, Code de Commerce art. 46.

⁹⁵ Act of November 13, 1933, art. 1, Code de Commerce art. 46.

⁹⁶ French law permits the *Statuts* of an SA to prescribe the maximum number of shares that any single shareholder may vote, provided the restriction is uniformly applied to all shares. Act of November 13, 1933, art. 1, as amended, Code de Commerce art. 46.

⁹⁷ Act of July 24, 1867, art. 25, Code de Commerce art. 46.

to ensure that a virtual veto power has not been obtained by the minority shareholders through provisions requiring most matters of substance to be approved by two-thirds vote at extraordinary meetings of shareholders.

In the case of the second pattern, and, to some extent, the third, *i.e.*, where the American company owns less than fifty-one percent of the shares, management control can be obtained initially, and such control maintained for a number of years, through the appropriate use of these devices. Generally, an American company is in the best position to be given management control, despite minority ownership, at the time when it is first undertaking the venture and entering into arrangements with its French associates to establish an SA. The French associates are usually willing to give up management control to the American company, recognizing that its technical and possibly financial know-how is necessary to the success of the enterprise being launched. However, this early cooperative attitude may not last, or the original majority shareholders might be replaced, through sale of their shares, by others intent on taking over management control. Consequently, it becomes necessary to provide for a more formal arrangement for management control while the circumstances permit it.

Management control under these circumstances may be obtained in two ways: by increasing the voting power of the American company as a shareholder (in relation to that of the other associates), or by obtaining control at the level of the board of directors. The devices that may bring about the former are shares with multiple voting rights and limitations on the maximum shares that may be voted by a single shareholder, combined with a restriction on transfer of shares. The devices that may bring about the latter are designation of directors in the *Statuts* and management contracts.

For nearly thirty years⁹⁸ shares with multiple voting rights were liberally utilized by French companies, at first ostensibly to prevent take-overs by foreigners, and later to maintain control in the hands of a limited group of businessmen. In 1930, new issues of shares with multiple voting rights were prohibited,⁹⁹ and in 1933, multiple voting rights were made illegal, except for shares with double vote, or *actions de droit de vote double*,¹⁰⁰ which may be issued under certain prescribed circumstances.

Shares with double vote may be issued in one of two ways. The

⁹⁸ From 1903, when the Act of November 16, 1903, Code de Commerce art. 34, was enacted to permit the issuance of actions de préférence, until 1933, when the Act of November 13, 1933, Code de Commerce art. 46, sharply restricted the scope of actions à droit de vote privilégié.

⁹⁹ Act of April 26, 1930, Code de Commerce art. 34.

¹⁰⁰ Act of November 13, 1933, art. 1, Code de Commerce art. 46.

Statuts, as originally executed, may provide that nominal shares, or *actions nominatives*, which are fully paid-up upon issuance at the time of formation of the SA, are entitled to double the number of votes they would otherwise carry,¹⁰¹ or the *Statuts*, as originally executed or as later amended at an extraordinary meeting of shareholders, may grant a double vote to all fully paid-up nominal shares which have been registered in the name of the same shareholder for a period of at least two years.¹⁰² By fully paying-in initially and by obtaining nominal shares, with the French associates either paying-in partially¹⁰³ or obtaining bearer shares for part of their capital contributions, it would be possible to increase the voting power of the American company to the point where it would have control.¹⁰⁴

The same result could be achieved by limiting the voting power of the French associates. French law permits the *Statuts* to set a ceiling on the number of votes that any single shareholder may cast at any shareholders' meeting,¹⁰⁵ whether it be a regular or an extraordinary meeting. Where there is a single French associate who owns those shares of an SA not owned by the American company and its nominees,¹⁰⁶ the ceiling on the number of votes that could be cast would be set either at or below the number of shares owned by the American company. This would equalize the voting power of the two, and the nominees of the American company would then be able to cast the controlling votes.

This device would only work if the transfer of the shares owned by the French associate could be restricted. While French law imposes civil and criminal sanctions on a shareholder who transfers part of his holdings to others in order to evade the limitations imposed by the ceiling,¹⁰⁷ it does not prohibit legitimate sale or good faith transfer for reasons unrelated to the ceiling.

French law generally does not permit total restrictions on trans-

¹⁰¹ Ibid. As will be seen, bearer shares may not be given double vote.

¹⁰² Ibid. The right of double vote must be made applicable to all shares meeting the requirement after the provision is inserted in the *Statuts*.

¹⁰³ The partial payment must be voluntary; if certain subscribers were not permitted to fully pay-in, the double vote would be deemed a special advantage which these subscribers would be entitled to when their shares were fully paid-up. Where the French associates are numerous, the most practical approach would therefore be the issuance of bearer shares.

¹⁰⁴ The second set of circumstances under which shares with double votes could be issued would not prove very useful, for it would merely postpone the day of reckoning. French holders of nominal shares would get the double vote within two years, and holders of bearer shares could convert them into nominal shares and get the double vote at the end of two years.

¹⁰⁵ Act of July 24, 1867, art. 31, as amended, Code de Commerce art. 46.

¹⁰⁶ Since the SA must have a minimum of seven shareholders, the other five shareholders should be nominees of the American company.

¹⁰⁷ See Becker, *supra* note 19, at 846.

ferability of the shares of an SA,¹⁰⁸ but it does permit certain limited restrictions on nominal shares.¹⁰⁹ As a matter of law, nominal shares may only be transferred by appropriate entry on the books of the SA.¹¹⁰ The *Statuts* of the SA may further restrict transfer by providing that (1) all or certain shareholders shall have a pre-emptive right to purchase the shares of any other shareholder; (2) all or certain shareholders shall have a pre-emptive right only where there is a proposed sale to a non-shareholder; (3) the proposed transferee, if a non-shareholder, shall be approved by either the president-director general, the board of directors, or a majority (or even two-thirds) of the shareholders; and (4) the board of directors shall designate a purchaser if a proposed transferee is not approved.¹¹¹

By combining, therefore, these two devices, management control through voting power could be achieved despite a minority ownership by an American company of the capital stock of an SA. However, such management control can also be achieved without having controlling voting power (provided that the American company has more than thirty-three and one-third percent of the shares of the company) by obtaining and maintaining control at the management level.

Control at the management level can be obtained in one of two ways. The directors of the SA may be designated in the *Statuts*, or a management contract could be entered into, whereby the operating management responsibilities of the president-director general would be delegated to the American company or to its nominee.

French law expressly permits directors to be designated in the *Statuts*, which may provide that their nomination need not be submitted to the shareholders for approval. However, under these circumstances, the law limits the maximum term for such a director to three years, as opposed to six years for elected directors.¹¹²

For a period of three years, therefore, the American company could have management control by designating in the *Statuts* its nominees as a majority of the board.¹¹³

French law also permits the board to delegate to a third party its management responsibilities.¹¹⁴ If the delegation of such manage-

¹⁰⁸ Such as, for example, the requirement of consent by all shareholders to a transfer. See Church, *supra* note 6, at 304.

¹⁰⁹ Bearer shares may not be restricted in any manner.

¹¹⁰ Act of July 24, 1867, art. 21, Code de Commerce art. 46.

¹¹¹ For a detailed discussion on restrictions on nominal shares, see Church, *supra* note 6, at 304-07.

¹¹² Act of July 24, 1867, art. 25, Code de Commerce art. 46.

¹¹³ Act of July 24, 1867, art. 25, Code de Commerce art. 46. While there is some authority to the contrary, which derives primarily from the inconsistency between art. 25 and art. 22 of the Act of July 24, 1867, Code de Commerce art. 46, during this three-year period a two-third vote would be required to remove a director designated in the *Statuts*.

¹¹⁴ Act of July 24, 1867, art. 22, Code de Commerce art. 46.

ment responsibilities is provided for in the *Statuts*, with the management company being designated, the American company could exercise management control through the management contract for the period of the term of contract.¹¹⁵

This type of control is not as valuable from the point of view of the American company as management control obtained through voting power, since it is limited in time and, moreover, would have limited control over financial policy, since under French law, as contrasted to United States law, the declaration and payment of dividends is a decision reserved to shareholders rather than the board of directors, and such decision is one which can be made by majority vote.

Assuming that management control is not desired or obtainable, but the American company wishes to obtain the degree of representation on the board of directors, it would be entitled to do so through its ownership of shares; or if it wishes to protect its minority rights, there is a device available to achieve this result. As stated earlier, cumulative voting as such is not permitted under French law; the same result can be reached, however, by dividing the shares of the SA into two classes and providing in the *Statuts* that each class shall be entitled to be represented on the board of directors by the number of directors as is proportional to the number of shares of each class outstanding. This device has been found acceptable because it does not limit the right to vote of any shareholder,¹¹⁶ but merely requires that certain directors have to be holders of shares of a given class in order to qualify for board membership. Since all shareholders would have to vote for all directors, this device could only operate if the ownership of a given class could be limited; in other words, the American company must ensure that the shares which entitle it to obtain proportionate representation on the board remain under the ownership of itself and its nominees.

In addition, to protect its minority rights, the American company should provide in the *Statuts* that most major matters of policy be decided at an extraordinary meeting of shareholders, where a two-thirds vote would be required. As discussed earlier, under French law, there are two matters which require action by unanimous vote of shareholders; there are others which require action by two-thirds vote at extraordinary meetings of shareholders; all other matters may be

¹¹⁵ Management contracts have not proved popular in France, which may be due to the fact that authorities differ about their enforceability. If a management contract is to be used, it should probably be limited to a term of six years.

¹¹⁶ There have been a number of cases which have declared "classified boards of directors" illegal as contravening the principle of "equal votes for equal stock"; however, all of these cases involved attempts, through classification, to obtain representation on the board disproportionate to the shares of each class involved. See Act of November 13, 1933, art. 1, Code de Commerce art. 46.

decided by majority vote. While French law does not permit the *Statuts* to provide for a lesser vote in these cases, it does not appear to prevent the *Statuts* from requiring a higher vote, provided that it is short of unanimity.¹¹⁷

Consequently, the *Statuts* may be drafted to provide as much protection as is felt necessary by the American company on matters of operating policy of the SA.

V. CONCLUSION

There is often a failure among American businessmen to appreciate the importance of a careful analysis of the legal system into which they are entering. They assume a similarity between United States and foreign corporate and other laws affecting business operations which does not in fact exist. Few of them are ordinarily willing to make a decision on whether to proceed with a venture before a detailed feasibility study has been carried out as to markets, sources of raw materials, availability and cost of labor, transportation facilities and other business factors. The nature of the business laws of the country has as serious an impact upon the feasibility of such a venture as any of the business factors, and yet few feasibility studies contain any systematic analysis of local laws. The businessman will first decide to proceed with the venture, structure its framework and only then turn to the lawyer to fit the venture, as best he can, within the existing legal system. It should be evident, from the detailed discussion that has preceded, that considerable legal planning should be undertaken before an American company proceeds with a given venture in France.

¹¹⁷ Except for removal of elected directors. See Church, *supra* note 6, at 441.