Send to: PUREVDORJ, MUNKHSELENGE
WAKE FOREST UNIVERSITY SCHOOL OF LAW
1834 WAKE FOREST DR
WINSTON SALEM, NC 27109-8758

Time of Request: Sunday, November 28, 2010 21:13:35 EST
Client ID/Project Name:
Number of Lines: 2507
Job Number: 1843:255646206

Research Information

Service: Terms and Connectors Search
Print Request: Current Document: 1
Source: Doing Business in France
Search Terms: § 5.02 Corporation--Societe par Actions

Doing Business in France

CHAPTER 5 Corporate Law and Business Organizations

1-5 Doing Business in France § 5.02

§ 5.02 Corporation--*Societe par Actions*

[I] Corporation--*Societe Anonyme*

A *societe anonyme* (hereinafter referred to as an "SA") is a corporation composed of at least seven shareholders created for a commercial purpose. It issues shares representing equity participations which are normally freely transferable and negotiable. n1 The SA is a corporate form offering the advantage of limited liability; the shareholders of an SA are subject to liability for the debts of the corporation only to the extent of their capital contributions thereto.

[1] Incorporation of an SA

The incorporation of an SA is a relatively simple task. The following steps, described in greater detail below, usually take approximately two weeks, such figure being increased if capital contributions in kind are to be made: n2

1. the preparation of the Articles of Incorporation (*statuts*) (hereinafter referred to as "Articles"),

2. the subscription and payment for the shares of the SA to be initially issued,

3. the preparation of a certificate of subscription and payment,

4. the execution of a lease or purchase agreement relating to the commercial property where the registered office of the SA will be located,

5. the signature of the Articles,

6. the appointment of the officers,

7. the completion of the legal formalities of publication, and

8. the registration of the SA in the *Registre du Commerce et des Societes* (hereinafter referred to as the "Register of Commerce and Companies").

Thereafter, the corporation may withdraw the paid-in capital and commence commercial activities therewith.

The SA is technically formed at the time of the signature of the Articles by all of the initial shareholders. However, the SA does not acquire full legal existence and, as a consequence, cannot enter into contracts in its own name, n3 until such time as it is registered in the appropriate Register of Commerce and Companies (*C.com.,* art. L.210-6).

[a] Preparation of the Articles.

The Articles may contain such provisions as the shareholders desire, but must, in all cases, contain the following (*C.com.,*, art. L.210-2).

[i] Declaration of Juridical Form. Declaration that the shareholders elect to associate themselves by forming an SA.

[ii] Name. Designation of the name of the SA, which name must always be accompanied by, but need not include, the words *societe anonyme* or the initials "SA" and a statement of the corporation's registered capital (*C.com.,* art. L.224-1). In order to avoid possible infringement of, or confusion with, third parties' trademarks or corporate names, n4 it is advisable to verify, at the outset, the availability of the proposed name of the SA. n5

[iii] Duration. Recital of the duration of the SA, which duration cannot exceed 99 years. n6

[iv] Registered Office. Recital of the address of the registered office of the SA. n7

[v] Purpose. Statement specifying the purpose of the SA; mere reference to "any commercial, financial or industrial activity" is not sufficient and a more specific recital of the nature of the proposed corporate activity is required.

[vi] Registered Capital. Declaration of the registered capital of the SA which, subject to certain exceptions, may not be less than 37,000 euros (*C.com.,* art. L.224-2). Reference must also be made in an annex to the Articles to the identity of the initial shareholders and to the number of shares for which each has subscribed. In the event that capital contributions in kind are made or specific advantages granted, the expert appraisal of such contributions in kind or specific advantages must be annexed to the Articles (*C.com.*, art. L.225-14).

[vii] Shares. Declaration of the number of shares is fixed by the Articles; inclusion of the par value of the shares in the Articles is optional (*C.com.*, art. L.228-8). Where the stock of an SA is divided into different classes benefiting from various privileges including, *inter alia*, preferential dividend or voting rights, specific mention thereof must be made in the Articles of the number of shares in each class and the type of special rights appurtenant to each class, as well as the portion of the registered capital represented by each class or the par value of the shares of each class (*C.com.*, art. R.224-2).

The Articles must state the form of the shares - shares may be issued by the SA either in nominative or in bearer form, except for corporations where the law or the Articles require all or part of the share capital to be in nominative form (*C.com.*, arts. L.228-1 and R.224-2, *C.mon. et fin.*, art. L.211-3).

Where the transfer of shares is restricted, the Articles must indicate the specific conditions required for such transfer (*C.com.*, art. R.224-2).

[viii] Distributions. Provisions relating to the distribution of profits, to the establishment of reserve accounts and to any priorities or preferences in liquidation (*C.com.*, art. R.224-2).

[ix] Appointment of Management. Appointment of the first members of the Board of Directors (*conseil d'administration*) or the first members of the Supervisory Board (*conseil de surveillance*) as well as the first Statutory

Auditor(s) (*commissaire(s) aux comptes*) (*C.com.*, art. L.225-16). n8

[x] Management. Provisions relative to the composition, functioning and powers of the management bodies (*C.com.*, art. R.224-2).

[xi] Initial Shareholders. A recital of the names of all shareholders who signed the Articles, or had them signed by an attorney-in-fact (*C.com.*, art. R.224-2).

In addition to the foregoing provisions which must be included in the Articles, a recital of all contracts entered into and of the commitments and obligations assumed by the initial shareholders in the name of the corporation before the signature of the Articles must be annexed to the Articles. The initial shareholders who acted in the name of the SA are personally jointly and severally liable for all such obligations until such time as the SA is fully incorporated; such obligations are then considered as ratified and as having been entered into *ab initio* by the SA. n9 The aforesaid recital of obligations incurred by the initial shareholders must be annexed to the Articles in order to insure that the initial shareholders who acted on behalf of the SA make full disclosure to the other shareholders of all such obligations before the Articles are signed. The ratification by the shareholders and the consequent release of the initial shareholders from personal liability applies only to obligations set forth in such recital (*C.com.*, art. R.210-6). If, however, the aforesaid recital of obligations omits one or more obligations incurred by the initial shareholders, such obligations may be subsequently ratified by the shareholders (*C.com.*, art. L.210-6).

The start-up of the corporation may require that certain acts be taken on behalf of the SA-in-formation after the signature of the Articles but before the registration of the corporation in the Register of Commerce and Companies. Those shareholders who act on behalf of the corporation after the signature of the Articles but before the aforesaid registration are jointly and severally liable for all such actions unless:

1. such acts have been authorized in an annex to the Articles, in which case, once the SA is duly registered, they are deemed to have been entered into *ab initio* by the SA, or

2. the shareholders, after the registration of the SA, specifically ratify same. n10

[b] Subscription and Payment for the Registered Capital. The registered capital must be subscribed for in its entirety (*C.com.*, art. L.225-3). It is to be noted that under French law the concept of authorized but unissued shares of stock does not exist; all shares must be issued and they are usually issued at par. n11 Only a portion of the capital, but never less than one half of the par value of the shares to be issued, must be paid in; the remaining subscription price for the shares must be paid in no later than five years from the date of the registration of the SA, or earlier, if the Board of Directors or the Directorate so decides (*C.com.*, art. L.225-3). As long as the subscription price for shares is not fully paid in, such shares may be issued in nominative form only (*C.com.*, art. L.228-9). However, the shares issued for contributions in kind must be fully paid in (*C.com.*, art. L.225-3).

It is also possible in France to incorporate an SA by making a public offering of its shares in order to raise the initial registered capital thereof (*C.com.*, arts. L.225-2 through L.225-11).

Payment in cash for stock subscribed for must be made either to the *Caisse des depots et consignations*, to a *notaire* n12 to an authorized investment firm, to a bank account opened in the name of the corporation-in-formation or, as is more frequently the case, to one of the persons overseeing the incorporation of the SA who is in turn obligated to remit same within eight days to one of the foregoing depositaries (*C.com.*, art. R.225-6). Such funds may not be withdrawn by the corporation until the incorporation process is completed (*C.com.*, arts. L.225-12 and L.225-11). In the event that payment is made in kind or specific advantages granted, an evaluation thereof must be made and incorporated into the Articles (*C.com.*, art. L.225-14). While such evaluation must be the subject of a report by an expert appraiser (*commissaire aux apports*) appointed by the President of the Commercial Court at the request of one or more

shareholders, such report is not binding and the shareholders may assign a different value to such contributions in kind. If, however, a third party is harmed as a result of an overvaluation of such contributions, the shareholders may be personally subject to civil and penal sanctions (*C.com.*, arts. L.225-8 and L.242-2).

[c] Certificate of Subscription and Payment. The subscription and payment for shares must be acknowledged by the depositary of the funds paid in by the shareholders in a certificate of subscription and payment; such certificate is issued upon presentation of a list of shareholders which indicates the amounts actually paid in by each shareholder (*C.com.*, arts. L.225-6 and L.225-13).

[d] Leasing or Purchasing a Registered Office. Inasmuch as mention must be made in the Articles of the location of the registered office of the SA, it is necessary to either execute a lease agreement relating to or to purchase commercial property where the corporation will maintain such office (*C.com.*, art. L.123-11). Furthermore, inasmuch as proof of the SA's lease or purchase of commercial property is needed to register the corporation, such agreement, as a practical matter, must be made before the corporation is incorporated. When selecting such office, the initial shareholders must bear in mind the land-use restrictions prohibiting the use of certain premises for commercial purposes. n13

In order to facilitate the creation of new enterprises in France, a newly formed SA may establish its registered office at the residence of its legal representative provided there is no contrary legal or contractual provision (*C.com.*, art. L.123-11-1). In the absence of such a provision, the SA may maintain its registered office at such residence for an unlimited period of time; where such a provision exists, the duration may neither exceed five years nor surpass the occupancy term (*C.com.*, art. L. 123-11-1). The SA may also share office premises with other companies (*C.com.*, art. L. 123-11).

[e] Signature of Articles. The Articles must be in writing and may be signed either *sous seing prive* n14 or before a *notaire*. The signature of the Articles before a *notaire* is mandatory when contributions in kind in the form of rights to real property are made. n15 By signing the Articles, the initial shareholders become legally obligated to pay the total amount of the subscription price for their shares if same has not already been fully paid in (*C.com.*, arts. L.225-3 and L.225-131).

Within one month of the signature of the Articles, the SA must file same with the Corporate Formalities Center (*Centre de Formalites des Entreprises*). n16

[f] Appointment of the Officers. After the signature of the Articles, the Directors (*administrator*) named in the Articles must meet and appoint the Chairman of the Board (*president du conseil d'administration*) and, if it so chooses a General Manager (*directeur general*) and one or several Assistant General Managers (*directeurs generaux delegues*) (*C.com.*, art. L.225-51-1 and L.225-53). In the event that the Articles provide for a Supervisory Board in lieu of a Board of Directors, this body appoints the members of the Directorate (*directoire*) (*C.com.*, art. L.225-59). At this juncture, the appointment of these officers is necessary in order to carry out the formalities of publication, filing and registration needed to complete the incorporation process; indeed, such appointment does not become fully effective, and the ability of these officers to act for the SA does not mature, until such time as the incorporation process is completed and the SA acquires full legal existence.

[g] Formalities of Publication. Very often in France, in order for a legal act, such as the incorporation of an SA, to be effective, a host of legal formalities must be accomplished. In most instances these formalities include:

1. a publication in a newspaper specifically designated as competent to publish legal announcements (hereinafter referred to as a "legal newspaper"),

2. a filing with the clerk of the *Tribunal de commerce* (hereinafter referred to as "Commercial Court"), n17

3. a recording in the Register of Commerce and Companies,

4. a publication in the *Bulletin Officiel des Annonces Civiles et Commerciales*(hereinafter referred to as "BODACC"). n18

The filings and other preliminary steps necessary to accomplish these formalities must usually be completed within one month of the underlying legal act; the actual completion of all such formalities by the appropriate administrative personnel normally takes approximately two weeks. Hereinafter, all such legal formalities will, from time to time, be collectively referred to as "appropriate formalities of publication."

In order to complete the incorporation process, the appropriate formalities of publication must be accomplished. It is to be noted that in connection therewith, a summary of the Articles and the identity of the management of the SA (*C.com.*, art. R.210-4), copies of the Articles, corporate minutes evidencing the appointment of the officers of the corporation, copies of the certificate of subscription and payment, copies of the report of the Expert Appraiser in the event that contributions in kind are made or specific advantages granted, the original birth certificates of the members of management (or other appropriate governmental documents), copies of the temporary resident card authorizing the conducting of a professional activity (*carte de sejour temporaire autorisant l'exercice d'une activite professionnelle*) or the Declaration to the local authorities (the *Prefet)* n19 of the President and General Manager if such individuals are required to obtain one, proof of the SA's lease or purchase of commercial property where it will establish its registered office, as well as various other documents must be filed.

A declaration of corporate existence (*declaration d'existence*) must be made to the tax authorities within one month after the registration of the corporation n20 and, as regards value added tax liability, n21 the corporation must make a declaration to the appropriate tax authorities within fifteen days after commencing operations. n22 Moreover, still other declarations must be made in function of the activities of the corporation. In the past, pre- and post-incorporation formalities required individual filings with each governmental authority requiring a filing of some kind. Currently, the majority of such filing requirements are accomplished by means of a single declaration to a Corporate Formalities Center which transmits the information contained in the declaration to the appropriate governmental authorities. n23 The declaration to the Corporate Formalities Center replaces, *inter alia*, declarations to the Register of Commerce and Companies and the Social Security Administration and the declaration of corporate existence (*declaration d'existence*) to the tax authorities. n24 Such declaration must be accompanied by all documents required by each governmental authority. The filing requirements may also be accomplished by electronic means. n25

Once the SA is registered in the Register of Commerce and Companies, corporate documents such as invoices, order forms, and correspondence, as well as the SA's website, must list certain identifying corporate information (*C.com.*, arts. R.123-237 and R.123-238).

[h] Withdrawal of Paid-In Capital. Only after the registration of the SA in the Register of Commerce and Companies may the paid-in capital of the corporation be withdrawn by corporate management for corporate purposes (*C.com.*, art. L.225-11). In order to make this withdrawal, a certificate issued by the clerk of the Commercial Court attesting to the due registration of the corporation must be supplied to the depositary bank or *notaire* holding the corporate funds (*C.com.*, art. R.225-11).

Immediately after the registration of the corporation in the Register of Commerce and Companies, the SA must set up accounting books (*livres de commerce*) certain of which must be on special numbered paper stamped by the Commercial Court or certain other enumerated officials (*C.com.*, arts. L.123-12 through L.123-16). The required accounting books are, *inter alia*, a general journal (*livre journal*), a general ledger (*grand livre*) and an inventory register (*livre d'inventaire*). The SA must also set up certain corporate books (*registres sociaux*), notably an attendance book (*registre de presence*) wherein is noted the attendance of the members of the Board of Directors or Supervisory

Board at the meetings of such bodies (*C.com.*, arts. R.225-20 and R.225-47), minute books (*registres de proces-verbaux*) wherein the minutes of the meetings of the shareholders and the Board of Directors, or Supervisory Board, are kept (*C.com.*, arts. R.225-106, R.225-22 and R.225-49) as well as a stock transfer book (*registre des mouvements de titres*) wherein are noted all transfers or issuances of the SA's shares and shareholders stock holding accounts *(comptes individuels d'actionnaires*) wherein are noted the stock holdings of each shareholder of the SA (*C.com.*, arts. R.228-8 and R.228-9). n26

[i] Sanctions

[i] Civil Sanctions

An invalid SA may be sanctioned by nullity in some cases in application of the common rules of French corporate law. Firstly, a fictive company in which there is no *affectio societatis* can be cancelled. The notion of *affectio societatis*, even if not clearly expressed by article 1832 of the Civil Code, is nevertheless traditionally considered as an essential element of a valid corporate agreement: it expresses the parties' will to collaborate. A fraudulent or illicit company may also be subject to nullity.

There are no specific legislative or regulatory sanctions regarding the failure to abide by the requirements necessary to form an SA, such as the rules governing the minimal number of shareholders or the level of the registered capital. Nonetheless, any interested third party can petition the court for the dissolution of the SA in the absence of regularization (*C.com.*, arts. L.225-247 and L.224-2).

[ii] Penal Sanctions

Initial shareholders and members of management may be subject to a fine of up to 9000 [Euro] for the irregular issuance of shares if shares are issued before the registration of the SA or after an irregular or fraudulent registration (*C.com.*, art. L.242-1). In case of a fraudulent overvaluation of contributions made in kind, initial shareholders and members of management may be subject to a fine of up to 9000 [Euro] and imprisonment of up to five years (*C.com.*, art. L.242-2-4 degrees).

[2] Management of an SA

The management of an SA is entrusted either to a Board of Directors and the President and General Manager (*C.com.*, arts. L.225-17 to L.225-56) n27 or to a Supervisory Board and Directorate (*C.com.*, arts. L.225-57 to L.225-93). n28 The former method of management is most often selected.

[a] Board of Directors--Officers.

[i] Board of Directors. The Articles of an SA may provide that each member of the Board of Directors must be a shareholder of the SA, thereby specifying the number of shares which must be held (C.com., art. L.225-25). The Director must acquire his share(s) within a period of six months from the date of his election and must retain such share(s) until he ceases his functions. If the Director has not acquired his shares or has disposed of them without acquiring a like number within six months, he is automatically deemed to have resigned from his post.

A Director does not acquire the status of a Trader (*commercant*) n29 by the mere fact of serving as Director; consequently, such individuals do not have to obtain a temporary residence card authorizing the conducting of a professional activity (*carte de sejour temporaire autorisant l'exercice d'une activite professionnelle*) or file a Declaration with the local authorities (the *Prefet)*. n30

A company or other legal entity may be appointed a Director of an SA (*C.com.*, art. L.225-20); if so appointed, such entity must designate in writing an individual as its permanent representative to the Board of the SA.

The Articles must specify a maximum age limit to be imposed on all or a portion of the Directors; if, however, no such provision is made, no more than one third of the Board of Directors may be made up of persons older than seventy. Subject to contrary provision in the Articles, when the percentage of septuagenarians exceeds the limit imposed by the Articles or by law, the oldest member of the Board of Directors is automatically removed from office (*C.com.*, art. L.225-19).

Among the other restrictions imposed on would-be members of management, no individual can be a member of the Board of Directors or Supervisory Board of more than five SAs having their registered offices in France (*C.com.*, arts. L.225-21 and L.225-77). n31 Moreover, no individual can hold in SAs having their registered offices in France more than a total of five management posts from among the following: Board of Directors, Directorate, Supervisory Board, General Manager or Sole General Director (*C.com.*, art. L.225-94-1). n32 In addition, an employee (*salarie*) n33 may be named a Director only if his or her employment agreement corresponds to actual duties performed for the corporation (*C.com.*, art. L.225-22) and as long as he or she remains in a position of subordination vis-a-vis the corporation. The number of Directors who are employed by the corporation pursuant to an employment contract can, at no one time, exceed one third of the entire Board of Directors (*C.com.*, art. L.225-22). Finally, the duties of Director may not be assumed by persons carrying out certain professions such as certified public accountants n34 or attorneys. n35

[ii] Appointment--Term of Office. The first Board of Directors of an SA is appointed by the Articles. Subsequent appointments to the Board of Directors are normally made at Ordinary General Meetings of the Shareholders (*assemblees generales ordinaires*) (*C.com.*, art. L.225-18). n36 In the event a Director resigns or dies, the remaining Directors may appoint a replacement for the remaining term of office, such appointment being subject, however, to the ratification thereof by the shareholders at their next General Meeting (*C.com.*, art. L.225-24). Where the number of Directors falls below the minimum specified in the Articles (but not below the legal minimum of three), the remaining Directors must, within three months, name a replacement whose appointment is similarly subject to ratification by the shareholders. If, however, the number of Directors falls below the legal minimum of three, the remaining Directors may not appoint a replacement but must immediately call a shareholders meeting to elect a sufficient number of directors to raise the total to the legal minimum.

An SA may have no less than three, nor more than eighteen, members on its Board of Directors (*C.com.*, art. L.225-17). n37 The term of office of each Director is specified in the Articles; no Director appointed at the time of the incorporation, however, may hold office for more than three years. In all other cases, the term of office of each Director, notwithstanding contrary provision in the Articles, cannot exceed six years (*C.com.*, art. L.225-18). Directors may be re-elected.

A Director may be removed, with or without cause, by a simple majority vote of the shareholders (*C.com.*, art. L.225-18). Removal of a Director will not subject the corporation to liability unless the aggrieved Director can establish that his removal was made in an injurious and vexatious manner.

The Articles of an SA may provide that, in addition to the Directors ordinarily appointed, a number of Directors are to be elected by the employees of the corporation or by the employees of both the corporation and the corporation's direct and/or indirect subsidiaries whose registered office is located in France (*C.com.*, art. L.225-27). n38 The number of Directors so elected may not exceed four, or five where the SA is listed on a stock exchange, or one-third of the Directors not elected by the employees. Such Directors are not taken into account in determining the minimum and maximum number of Directors prescribed by law (*C.com.*, art. L.225-27), nor in determining the number of employees appointed to the Board of Directors by the shareholders (*C.com.*, art. L.225-22). An employee may be elected Director by the employees only if he has been employed by the SA or by one of its direct or indirect subsidiaries whose registered office is located in France for at least two consecutive years prior to his election (*C.com.*, art. L.225-28). n39

The term of office of a Director elected by the employees may not exceed six years (*C.com.*, art. L.225-29); such term

of office automatically ends upon termination of the employment agreement (*C.com.*, art. L.225-32). In the event that an elected employee Director's employment agreement is terminated, such Director resigns, dies or is removed from office, or for any other reason his office becomes vacant, his position is filled for the remaining term of office by a replacement determined at the time of election (*C.com.*, art. L.225-34).

If, in the Board of Directors' annual report to the Ordinary General Meeting of the Shareholders of an SA listed on a regulated market, it is determined that the employees of the company and the company's corporate group own more than 3 percent of the company's registered capital, one or more employee shareholders must be appointed to the company's Board of Directors by the shareholders acting at the Ordinary General Meeting (*C.com.*, art. L.225-23). Such employee shareholders/Directors are not taken into account in determining the minimum and maximum number of Directors permitted by law. Their term may not exceed six years, and automatically ends upon the expiration or termination of their employment agreement (*C.com.*, art. L.225-23).

Any modification in the composition of the Board of Directors by the removal, resignation or death of a Director must be the subject of appropriate formalities of publication within one month of such modification. n40 Failure to make such public disclosure may render the director in question subject to liability to third parties.

[iii] Powers of the Board of Directors. Decisions of the Board of Directors are taken by majority vote of the Directors present or represented (*C.com.*, art. L.225-37) n41 at a duly convened meeting n42 at which half of the Directors are present and voting throughout. n43 A Director cannot enter into a voting agreement whereby he agrees, in advance, to vote in a particular way. If the employees of the corporation have elected a Workers Representation Committee (*comite d'entreprise*) n44 the representatives thereof must be notified of each meeting of the Board of Directors; two representatives may attend each meeting of the board and express thereat their non-binding opinion on matters discussed. n45

Meetings of the Board of Directors are called either verbally or by written notice pursuant to the provisions of the Articles (*C.com.*, art. L.225-36-1). n46 The Board of Directors is responsible for determining the corporate strategy and supervising its implementation (*C.com.*, art. L.225-35). It has the power to review any issue pertaining to the operation of the corporation and to make any decision relating to the corporation's affairs, limited only by the corporate purpose of the SA as set forth in the Articles and the powers expressly granted to the shareholders acting at a General Shareholders Meeting. Specific matters are, by statute, within the sole competence of the Board of Directors: the calling of meetings of the shareholders (*C.com.*, art. L.225-103), the preparation, review and approval of the financial statements and the preparation of the report on the activities of the corporation for each fiscal year. The President must submit to the shareholders a report annexed to the Board's annual report setting forth the review and recommendation to the shareholders of the ratification of contracts entered into by the corporation and management, n47 the appointment and revocation of the President and General Manager (*C.com.*, arts. L.225-47, L.225-51-1, L.225-53, L.225-55), the creation of study committees (*comites d'etudes*), n48 the granting of guarantees by the corporation (*C.com.*, art. L.225-35), the allocation among the Directors of the attendance fees (*jetons de presence*) n49 and, for corporations listed on a regulated market, n50 information on the preparation and organization of the Board's work, any internal audit and risk management procedures adopted by the corporation, n51 and any limitations the Board has placed on the powers of the General Manager (*C.com.*, art. L.225-37). In the event that the Board of Directors authorizes an act which is *ultra vires*, third parties who rely in good faith on such authorization may hold the corporation liable for the consequences thereof unless the corporation is able to show that said third parties knew that the act was outside of the corporate purpose or should have known under the circumstances (*C.com.*, art. L.225-35). The Board of Directors may conduct any investigations and audits it deems necessary (*C.com.*, art. L.225-35).

[iv] Officers. A principal officer of an SA is the President (*President du Conseil dAdministration*). The President is selected by the Board of Directors from among its members and must be less than 65 years old (*C.com.*, art. L.225-47 and L.225-48). The Articles may explicitly provide for a maximum age beyond 65; when the President attains the maximum age, he is automatically removed from office. The term of office of a President is co-extensive with his term

as a Director. The President may be removed, with or without cause, by the Board of Directors at any time (*C.com.,* art. L.225-47). The removal of the President does not necessarily imply his removal as a Director. In the event that the President is removed without cause, he may bring suit against the corporation for damages but only where his removal was made in an injurious and vexatious manner or was abruptly decided. n52 In addition to the attendance fee payable to him as a Director, the President may be paid a remuneration fixed by the Board of Directors. No individual may be a President of more than five SAs having their registered offices in France (*C.com.,* art. L.225-21). If the President is not a national of a Member-State of the European Union, Norway, Liechtenstein, Iceland or Switzerland, he must obtain a temporary residence card authorizing the conducting of a professional activity (*carte de sejour temporaire autorisant l'exercice d'une activite professionnelle)* or file a Declaration with the local authorities (the *Prefet)*. n53

The President's role is to organize and direct the work of the Board of Directors and report thereon to the shareholders at their General Meetings. The President ensures that the various management bodies of the SA are functioning properly and that the Directors are able to perform their requisite duties (*C.com.,* art. L.225-51).

The President may have the additional role of carrying out the actual management of the corporation (*C.com.,* art. L.225-51-1). It is within the discretion of the Board of Directors to decide, in accordance with conditions set out in the Articles, whether the President shall carry out such management duties as the *President Directeur-General* (P.D.G.) or whether they will be attributed to a separate and distinct General Manager (*Directeur General*) (*C.com.,* art. L.225-51-1 and R.225-26). n54 If the Board of Directors chooses to join the two respective positions of President and General Manager, the rules governing the General Manager discussed below apply to the P.D.G.

The actual management of the SA is conducted by a General Manager appointed by the Board of Directors (*C.com.,* art. L.225-51-1). The Board of Directors may also appoint, upon the recommendation of the General Manager, between one and five Assistant General Managers (*Directeurs Generaux Delegues*) whose role is to assist the General Manager (*C.com.,* art. L.225-53). The General Manager and Assistant General Manager(s) may, but need not, be a Director; they must, however, be less than 65 years old unless specified otherwise by the Articles (*C.com.,* art. L.225-54). When the General Manager or Assistant General Manager(s) attains the maximum age, he is automatically removed from office. The remuneration of the General Manager and Assistant General Manager(s) is fixed by the Board of Directors (*C.com.,* art. L.225-53). The terms of office of the General Manager and Assistant General Manager(s) are specified in the Articles. No one individual can be a General Manager of more than one SA having its registered office in France (*C.com.,* art. L.225-54-1). n55

A General Manager may be removed at any time by the Board of Directors; an Assistant General Manager may also be removed at any time by the Board of Directors pursuant to the recommendation of the General Manager (*C.com.,* art. L.225-55). If the General Manager or an Assistant General Manager is removed without cause, he may bring suit against the corporation for damages unless, with respect to the General Manager, he also is the President of the SA in which case the rules applicable to the removal of the President apply (*C.com.,* arts. L.225-55 and L.225-47). Where the General Manager is removed, resigns or dies, the Assistant General Manager(s) remains in his post, unless removed by the Board of Directors, until a new General Manager is named (*C.com.,* art. L.225-55).

The powers of the General Manager to carry out the actual management of the corporation and to represent, act for and bind the corporation are plenary, limited only by the purpose of the corporation as set forth in the Articles, specific provisions of law, or specific directives from the Board of Directors (*C.com.,* art. L.225-56). The General Manager may, for example, with and within the Board's authorization, give guarantees in the name of the corporation in order to secure third party undertakings (*C.com*., art. R.225-28). The limitations imposed on the powers of the General Manager are not enforceable against third parties unless it can be shown that the third party in question knew, or should have known under the circumstances, that the unauthorized act of the General Manager was not within the corporate purpose of the SA (*C.com.,* art. L.225-56). Thus, subject to the foregoing exceptions, the General Manager can bind the corporation even by an act not authorized by the Articles or the Board of Directors (*C.com.,* art. L.225-56).

The Board of Directors, with the General Manager's approval, determines the scope of the Assistant General Manager's powers as well as his term of office (*C.com.*, art. L.225-56). The Assistant General Manager has the same power vis-a-vis third parties to bind the corporation as the General Manager himself (*C.com.*, art. L.225-56).

[b] Supervisory Board/Directorate.

The principle underlying the Supervisory Board/Directorate method of corporate organization is the separation of the actual management of an SA from the supervision thereof. While in the form of corporate structure consisting of only a Board of Directors n56 the Directors perform both roles, the Supervisory Board/Directorate format separates these functions. Whenever an SA is managed by a Supervisory Board and Directorate, it must so indicate by placing on its letterhead and all other communications with the public the following legend: "*societe anonyme a directoire et conseil de surveillance* (corporation governed by a Directorate and Supervisory Board) (*C.com.*, art. R.123-238).

[i] The Supervisory Board. The sole purpose of the Supervisory Board is to control the management organs of the corporation (*C.com.*, art. L.225-68). Members of the Supervisory Board are either named in the Articles of the SA at the time of incorporation or, if the SA makes a public offering of its shares appointed at the first Ordinary General Meeting of the Shareholders (*C.com.*, art. L.225-75). n57 The Supervisory Board must be made up of no less than three nor more than eighteen members (*C.com.*, art. L.225-69). n58 As is the case for Directors, the Articles may provide that each member of the Supervisory Board must hold a specified number of shares (*C.com.*, art. L.225-72). A member of the Supervisory Board cannot, at the same time, be a member of the Directorate (*C.com.*, art. L.225-74). If a corporation or business entity is a member of the Supervisory Board, it must designate, in writing, an individual as its permanent representative thereto (*C.com.*, art. L.225-76). The Supervisory Board appoints a president and vice-president from among its members; the latter must be individuals and are charged with calling and directing the meetings thereof (*C.com.*, art. L.225-81). The Supervisory Board may fix the president and vice-president's remuneration.

The Articles of an SA may provide that, in addition to the members of the Supervisory Board ordinarily appointed, a number of members are to be elected by the employees of the corporation or by the employees of both the corporation and the corporation's direct and/or indirect subsidiaries with registered offices located in France (*C.com.*, art. L.225-79). The conditions which apply to the number, term of office and replacement of such members of the Supervisory Board are similar to those applicable to Directors elected by the employees (*C.com.*, art. L.225-80). n59 Moreover, where the employees of the company and the company's corporate group own more than 3 percent of the company's registered capital, one or more employee shareholders must be appointed to the Supervisory Board in the same manner as applicable to the appointment of employee shareholders to the Board of Directors (*C.com.*, art. L.225-71). n60

The decision-making process of the Supervisory Board is subject to the same constraints as that of the Board of Directors; n61 the powers peculiar to the Supervisory Board are:

1. to name the members of the Directorate and the president of the Directorate (*C.com.*, art. L.225-59),

2. to empower certain members of the Directorate to act for and on behalf of the corporation as General Managers, if provided in the Articles (*C.com.*, art. L.225-66), and

3. to approve, *inter alia* the issuance of guarantees (to secure either third party undertakings or the corporation's undertakings), the total or partial transfer of shareholding interests and the transfer of real property by the corporation (*C.com.*, art. L.225-68).

[ii] The Directorate

[A] Formation The members of the Directorate are responsible for the actual management of the SA (*C.com.*, art. L.225-64). The President and other members of the Directorate are appointed by the Supervisory Board (*C.com.*, art. L.225-59). There can be no more than five members of the Directorate except where the shares of the SA are listed on a

stock exchange, in which case the number of members may be increased, by the Articles, to seven; there are normally no less than two members of the Directorate (*C.com.*, art. L.225-58). n62 No individual can be a member of more than one Directorate. n63 (*C.com.*, art. L.225-67). The term of office of a member of the Directorate is specified in the Articles and may be from two to six years; where no mention is made in the Articles, the duration is four years. (*C.com.*, art. L.225-62). Unlike a Director, there is no restriction imposed by statute upon an employee of the corporation becoming a member of its Directorate. n64 A member of the Directorate may be removed with or without cause by the shareholders or, if so provided in the Articles, by the Supervisory Board (*C.com.*, art. L.225-61). Removal decided without cause may give rise to the payment of an indemnity.

[B] Powers

The power of the Directorate to manage the SA is plenary, subject only to limitation by the corporate purpose of the SA and the provisions of the Articles (*C.com.*, art. L.225-64). The limitations imposed upon the powers of the Directorate by the Articles are not enforceable against third parties. n65 If the members of the Directorate take actions not within the corporate purpose, third parties may hold the corporation liable therefor unless it is proved that such third parties were aware that the act was *ultra vires*. The Directorate is specifically empowered to call meetings of the shareholders (*C.com.*, art. L.225-103), to certify the receipt by the corporation of increases in capital (*C.com.*, arts. L. 225-129-2 and L.225-146) and, subject to prior consent of the shareholders, to carry out various actions relating to the shares of the corporation such as the redemption of the shares of the SA in reduction of its capital. n66 The Directorate must act as a group, taking decisions only upon a majority vote of its members; n67 its relations with third parties, however, are conducted exclusively through the president of the Directorate unless the Articles permit the Supervisory Board to appoint General Managers to represent the corporation (*C.com.*, art. L.225-66).

The Directorate must submit a report on the activities of the corporation to the Supervisory Board no less than once every calendar quarter (*C.com.*, art. L.225-68), prepare and submit to the Supervisory Board, within three months following the close of each fiscal year, the financial statements of the corporation (*C.com.*, art. L.225-68), and prepare and submit certain reports to the shareholders (*C.com.*, art. L.232-1).

[c] Statutory Auditors. Each SA must have at least one Statutory Auditor (*commissaire aux comptes*) (*C.com.*, art. L.225-218) who is totally independent n68 from the corporation and whose principal function is to ensure that the corporation complies with certain provisions of applicable law and to certify the fairness and accuracy of the financial statements of the corporation as well as the accuracy of all financial data submitted to the shareholders (*C.com.*, art. L.823-9 and L.823-10). Each SA must also appoint an Alternate Statutory Auditor n69 (*commissaire aux comptes suppleant*) who will replace the Statutory Auditor in the event the latter refuses or is unable, because of his resignation or death, to carry out his functions; if an Alternate Statutory Auditor is called upon to replace a Statutory Auditor, his term of office will end at the time the Statutory Auditor's term would have ended (*C.com.*, art. L.823-1).

The role assigned to the Statutory Auditor is supervisory: the Statutory Auditor, for example, is called upon not to prepare the financial statements of the corporation, a task handled by management, but rather to verify the accuracy thereof and, in addition, to ensure the proper functioning of the corporation and the equal treatment of the shareholders (*C.com.*, art. L.823-9 through L.823-11).

The initial Statutory Auditor is named in the Articles if the corporation has not made a public offering of its shares or at the first meeting of the shareholders if it has (C.com., arts. L.225-16 and L.225-12). If the SA is obligated to publish consolidated accounts, it must appoint no less than two Statutory Auditors (*C.com.*, art. L.823-2). n70 The term of office of the initial Statutory Auditor(s), and each successive term must be six fiscal years, ending immediately after the Ordinary General Meeting of the Shareholders whereat were approved the financial statements for the sixth fiscal year (*C.com.*, art. L.823-3). Statutory Auditors of companies which conduct public offerings are limited to one six-year term of office and are not entitled to take part in the review of such company's financial statements for a period of two years following the completion of their term (*C.com.*, art. L.822-14).

The Statutory Auditor has the right to inspect, at any time, all of the contracts, books, financial documents or minutes of the meetings of management or the shareholders (*C.com.*, art. L.823-13). In addition, the Statutory Auditor may, in connection with the review of corporate documents, examine the files of the corporation's parent company or affiliates and may also gather information about the corporation from third parties who have acted or are acting as agents of the corporation (*C.com.*, art. L.823-14). The Statutory Auditor also has the right to be notified of and to attend all meetings of the shareholders as well as those meetings of the Board of Directors or of the Directorate, and of the Supervisory Board whereat the annual or interim financial statements and, if appropriate, the consolidated accounts of the corporation are reviewed and/or adopted (*C.com.*, art. L.823-17). In order to permit the Statutory Auditor to effectively carry out his functions, all the documents which must be furnished to the shareholders in connection with shareholders meetings must be made available to the Statutory Auditor at the registered office of the SA no less than one month before the Annual Ordinary Meeting of the Shareholders is called (*C.com.*, art. R.232-1). n71 The Statutory Auditor of a corporation listed on a regulated market must provide the regulated market authorities, the *Autorite des Marches Financiers* "AMF", with, and the AMF may request, certain information concerning the corporation. (*C. mon. et fin.*, art. L. 621-22). n72

If, in the exercise of his functions, the Statutory Auditor discovers any state of affairs which may compromise the continued operation of the SA, he may request the President of the Board or President of the Directorate to provide him with information and explanations thereon (*C.com.*, art. L.234-1). In the event that the latter does not do so within fifteen days, or if the response given is deemed to be unsatisfactory by the Statutory Auditor, he may, within eight days of his receipt of said response or the end of the aforesaid fifteen day period, request in writing that a special meeting of the Board of Directors or Supervisory Board take place; n73 upon receipt of such request, the President of the Board or president of the Directorate must, within eight days, call such special meeting for a date within no more than fifteen days (*C.com.*, arts. L.234-1; and R.234-1 through R.234-7). The Statutory Auditor is called to attend this special meeting (*C.com.*, art. R.234-2). The minutes of the meeting of the Board of Directors or Supervisory Board must be sent to the Commercial Court and the SA's Workers Representation Committee within eight days following said meeting. If the President of the Board or President of the Directorate does not call such meeting, or if the Statutory Auditor believes that, despite the decisions made at such meeting, the continued operation of the SA is still in jeopardy, he invites the Board of Directors or Supervisory Board to call a shareholders meeting. The Board of Directors or Supervisory Board has eight days to call such meeting, which meeting must be held no more than one month following the Statutory Auditor's notification. n74 If, upon the conclusion of the shareholders meeting, the Statutory Auditor determines that the decisions taken do not ensure the continuation of the corporation, he informs the Commercial Court of the steps he has taken and the results thereof (*C.com.*, art. L.234-1).

The duties and specific tasks to be performed by the Statutory Auditor must be set forth in a written program and a mission plan established by the corporation and the Statutory Auditor. n75 Said program must indicate the number of hours to be spent by the Statutory Auditor in performing his functions and the cost per hour of the services so rendered (*C.com.*, art. L.820-3). n76

Where the Statutory Auditor has discovered an act of felonious mismanagement or other felonious acts committed in connection with the operation of the corporation, he must, under penalty of civil and penal sanctions, report same to the criminal justice authorities of the French government (*C.com.*, art. L. 820-7).

The Statutory Auditor shall also prepare a report on the terms of payment granted by the company to its customers or by its suppliers. If several significant violations of the provisions set out in article L.441-6 al. 6 and 9 of the French Commercial Code are detected by the Statutory Auditor, he must transmit his report to the Ministry of the Economy (*C.com.*, art. L.441-6-1).

Any shareholder or group of shareholders that hold, either individually or in the aggregate, at least 5 percent of the SA's registered capital, as well as the Workers Representation Committee, the appropriate governmental officials and, if the

SA is listed on a regulated market, the *Autorite des Marches Financiers*, may petition the Commercial Court for the removal of the Statutory Auditor from office either for cause or his inability to serve (*C.com.*, arts. L.823-6, L.823-7 and R.823-5).

Finally, if the Board of Directors or Directorate recommends to the shareholders that the Statutory Auditor not be reappointed upon the expiration of his term of office, the Statutory Auditor has the right to address the shareholders at the shareholders meeting (*C.com.*, art. L.823-8).

[d] Agreements Between Management and the Corporation. As a general rule, agreements may be entered into by the corporation, directly or indirectly, with one of the members of its management where such agreements relate to the "normal operations" of the corporation and are concluded upon "normal terms" (*C.com.*, arts. L.225-39 and L.225-87). n77

[i] Regulated Agreements Where, however, an agreement is entered into by the corporation with a member of its management directly or indirectly which is not within the normal scope of the corporation's activities or which is not at arm's length, such agreement must be submitted to either the Board of Directors or the Supervisory Board for its prior approval (*C.com.*, arts. L.225-38 and L.225-86). n78 This rule also applies to an agreement entered into by the corporation with one of its shareholders holding more than 10 percent of the voting rights or, where such shareholder is a legal entity, with the company controlling said shareholder (*C.com.*, arts. L.225-38 and L.225-86). Similarly, the Board of Directors or the Supervisory Board of the corporation must give its prior consent before an agreement may be concluded between the corporation and another enterprise:

1. for the actions of which a member of the management of the corporation is personally liable, *e.g.*, as a member of a *societe en nom collectif*, n79 a General Partner of a *societe en commandite* n80 or a member of a *societe civile*, n81

2. in which a member of the management of the corporation is Director, General Manager, member of the Supervisory Board, or officer, or

3. which a member of the management of the corporation owns (*C.com.*, arts. L.225-38 and L.225-86).

This same approval process applies to any commitment made by a listed corporation (or by any company controlled by it or which it controls) to a member of its management which corresponds to remuneration, indemnities or benefits that are due or may be due upon the termination or modification of such member's duties or subsequent thereto, such as a departure bonus or non-competition indemnity (*C.com.*, arts. L.225-42-1 and L.225-90-1). n82

The interested party must submit the proposed agreement to the Board of Directors or the Supervisory Board. Upon submission, the members of the Board of Directors or the Supervisory Board, excluding the interested party (*C.com.*, art. L.225-40 and L.225-86), vote whether to consent to the agreement; only if consent is given can such agreement be concluded. n83 If the foregoing procedure is not followed, the agreement may be annulled upon the petition of the corporation or its shareholders if it is prejudicial to the corporation (*C.com.*, arts. L.225-42 and L.225-90). Once the agreement has been authorized by the Board of Directors or the Supervisory Board, the Statutory Auditor must be informed by the President of the Board of Directors or the President of the Supervisory Board within one month after the execution of such agreement (*C.com.*, arts. R.225-30 and R.225-57). The Statutory Auditor then prepares a report on the authorized agreement which is in turn submitted to the shareholders (*C.com.*, arts. R.225-31 and R.225-58). At their next meeting, the shareholders vote whether to approve the authorized agreement. n84

[ii] Prohibited Agreements

Notwithstanding the above procedure, there is a total prohibition against the corporation making any loan, granting any

overdraft protection for or otherwise securing obligations owing to third parties by the management of the corporation (*C.com.*, arts. L.225-43 and L.225-91). For purposes of this prohibition, management includes the General Manager, Assistant General Managers, members of the Board of Directors, Directorate or Supervisory Board as well as their respective spouses, ascendants and descendants. In the event that a corporation or other legal entity holds a management position, this prohibition extends to the permanent representatives of such legal entity, but not to the legal entity itself (*C.com.*, arts. L.225-43 and L. 225-91).

There are two exceptions to this prohibition principle. First, an agreement may be entered into with a legal entity Director such as a subsidiary or affiliate, in order to grant a loan to the parent company provided the agreement is first submitted to the Board of Directors for approval (*C.com.*, art. L.225-38). This approval procedure is not required if the agreement is concluded upon "normal terms" and relates to the "normal operations" of the corporation. Second, an agreement making a loan or granting overdraft protection to a member of the management can be entered into with a bank or financial institution if it is concluded under "normal terms" and relates to the "normal operations" of the corporation in consideration of its business activity (*C.com.*, art.L.225-43).

[e] Liability of Management. A Director or member of the Directorate is subject to civil liability for a violation of the provisions of either the law or the Articles or for acts of mismanagement (*C.com.*, arts. L.225-249, L.225-251 and L.225-256). Specifically, liability is imposed on Directors or members of the Directorate who, *inter alia*, fail to respect applicable provisions of law or the Articles, cause the corporation or any of its acts to be held void, or regularly fail to properly carry out their duties either by imprudent management, by failing to supervise subordinates, or by breaching their fiduciary duty to the corporation. Suit against a member of management may be brought by an individual, either a shareholder or a third party, or by shareholders, or in the case of a listed corporation, a shareholder association, for and on behalf of the corporation, as a derivative action, suffering actual damage (*C.com.*, arts. L.225-120, L.225-252, and R.225-167 through R.225-170). n85 A derivative or other action not brought within three years from the act giving rise thereto is time barred (*C.com.*, art. L.225-254). n86 Except where the liability arises out of specific acts taken by an individual, all Directors or members of the Directorate are jointly and severally liable (*solidairement*) to the corporation or third parties suffering damages; as among the Directors or members of the

Directorate, however, the court has the power to allocate damages (*C.com.*, arts. L.225-251 and L.225-256).

The civil liability of a member of the Supervisory Board is more restricted. Inasmuch as the role of the Supervisory Board is to supervise, and not to carry out, the actual management of the SA, n87 civil liability will be imposed on a member of the Supervisory Board only upon his failure to properly carry out his duties, *i.e.*, to properly supervise management or to disclose to the shareholders his personal knowledge of the crimes or acts of serious mismanagement of a member of the Directorate (*C.com.*, art. L.225-257).

It is important for a foreign investor to be aware that French corporate law contains many provisions imposing penal sanctions on Directors, members of the Directorate or members of the Supervisory Board. n88 For example, a Director may be sentenced to five years in prison and fined 375,000 euros for the declaration of an unauthorized dividend, the submission to the shareholders of a fraudulent balance sheet or a breach of a fiduciary duty owed to the corporation (*C.com.*, art. L.242-6). Punishable by a fine of 9,000 euros is the failure to prepare, or have prepared, the financial statements and the annual report on operations of the corporation as required by the Article (*C.com.*, art. L.242-8). Similar penal sanctions are imposed on members of the Directorate or Supervisory Board (*C.com.*, art. L.242-30).

Inasmuch as the President is, by definition, a Director, he is liable to the corporation and to third parties for acts of mismanagement in the same manner as any member of the board.

The General Manager of an SA is subject to the same civil and penal liability as a Director or member of the Directorate (*C.com.*, art. L.225-251). The Assistant General Manager(s) is subject to penal sanctions under the same conditions as the General Manager (*C.com.*, art. L.248-1).

The Directors, the members of the Directorate and the General Manager (*les dirigeants de droit*) and any person who, although not formally named to a management position, actively manages or has actively managed the affairs of an SA (*les dirigeants de fait*) may be subject to civil and penal sanctions in the event of the commencement of bankruptcy proceedings.

Under current bankruptcy legislation, the *dirigeants de droit* and/or the *dirigeants de fait* may be held personally liable for all or part of the debts of the bankrupt corporation where they have committed a proven error in the operation of the enterprise and where such error contributed to the insolvency of the corporation. n89 See Chapter 18--*Bankruptcy, infra* for a detailed discussion of bankruptcy proceedings and the sanctions imposable on the *de jure* and *de facto* management of a corporation.

In certain circumstances, a member of management can be held personally liable for the payment of taxes and penalties owed by the SA (LPF, art. L. 267).

The sanctions for insider trading violations by members of management are discussed in Chapter 14, Securities, *infra.*

[3] The Functioning of an SA

[a] Meetings of the Shareholders.

In the shareholders is vested the ultimate power over the SA. It is the shareholders who appoint the management n90 and the Statutory Auditor (*commissaire aux comptes*) n91 of the corporation, who declare dividends, n92 who approve the financial statements n93 and who may decide to dissolve the corporation. n94

A General Meeting of the Shareholders (*assemblee generale*) must be held at least once a year (*C.com.*, art. L.225-100) in order, *inter alia*, to elect the Directors or members of the Supervisory Board, to ratify agreements entered into between the corporation and the management thereof, to receive the written report of the Board of Directors (or Directorate) and the Statutory Auditor on the operations of the corporation for the past fiscal year and to approve the financial statements and, if appropriate, the consolidated accounts therefor (*C.com.*, arts. L.225-100, L.232-1, L.225-18, L.225-75 and L.225-40). Other meetings of the shareholders may be convened from time to time: a meeting of the shareholders is called an Extraordinary General Meeting of the Shareholders (*assemblee generale extraordinaire*) when, due to certain fundamental changes in the structure of the SA, amendment(s) of the Articles (*C.com.*, art. L.225-96) must be approved by the shareholders. Any other meeting is called an Ordinary General Meeting of the Shareholders (*assemblee generale ordinaire*).

All meetings of the shareholders are held pursuant to notice (*avis de convocation*) thereof sent by the Board of Directors, the Directorate or the Supervisory Board or, failing which, by the Statutory Auditor, n95 by a court-appointed attorney-in-fact n96 or by the liquidators n97 of the corporation (*C.com.*, art. L.225-103). Notice of the meeting must be mailed or e-mailed to all holders of nominative shares (*C.com*. art. R.225-68) and to the Statutory Auditor (*C.com.*, art. R.823-9) no less than fifteen days prior to the proposed date of the meeting (*C.com*. art. R.225-69). n98 If the shares are not all nominative, the notice must also be published in a legal newspaper and in the *Bulletin des annonces legales obligatoires (BALO)* (*C.com*. art. R.225-67). n99 The notice of the meeting must contain the agenda of the meeting. Except for the removal of management personnel, any decision taken at the meeting which is not set forth in such notice is null and void (*C.com.*, art. L.225-105). n100 The agenda of the meeting is normally fixed by the Board of Directors or Directorate; under certain circumstances, however, shareholder(s) representing at least five percent of the stock of the corporation (*C.com.*, art. L.225-105) n101 or the Workers Representation Committee may request that a resolution that they propose for adoption at such meeting be included in the agenda (*C.trav.*, art. L.2323-67).

The corporation must make available, and each shareholder or his representative must sign, the attendance sheet (*feuille*

de presence) at the commencement of the meeting (*C.com*. art. R.225-95). n102 If a quorum is present, the meeting may proceed. At Ordinary General Meetings of the Shareholders, a quorum is present if one-fifth of the voting shares are present or represented (*C.com.*, art. L.225-98). n103 If no quorum is obtained, the meeting must be adjourned and a new meeting called pursuant to a notice sent or e-mailed no less than six days before such second meeting is to take place; there is no quorum requirement for the second meeting (*C.com.*, arts. L.225-98). At Extraordinary General Meetings of the Shareholders, a quorum is present if one-quarter of the voting shares are present or represented (*C.com.*, arts. L.225-96, R.225-69 and R.225-70). If no quorum is obtained, the meeting must be adjourned and a new meeting called pursuant to a notice sent or e-mailed no less than six days before such second meeting is to take place; n104 a quorum is present at the second meeting if one-fifth of the voting shares are present or represented (D. arts. 126-27; *C.com.*, art. L.225-96, R.225-69 and R.225-70). As a general rule, each share is entitled to one vote (*C.com.*, art. L.225-122). Certain shares do not have the right to vote, n105 while others may be granted double voting rights. n106 Shareholders' agreements, voting trusts, voting pools, irrevocable proxies or any other mechanism tending to restrict a shareholder's ability to freely vote his shares are prohibited. Nonetheless, shareholders may grant a proxy, valid for only one shareholders meeting (*C.com*., art. R.225-79), n107 empowering either another shareholder or his spouse to vote his shares (*C.com.*, art. L.225-106). n108 Unlike the holders of proxies given for a meeting of the Board of Directors, a shareholder may hold more than one proxy. n109 Finally, where a shareholder grants a proxy without specifying who is to vote his shares and how they are to be voted, the chairman of the meeting of the shareholders is entitled to vote such shares on behalf of the shareholders provided that he votes same in favor of the resolutions proposed or supported by the Board of Directors or the Directorate and against all other resolutions (*C.com.*, art. L.225-106).

It should be noted that under certain conditions, shareholders may vote their shares in advance by mail or by electronic means with respect to all shareholders meetings through a vote-at-a-distance form (*formulaire de vote a distance*) (*C.com.*, art. L.225-107). n110 In order to obtain a vote-at-a-distance form, the shareholder must submit a formal request to the corporation no later than six days prior to the date of the meeting (*C.com*., arts. R.225-75 and R.225-85). The vote-at-a-distance form must permit the shareholder to vote on each resolution in the order in which the resolutions are to be presented to the shareholder meeting (*C.com*., art. R.225-76). n111 It must be sent to the shareholder together with the text of the proposed resolutions and a form by which the shareholder may request additional documents and information. The shareholder must complete and sign the form and return same within the requisite time period. n112 The shares of the shareholders who vote by mail or by electronic means are taken into account for purposes of establishing a quorum. n113 Moreover, if so provided in the Articles, shareholder meetings may be held by videoconference (*C.com.*, art. L.225-107). n114 In this case, the corporation must create a special website for such purpose (*C.com.*, art. R.225-61). Access to the website is limited to shareholders presenting a special code issued prior to the meeting. (*C.com*., art. R.225-98).

Decisions at Ordinary General Meetings of the Shareholders are adopted by a simple majority of the voting shares present, or represented thereat (*C.com.*, art. L.225-98); at Extraordinary General Meetings of the Shareholders, decisions are adopted by a two-thirds majority of the voting shares present, or represented thereat (*C.com.*, art. L.225-96). n115

A meeting of the shareholders may not end until all of the items of the agenda have been submitted to the shareholders. After each meeting, minutes thereof must be prepared and signed by the officers of the meeting (*C.com*., art. R.225-106).

[i] Ordinary General Meetings of the Shareholders. All decisions not specifically reserved to the competence of Extraordinary General Meetings of the Shareholders may be taken at an Ordinary General Meeting of the Shareholders (*C.com.*, art. L.225-98). An Ordinary General Meeting must be held at least once a year for the approval of the annual report on corporate operations and the financial statements and, if appropriate, the consolidated accounts of the corporation and must take place within six months after the close of the fiscal year to which the financial statements relate (*C.com.*, art. L.225-100). n116

In connection with the approval of the financial statements, the Statutory Auditor plays an important role: he must

certify the accuracy and fairness of such statements (*C.com.*, art. L.225-235); he must also be notified of and invited to attend both the Board of Directors meeting whereat such statements are approved for submission to the shareholders and the shareholders meeting at which such statements will be approved so that he may respond to questions of the shareholders relating thereto (*C.com.*, arts. L.823-17 and R.823-9. L.225-238).

In order to permit the Statutory Auditor to effectively carry out his functions, all the documents which must be furnished to the shareholders in connection with shareholders meetings must be made available to the Statutory Auditor at the registered office of the SA no less than one month before the Annual Ordinary General Meeting of the Shareholders is called (*C.com.*, art. R.232-1). n117

Within one month after the Annual Ordinary General Meeting of the Shareholders, the financial statements of the corporation adopted thereat must be filed with the clerk of the Commercial Court (*C.com.*, art. L.232-23). The report of the

Board of Directors or Directorate, the report of the Supervisory Board, if any, the report of the President on the preparation and organization of the Board's work as well as internal audit procedures and the Statutory Auditor's report on this report, n118 the report of the Statutory Auditor(s), the resolution relating to the allocation of the annual profits or losses which was submitted to the shareholders by management as well as the definitive text of such resolution as adopted by the shareholders, and a summary table of the powers granted to the Board of Directors or Directorate in connection with capital increases (*C.com*, art L.225-100) must also be filed with the Clerk of the Commercial Court. In the event that the shareholders do not approve the financial statements, a copy of the minutes of the shareholders meeting must be filed within the same time limit. The above-mentioned documents must be certified by the legal representative of the corporation (*C.com.*, art R.123-102). n119

Ordinary General Meetings of the Shareholders are held from time to time to consider other matters such as:

1. the removal, replacement and election of members of management (*C.com.*, arts. L.225-18 and L.225-75) n120 and the Statutory Auditor (*C.com.*, arts. L.225-228),

2. the determination of the Directors' fees (C.com, art. L.225-45),

3. the ratification of the appointment by the Board of Directors or Supervisory Board of a successor to one of the members of management who resigns or dies during the course of a fiscal year; n121

4. the payment of a stock dividend,

5. the approval of agreements between the corporation and management and between the corporation and one of its shareholders representing more than 10 percent of the voting rights (C.com., art. L.225-40), n122

6. the ratification of the decision of the Board of Directors to transfer the registered office of the corporation within the same or to a neighboring Departement n123 (*C.com.*, art. L.225-36), and

7. the issuance of debentures if provided by the Articles of Incorporation.

Within 15 days after the Annual Ordinary General Meeting, the corporation must, through publication in a legal newspaper, inform its shareholders of the total number of voting rights; if such number varies by more than a fixed percentage between two annual general meetings, the corporation must so inform the shareholders (*C. com*., arts. L.233-8 and R.233-2). Special disclosure rules apply to listed companies (*C.com*., art. L.233-8).

[ii] Extraordinary General Meetings of the Shareholders. The Articles of an SA may only be modified by the two-thirds majority vote of the shareholders assembled at an Extraordinary General Meeting; the Articles may not modify or alter this rule of law in any way (*C.com.*, art. L.225-96). Similarly, it is within the sole competence of the shareholders, voting at an Extraordinary General Meeting, to, *inter alia*:

1. transfer the registered office of the corporation to a non-neighboring *Departement*, n124

2. to increase (*C.com.*, art. L.225-129) or reduce (*C.com.*, art. L.225-204) the registered capital of the corporation,

3. to eliminate the pre-emptive rights of some or all of the shares in the event of an increase in capital (*C.com.*, arts. L.225-135 and L.225-138),

4. to transform the SA into another type of company (*C.com.*, art. L.225-243), n125

5. to authorize employee stock purchase plans (*C.com.*, art. L.225-177) or the distribution of shares free of charge to employees and qualified members of management (*C.com.*, arts. L.225-197-1 through 3), and

6. to authorize major corporate reorganizations such as mergers or acquisitions. n126

In connection with each of the foregoing decisions submitted to the shareholders for their approval at an Extraordinary General Meeting, the Board of Directors, or the Directorate, must prepare and present to the shareholders a report setting forth the terms and consequences for the corporation of such actions. Similarly, the Statutory Auditor must, in connection with certain of the foregoing decisions, prepare and submit to the shareholders a report setting forth the relevant financial considerations relating thereto. If one of these reports is not presented, the Extraordinary General Meeting is not void but any interested party may petition the president of the court to enjoin their presentment (*C.com*, art. L.238-1). In the event that one of the decisions proposed to be adopted by the shareholders at an Extraordinary General Meeting contemplates a capital increase made by contributions in kind or the granting of special and unequal benefits to one or more shareholders or future shareholders, a court-appointed expert appraiser (*commissaire aux apports*) must prepare and submit to the shareholders a report setting forth the value of either such contributions in kind or special benefits (*C.com.*, art. L.225-147). n127 One of the purposes of the report of the expert appraiser is to ensure respect for the principle of equal treatment of shareholders.

[iii] Special Meetings of the Shareholders. An SA issuing different classes of stock benefiting from special rights and preferences must call a special meeting of those shareholders holding such shares whenever their special rights are to be modified (*C.com.*, art. L.225-99). A quorum of a Special Meeting of the Shareholders is present if one third of the voting shares are present at the first convocation or, if a quorum is not obtained and the meeting must be adjourned, if one fifth of the voting shares are present at the reconvened meeting. Action is taken upon the affirmative vote of two-thirds of the voting shares present or represented at the meeting.

[b] Access to Information. The shareholders of an SA benefit from five principal rights to obtain information about the corporation:

1. the continuing right to obtain information, at any time, relating to the operations of the corporation during the past three fiscal years,

2. the right to receive or to consult corporate documents in connection with meetings of the shareholders,

3. the right to receive certain periodic financial information,

4. the right to receive disclosures made by corporations listed on a regulated market, and

5. the right to receive disclosures made by certain corporations not listed on a regulated market.

In the event that the corporation is a member of a corporate group, special rules concerning the information which must be disclosed concerning said group come into play. See *Section 5.12[3][b] infra* for a discussion of these rules.

[i] The Continuing Right to Receive Corporate Information. All shareholders of an SA have the right to consult and to copy n128 at the registered office of the corporation the following documents relating to the past three fiscal years (*C.com.*, art. L.225-117): balance sheets, income statements, inventory lists, lists of members of the Board of Directors or the Supervisory Board and the Directorate, the reports of management and those of the Statutory Auditors, a statement of the total amount of the salaries of the five most highly paid employees or of the ten most highly paid employees if the corporation has more than two hundred employees, the attendance sheets and the minutes relating to shareholders meetings (*C.com.*, art. L.225-115) and a certified copy of the Articles (*C.com.*, art. R.225-109).

Any shareholder or group of shareholders representing at least 5 percent of the registered capital of the corporation, or a qualified shareholder association (*C.com.*, art. L.225-120), may submit written questions to the President of the Board of Directors or the Directorate on one or more aspects of the management of the corporation, or where applicable, any company controlled by the corporation (*C.com.*, art. L.225-231). In the absence of a response or a satisfactory response within one month of the request, these shareholders may petition the court of competent jurisdiction to appoint an expert to prepare a report on one or more aspects of the management of the corporation (*C.com.*, art. L.225-231). The public prosecutor, the Workers Representation Committee, if there is one, and the *Autorite des marches financiers* if the corporation is listed on a regulated market, may also petition the court to appoint an expert to prepare such report.

Furthermore, any shareholder or group of shareholders that holds, either individually or in the aggregate, at least 5 percent of the SA's registered capital may, two times a year, submit written questions to the President of the Board or the President of the Directorate concerning any matter which may compromise the continued operation of the corporation (*C.com.*, art. L.225-232). The President of the Board or President of the Directorate must respond to such questions in writing within one month; a copy of such response must be given to the SA's Statutory Auditor (*C.com.*, art. R.225-164).

In addition to the aforementioned provisions which require that the petitioning shareholder(s) hold at least 5 percent of the stock of the corporation, there exists a general rule of civil procedure which may, in certain instances, permit any shareholder to obtain additional information about the corporation without being subject to said 5 percent requirement. n129 Pursuant to such rule, a judge may, upon the petition of an interested party, order that certain measures of discovery be carried out before the initiation of litigation in order to safeguard or uncover evidence on which the outcome of such litigation may depend. Moreover, any interested party may petition the president of the court to enjoin the production of the documents listed in article L.225-117 (*C.com*, art. L.238-1).

[ii] The Right to Receive Information Relating to Shareholders Meetings. As discussed above, management is under the obligation to notify each shareholder of the date, time and agenda of each shareholders meeting. n130 If, however, management encloses with such notice a form of proxy, it is obligated to enclose certain additional documents including, *inter alia*:

1. the text of the resolutions which management proposes to have adopted,

2. a brief summary of the operations of the corporation during the past fiscal year,

3. a chart indicating the operating results of the corporation for the past five fiscal years,

4. a form by which the shareholders may request additional information,

5. a vote-at-a-distance form containing certain required information, and

6. a note informing the shareholders that, where they do not personally participate in the shareholders meeting, they may either (i) grant a proxy to another shareholder or his spouse to vote his shares, (ii) vote by mail or by electronic means or (iii) grant a proxy without specifying who is to vote his shares and how they are to be voted, thus permitting the chairman of the meeting to vote such shares subject to certain specific requirements (*C.com.*, art. R.225-81).

Upon receipt of the notice of an Ordinary General Meeting of the Shareholders, n131 a shareholder may, by causing the form mentioned in No. 4 *supra* or another means of communication to be received by the corporation no less than five days before the meeting, obtain not only those documents listed in the preceding paragraph, but, in addition, the following:

1. the annual financial statements of the corporation and, if appropriate, its consolidated accounts and a report on corporate group activities, as well as a schedule setting forth the origin and proposed allocation of its distributable profits,

2. a schedule setting forth the profit or loss realized by the corporation during each of the last five fiscal years or, if the corporation has not existed for five years, during each year since its incorporation,

3. the annual report prepared by the Board of Directors or Directorate and any comments made thereon by the Supervisory Board,

4. the text of any resolutions which a shareholder or the Workers Representation Committee has proposed for adoption,

5. any reports prepared by the Statutory Auditors, n132

6. the name, address and corporate posts in other corporations of each member of the management of the corporation,

7. the name, address and professional experience of all candidates for election to management posts,

8. a form of proxy, and

9. a form by which the shareholders can elect to automatically receive the above documents without having to request same prior to each meeting (*C.com.*, arts. R.225-81, R.225-83 and R.225-88).

If the management fails to supply the above documents, any interested party may petition the court of competent jurisdiction to enjoin their production (*C.com.*, art. L.238-1).

Before each Annual Ordinary General Meeting of the Shareholders, n133 each shareholder has the right to consult and copy at the registered office or administrative office of the corporation certain corporate documents (*C.com.*, art. R.225-89), including, without limitation, the shareholders list on which is indicated each shareholder's name, address and shareholdings (*C.com.*, art. R.225-90). If the corporation has three hundred employees or more, a copy of the Report on Employment Conditions (*bilan social*) and the report of the Workers Representation Committee n134 thereon must

be sent to the shareholders in addition to the documents which must be furnished in connection with a General Meeting of the Shareholders. n135 At the commencement of each Meeting of the Shareholders, the Chairman of the Meeting must make available to the shareholders documents evidencing due compliance with the procedures relating to the holding of the meeting, such as a copy of the notices sent to the shareholders and Statutory Auditor(s), the duly signed attendance sheet, any proxies granted by shareholders, as well as copies of the text of the proposed resolutions and all reports submitted to the shareholders.

In connection with each Annual Ordinary Meeting of the Shareholders, the Board of Directors or Directorate must prepare and submit for the approval of the shareholders an annual report on the activities of the corporation during the past fiscal year and the financial statements relating thereto (*C.com.*, arts. L.225-100 and L.232-1). n136 If the corporation has joint or exclusive control over one or more subsidiaries, the Board of Directors or Directorate must also prepare consolidated accounts n137 and include in the annual report a discussion of the activities of the consolidated group (*C.com.*, art. L.233-16, L.225-100-2 and L.233-26). The annual report must specifically discuss the evolution of the business, results and financial situation of the corporation during the past fiscal year and management's projections of its future evolution, any acquisitions by the corporation of a controlling interest in a French company, the activities of and the profits or losses realized by the corporation and all of its subsidiaries broken down by branch of activity, the amount of dividends declared by the corporation during the past three fiscal years, and the manner in which any proxies granted by the Extraordinary General Shareholders Meeting to the Board of Directors or to the Directorate with regard to capital increases have been used (*C.com.*, arts. L. 225-100, L.225-100-1, L.232-6, L.233-6 and L.247-1; *C.com*., art. R.225-102). n138 In addition, the annual report must discuss the research and development activities of the corporation as well as the most significant events concerning the corporation which occurred between the end of the last fiscal year and the date of such report (*C.com.*, art. L.232-1). Moreover, the annual report must analyze the periodic reports prepared by management in which certain financial information is set forth (*C.com.*, art. L.232-3). n139 The annual report must also state the percentage of the corporation's registered capital which is held by employees of the corporation as of the last day of the fiscal year (*C.com.*, art. L.225-102). The remuneration paid to each member of management by the corporation and by any company controlling or controlled by the corporation, n140 as well as a list of management posts held and functions carried out by these members of management in other corporations, n141 must also be included in the annual report (*C.com.*, art. L.225-102-1). If the corporation is listed on a regulated market, the annual report must set forth the manner in which the corporation takes into consideration the social and environmental consequences of its business activity (*C.com.*, arts. L.225-102-1, R.225-104 and R.225-105). Where the SA is listed on a regulated market, the President shall attach to the annual report a report containing information relating to the composition, conditions of preparation and of organization of the Board's work, as well as the internal audit and risk management procedures (C.com, art. L.225-37). This report indicates whether the company refers to a corporate governance code, the limitations (if any) the Board has placed on the powers of the General Manager, and the methods of determining the members of management's remuneration. In addition to the annual report, the Board of Directors must prepare a special report on stock options granted or exercised during the past year (*C.com.*, art. L.225-184).

Once the shareholders have received the foregoing documents furnished in connection with a shareholders meeting, they may submit written questions concerning same or any other aspect of the corporation to the Board of Directors or Directorate; the latter must respond thereto during the shareholders meeting (*C.com.*, art. L.225-108).

[iii] The Right to Receive Certain Periodic Financial Information.

In order to increase the financial information provided to the shareholders of corporations, corporations are required to prepare, disclose and analyze certain financial information (*C.com.*, arts. L.232-2 and L.232-3).

[A] Corporations Obligated to Make Disclosures. The disclosure obligations described in Section 5.02[3][b][iii][B] *infra* must be respected by all corporations that have, at the end of a given fiscal year at least 300 employees or a net turnover equal to or greater than 18 million euros. (*C.com*., art. R.232-2). n142

A corporation which was obligated to make disclosures and which, for a period of two consecutive fiscal years, does not satisfy either the employee or net turnover thresholds, ceases to be obligated to make such disclosures (*C.com.*, art. R.232-2).

[B] Documents to Be Prepared and Disclosed. The Board of Directors or Directorate of those corporations which, pursuant to the rules set forth in *Section 5.02[3][b][iii][A] supra* , are obligated to make disclosures, must, within four months of the end of each semester, prepare a statement in which are set forth the current net assets of the corporation, excluding operating assets, and the liabilities of the corporation which are due and payable (*C.com.*, art. R.232-3). n143 In addition, the management of such corporations must prepare, in conjunction with the corporation's financial statements and no later than four months after the end of its fiscal year, a statement of financial position; they must also prepare a provisional financing plan and a provisional operating statement during the first four months of each fiscal year (*C.com.*, art. R.232-3). n144 The provisional operating statement must be revised and updated during the first four months of the corporation's second fiscal semester (*C.com.*, art. R.232-3).

The foregoing statements and plan must be commented upon in a report annexed thereto prepared by the corporation's Board of Directors (*C.com.*, art. L.232-3). If necessary, such supplementary information as is necessary to permit the comparison of the information set forth in such statements and plan with the corporation's financial statements must be included in the report annexed thereto (*C.com.*, art. R.232-5). In addition, if the accounting methods used for the preparation and/or presentation of the foregoing statements and plan are changed from one year to the next, the reasons for and the effect of such change must also be set forth in the reports (*C.com.*, art. R.232-5).

Within eight days of their preparation, the foregoing statements and the reports annexed thereto must be delivered to the corporation's Statutory Auditor(s), Workers Representation Committee and, if appropriate, Supervisory Board (*C.com.*, art. R.232-6). In the event that the foregoing statements and the reports annexed thereto are not prepared, or if the information contained therein appears to be questionable, the Statutory Auditor must, within one month, prepare a report in this regard and submit same to the Board of Directors or Directorate and the Workers Representation Committee; said report must also be submitted to the shareholders at their next meeting (*C.com.*, arts. L.232-3 and R.232-7).

[iv] Disclosures Made by Corporations Listed on a Regulated Market and Certain of Their Subsidiaries.

In addition to the above-mentioned general requirements, corporations listed on a regulated market, as well as their subsidiaries whose asset value or securities portfolio exceeds certain thresholds, are subject to additional requirements. n145 Specifically, listed corporations must make additional information available to the public on an annual basis and in connection with special events. A brief discussion of some of these additional requirements follows.

[A] Annual Disclosures Made by Corporations Listed on a Regulated Market. All corporations listed on a regulated market must publish in the appropriate legal newspaper the following documents relating to their most recent fiscal year under a legend which clearly indicates that such documents have not been verified by their Statutory Auditors:

1. the financial statements for their most recent fiscal year,

2. the proposed allocation of the profit or loss they realized during their most recent fiscal year, and

3. their consolidated financial statements, if they are available (*C.com.*, arts. R.232-9 and R.232-10).

In addition, such corporations must publish the following documents in the appropriate legal newspaper no more than forty-five days after the Ordinary General Meeting of the Shareholders whereat their financial statements for their most recent fiscal year were approved:

1. their most recent financial statements, as approved by their shareholders and verified by their Statutory Auditors,

2. the allocation of the profit or loss they realized during their most recent fiscal year, as approved by their shareholders, and

3. their consolidated financial statements, as verified by their Statutory Auditors (*C.com.*, art. R.232-11). n146

In addition, a corporation which is listed on a regulated market must:

1. within four months of the end of the fiscal year, prepare, publish and file with the *Autorite des Marches Financiers* (AMF) an annual financial report containing their annual financial statements and an annexed statement of the accounting treatment and proposed allocation of their distributable profits which will be submitted to their shareholders (*C.com*., art. L.232-7), their consolidated financial statements, the report of the Board of Directors or of the Directorate if any, the statement of the persons responsible for the annual financial report, and the Statutory Auditor's report (*C.mon et fin*., art. L.451-1-2 I, *General Regulations of the AMF*, art. 222-3),

2. within two months of the end of the first semester of each fiscal year, prepare and file with the AMF a report, which has been duly certified by its Statutory Auditors, containing their condensed financial statements for the preceding semester, an interim management report, a statement by the person responsible for the interim financial statements, and the Statutory Auditor's limited review report on the interim financial information (*C.mon et fin.*, art. L.451-1-2 III, *General Regulations of the AMF*, art. 222-4 through 222-6); this report shall also be published within four months of the end of the first semester of each fiscal year (*C.com.*, art. R.232-13), and

3. within forty-five days of the end of the first and third fiscal quarters, prepare and publish a quarterly financial report containing an explanation of the operations and events of the preceding quarter as well as the consequences of these operations and events on their financial situation, a general description of their financial situation and of the profit or loss realized, an indication of their net turnover during the preceding quarter and, if appropriate, during each of the preceding quarters of the current fiscal year, as well as the corresponding figures for the quarters of the preceding fiscal year; if the corporation prepares consolidated accounts, said report must indicate consolidated figures (*C.mon et fin.*, art. L.451-1-2 IV).

In addition to the foregoing obligations these corporations must file annually with the AMF a document containing all the information they were required by law or regulation to publish or make public during the last 12 months in any European Economic Area (EEA) or other country (*C.mon et fin.*, art. L. 451-1-1, *General Regulations of the AMF*, art. 222-7)

[B] Special Disclosures Made by Corporations Listed on a Regulated Market. A corporation whose securities are listed on a regulated market must inform the public forthwith of any inside information which, if known, could significantly affect the quotation price of its securities or related securities. n147 Such disclosure must be in the form of a *communique*. n148 Furthermore, where such corporation is in the process of preparing a financial transaction which could have a significant impact on the quotation price of its securities or the position and rights of the holders of such securities, it must inform the public forthwith of the characteristics of such transaction. n149 The information disclosed in France by a foreign corporation whose securities are listed must be identical to and provided at the same time as that provided abroad. n150

In each of the above cases, the AMF may order the corporation to publish information it deems useful for the protection of investors and the proper functioning of the market. n151 In the event the corporation fails to carry out such publication, the AMF has the power to publish the information itself. n152

The corporation and the AMF are informed by the members of management of their purchases and sales of the corporation's securities; the AMF so informs the public. n153 Moreover, any clause in an agreement which allows preferential terms and conditions to be applied to the sale and purchase of shares amounting to at least 0.5 percent of the capital or voting rights of the corporation must be submitted to the corporation, and to the AMF which informs the public thereof. n154 The corporation must draw up a list of all persons working for it who have access to inside information; it must regularly update this list and make it available to the AMF. n155 At the end of each month, the corporation must disclose on its website and transmit to the AMF the total number of voting rights and shares comprising the share capital if they have changed with respect to previously disclosed numbers (*C.com.*, art. L.233-8, *General Regulation of the AMF*, art. 223-16). The corporation must publish a *communique* within four months of the end of each fiscal year, setting forth the amount of fees paid to its Statutory Auditor(s). n156 Finally, if the company acquires shares which causes its aggregate shareholding to exceed applicable thresholds of the capital or voting rights of a company headquartered in France and listed on a European Economic Area regulated stock exchange, it must inform the AMF within five trading days after exceeding the applicable shareholding threshold (see generally *§ 14.01[4]* infra).

[c] Share Transactions.

[i] Methods of Transfer. All shares issued or to be issued in France are not represented by stock certificates; n157 instead, their existence is only evidenced by annotation in an account opened with the issuer or with a financial intermediary approved by the Ministry of Economy. n158 Where the shares are nominative, such account must be opened with the issuer; the latter may in turn elect to entrust a financial intermediary with the management of the account. Where the shares are in bearer form, the account must be opened with the issuer or a financial intermediary. Thus, shares in bearer form are not conveyed by simple transfer of possession and shares in nominative form are not conveyed by the execution and delivery of a share transfer form (*ordre de mouvement*) and the recording of such transfer in the stock registry (*registre des mouvements de titres*); instead, the transfer of shares is accomplished by the credit of the purchaser's account.

Reference should be made to *Sections 5.11[3]* and *13.03[5][c] infra* for a discussion of the rules governing a transfer of a substantial portion of the shares of a corporation and the tax consequences of such a transfer. n159

To facilitate transfers of small enterprises, a shareholder may under certain conditions rent his shares to an individual pursuant to a written rental agreement (*C.com.*, arts. L. 239-1 through L.239-5).

[ii] Share Transfer Restrictions.

[A] Restrictions on Negotiability. The negotiation of originally issued shares is impermissible unless the registered capital of the SA is accurately recorded in the Register of Commerce and Companies (*C.com.*, art. L.228-10). The shares issued in connection with a capital increase by a contribution of cash or by a capitalization of reserves are negotiable as of the realization of said capital increase. The negotiation of shares of an SA issued as consideration for a contribution in kind is prohibited where the contribution in kind is made at the time of incorporation, until the registered capital is accurately recorded in the Register of Commerce and Companies. Where the contribution in kind is made in connection with a capital increase, the shares are negotiable as of the realization of the capital increase. Failure to respect these restrictions, or the negotiation of shares before the required subscription payment has been fully paid in where required subjects management and the shareholders involved to penal sanctions (*C.com.*, arts. L.242-3 and L.242-21).

[B] Inalienability of Shares. The negotiability or the transfer by written contract of sale of the shares of an SA is subject to certain instances of "temporary inalienability" imposed either by law or by the Articles.

In addition, the Articles may limit the free transferability of the shares of the SA. Provision may be made requiring that the proposed transferee be acceptable to the corporation (*clause d'agrement*) (hereinafter referred to as an "Approval Clause"); provision may also be made granting to each shareholder the right of first refusal (*clause de preemption*) of any proposed transfer. While an Approval Clause makes the sale of shares of an SA subject to the approval of the corporation, a right of first refusal merely gives the shareholders of the SA the right to purchase the tendered stock. The use of one or the other is common in closely held corporations where the shareholders wish to assure the maintenance of control or a certain shareholding ratio.

Where a shareholder wishes to transfer all or part of his shares and such transfer is properly the subject of an Approval Clause, the shareholder must notify the corporation of the name and address of the proposed transferee, the number of shares to be transferred and the price to be paid therefor (*C.Com.*, art. L.228-24). The Articles must specify which management body is competent to give the consent of the corporation to the proposed transfer. The proposed transfer is deemed approved either upon:

1. the express consent of the corporation,

2. the failure of the corporation to respond to the notification of intent to transfer within three months of its receipt thereof, or

3. the failure of the corporation to cause the purchase of the tendered shares after it has refused to consent to the proposed transfer (*C.com.*, art. L.228-24).

If the corporation refuses to consent to a proposed transfer, it is obligated, within three months of such refusal, either to purchase the tendered shares itself and to proceed with a reduction of its registered capital or to cause such shares to be purchased by a shareholder or a third party acceptable to the corporation (*C.com.*, art. L.228-24). The purchase price to be paid by the corporation, shareholder or third party subsequent to the refusal of the proposed transfer may be established, absent agreement between the parties, by a court-appointed expert. n160 The would-be transferor may elect at any time to retain the shares he originally wished to transfer (*C.com.*, art. L.228-24). It is to be noted that any transfer conducted in violation of an Approval Clause contained in the Articles is deemed null and void (*C.com.*, art. L.228-23). Approval Clauses are normally without effect where shares are transferred by testate or intestate succession or among family members (*C.com.*, art. L.228-23).

Where the Articles provide for a right of first refusal, such Articles set forth the terms and conditions applicable to such right. For example, it is generally provided that the shareholder seeking to transfer his shares must notify the other shareholders or the Board of Directors of his intention, specifying the number of shares to be transferred, the price to be paid therefor, and often the name and address of the proposed transferee. The Articles delineate the notification procedure to be followed by shareholders seeking to exercise their right of first refusal. They may also place varying limitations on the particular shareholders qualified to exercise such right. For instance, the right of first refusal may be reserved to one or several shareholders named in the Articles, or priority may be given to shareholders with shareholdings below a certain threshold. If the shareholders fail to exercise their right of first refusal, the shareholder/transferor is free to sell his shares to the proposed transferee. Provision is usually made in the Articles requiring the shareholder/transferor in such case to sell to the proposed transferee at the same price, terms and conditions as proposed to other shareholders.

The right of first refusal granted by the Articles has been held enforceable in the event of a transfer among shareholders of the corporation. The right of first refusal provisions may also be contained in a shareholders agreement (*pacte d'actionnaires*).

[C] Restrictions on an SA Trading in its Own Shares. An SA may purchase its own shares:

1. in order to reduce its capital, n161

2. in connection with profit sharing or stock option plans, n162 or

3. in order to improve the financial management of its capital if the company is listed on a regulated or organized market. n163

Whether or not listed on a regulated market, an SA may purchase its own shares in connection with a reduction in capital only pursuant to specific authorization to do so given at an Extraordinary Meeting of the Shareholders (*C.com.*, arts. L.225-207 and L.225-209).

Moreover, whether or not listed on a regulated market, an SA may purchase its own shares in connection with profit sharing or stock option plans under the following conditions:

1. specific authorization to do so has been granted by an Extraordinary General Meeting of the Shareholders (*C.com.*, art. L.225-179),

2. the corporation would, as a result of such trading, hold no more than 10 percent of its shares nor of any given class of its shares (*C.com.*, art. L.225-210), and

3. the corporation has reserves, exclusive of statutorily required reserves, at least equal to the total value of all of its holdings of its own shares (*C.com.*, art. L.225-210).

An SA which is listed on a regulated market may also purchase its own shares representing no more than 10 percent of its registered capital in order to improve the financial management of its capital (*C.com.*, art. L.225-209). Specific authorization to do so must have been granted by an Ordinary General Meeting of the Shareholders and conditions (2) and (3) above, applicable to the purchase by a company of its shares for the purposes of a stock option plan, must have been fulfilled (*C.com.*, art. L.225-210). The Ordinary General Meeting determines the intended purpose of the stock purchase, the terms and conditions of the purchase, the maximum number of shares that may be acquired and the maximum amount of the transaction (*C.com.*, art. L.225-209). Shares purchased for purposes of a subsequent merger, spin-off or contribution may not exceed 5% of the SA's registered capital (*C.com.*, art. L.225-209).

In addition, the listed SA must inform the market, in advance, of its buy-back program. n164 An SA's trading in its own shares is presumed legitimate where it meets the conditions of the General Regulations of the *Autorite des marches financiers*. n165

The shares so purchased are stripped of their pre-emptive and dividend rights (*C.com.*, art. L.225-210); the shares are also stripped of their voting rights (*C.com.*, art. L.225-210). The shares may be cancelled only in reduction of the SA's capital (*C.com.*, arts. L.225-207 and L.225-209). n166 If the SA is listed on a regulated market, the shares may be disposed of to the SA's employees in connection with profit sharing or stock option plans; where the purchase of the shares by the SA is to improve the financial management of its capital, the shares may be transferred by any authorized means. (*C.com.*, art. L.225-209). Failure to respect the foregoing provisions relating to the purchase by an SA of its own shares subjects its management to fines (*C.com.*, art. L.242-24).

[d] Corporate Finance.

In this subsection will be grouped those topics touching on the financial life of a corporation. Specifically, mention will be made of:

1. methods of financing not entailing the issuance of common stock such as the issuance of preferred stock, debentures, etc.,

2. increases of capital,

3. reductions in capital,

4. amortization of capital, and

5. the impact of operating results on corporate capital.

To be sure, the possible permutations of the principles set forth below are too numerous to permit an exhaustive treatment of all possibilities; the following, therefore, is intended to be merely a discussion of the fundamental principles.

[i] Methods of Financing.

In addition to the issuance of common stock, the SA has four principal methods of obtaining the financial wherewithal needed for operations:

1. issuing preferred stock (*actions de preference*),

2. issuing debentures (*obligations*),

3. issuing securities coupled with a stock or debt security warrant (*valeurs mobilieres donnant acces au capital ou donnant droit a l'attribution de titres de creances*) and

4. taking out certain types of loans.

A discussion of these principal methods will be followed by a discussion of some of the debt/equity ratio considerations extant in France which might be relevant to and influence the method(s) of financing selected by the foreign investor.

[A] Preferred Stock. An SA may, upon incorporation or pursuant to due authorization granted at an Extraordinary General Meeting of the Shareholders, issue preferred stock (*actions de preference*) (*C.com.*, arts. L.228-11 through L. 228-20 and L.225-127). n167 Preferred stock may be issued with or without the right to vote, with certain special rights, either temporary or permanent, as defined in the Articles (*C.com.*, art. L.228-11). n168

The right to vote may be amended or suspended for a fixed or determinable period of time, or eliminated (*C.com.*, art. L.228-11). It is subject to the provisions of the Commercial Code, arts. L.225-10 and L.225-122 through L.225-125. n169 Non-voting preferred stock may not exceed one-half of the SA's registered capital, or one-quarter of said capital if the SA is listed on a regulated market (*C.com.*, art. L.228-11).

Special rights that preferred shareholders may be granted include the right to receive, before any dividends are paid to the shareholders of common stock, preferred dividends (*dividende prioritaire*). n170 If the SA does not have enough distributable profits to pay the complete amount of dividends owing to the preferred shareholders, the unpaid dividends may be cumulated and paid from future profits (*dividende cumulatif*). In addition to preferential dividend rights, preferred shareholders may have the right, in the event of the dissolution and liquidation of the corporation, to receive not only all unpaid dividends but also their complete distribution-in-liquidation before any distribution is made to common stockholders. Preferred shareholders may benefit from these special rights with regard to the SA itself, as well

as to its subsidiary or parent company (*C.com.*, art. L.228-13). n171 The share issuance must be authorized by the shareholders (acting at an Extraordinary General Meeting) of both the SA and the subsidiary or parent company in which the rights are exercised.

If authorized by the Extraordinary General Meeting and on the basis of a report prepared by the SA's Statutory Auditors and a report prepared by an auditor appointed by the Commercial Court (*Commissaire aux avantages particuliers*) in charge of verifying the advantages granted to the preferred shareholders, preferred stock may be redeemed by the corporation or converted to common stock or to another category of preferred stock (*C.com.*, arts. L.228-12 and L.228-14). n172 The terms and conditions of the redemption or conversion may also be set forth in the Articles (*C.com.*, art. L.228-12). In case of a conversion of preferred stock, the shareholders waive their preemptive right to subscribe to the shares resulting from the conversion (*C.com.*, art. L.225-132).

The preferred shareholders assemble, from time to time, at Special Meetings of the Shareholders. n173 Any decision of the common shareholders at a General Shareholders Meeting which would modify the rights of the preferred shareholders must be submitted for approval to a Special Meeting of the preferred shareholders (*C.com.*, arts. L.225-99 and R.228-16). The preferred shareholders may, acting at a Special Meeting, request one of the corporation's Statutory Auditors to prepare a report on the corporation's respecting of the special rights appurtenant to the preferred stock; the report is disseminated to the preferred shareholders at a Special Meeting (*C.com.*, arts. L.228-19 and R.228-22).

In the event of a merger or spin-off, the preferred stock may be exchanged either for shares of the Transferee Company which confer equivalent special rights, or in accordance with a special exchange parity which takes into account the special rights relinquished (*C.com.*, art. L.228-17). In the absence of an exchange for shares with equivalent special rights, the merger or spin-off may only be carried out with the consent of the preferred shareholders acting at a Special Meeting (*C.com.*, art. L.228-17).

[B] Debentures. An SA may issue negotiable debentures if all of its registered capital has been paid in; n174 in the event that the SA has not had its financial statements duly approved by its shareholders for at least two years, it must have its assets and liabilities audited in accordance with certain requirements prior to the issuance (*C.com.*, art. L.228-39).

The Board of Directors or the Directorate may authorize the issuance of debentures, unless the Articles have reserved this power to the Ordinary General Meeting or if the latter decides to exercise such power (*C.com.*, art. L.228-40). The Board may delegate this power to one or more of its members, to the General Manager, or with the latter's consent, to the Assistant General Manager(s) and the Directorate may delegate this power to its President or with his approval to one or more of its members, which have one year to conduct such issuance (*C.com.*, art.L.228-40).

If the placement of the debentures is not private, n175 it must be the subject of the appropriate formalities of publication, including, *inter alia*, the preparation and diffusion of a prospectus that has been approved by the *Autorite des Marches Financiers* (AMF). n176 Once the debentures have been placed, the debentureholders of each particular issue constitute a legal entity (*masse des obligataires*) and benefit from certain rights as a group (*C.com.*, art. L.228-46). First, the debentureholders may designate up to three representatives (*C.com.*, art. L.228-47) n177 who have the right, *inter alia*, to obtain all information made available to the shareholders (*C.com.*, art. L.228-55). n178 Second, as is the case with shareholders, the debentureholders have the right to hold general meetings (*assemblees generales*) from time to time pursuant to rules similar to those governing ordinary general meetings of the shareholders (*C.com.*, arts. L.228-57, L.228-64 through L.228-69). n179 Unlike the case of meetings of the shareholders, there is no requirement that meetings of the debenture holders be held at fixed intervals. Extraordinary General Meetings of the Debenture holders are held whenever the corporation proposes, *inter alia*, to change its corporate purpose, to transform itself into another type of company, n180 to merge, n181 to issue debentures having preferential rights or to take any other actions which might prejudice the rights of the debenture holders (*C.com.*, art. L.228-65). In certain instances, the refusal by the debenture holders to consent to the proposed transactions requires the corporation to offer to redeem the debentures;

n182 in other instances, the corporation may proceed with the proposed transaction subject to the rights of the debenture holders to commence legal proceedings to safeguard their interests. n183

The debenture holders also benefit from certain individual rights. Most important among these is the right to receive the agreed-upon interest, which interest may either be fixed for the life of the debenture or tied to the performance of the corporation. Interest is generally paid once a year; if the corporation wishes it may pay interest more frequently. The debentureholder also has the right to repayment of principal at the times and in the amounts specified in the debenture; the corporation may not redeem a debenture before its maturity date without the consent of the debenture holders unless specific provision therefor is made in the debenture (*C.com.,* art. L.228-75). If the corporation does redeem a debenture, it must immediately cancel it (*C.com.*, art. L.228-74).

The tax treatment of the issuance of debentures and the receipt of payments of principal and interest by the debenture holders will be *treated in Sections 13.02[3][b][ii][D]* and *13.04[2][a][vi][B] infra* . At this juncture, it suffices to note that payments of interest to both French and foreign debenture holders may be subject to withholding tax. n184

[C] Securities Coupled with a Stock or Debt Security Warrant. An SA may, if duly authorized by the shareholders at an Extraordinary General Meeting, n185 issue securities coupled with a stock or debt security warrant (***valeurs mobilieres donnant acces au capital ou donnant droit a l'attribution de titres de creances***) which entitle the holder thereof to subscribe to shares or debt securities issued by the SA (*C.com.,* arts. L.228-91 and L.228-92). The shareholders of the SA shall, in proportion to the amount of their shares, have a preemptive right to subscribe to such securities (*C.com.,* arts. L.228-91 and L.228-95).

An SA may issue securities coupled with a stock warrant entitling the holder to subscribe to shares of the SA's parent company (that directly or indirectly holds more than 50 percent of the SA's capital) or the SA's subsidiary (which is held directly or indirectly to the extent of more than 50 percent by the SA) (*C.com.,* art. L.228-93). The issuance of these securities must be approved by the Extraordinary General Meeting of the Shareholders of the SA and of the parent company or the subsidiary, respectively.

The SA is subject to certain measures aimed at protecting the rights of holders of securities coupled with a stock warrant. These measures govern the inability of the SA to modify its corporate purpose or the distribution of its profits, to transform itself into another type of company, to amortize its capital, or to create preferred stock that would result in such a transformation or amortization (*C.com.,* art. L.228-98). Protective measures must also be taken if the SA decides to issue new shares with preemptive rights for shareholders, to distribute reserves, or to modify the allocation of its profits through the creation of preferred stock (*C.com.,* arts. L.228-99 and R.228-87 through R.228-91).

In the event of a merger or spin-off, the holders of securities coupled with a stock warrant may exercise their rights in the Transferee Company(ies) (*C.com.,* art. L.228-101). Unless specific provision therefor is provided in the issuance contract, the holders of securities coupled with a stock warrant need not approve a Plan of merger or spin-off, nor can the SA mandate the redemption or reimbursement of such holders' rights (*C.com.,* art. L.228-101). Special rules apply regarding the exercise, as well as the suspension of the exercise, of the stock warrant. n186

[D] Loans.

[I] Shareholders Loans. Loans made by shareholders to an SA, in addition to raising the issue of permissible debt to equity ratio, present peculiar problems under French law. The interest paid on such loans is normally deductible by the corporation if the registered capital of the SA is fully paid in; n187 such deductions, however, are limited both in function of the interest rate charged and the identity of the lending shareholders. n188

[II] Subordinated Loans. An SA may take out a subordinated loan (*pret participatif*) from banks, insurance companies and, more generally, from any financial and commercial enterprise. n189 A subordinated loan is a special legislatively created type of debt financing which ranks above equity yet below all other debts in the liquidation of the

corporation; n190 in the event bankruptcy proceedings in the nature of rehabilitation are commenced, n191 the lender has no right to receive either payments of principal or interest during the pendency of the plan of rehabilitation. n192

As a result of the special nature of the subordinated loan, the debtor-corporation may consider the funds so loaned as equity for accounting purposes. n193

[III] Debt to Equity Ratio. As a general rule, the ability of a corporation to have a very high debt to equity ratio is determined by tax and business considerations.

[ii] Capital Increases.

The capital of an SA may be increased by an issuance of common or preference shares, by an increase in the par value of outstanding shares, or by the exercise of the rights appurtenant to securities coupled with a stock warrant (*C.com.*, art. L.225-127). The decision to increase the capital is within the sole competence of the shareholders assembled at an Extraordinary General Meeting (*C.com.*, art. L.225-129). n194 In the event new shares are to be issued, such issuance may in no event take place before:

1. the approval, if necessary, of such capital contribution by the Ministry of the Economy has been obtained, and n195

2. the payment of all or part of the subscription price therefor n196 and the payment of all of the issuance premium (*prime d'emission*) related thereto have been made (*C.com.*, art. L.242-17). n197

[A] Increase in Capital by Contribution of Cash. Where the capital increase is to be made by the issuance of shares in consideration of contributions made in cash, as opposed to in kind, the payment price for all stock already outstanding must be fully paid in before new stock may be issued (*C.com.*, art. L.225-131). n198 In addition, corporations not making public offerings which decide to increase their capital by making such an offering within two years of their incorporation must first cause a court-appointed expert appraiser to conduct an audit of all of their assets and liabilities.

All capital increases made in cash, by token of the resultant issuance of new shares, permit the exercise by the pre-existing shareholders of the corporation of their preemptive right to participate *pro rata* in such new issue (*C.com.*, art. L.225-132). n199 In the event that the corporation has issued preferred stock, n200 an Extraordinary General Meeting of the Shareholders thereof must also be held to determine the effect of the capital increase on the rights of the preferred shareholders (*C.com.*, art. L.228-16). n201 It is possible for an Extraordinary General Meeting of the Shareholders to waive preemptive rights (*C.com.*, arts. L.225-135 and L.225-138). n202 Such a decision to waive preemptive rights is usually taken to facilitate and simplify certain corporate transactions such as mergers, public offerings conversion of corporate debt into equity. In order for the shareholders to make an informed decision, both the Board of Directors or the Directorate and the Statutory Auditor are required to submit a report on various aspects of the capital increase, including the waiver of the shareholders' preemptive rights (*C.com.*, arts. R.225-114 and R.225-115).

Where the shareholders' preemptive right to subscribe to the new shares has been waived corporations making public offerings of their securities which would confer the same rights upon the new shareholders as upon the existing shareholders, must issue said new shares within five years of the Extraordinary General Meeting of the Shareholders whereat such issuance was authorized (*C.com.*, art. L.225-136). With regard to corporations whose shares are listed on a regulated market, the issuance price of the shares must be at least equal to the average weighted price quoted during the last three trading days, less a maximum of 5 percent (*C.com.*, arts. L.225-136 and R.225-119). However, subject to a limit of no more than 10 percent of the registered capital per year, the Extraordinary General Meeting may authorize the Board of Directors or the Directorate to set the issuance price in accordance with the terms and conditions established by the Extraordinary General Meeting. Where the corporation is unlisted, the issuance price or the conditions for setting

that price are determined by the shareholders acting at an Extraordinary General Meeting based on a report of the Board of Directors or the Directorate and a special report of the Statutory Auditor (*C.com.,* art. L.225-136). If the new shares do not confer the same rights on their holders as those conferred by the existing shares, in both listed and unlisted corporations, the same 5-year issuing period applies and the issuance price is determined by the Extraordinary General Meeting as above (*C.com.,* art. L.225-136).

Where the holdings of a shareholder do not confer upon him the right to subscribe to a round number of shares to be issued in connection with the capital increase, he is entitled to scrip (*rompus*). Inasmuch as it is impossible to hold a fraction of a share of a French corporation, the shareholders who receive scrip must negotiate the disposition thereof or the acquisition of additional scrip so as to have a round number of shares. Scrip is freely negotiable if the underlying shares giving rise to such scrip are themselves negotiable. If the underlying shares are not negotiable scrip issued in relation thereto may be transferred only by a written agreement of sale subject to a registration tax of 3 percent (*C. gen.imp.*, art. 726).

Whenever a corporation decides to increase its capital, a notice of such decision and a brief description of the terms and conditions of the capital increase must be communicated by registered letter to all nominative shareholders (*C.com.,* arts. L.225-142 and R.225-120). If the increase is to be made by a public offering or if not all the shares are in nominative form, an announcement must also be published in a special legal newspaper before the effective date of the offer to subscribe to the capital increase and, in addition, the corporation making a public offering must prepare and submit for the approval of the *Autorite des marches financiers* an offering prospectus (*C.com.,* arts. L.225-142, R.225-120, R.225-124, and R.225-125). n203

The shares constituting the capital increase may be subscribed for by the shareholders who exercise their preemptive rights (*souscription a titre irreductible*) and/or by other shareholders or third parties to whom unexercised preemptive rights were transferred (*C.com.,* art. L.225-132). n204 If expressly authorized by the Extraordinary General Meeting whereat the capital increase was approved or by the Board of Directors or Directorate if so delegated, the shareholders or the third parties to whom preemptive rights were transferred may subscribe to the capital increase above and beyond their *pro rata* share (*souscription a titre reductible*) by purchasing the stock reserved for shareholders who neither exercised nor transferred their preemptive rights (*C.com.,* art. L.225-133).

If all of the shares constituting the capital increase are not purchased either (i) by shareholders exercising their preemptive rights (*souscription a titre irreductible*) or by third parties to whom unexercised preemptive rights were transferred, or (ii) by shareholders or third parties to whom pre-emptive rights were transferred who subscribed to the capital increase above and beyond their *pro rata* share (*souscription a titre reductible*), the remaining shares may be subscribed for by the public as long as such has been expressly authorized by the Extraordinary General Meeting of the Shareholders whereat the capital increase was approved (*C.com.,* art. L.225-134). In addition, absent contrary decision by the shareholders at the Extraordinary General Meeting whereat the capital increase was approved, the Board of Directors or the Directorate may reduce the amount of the capital increase to the amount of the subscription actually received if such amount is at least equal to three-quarters of the amount of the proposed increase (*C.com.,* art. L.225-134).

In the event that one hundred percent of the shares (or three-quarters where applicable) constituting the capital increase are not subscribed for, the capital increase is normally vitiated. n205

If the capital increase is successful, its amount may be increased within 30 days by no more than 15 percent and at the same price (*C.com.* arts. L.225-135-1 and R.225-118).

No less than one quarter of the purchase price and all of the issuance premium must be paid in at the time of the subscription for the shares constituting the capital increase. The remainder of the subscription price must be paid in within five years of the date on which the capital increase becomes final (*C.com.,* art. L.225-144). Once the funds

constituting the capital increase made in cash have been received for and on behalf of the SA by a *notaire*, bank, authorized investment firm, or the *Caisse des depots et consignations* (*C.com.*, arts. L.225-5, and R.225-6), such depositary will issue a certificate attesting to the subscription and payment for all of the shares constituting the capital increase and the funds constituting the capital increase may be withdrawn by the corporation (*C.com.*, arts. L.225-144 and L.225-146). If the capital increase is not completed within six months of the opening of the subscription period, any subscriber may petition the Commercial Court for the annulation of the capital increase and the reimbursement of funds previously paid in (*C.com.*, art. L.225-144 and L.225-11). After the completion of the capital increase, the corporation must accomplish the appropriate formalities of publication. n206

As a general rule, registration tax is payable by the SA in connection with the capital increase. n207

[B] Capital Increase by Capitalization of Reserves. An SA may increase its capital by capitalizing reserves it has established, either voluntarily or as required by law. n208 Such reserves may be capitalized by increasing the par value of all outstanding shares or by conferring upon all outstanding shares the right (*droit d'attribution*) to receive additional shares of stock having the old par value. Unlike other methods of approval of an increase in capital, where the increase of capital is to be accomplished by the capitalization of reserves, the Extraordinary General Meeting of the Shareholders need only comply with the quorum and majority requirements for an Ordinary General Meeting of the Shareholders (*C.com.*, art. L.225-130). n209 In the event that the corporation has issued preferred stock, the Extraordinary General Meeting of the Shareholders must determine the effect of the capital increase on the rights of the holders of preferred stock (*C.com.*, art. L.228-16). n210

Where the holdings of a shareholder do not confer upon him the right to receive a round number of newly issued shares, he is entitled to scrip (*rompus*). n211 Shares issued in connection with an increase of capital by the capitalization of reserves are negotiable immediately upon the realization of the capital increase (*C.com.*, art. L.228-10).

This method of capital increase is subject to a registration tax of 375 euros, or 500 euros for companies with a registered capital of at least 225,000 euros. n212

[C] Increase in Capital by Contribution in Kind. A capital increase may also be accomplished by contributions to the capital of the SA made in kind. Unlike the case where capital contributions are made in cash, there is no requirement that all of the subscription price for all outstanding shares be paid in. The SA and the persons making the capital contributions in kind enter into a subscription agreement (*contrat d'apport*) wherein are set forth:

1. the nature of the contribution to be made,

2. the number of shares to be issued in consideration therefor,

3. the amount of the issuance premium, if any, to be paid (where the value of the shares to be issued exceeds their par value), and

4. any preferential voting or dividend rights attached to the shares to be issued. n213

As is the case with all contributions in kind, a court-appointed expert appraiser is appointed to ascertain the value of the assets contributed (*C.com.*, art. L.225-147); the report prepared by the expert appraiser must be placed at the disposal of the shareholders at the registered office of the SA no less than eight days before the Extraordinary General Meeting of the Shareholders at which the proposed capital increase is to be considered (*C.com.*, art. R.225-136). n214 The shares of any shareholder making a contribution in kind may not be taken into account for the determination of the quorum and the outcome of the vote at such Extraordinary General Meeting (*C.com.*, arts. L.225-147 and L.225-10).

Shares issued in connection with an increase in capital made by contributions in kind are negotiable as of the realization

of the capital increase (*C.com.,* art. L.228-10).

This method of capital increase is normally subject to registration tax. n215

[D] Increase in Capital by the Exercise of a Right Appurtenant to Securities Coupled with A Stock Warrant. The capital of an SA may also be increased upon the exercise of a right appurtenant to securities coupled with a stock warrant (*C.com.,* art. L.225-128).

[iii] Reductions in Capital. An SA usually decides to reduce its capital when it has suffered such serious losses that the amortization thereof by profits and the consequent possibility of declaring dividends n216 seem too uncertain. By specific statutory provision, any SA, the shares of which have a book value less than one half of its registered capital, may be required to reduce its capital (*C.com.,* art. L.225-248). Another common reason for the reduction in the capital of an SA is to encourage the investment of outside funds, for, if the SA has experienced losses so that its asset value is inferior to its registered capital (but not necessarily as low as one half thereof), a third party is unlikely to invest at par. Thus, it is commonplace to reduce the capital and to immediately thereafter increase it with "fresh money."

An SA may reduce its capital by the reduction of the par value of its shares or by the reduction in number of its outstanding shares. Where the method of reduction of capital is the reduction of the par value of the outstanding shares, all that need be done, after obtaining the appropriate approval of the shareholders assembled at an Extraordinary General Meeting based on a specific Statutory Auditor's report (*C.com.,* art. L.225-204), is to issue new share certificates indicating the lower par value. If the subscription price for certain shares has not been fully paid in, the amount owing by such shareholders is reduced accordingly. Where the method of reduction of capital is the reduction of the number of outstanding shares, either the shareholders gratuitously surrender a portion of their holdings to the corporation or the corporation redeems the necessary number of shares in order to cancel them. n217

Strict equality among the rights of the shareholders must be respected (*C.com.,* art. L.225-204). n218 Similarly, the corporation may not, by reducing its capital, place its creditors in a less advantageous situation. It is for this reason that where the reduction is not occasioned by losses, the creditors may, within the twenty days following the accomplishment of the appropriate formalities of publication of the decision taken by the SA to reduce its capital (*C.com.,* arts. L.225-205 and R.225-152), petition the Commercial Court for either the reimbursement of all outstanding debts or the establishment by the corporation of guarantees or other security devices. Until the court proceeding commenced by the creditors of the corporation has been terminated, the reduction of capital may not proceed. The Statutory Auditor(s) must submit to the shareholders at least fifteen days prior to the General meeting whereat the reduction is to be adopted a report on the terms, consequences and conditions of the reduction (*C.com.,* arts. L.225-204 and R.225-150).

The reduction of capital must be the subject of the appropriate formalities of publication. The reduction is subject to a nominal registration tax. n219

[iv] Amortization of Capital. An SA may, from time to time, make payments out of distributable profits n220 to all of the shareholders, or to all of the shareholders of any class of shares, in amortization of the distributions they would receive upon liquidation (*C.com.,* art. L.225-198). Such payments in no way affect the registered capital of the corporation nor the rights and duties of third parties vis-a-vis the corporation. If a share has been partially amortized, its right to First Dividends, n221 if any, and to distributions-in-liquidation is reduced *pro rata* (*C.com.,* art. L.225-199). Once a share has been completely amortized, however, it is deemed an *action de jouissance* and does not have the right to receive First Dividends or distributions-in-liquidation. An *action de jouissance* nonetheless enjoys all other rights including, without limitation, the right to vote.

[v] Operating Results.

The determination of the operating results of an SA must be carried out pursuant to the generally accepted accounting

principles of France. The general principle underlying the preparation of all financial documents in France, however, is that the financial document must represent with "sincerity" the true financial posture of the corporation. n222 At this juncture, only the accounting principles directly relating to the determination of profits/distribution of dividends and the treatment of losses will be addressed.

[A] Determination of Profits/Distribution of Dividends.

At each Annual Ordinary General Meeting of the Shareholders, which meeting must be held within six months of the close of the fiscal year, the financial statements and, if appropriate, the consolidated accounts of the corporation are submitted to the shareholders (*C.com.,* art. L.225-100). As a general rule, such financial statements must be submitted to the Statutory Auditor(s) no less than one month before notice is given of the Annual Ordinary General Meeting; consequently, the Board of Directors or Directorate must meet at least one month before such notice is given in order to close the books of the corporation and to prepare and to adopt the financial statements (*C.com.,* arts. L.232-1 and R.232-1). The report of the Statutory Auditor, together with the report of the Board of Directors or Directorate on the operations of the corporation during the past fiscal year, are presented to the shareholders. With reference to operating profits, provision is made for, *inter alia*, the creation of mandatory or voluntary reserves; once such provision has been made, distributable profits may be calculated and dividends declared.

[I] Reserves. An SA must establish a balance sheet entry entitled Legal Reserve (*reserve legale*) to which is credited five percent of the corporation's net after-tax profits for each fiscal year until such time as the aggregate Legal Reserve is equal to 10 percent of the registered capital of the corporation (*C.com.,* art. L.232-10). n223 In the event the corporation increases or reduces its capital, the required quantum of the Legal Reserve varies accordingly. In theory, the function of the Legal Reserve is to give an element of security to third parties dealing with the corporation, insuring a minimum level of solvency; consequently, the Legal Reserve may not be a source of dividends or other distributions, nor a source of funds used to redeem shares (*C.com.,* art. L.232-11). The Legal Reserve serves as a source of funds from which to pay the debts of the corporation only when all other sources are exhausted.

The Articles may require that certain other reserves must be created by the shareholders assembled at an Annual Ordinary General Meeting of the Shareholders. Said reserves may be used to offset losses or to increase the capital (*C.com.,* art. L.232-11). Moreover, the corporation may, pursuant to a decision by the shareholders assembled at an Ordinary General Meeting of the Shareholders, create such other reserves as it deems necessary and appropriate. Such latter reserves may serve to offset losses, to permit distributions to shareholders, to increase the capital or to redeem shares.

[II] Dividends.

[aa] General Rule. Dividends may only be declared out of distributable profits (*benefice distribuable*) which are equal to the net after tax profit. n224 *minus* any loss carry-forwards (*reports a nouveau deficitaires*) or allocations to reserves *plus* any profit carry-forwards (*reports a nouveau beneficiaires*) (*C.com.,* art. L.232-11) and special reserves created by the Articles or shareholder resolutions from which dividends may be declared.

Dividends may be declared only after the shareholders have approved the financial statements of the corporation for the past fiscal year and have determined the amount of distributable profits (*C.com.,* art. L.232-12). The only exception to this mandatory chronological sequence of events is the declaration by the corporation of interim dividends (*acomptes sur dividendes*) which may be declared from time to time during the fiscal year by the Board of Directors or Directorate if, after allowance is made for all reserves, loss carry-forwards or other charges, and, after taking into account all profit carry-forwards, the corporation has net profits, as reflected on an interim balance sheet duly certified by its Statutory Auditor(s), sufficient to pay the proposed interim dividends. n225

All persons who are shareholders as of the date of the declaration of the dividend normally have the right to receive same. If the Articles so provide, the corporation may reward shareholders who have held their shares in the SA for at

least two years with a higher dividend than that paid to shareholders not fulfilling such requirement (*C.com.,* art. L.232-14). n226 In such case, the ordinary dividend is increased by a special premium known as a *prime de fidelite* which may not exceed ten percent of the ordinary dividend; the rate of the *prime de fidelite* is fixed by the shareholders acting at an Extraordinary General Meeting. n227 *Primes de fidelite* may not be attributed to shareholders until after the close of the second fiscal year following the amendment of the Articles allowing for the payment of *primes de fidelite*.

Upon declaration, the dividend is deemed a corporate debt and may be attached, before payment, by creditors of the shareholders. In the event that the corporation fails to make timely payment of dividends duly declared, interest accrues thereon as a matter of law. n228 The right of any shareholder to receive dividends is revoked if he fails to make full payment for his shares within the required period (*C.com.,* art. L.228-29). n229 Dividends not claimed within five years of their declaration are paid to the State. n230

[bb] Stock Dividends. Each year, at the Ordinary General Meeting of the Shareholders convened in order to approve the financial statements of the corporation, the shareholders of an SA may authorize and direct the SA to offer to pay all or part of a dividend in shares of stock instead of cash if the shareholders are so authorized by the Articles of Incorporation and the price for all outstanding stock has been fully paid in (*C.com.,* arts. L.225-131 and L.232-18). Such offer must be made to all shareholders entitled to receive a dividend. The type or class of stock offered to each shareholder is the same, unless the shareholders decide to authorize an offer to pay a dividend consisting of the type or class of stock giving rise to the dividend.

Although the shareholders always fix the value of the stock offered for distribution as a dividend, the valuation rules are not the same for all corporations. For corporations listed on a regulated market, the per-share value fixed by the shareholders may not be less than 90 percent of the average stock market quotation of the SA's stock during the twenty days preceding the decision of the stockholders to authorize the offering of a stock dividend, as reduced by the net amount of the dividend declared (*C.com.,* art. L.232-19). n231 For all other corporations, the per-share value of the stock to be distributed is fixed either:

1. at the net book value of a share of the corporation before the declaration of the dividends, or

2. by an expert appointed by the court upon the petition of the Board of Directors or Directorate.

If a shareholder elects to accept the offer of a stock dividend, he must inform the corporation thereof within the time period fixed by the shareholders, which time period may not exceed three months (*C.com.,* art. L.232-20). n232 It is to be noted that if a shareholder elects to receive a stock dividend, he may not elect to receive in cash part of the stock dividend offered to him. Where the number of shares to which the shareholder is entitled is not an integral number, however, he may elect to receive cash from the corporation in an amount equal to his fractional share or, if authorized by the shareholders at the Ordinary General Meeting, to pay the necessary amount of cash to acquire one more share. n233

As a result of the payment of a stock dividend, the corporation must increase its capital. It is to be noted that such increase is deemed to be an increase in capital by contribution of cash. Registration tax is consequently imposed at a flat rate of 375 euros, or 500 euros for companies with a registered capital of at least 225,000 euros; n234 the rules governing the corporate formalities normally applicable to such an increase are, however, simplified (*C.com.,* art. L.232-20). n235 During the first meeting held by the Board of Directors or Directorate after the period during which the shareholders may elect to receive a stock dividend, the Board of Directors or Directorate must amend the Articles of the corporation to reflect the new registered capital of the corporation and the number of shares distributed.

[cc] First Dividends. Provision may be made in the Articles for a First Dividend (*premier dividende*) calculated in function of the subscription payments paid in and not reimbursed (*C.com.*, art. L.232-16). A First Dividend is, in effect, the payment of interest at a rate fixed in the Articles on the subscription payments. Such dividend, of course, may not be

paid unless the corporation has sufficient distributable profits. The utility of a provision calling for First Dividends is a means to assure minority shareholders of a "guaranteed" dividend and to thereby frustrate any attempt by the majority shareholders to assure the self-financing of the corporation by blocking the payment of dividends. It should be noted, however, that it is impermissible to make provision for fixed or guaranteed dividends in the absence of sufficient distributable profits (*C.com.*, art. L.232-15). While it is common practice to provide that First Dividends are not cumulative, the Articles may specifiy that such dividends may be cumulated from year to year.

[B] Losses. An SA that has suffered losses during any given fiscal year must either create a balance sheet entry for loss carry-forwards (*report a nouveau deficitaire*) or must offset same against reserves, including the Legal Reserve if all other reserves are exhausted. If the corporation adopts the first method, future profits must be set off against such loss carry-forward before the declaration of dividends. If the second alternative is chosen, future profits must be used to re-establish the Legal Reserve.

In the event the SA suffers losses causing its net asset value to fall below one half of its registered capital, the Board of Directors or Directorate must call an Extraordinary General Meeting of the Shareholders within the four months following the approval of the financial statements of the SA indicating such losses (*C.com.*, art. L.225-248). At such meeting, the shareholders must decide whether to dissolve the SA or to continue operations by taking remedial steps. n236 The appropriate formalities of publication must be respected in order to disclose the fact that the corporation has suffered such losses and the decision of the shareholders relating thereto. n237 Within two fiscal years, n238 the corporation must increase its net asset value to at least one half of its registered capital either by earning sufficient profits, by proceeding with a capital increase n239 or by writing off certain losses and simultaneously reducing its registered capital. n240 Once its net asset value has been so increased, the corporation should take the necessary steps to expunge the notation on the Register of Commerce and Companies that it had suffered such losses.

The failure to call an Extraordinary General Meeting of the Shareholders or to carry out the appropriate formalities of publication relating to such losses makes management subject to penal sanctions (*C.com.*, art. L.242-29). In addition, the failure to call such a meeting or to take the steps necessary to remedy the situation within two years permits any interested third party to petition the court for an order dissolving the corporation (*C.com.*, art. L.225-248) n241 and exposes management to civil sanctions where the failure to remedy the situation has harmed the corporation. n242

[4] Transformation of an SA into Other Corporate Forms

The transformation of an SA into another corporate form is a relatively infrequent occurrence. Such a transformation is prompted by the desire of the shareholders to adopt a less cumbersome structure, one which permits greater flexibility in areas such as the holding of shareholders meetings or the approval of financial statements or, alternatively, a structure which permits a registered capital inferior to the statutory minimum. Finally, transformation may also be prompted by losses necessitating a reduction of the capital of the corporation which causes its registered capital to fall below the minimum registered capital required by law. n243

An SA may be transformed into another corporate form, if, at the time of transformation, it has been in existence for at least two years and its shareholders have approved its financial statements for said years (*C.com.*, art. L.225-243). n244 After transformation, the corporation must be in compliance with the statutory provisions relating to the new corporate form. If all legal requirements are respected, the SA does not cease to exist as a legal entity and its contractual rights and obligations survive (*C.com.*, art. L.210-6). Importantly, certain tax disincentives arising out of the dissolution of a company (*e. g.*, taxation of the distribution of assets upon dissolution and liquidation) and the creation of a new company (*e.g.*, capital contribution taxes) n245 are normally avoided. n246 Nonetheless, a nominal registration tax must be paid on all transformations. n247

The decision to transform must be made by the shareholders yet the quorum and majority requirements vary in function of the corporate form to be subsequently adopted. In all cases, however, the shareholder decision may not be taken until

such time as the Statutory Auditors have prepared and submitted to the shareholders a report n248 setting forth, *inter alia*, that the net asset value of the SA is at least equal to the registered capital (*C.com.*, art. L.225-244). If the SA has issued debentures, the transformation must be approved at a General Meeting of the Debenture Holders (*C.com.*, art. L.225-244); if the debenture holders refuse to approve same, the transformation may proceed only if the SA offers to retire all outstanding debentures (*C.com.*, art. L.228-72).

[a] Transformation into a *Societe a Responsabilite Limitee.* An SA may be transformed into an SARL n249 "pursuant to the statutory conditions for the amendment of the Articles of this form of company" (*C.com.*, art. L.225-245); in other words, upon the affirmative vote of three-quarters of the capital of the corporation (*C.com.*, art. L.223-30). n250 In addition, the requirements for the creation of an SARL must be satisfied:

1. although there is no minimum registered capital for SARLs, the registered capital must be fully paid in,

2. the number of shareholders may not exceed one-hundred,

3. the activity of the SA must not be one which an SARL may not carry out (for example, insurance activities), and

4. the shares of the corporation must be transformed into non-negotiable form.

[b] Transformation into a *Societe en Nom Collectif.* An SA may be transformed into a *societe en nom collectif* (hereinafter referred to as an "SNC") n251 only pursuant to the consent of all of the shareholders (*C.com.*, art. L.225-245). Two specific requirements must be borne in mind before proceeding with such a transformation. First, all shareholders, because they will be subject to unlimited personal liability for the debts of the SNC, must have legal capacity to be Traders (*commercants*). n252 Second, if a husband and wife are shareholders of the SA, one spouse must dispose of his shares because spouses may not be co-partners of an SNC. If these requirements are not respected, the transformation is null. n253

[c] Transformation into a *Societe par Actions Simplifiee.* An SA may be transformed into a *societe par actions simplifiee* (hereinafter referred to as an "SAS") only with the unanimous consent of the shareholders (*C.com.*, art. L.227-3).

[d] Transformation into a *Societe en Commandite Simple* or a ***Societe en Commandite par Actions.*** An SA may be transformed into a *societe en commandite simple* (hereinafter referred to as an "SCS") n254 or a *societe en commandite par actions* (hereinafter referred to as an "SCPA") n255 pursuant to the affirmative vote of the shareholders assembled at an Extraordinary General Meeting; n256 in addition, all shareholders who are to be General Partners n257 must unanimously accept such position (*C.com.*, art. L.225-245). Again, all conditions precedent to the formation of an SCS or an SCPA must be satisifed as at the time of transformation.

[e] Transformation into a *Societe Civile.* An SA may be transformed into a *societe civile* n258 only upon the affirmative vote of all of the shareholders because, as a result of such transformation, the shareholders will be subject to unlimited personal liability for all of the debts of the corporation (*C.com.*, art. L.225-96). Again, all conditions precedent to the formation of a *societe civile* must be satisfied at the time of transformation.

[5] Dissolution/Liquidation of an SA

[a] Dissolution of an SA. An SA may be dissolved for any of a number of reasons, including the will of the shareholders, the end of its stated period of duration, the accomplishment of its corporate purpose, the satisfaction of a condition precedent contained in the Articles requiring dissolution, n259 dissolution in conjunction with bankruptcy proceedings n260 or dissolution due to the court-ordered cancellation of the corporate charter. n261 Other causes

leading to the dissolution of an SA are the reduction of the number of shareholders to less than seven, the reduction of the registered capital to less than the statutory minimum (*C.com.*, art. L.224-2), the existence of a net asset value of less than one half of its registered capital for a period of two fiscal years n262 (*C.com.*, art. L.225-248) or court-ordered dissolution. n263

The shareholders may voluntarily decide at an Extraordinary General Meeting to dissolve the SA (*C.com.*, art. L.225-246). If the corporation has issued debentures, the debenture holders may force the corporation to redeem all outstanding debentures before dissolution (*C.com.*, art. L.228-76); in addition, the corporation may obligate the debentureholders to tender their debentures for redemption.

If the number of shareholders of an SA falls below seven, the SA is not automatically dissolved; if, however, the number of its shareholders remains at that level for a period of one year, any interested party may petition the Commercial Court for the dissolution of the SA (*C.com.*, art. L.225-247). In the event that all of the shares of the corporation become the property of only one person, said person may declare the corporation dissolved at any time (*C.com.*, art. R.210-14). Where all of the shares are transferred to one person and in the case of a dissolution, all of the SA's assets and liabilities are automatically transferred to the sole shareholder; the company does not proceed to liquidation. n264

In the event that the SA reduces its capital to less than the statutory minimum, n265 the SA must, within one year, either increase its capital or transform itself into another form. n266 Failing which, any interested party may, after serving notice upon the management of the corporation, petition the court no earlier than two months after the service of such notice for the dissolution of the corporation (*C.com.*, art. L.224-2).

[b] Liquidation of an SA. As soon as the decision to dissolve the SA has been taken, the corporation is in liquidation (*C.com.*, art. L.237-2). n267 The corporation must thenceforth place the following legend after its corporate name: "*societe en liquidation*." In the absence of provision made in the Articles contemplating the grounds for liquidation, the Commercial Court may, acting upon the petition of shareholders representing at least 5 percent of the registered capital, the creditors of the corporation or a representative of the debenture holders of the corporation, declare a corporation in liquidation (*C.com.*, art. L.237-14).

The liquidation is carried out by one or more liquidators appointed either by shareholders representing a majority of the capital of the corporation, or, in the event that the dissolution of the SA is ordered by the Commercial Court, by such court (*C.com.*, arts. L.237-18 through L.237-20). The liquidator must carry out the formalities of publication (*C.com.*, art. L.237-3), marshal the assets of the corporation and pay all of its outstanding debts (*C.com.*, art. L.237-24). He may not continue the business dealings of the corporation, nor enter into new transactions without the express consent of the shareholders or the president of the Commercial Court that appointed him (*C.com.*, art. L.237-24). Only the liquidator may act for the corporation and the powers of management are annulled (*C.com.*, art. L.237-15). n268 The liquidator must, within the six months following his nomination, call a meeting of the shareholders at which he must present a report on the status of the corporation, the progress of the liquidation and the time necessary to complete the liquidation (*C.com.*, art. L.237-23). n269 Within three months of the close of each fiscal year of a corporation in liquidation, the liquidator must prepare an inventory of corporate assets, a profit and loss statement, an operating report and a report on the progress of the liquidation (*C.com.*, art. L.237-25). In addition, the liquidator must call a meeting of the shareholders of the corporation, pursuant to the provisions relating thereto contained in the Articles, within six months of the end of each fiscal year; at such meeting, the shareholders approve the financial statements and reappoint, if necessary, the Supervisory Board, if any, and Statutory Auditor(s) of the corporation (*C.com.*, art. L.237-25).

Once all corporate debts and all shareholders benefiting from special distribution rights have been paid (*C.com.*, art. L.237-29), the liquidator has the authority to distribute corporate assets to the shareholders (*C.com.*, art. L.237-31). n270

Upon the termination of the liquidation, the liquidator must call a meeting of the shareholders to approve the liquidation and to declare the corporation definitively liquidated (*C.com.*, art. L.237-9). After such meeting, the corporation ceases to exist as a legal entity (*C.com.*, art. L.237-2).

The liquidator is compensated pursuant to the decision of the court or the shareholders appointing him (*C.com.*, art. R.237-14). The liquidator is liable to the corporation, shareholders or any third party that has suffered damages because of his intentional or negligent acts or omissions (*C.com.*, art. L.237-12). Penal sanctions may also be imposed on the liquidator in certain instances, for example, in the event of his intentional misuse of corporate funds (*C.com.*, arts. L.247-7 and L.247-8).

[II] Corporation--*Societe par Actions Simplifiee*

The *societe par actions simplifiee* (hereafter "SAS") is a limited liability company which is principally used by large industrial enterprises as the corporate vehicle for holding companies and joint ventures both on a national and international level. One of the major advantages of the SAS is its flexibility and the wide latitude it offers to its shareholders with respect to corporate organization. Subject to a limited number of legal requirements, the SAS is primarily governed by the terms and conditions of its Articles of Incorporation. The legal requirements to which the SAS is subject are: the general principles set forth in the Civil Code (Articles 1832 through 1844-17); the special rules applicable to SASs set forth in the Commercial Code; and, to the extent they are compatible with the special rules applicable to SASs, the provisions of the Commercial Code regulating *societes anonymes* with the exception of Articles L.225-17 through L.225-126 relating to management and shareholders' decisions (*C.com.*, art. L.227-1) n271 and Article L.225-243 relating to the transformation of a *societe anonyme* into other corporate forms. Inasmuch as the provisions applicable to *societes anonymes* are discussed at length in *Section 5.02 supra* , the following text will focus on those aspects of the SAS which differ from the *societe anonyme*.

[a] Incorporation of an SAS

An SAS may be formed *ex-nihilo* or via the transformation of an existing company as long as such transformation is unanimously approved by the shareholders of the existing company and the latter is in compliance with the requirements relating to SASs at the time of the transformation (*C.com.*, art. L.227-3).

[i] Name

The name of an SAS preceded or followed by the words *societe par actions simplifiee* or the initials "SAS" and a statement of the company's registered capital must appear on all documents issued by the company and destined for third parties.

[ii] Shareholders

Companies or individuals may be shareholders of an SAS (*C.com.*, art. L.227-1). n272 An SAS may be formed with as little as one shareholder. n273 Moreover, since the SAS is in essence a closely-held company, it is prohibited from making public offerings (*C.com.*, art. L.227-2). The violation of the prohibition against public offerings can subject the President or any person performing management duties on a *de facto* or *de jure* basis to a fine of 18,000 euros (*C.com.*, arts. L.244-3 and L.244-4).

[iii] Registered Capital

No minimum registered capital is required. Its amount shall be determined by the Articles (*C.com.*, art. L.227-2). It need not be fully paid in at the time of the incorporation of the SAS, and therefore may be paid in in the same manner as that applicable to *societe anonymes*. n274

[b] Management

The organization of management is freely determined in the Articles of the SAS (*C.com.*, art. L.227-5). The only management body of the SAS which is required by law is the President n275 who is appointed to represent the company in its dealings with third parties (*C.com*, art. L.227-6). n276 A company or other legal entity may be appointed President. n277 The Articles determine the procedure for appointing n278 and removing the President as well as his term of office and the renewal thereof. The President's remuneration may be specified in the Articles or left to a vote of the shareholders. The powers of the President to act for and on behalf of the company are plenary limited only by the corporate purpose (*C.com.*, art. L.227-6). He binds the company even by actions outside of the corporate purpose unless it can be shown that the third party in question knew or under the circumstances could not have been unaware that the act of the President was not within the corporate purpose. n279 In addition, the limitations imposed upon the powers of the President by the Articles are not enforceable against third parties (C.com., art. L.227-6).

In the event that the management duties are not to be conducted solely by the President, the Articles determine the nature and number of management bodies to be established. For example, the Articles can provide for a body comparable to the board of directors or directorate of a *societe anonyme*, or any other type of board or committee with proposal, decision-making or veto powers. The minimum and maximum number of members of management as well as the procedure for appointing n280 and removing them, their terms of office and the renewal thereof, and their remuneration may be fixed by the Articles. A legal entity may be a member of management of an SAS.

The Articles also set forth the organization of management meetings such as the manner in which they are called, quorum requirements, place and frequency of meetings, voting majority, and proxy rules. Unlike the case of the President, the powers of the other members of management are not specifically provided by statute. Consequently, the powers of the members of management may be specified in the Articles or may be the result of a shareholder decision or delegation of powers by the President. n281 The allocation of powers among the various members of management as well as the division of management positions among the different shareholder groups may also be included in the Articles.

[c] Liability of Management

The President and the other members of management, if any, of the SAS are subject to the same rules governing civil liability as the members of the board of directors or directorate of a *societe anonyme* (*C.com.*, art. L.227-8); with respect to criminal liability, the President and other members of management are subject to the same penalties as the president, directors and general manager of a societe anonyme (C.com., art. L.244-1). n282 Moreover, it should be noted that in the event that a legal entity is the President or member of management of the SAS, the officers and directors of such legal entity are jointly and severally liable with the legal entity (*C.com.*, art. L.227-7).

[d] Statutory Auditors

The SAS must have one or more Statutory Auditor(s) if two of the following thresholds are met:

1. the sum of the net values of its assets is greater than 1,000,000 euros,

2. its pre-tax turnover is greater than 2,000,000 euros, or

3. it employed during the fiscal year an average number of employees which exceeded fifty (*C.com.*, arts. L.227-9-1 and R.227-1).

The SAS which controls or is controlled by one or more legal entities is also subject to this requirement (*C.com.*, art. L.227-9-1).

Even if the foregoing criteria are not attained, one or more shareholders of the SAS that hold, in the aggregate, at least 10 percent of its registered capital may petition the Commercial Court for an order appointing a Statutory Auditor and an Alternate Statutory Auditor (*C.com.*, art. L.227-9-1).

The Statutory Auditor's principal function is to ensure that the company complies with certain provisions of applicable corporate law, and to certify the fairness and accuracy of the financial statements of the company as well as the accuracy of all financial data submitted to the shareholders (*C.com.*, art. L.823-9 and L.823-10). He must apply specific professional rules of certification of the financial statements (*C.com.*, arts. L.823-12-1 and A.823-27-1). The Statutory Auditors are appointed by the shareholders (*C.com.*, art. L.227-9). The rules governing the number of Statutory Auditors that must be appointed, as well as their powers, remuneration and liability are the same as those that apply to Statutory Auditors of a *societe anonyme*. n283 The criminal sanctions applicable to certain violations committed by the Statutory Auditors of a societe anonyme also apply to the Statutory Auditors of an SAS (*C.com.*, art. L.244-1).

[e] Agreements Between Management and the SAS. As a general rule, agreements may be entered into by the SAS, directly or indirectly, with its President or one of the other members of its management where such agreements relate to the "normal operations" of the SAS and are entered into upon "normal terms" (*C.com.*, art. L.227-11). n284 Where, however, an agreement is entered into by the SAS with the President, a member of its management, one of its shareholders holding more than 10 percent of the voting rights, or the company controlling such latter shareholder, directly or indirectly, which is not within the normal scope of the company's activities or which is not at arm's length, such agreement must be submitted to the shareholders (*C.com.*, art. L.227-10). Although such agreements are not legally subject to the shareholders' prior approval, the Statutory Auditor or if no Statutory Auditor has been appointed, the President, prepares a report on said agreements and submits same to the shareholders for approval. Any agreement which is not approved by the shareholders is effective; however, the interested party and eventually the President and other members of management must bear the financial consequences thereof to the company (*C.com.*, art. L.227-10). Notwithstanding the above, there is a total prohibition against the SAS making any loan, granting any overdraft protection for, or otherwise securing obligations owing to third parties by the President or other members of management of the SAS if these persons are individuals and not corporations (*C.com.*, arts. L.227-12 and L.225-43).

[f] The Functioning of the SAS.

[i] Shareholder Decisions. Great flexibility is accorded to the form that shareholder decisions may take and the conditions applicable to the making of such decisions (*C.com.*, art. L.227-9). In particular, the Articles determine the manner in which decisions that require shareholder approval are to be taken, *e.g.*, through actual formal meetings, written consultation or any other medium such as videoconferencing. If actual meetings are to be held, the Articles set forth the rules governing the convening of such meetings, quorum requirements, proxy rules and the information that must be furnished to the shareholders in connection with the meeting. The Articles may decide that certain decisions must be taken at an actual formal meeting.

While the Articles are free to determine the person(s) competent to make decisions (*e.g.*, they may provide that certain decisions may only be made by shareholders of certain classes of stock, or that veto power may be given to certain persons within or outside the company, such as a banker or important customer, decisions relating to the following, deemed essential, may only be made by the shareholders: increases or reductions in capital and redemptions of shares, mergers, spin-offs or partial spin-offs, dissolution, transformation into another corporate form, the annual financial statements and profits, and the appointment of the Statutory Auditors (*C.com.*, art. L.227-9).

The Articles may determine the allocation of the voting rights among the shareholders. For example, they may provide that different classes of stock have different voting rights, that certain shares shall have multiple voting rights, or that specific shares shall have no voting rights. Importantly, unlike in the case of a *societe anonyme*, voting rights need not be proportionate to the equity interest held by the respective shareholders.

Although the Articles may establish the voting majority required for most types of decisions, a unanimous vote of the shareholders is necessary to adopt or modify the Articles where the following are concerned: a temporary non-transferability clause (*clause d'inalienabilite temporaire*); an approval clause (*clause d'agrement*); a squeeze-out clause (*clause d'exclusion*); or the suspension of a shareholder's voting rights or a shareholder's exclusion following a change in control over the shareholder (C.com., art. L.227-19). n285 Absent contrary provision in the Articles, a unanimous vote of the shareholders is also required with respect to the appointment and renewal of a liquidator in the event of the SAS's dissolution (*C.com.*, art. L.237-18), the approval of the financial statements in the event of the SAS's liquidation (*C.com.*, art. L.237-27), the amendment of the Articles, and the extension of the SAS's duration (C.civ., art. 1836). Where the SAS has only one shareholder, shareholder decisions must be taken by him (*C.com.*, art. L.227-1); he may not delegate his powers (*C.com.*, art. L.227-9). All decisions made by the sole shareholder are recorded in a special register established for said purpose. The President of the SAS establishes the financial statements and prepares the management report; n286 the sole shareholder approves the financial statements subsequent to the submission of the report of the Statutory Auditor, if any, and within six months of the close of the fiscal year. When the sole shareholder is the sole manager of the company, the filing with the clerk of the inventory list and the executed financial statements is deemed an approval of the SAS's financial statements (*C.com.* art. L.221-9). Any action taken in violation of the aforementioned rules may be declared void upon the petition of any interested party.

[ii] Shareholder Control

Shareholders of an SAS wishing to assure the maintenance of control, a certain shareholding ratio or shareholding stability may insert specific clauses to this effect in the Articles. Unlike in the case where these clauses are inserted in an undisclosed shareholders' agreement, their inclusion in the Articles themselves renders them enforceable against third parties. The clauses expressly referred to in the section of the Commercial Code relating to SASs are discussed below. n287

[A] Temporary Non-Transferability Clause (*Clause d'Inalienabilite Temporaire*)

If specified in the Articles, the shares of an SAS may be subject to a period of "temporary inalienability" (*C.com.*, art. L.227-13). Such period may not exceed ten years. The Articles are free to provide, for instance, that the inalienability shall cover all shares of all shareholders with respect to all types of share transfers, or that it shall only apply to certain shareholders, transferees or third parties, or to only certain types of transfers. Any transfer of shares in violation of the non-transferability clause is null and void (*C.com.*, art. L.227-15). n288

[B] Approval Clause (*Clause d'Agrement*)

The Articles may limit the free transferability of the shares of the SAS: provision may be made requiring that the proposed transferee be acceptable to the SAS (*C.com.*, art. L.227-14). This clause may cover all types of transfers, including transfers between shareholders. The Articles should specify whether the President, shareholders, management or other body is competent to give the company's consent to the proposed transfer. Any transfer of shares in violation of the approval clause is null and void (*C.com.*, art. L.227-15).

If the SAS refuses to consent to a proposed transfer, the rules for determining the purchase price to be paid to the shareholder/transferor by the company, or by a shareholder(s) or third party acceptable to the company, are included in the Articles. If the Articles do not set forth such rules, the purchase price may be established by mutual agreement of the parties or by a court-appointed expert (*C.com.*, art. L.227-18). n289 Where the shares are repurchased by the company itself, the company must either transfer them within six months or cancel them.

[C] Squeeze-Out Clause (*Clause d'Exclusion*)

The Articles may include a squeeze-out clause pursuant to which a shareholder can be compelled to transfer his or her

shares (*C.com.*, art. L.227-16). Where such a clause is set forth in the Articles, the latter must determine the conditions under which the squeeze-out clause will apply, *e.g.*, the organ (*e.g.*, all of the shareholders or only a certain group of shareholders) which is competent to make the decision; the information to be supplied to the shareholder concerned as well as to the other shareholders prior to the transfer; and the means by which the concerned shareholder can exercise his right to be heard. n290 The Articles can provide that if a shareholder refuses to transfer the shares once required to do so, the company can suspend the voting rights attached to such shares. The means of determining the price to be paid to purchase the excluded shareholder's stock may be contained in the Articles, failing which they may be determined by mutual agreement of the parties or by a court-appointed expert (*C.com.*, art. L.227-18). Where the shares are repurchased by the company itself, the company must either transfer them within six months or cancel them.

[D] Change in Shareholder Control

Provision may be made in the Articles to deal with a change in control over an existing shareholder. Specifically, a shareholder can be required to immediately inform the company if control over that shareholder changes within the meaning of art. L.233-3 of the Commercial Code (*C.com*., art. L.227-17). n291 The company may be authorized by the Articles to suspend the voting rights of said shareholder or expel it from the SAS. The rules relating to a change in control also apply in the event a shareholder is replaced by a new shareholder as a result of a merger, spin-off or dissolution.

The means of determining the price to be paid to purchase the excluded shareholder's stock may be contained in the Articles, failing which they may be determined by mutual agreement of the parties or by a court-appointed expert (*C.com.*, art. L.227-18). Where the shares are repurchased by the company itself, the company must either transfer them within six months or cancel them.

[g] Employee Representation.

If the employees of the company have elected a Workers Representation Committee, the Articles must specify the corporate organ which shall be responsible for providing the representatives of the Workers Representation Committee with the information concerning the company that they are entitled to receive. n292

[h] Dissolution and Liquidation of an SAS

The provisions of the Commercial Code regulating the dissolution and liquidation of *societes anonymes* discussed in *Section 5.02 supra* are compatible with the SAS.

[i] *Societe par Actions Simplifiee Unipersonnelle*

The societe par actions simplifiee unipersonnelle (hereafter "SASU") is a particular form of SAS in which there is only one shareholder--who is not necessarily the manager--since the time the SASU was formed or as a result of a factual transformation of an SAS: changes in the number of shareholders cause the SAS to become "unipersonnelle" without implying a legal transformation of the corporate entity. A regular liquidation will be conducted if the sole shareholder is an individual in application of the normal rules of French corporate law: the legal entity will subsist for purposes of the needs of the liquidation (*C.com*, art. L.237-2).

While principally governed by the rules applicable to SASs, the SASU is subject to some particular legal requirements.

First, the annual financial statements prepared by the President must be approved by the sole shareholder himself; his decision must be listed in a register (*C.com.*, art. L.227-9). Furthermore, agreements entered into directly or indirectly by the SASU with its manager must be listed in the register though no intervention by the Statutory Auditor is necessary (*C.com.*, art. L.227-10).

Lastly, the dissolution process of the SASU depends on the legal nature of the sole shareholder

If the sole shareholder is a legal entity, the dissolution will not be followed by a liquidation but rather by a universal transfer of capital in application of article 1844-5 of the Civil Code. The dissolution thus leads to the appropriation by the legal entity of all assets and liabilities of the dissolved SASU. Creditors may object to the dissolution by petitioning the appropriate court within thirty days of its publication in application of article 1844-5 al. 3 of the Civil Code. During such period, the company is represented by the president or a manager. Said representative is in charge of the current management of the company, the legal representation of the company, the closing of the accounting situation of the assets to be transferred to the sole shareholder, the recording of the effective date of such transfer, and the termination of the legal entity and accomplishment of all necessary formalities of publication.

A regular liquidation will be conducted if the sole shareholder is an individual in application of the normal rules of French corporate law: the legal entity will subsist for purposes of the needs of the liquidation (C.com, art. L.237-2).

FOOTNOTES:

(n1)Footnote 1. *See § 5.02[3][c][ii] infra* (share transfer restrictions).

(n2)Footnote 2. Reference should be made to *§ 3.02[2] supra* , for a detailed discussion of the rules governing Treasury Department declarations and clearances.

(n3)Footnote 3. The clerk of the Commercial Court or the CFE issues a filing receipt (*recepisse*) stating *"en attente d'immatriculation"* (registration pending) as soon as the completed registration application is filed. C.com., art. L.123-9-1. This receipt, valid for no more than one month, allows the SA-in-formation to enter into certain contracts (e.g., electricity, telephone service). The receipt does not authorize withdrawals of paid-in capital.

(n4)Footnote 4. *See § 17.05 infra.*

(n5)Footnote 5. Such verification may be conducted at the *Institut National de la Propriete Industrielle* (I.N.P.I.), 26 bis rue de Saint Petersbourg, 75008 Paris, www.inpi.fr. Such verification usually takes two weeks to complete.

(n6)Footnote 6. Period starts to run at time of registration. *C.com.*, art. R.210-2. The duration of the corporation may be extended for periods not to exceed ninety-nine years. *Id.*

(n7)Footnote 7. *See § 5.02[1][e] infra*.

(n8)Footnote 8. *But see, C.com.*, art. L.225-7 (where there is a public offering of the shares of the SA, the first members of management and the first Statutory Auditor(s) are appointed at the first meeting of the shareholders); *see generally § 5.02[2][c]* infra.

(n9)Footnote 9. *Decree No. 78-704 of July 3, 1978*, art. 6(2).

(n10)Footnote 10. *C.com.*, art. L.210-6.

(n11)Footnote 11. *See § 5.02[1][a][vii] supra*.

(n12)Footnote 12. *See § 2.03[1] supra* .

(n13)Footnote 13. *See § 11.06 infra* (land-use restrictions).

(n14)Footnote 14. A document signed *sous seing prive* is a legally binding instrument signed by the parties thereto. It is the equivalent of any signed document in common law jurisdictions; the importance of this concept in civil law jurisdictions is the absence of the intervention of a *notaire*. *See § 2.03[1] supra*.

(n15)Footnote 15. *Decree No. 55-22 of January 4, 1955*, art. 4.

(n16)Footnote 16. *See § 5.02[1][g]*.

(n17)Footnote 17. *See § 2.01[1][d][i][A][III] supra*.

(n18)Footnote 18. The publication in the BODACC is effectuated by the clerk of the *Tribunal de commerce.*

(n19)Footnote 19. *C. ent. sej. etr*., arts. L.313-10, L.121-1 and R.313-16, and *C.com*. arts. L.122-1 and D.122-1. *See § 3.03* supra.

(n20)Footnote 20. *C. gen. imp.*, ann. IV, art. 23 A.

(n21)Footnote 21. *See § 13.06 infra.*

(n22)Footnote 22. *C. gen. imp.*, art. 286, I.

(n23)Footnote 23. *Law No. 94-126 of February 11, 1994*, art. 2, [1994] J.O. 2493; *C.com.*, arts. R..123-5 and R.123-9.

(n24)Footnote 24. It should be noted that in order to reduce the filing time, a corporation may directly file a declaration with the Register of Commerce and Companies; in this case, the Clerk of the Commercial Court transmits the file to the Corporate Formalities Center. *C.com.*, art. R.123-5.

(n25)Footnote 25. *Id.*, arts. R.123-8 and R.123-20.

(n26)Footnote 26. The name of the owner of the shares must be noted in the stock holding account. *C.com.*, art. L.228-1. *C.mon. et fin.*, art. L.211-4. See also *C.com.* art. L.228-2 on the identification of holders of bearer shares. Special provisions apply where the owner of the shares is a non-resident of France and the shares are listed on a regulated market. *C.com.*, arts. L.228-1 through L.228-3-4.

(n27)Footnote 27. *See § 5.02[2][a] infra.*

(n28)Footnote 28. *See § 5.02[2][b] infra.*

(n29)Footnote 29. *See § 5.10[4][a] infra.*

(n30)Footnote 30. *C. ent. sej. etr.*, arts. L.313-10 and R.313-16, and *C.com.* arts. L.122-1 and D.122-1. *See § 3.03 supra.*

(n31)Footnote 31. Membership in a Board of Directors or Supervisory Board of a corporation which is controlled by a corporation on whose Board of Directors or Supervisory Board an individual serves is excluded for purposes of such limitation. *C.com.*, arts. L.225-21 and L.225-77. Memberships in Boards of Directors or Supervisory Boards of corporations which are unlisted and which are controlled by the same corporation (sister companies) only count as one appointment, subject to a total limit of five. *Id.*

(n32)Footnote 32. For purposes of this provision, an individual who is both a member of the Board of Directors and the General Manager of a corporation is deemed to hold only one management post. *C.com.*, art. L.225-94-1. Moreover, an individual who is a General Manager, member of the Directorate or Sole General Director of a corporation may hold an unlimited number of directorships or Supervisory Board memberships in companies controlled by the corporation for which he performs his duties. Id.

(n33)Footnote 33. *See § 12.02[3] infra.*

(n34)Footnote 34. *Ordinance No. 45-2138 of September 19, 1945*, art. 22, [1945] Gaz. Pal. II 306.

(n35)Footnote 35. No *avocat, see § 2.03*[2-3] *supra*, may serve as a Director unless he has been licensed to practice for seven years. The Bar may grant an exemption for a portion of this seven-year period. *Law No. 71-1130 of December 31, 1971*, art. 6.

(n36)Footnote 36. Following a merger or spin-off, however, the Directors may be appointed at an Extraordinary General Meeting of the Shareholders. *C.com.*, art. L.225-18; *see § 5.11[4] infra* (corporate reorganizations).

(n37)Footnote 37. No more than one-third of the total number of Directors may have an employment contract with the corporation. *C.com.*, art. L.225-22. In the event of a merger of two corporations, during the three years following the merger, the surviving corporation may keep a maximum of twenty-four directors. *See § 5.11[4] infra* (mergers). *C.com.*, art. L.225-95.

(n38)Footnote 38. It should be noted however, that the inclusion of such a provision in the Articles of Incorporation is not mandatory.

(n39)Footnote 39. This condition does not apply if, at the date of the election, the corporation or its direct or indirect subsidies has been incorporated for less than two years.

(n40)Footnote 40. *C.com.*, art. R.123-105.

(n41)Footnote 41. Abstentions are deemed to be votes against a proposed resolution. In the event of a tie vote, the President has the power to break the tie unless otherwise provided in the Articles. *C.com.*, art. L.225-37.

(n42)Footnote 42. Meetings are called in such manner and at such times as are specified in the Articles. *C.com.*, art. L.225-36-1.

(n43)Footnote 43. While a Director has the right to give a proxy to another Director, no one Director may hold more than one proxy. *C.com.*, art. R.225-19. A proxy may be given by e-mail.

(n44)Footnote 44. *See § 12.06[4] infra.*

(n45)Footnote 45. *C. trav*., arts. L.2323-79 and L.2323-62.

(n46)Footnote 46. Normally, it is the President that calls a meeting of the Board of Directors; exceptionally, however, at least one third of the Directors may fix the agenda for a meeting of the Board of Directors and request the President to call such meeting if the Board of Directors has not met for two months. Where the President is not responsible for carrying out the actual management of the corporation, the General Manager may also fix the agenda and request the President to call a meeting. The President may not refuse these requests. *C.com.*, art. L.225-36-1. It should be noted that if so provided in the Board of Directors' internal regulations and if not prohibited by the Articles, the Board of Directors meetings may be held (except with respect to certain resolutions) by videoconference. *C.com.*, art. L.225-37 and *C.com*., art. R 225-21.

(n47)Footnote 47. *See § 5.02[2][d] infra.*

(n48)Footnote 48. Study committees may be created by the Board of Directors to study specific questions delineated by the Board of Directors or the President. The members of the study committee may be paid. *C.com*., arts. R 225-29 and R.225-33.

(n49)Footnote 49. It is within the sole competence of the shareholders to fix the amount of fees to be paid annually to the Board of Directors as a whole. *C.com.*, art. L.225-45. It is the function of the board itself to allocate the fees among its members. *C.com.*, art. L.225-45. The fees must be of a fixed sum and must in no way be tied to the profits or

losses of the corporation; thus, they are payable even where the corporation operates at a loss. *C.com.*, art. L.225-45. Such fees are deductible by the corporation only to the extent they do not exceed 5 percent of the average remuneration of the five highest paid employees of the corporation multiplied by the number of Directors.

(n50)Footnote 50. Article 7 VI, 1 degrees of Ordinance No. 2009-80 specifies that the President's obligation to publish a report on corporate governance only concerns companies listed on a regulated market. Therefore, companies listed on Alternext are exempt from publishing this President's report

(n51)Footnote 51. The Statutory Auditor must present his observations on the financial or economic aspects of such internal audit procedures in a report. (*C.com*., art. L.225-235).

(n52)Footnote 52. *Judgment of November 26, 1996*, Cass. civ. com., [1996] Bull. Civ. IV 251.

(n53)Footnote 53. *C. ent. sej. etr.*, arts. L.313-10, L.121-1 and R.313-16, and *C.com*. arts. L.122-1 and D.122-1. *See § 3.03 supra.*

(n54)Footnote 54. The shareholders may learn of the Board's decision through the Board minutes relating to such decision available at the SA's registered office or administrative offices. *C.com*., art. R.225-93. The Board minutes evidencing this decision must be published in a legal newspaper and recorded with the Register of Commerce and Companies. *C.com*., arts. R.225-27 and R.123-109. The Board must include its decision in its annual report to the shareholders (at the ordinary general meeting) for the year the Board's decision was made. *C.com*., art. R.225-102.

(n55)Footnote 55. The appointment as General Manager (or as a member of the Directorate or Sole General Director *Directeur general unique*) of a corporation which is controlled by a corporation for which the individual serves as General Manager is excluded for purposes of such limitation. *C.com.*, art. L.225-54-1. Moreover, a General Manager of an unlisted corporation may be appointed General Manager (or a member of the Directorate or Sole General Director) of another unlisted corporation. *Id.*

(n56)Footnote 56. *See § 5.02[2][a] supra.*

(n57)Footnote 57. Following a merger or spin-off, however, the members of the Supervisory Board may be appointed at an Extraordinary General Meeting of Shareholders. *C.com.*, art. L.225-75; *see § 5.11[4] infra* (corporate reorganizations).

(n58)Footnote 58. In the case of a merger of two corporations, during the three years following the merger the surviving corporation may keep a maximum of twenty-four members of the Supervisory Board. *C.com.*, art. L.225-95.

(n59)Footnote 59. *See § 5.02[2][a][ii] supra*.

(n60)Footnote 60. *Id.*

(n61)Footnote 61. *Id.*

(n62)Footnote 62. In the event, however, that the registered capital of the corporation is less than 150,000 euros, the Directorate may only consist of one member, who assumes the title of Sole General Director (*Directeur general unique*). *C.com.*, arts. L.225-58 and 225-59.

(n63)Footnote 63. Membership in a Directorate (or appointment as a General Manager or Sole General Director) of a corporation which is controlled by a corporation on whose Directorate an individual serves (or for which he is Sole General Director) is excluded for purposes of such limitation. *C.com.*, art. L.225-67. Moreover, a member of the Directorate (or a Sole General Director) of an unlisted corporation may be appointed a member of the Directorate (or a General Manager or Sole General Director) of another unlisted corporation. *Id.*

(n64)Footnote 64. *Judgment of November 17, 1988*, Cass. civ. soc., [1988] Bull. Civ. V 390. Moreover, contrary to a Director, a member of the Directorate may become an employee. *Id.*

(n65)Footnote 65. In addition, the SA is not bound to third parties by guarantees of the corporation given to them by a member of the Directorate without the prior approval of the Supervisory Board, which prior approval is required by law. *C.com.*, art. L.225-68.

(n66)Footnote 66. *See, e.g., C.com.*, arts. L.225-129, L.225-204, L.225-177, L.225-179, and L.225-203; *see generally § 5.02[3][d][iii] infra* (reduction in capital).

(n67)Footnote 67. The Directorate itself may, absent contrary provision in the Articles, appoint specific areas of responsibility to its members; actions taken by any one member of the Directorate, however, are deemed to be the actions of all the members thereof. *C.com.*, art. R.225-39.

(n68)Footnote 68. See *C.com.*, arts. L.822-9 through L.822-16 for the rules of law which are intended to ensure the independence of Statutory Auditors.

(n69)Footnote 69. One Alternate Statutory Auditor should ordinarily be appointed for each Statutory Auditor.

(n70)Footnote 70. The two Statutory Auditors must not only be totally independent from the corporation but also totally independent from each other; thus, they may not be members of the same firm or, directly or through a company with which they are associated, members of the same network. See also, *C.com.*, art. L.823-15.

(n71)Footnote 71. *See § 5.02[3][b][ii] infra* (shareholder documents).

(n72)Footnote 72. Statutory Auditors of corporations making public offerings must file on their websites an annual transparency report setting forth such information as their legal structure and ownership, their network, if any, a list of corporations making public offerings which they have audited during the preceding fiscal year, and a statement concerning their independence practices. *C.com.*, art. R.823-21.

(n73)Footnote 73. A copy of such request is sent to the Commercial Court.

(n74)Footnote 74. The Statutory Auditor prepares a special report which is sent to the Board of Directors or Supervisory Board, presented to the shareholders, and submitted to the Workers Representation Committee. The Statutory Auditor himself may call the shareholders meeting if the Board of Directors or Supervisory Board fails to do so (*C.com.*, art. R.234-3).

(n75)Footnote 75. *Id.*, art. R.823-11.

(n76)Footnote 76. *Id.*, arts. R.823-11 and R.823-15. The number of hours to be spent by the Statutory Auditor is fixed by decree in function of the balance sheet and turnover of the corporation unless, inter alia, [i] the aggregate of the corporation's equity, operating assets and financial assets exceeds 122,000,000 euros, [ii] the shares of the corporation are listed on a regulated market, [iii] the corporation is governed by the insurance code, [iv] the corporation is a credit or financial establishment, [v] the corporation is a financing corporation, [vi] the corporation is an SDR, [vii] the corporation is a public housing corporation or [viii] the corporation is a semi-public construction corporation. *Id.*, arts. R.823-12 and R.823-17. The amount of the fees paid to the Statutory Auditor must be made available to the shareholders at the registered office. *C.com.*, art. L.820-3.

(n77)Footnote 77. Agreements which relate to "normal operations" of the corporation and are concluded upon "normal terms" must be transmitted by the interested party to the President of the Board of Directors or Supervisory Board. The President must then submit a list of these agreements and a description of their purpose to the members of the Board of Directors or Supervisory Board, as well as to the Statutory Auditor. *C.com.*, arts. L.225-39, L.225-87,

R.225-32 and R.225-59. The shareholders may receive this list and description. *C.com.*, art. L.225-115. This list need not be communicated if the agreement, by virtue of its purpose or financial implications, is not significant to either party. C.com., arts. L. 225-39 and L.225-87.

(n78)Footnote 78. It has been held that the Board of Directors or the Supervisory Board must also approve a modification made to such an agreement as well as the termination thereof by mutual agreement of the parties. *Judgment of February 27, l996*, Cass. civ. com, [1996] Bull. Civ. IV 55.

(n79)Footnote 79. *See § 5.05[1] infra.*

(n80)Footnote 80. *See § 5.05[2] infra.*

(n81)Footnote 81. *See § 5.07 infra.*

(n82)Footnote 82. Any remuneration, indemnities or benefits which are not contingent upon the meeting of conditions tied to the member's performance, viewed in light of those of the corporation, are prohibited. *C.com*., arts. L. 225-42-1, L.225-90-1, and L.235-1.

(n83)Footnote 83. Specific mention must be made in the agenda and minutes that the vote is for the purpose of consenting to an agreement governed by article L.225-38 of the Commercial Code. *Judgment of May 3, 2000*, Cass. com., [2000] Bull. Civ. IV.

(n84)Footnote 84. The interested party cannot vote and his shares cannot help constitute a quorum. If the agreement is not approved by the shareholders, it remains enforceable by third parties as against the corporation but the corporation may in turn hold the interested party liable for any damages it suffers as a result thereof. *C.com.*, arts. L.225-41 and L.225-89. *See also Judgment of February 27, 2001*, Cass. com., [2001] Bull. Civ. IV (approval process for agreements concluded for an indefinite duration need not be renewed).

(n85)Footnote 85. *C.com.*, art. L.225-251. Shareholders seeking damages from the Board of Directors for injury sustained by them on an individual basis, where said injury arose from the same set of facts, may designate one or more of their members to act in the name and on behalf of all of said shareholders before the appropriate civil court. *C.com*., arts. R.225-167 and R.225-168. An investor association may also be authorized by such shareholders to bring a civil action against the Board of Directors. *C.mon. et fin.*, art. L.452-2. See Chapter 18 *infra* for the civil and criminal sanctions which may be imposed on management in the case of the bankruptcy of the corporation.

(n86)Footnote 86. If the act giving rise to the suit is concealed, the three year statute of limitations starts to run from the date of discovery of such act. *C.com.*, art. L.225-254.

(n87)Footnote 87. *See § 5.02[b][i] supra.*

(n88)Footnote 88. It should be noted that a corporation may itself be subject to penal sanctions for violations committed on its behalf by its management bodies or representatives. *C. pen.*, arts. 121-2, 131-38 and 131-39.

(n89)Footnote 89. *C.com.*, art. L. 651-2. *See also, C.com.*, art. L. 652-1.

(n90)Footnote 90. *See §§ 5.02[2][a]* and *5.02[2][b][i] supra* .

(n91)Footnote 91. *See § 5.02[2][c] supra.*

(n92)Footnote 92. *See § 5.02[3][d][v][A][II] infra.*

(n93)Footnote 93. *See generally* § 14.04 *infra.*

(n94)Footnote 94. *See § 5.02[5][a] infra.*

(n95)Footnote 95. The Statutory Auditor must first request that a Shareholders Meeting be held; only upon the refusal of such request and for valid cause may the Statutory Auditor call a meeting of the shareholders. *C.com.*, art. R.225-162.

(n96)Footnote 96. Shareholders representing 5 percent of the registered capital of the corporation as well as a shareholder association may petition the president of the Commercial Court to order the calling of a meeting of the shareholders. *C.com.*, arts. L.225-103 and R.225-65. In an emergency, the Workers Representation Committee or any interested party may petition the president of the Commercial Court to order the calling of such meeting. *Id.*, and *C. trav.* art. L. 2323-67 and R.2323-13.

(n97)Footnote 97. *See § 5.02[5][b] infra.*

(n98)Footnote 98. The Articles may provide for a longer notice period. The day on which the notice is sent is not included in the calculation of the notice period.

(n99)Footnote 99. An *avis de reunion* must be published in the BALO within 35 days of the meeting if the shares are not all nominative. *C.com.*, art. R.225-73.

(n100)Footnote 100. Any meeting improperly convened may be annulled. *C.com.*, art. L.225-104.

(n101)Footnote 101. This threshold of five percent is reduced where the capital of the corporation exceeds 750,000 euros. *Id.*, art. R.225-71.

(n102)Footnote 102. Each shareholder (or his representative) voting by mail or by electronic means is deemed present at the meeting and his name is included on the attendance sheet. *Id*, art. R.225-95.

(n103)Footnote 103. The Articles of corporations not making public offerings may provide for a higher quorum. *C.com.*, art. L.225-98.

(n104)Footnote 104. In the event that a quorum is not obtained at said second meeting, the meeting may be postponed for up to two months. *C.com.*, art. L.225-96.

(n105)Footnote 105. It is possible for a corporation to issue preferred stock having preferential rights, *inter alia*, to dividends and distributions-in-liquidation. *See § 5.02[3][d][i][A] infra*, or investment certificates. *See § 5.02[3][d][i][B] infra*.

(n106)Footnote 106. Double voting rights may be granted by the Articles or by a resolution of the shareholders adopted at an Extraordinary General Meeting to shares which have been nominative for at least two years and for which the subscription price has been fully paid in. *C.com.*, art. L.225-123. The right to hold shares having double voting rights may be reserved to citizens of France, the EU or the EEA. *C.com.*, art. L.225-123. Whenever a corporation issues shares that have double voting rights, any shareholder fulfilling the aforesaid two conditions must be granted similar rights. Whenever a corporation issues shares with double voting rights, it must disclose same to the public by respecting the appropriate formalities of publication relating thereto. *C.com.*, art. R.210-4.

(n107)Footnote 107. The proxy may be mailed or sent electronically to the corporation (in the latter case it must contain an electronic signature). *C.com.*, art. R.225-79. Upon receipt by the corporation the proxy is generally irrevocable. *C.com.*, art. R.225-80.

(n108)Footnote 108. Where the shareholder is a legal entity, it may grant a proxy to its legal representative or to another person specifically appointed for such purpose; the latter person need not be a shareholder of the SA holding the shareholders meeting. *Judgment of May 26, 1994*, Cass. crim., [1994] Bull. Crim 483. Where the SA holding the

shareholders meeting is listed on a regulated market, a financial intermediary may represent shareholders who are non-residents of France. *C.com.*, art. L.225-107-1; *see also C.com.*, arts. L.228-1, and L.228-3-2, and *C.com*., art. R.228-6.

(n109)Footnote 109. Prior to each General Shareholders Meeting, the President or the Directorate may organize a meeting of the employee shareholders of the corporation to permit the latter to choose one or more representatives to vote their shares. *C.com.*, art. L.225-106 and *C.trav.*, art. D.3341-1. Such meeting is mandatory in the event the General Shareholders Meeting is to vote on an amendment to the Articles which would allow Directors or Supervisory Board members to be appointed from among the employee shareholders. Moreover, if the employees of the corporation have elected a Workers Representation Committee, two members thereof may attend each General Shareholders Meeting and must be permitted to express their opinion on decisions requiring unanimous approval. *C.trav.*, art. L.2323-67.

(n110)Footnote 110. The use of a vote-at-a-distance form by electronic means is, however, not authorized with respect to meetings of holders of investment certificates or holders of non-voting priority shares. The notice of the meeting must indicate the procedure to be followed by shareholders who wish to vote by mail or by electronic means. *C.com*., art. R.225-66. The vote-at-a-distance form may be included in the same document in which is contained the proxy. *C.com*., art. R.225-76.

(n111)Footnote 111. It should be noted that where the shareholder submits a form in which he has not voted for or against or abstained from voting on one or more resolutions, such failure to vote or abstain is deemed to be a vote against said resolution(s). *C.com.*, art. L.225-107 and R.225-76.

(n112)Footnote 112. The due date for the return of vote-at-a-distance forms may be no earlier than three days prior to the date of the shareholders meeting, unless a shorter period is provided for in the corporation's by-laws. *C.com*., art. R.225-77. Electronic vote-at-a-distance forms may be received by the corporation until the day preceding the shareholders meeting, and must contain an electronic signature. *Id.*

(n113)Footnote 113. The single document containing the proxy and vote-at-a-distance form must allow the shareholder to either abstain from voting or to designate the chairman of the meeting or a named proxy to vote for him, in the event that the shareholders assembled at the shareholders meeting are called upon to vote on a new proposal raised during the meeting. *C.com*., art. R.225-78.

(n114)Footnote 114. To ensure the identification and effective participation of the shareholders at the meeting, their voices must be transmitted and the meeting must be continuously transmitted to the shareholders. *C.com*., art. R.225-97.

(n115)Footnote 115. A similar two-thirds majority is required at Special Meetings of the Shareholders. *C.com.*, art. L.225-99

(n116)Footnote 116. See *§ 5.02[3][b][ii] infra* for a discussion of the modalities of the preparation and the content of the corporation's annual report.

(n117)Footnote 117. *See § 5.02[3][b][ii] infra* (shareholder documents).

(n118)Footnote 118. Bull. CNCC 2004 p. 51 and 169.

(n119)Footnote 119. In addition, upon the petition of any interested party or the public prosecutor, the court may enjoin the management of any corporation to file the requisite documents with the clerk of the commercial court. *C.com.*, art. L.123-5-1.

(n120)Footnote 120. Following a merger or spin-off, however, the members of management may be elected at an Extraordinary General Meeting of the Shareholders. *C.com.*, arts. L.225-18 and L.225-75.

(n121)Footnote 121. *See §§ 5.02[2][a][ii]* and *5.02[2][b][i] supra* .

(n122)Footnote 122. *See § 5.02[2][d] supra.*

(n123)Footnote 123. *See § 1.01[1][a] supra* (*Departement*).

(n124)Footnote 124. *Id.*

(n125)Footnote 125. *See § 5.02[4] infra.*

(n126)Footnote 126. *See § 5.11 infra.*

(n127)Footnote 127. In the case of a merger, this report is prepared by the merger expert (*commissaire a la fusion*). *C.com.*, art. L.236-10.

(n128)Footnote 128. Copies of inventory lists may not, however, be made. *C.com*., art. R.225-92.

(n129)Footnote 129. *N. C. pr. civ.*, art. 145.

(n130)Footnote 130. *See § 5.02[3][a] supra.*

(n131)Footnote 131. Similar documents must be supplied in connection with Extraordinary General Meetings of the Shareholders or Special Meetings of the Shareholders. *C.com*., arts. R.225-81 and R.225-83.

(n132)Footnote 132. *See, e.g., § 5.02[2][d] supra.*

(n133)Footnote 133. Similar documents must be made available in connection with Extraordinary General Meetings of the Shareholders and Special Meetings of the Shareholders. *C.com*., art. R.225-89.

(n134)Footnote 134. *See § 12.06[4][d][i] infra.*

(n135)Footnote 135. *C. trav.*, art. L.2323-74.

(n136)Footnote 136. The Board of Directors or Directorate must annex to the financial statements a schedule of the guarantees, pledges and sureties given by the corporation. *C.com.*, art. L.232-1.

(n137)Footnote 137. A corporation is exempt from this obligation if i) it is controlled by another corporation filing consolidated accounts, or ii) the corporate group does not meet at least two of the following three criteria: 1) the sum of the net values of the group's assets is greater than 15 million euros, 2) the group has a pretax turnover greater than 30 million euros and 3) the group employed during the fiscal year an average number of employees which is greater than 250. *C.com.*, arts. L.233-17 and R.233-16. Consolidated accounts prepared by listed corporations must, under certain conditions, be in conformity with International Accounting Standards. Regulation 2003/1725/EC of September 29, 2003 (OJ L261, p. 1). Consolidated accounts must be prepared with another company or companies if the corporation has a dominant influence by virtue of a contract or by-laws over said company or companies even if the corporation has no shareholding interest therein. C.com., art. L. 233-16.

(n138)Footnote 138. *C. gen. imp.*, art. 243 bis.

(n139)Footnote 139. *See § 5.02[3][b][iii] infra* (periodic reports setting forth certain financial information).

(n140)Footnote 140. This requirement does not apply to corporations which are neither listed on a regulated market nor controlled by a listed company. *C.com.*, art. L.225-102-1. It includes any commitment of the corporation to a member of management which corresponds to remuneration, indemnities or benefits that are due or may be due upon the undertaking, termination or modification of such member's duties or subsequent thereto, such as a departure bonus

or non-competition indemnity. *C.com.*, art. L.225-102-1.

(n141)Footnote 141. This provision includes both French and foreign companies.

(n142)Footnote 142. The employees to be taken into consideration for purposes of these rules are those who are employed by the corporation or any company in which it has a greater than 50 percent equity interest pursuant to an employment contract for an indefinite duration. *C.com.*, art. R.232-2. For purposes of these rules, the net turnover of the corporation is equal to the value of the goods and services it sold in the course and furtherance of its normal activities, as reduced by rebates and taxes.

(n143)Footnote 143. This statement must indicate, for each figure appearing therein, the corresponding figures for the preceding two semesters. *C.com.*, art. R.232-5.

(n144)Footnote 144. These schedules, plans and reports must indicate, for each figure appearing therein, the corresponding figure for the preceding fiscal year. *C.com.*, art. R.232-5.

(n145)Footnote 145. *See § 14.01*(regulated markets).

(n146)Footnote 146. If the shareholders approved without modification the documents disclosed prior to the Ordinary General Meeting, the corporation does not have to publish such documents, but instead, may merely publish a notice (i) indicating the reference to the legal newspaper in which such documents were theretofore published and (ii) setting forth the certification of such documents by the corporation's Statutory Auditors. *C.com.*, art. R.232-11.

(n147)Footnote 147. *General Regulation of the AMF* art. 223-2. The disclosure may be deferred if it could impair the corporation's legitimate interests as long as such deferral does not mislead the public and the corporation is capable of ensuring the confidentiality of the information. *Id.*

(n148)Footnote 148. *Id.*, art. 223-9.

(n149)Footnote 149. *Id.*, art. 223-6. The corporation may defer disclosure of such information if the confidentiality thereof is necessary to the carrying out of the transaction and the corporation is capable of ensuring such confidentiality. *Id.*

(n150)Footnote 150. *Id.*, art. 223-8.

(n151)Footnote 151. *Id.*, art. 223-10.

(n152)Footnote 152. *Id.* The AMF is generally responsible for ensuring that listed corporations abide by the publication requirements and may disclose information it deems necessary. *C. mon. fin.* art. L. 621-18.

(n153)Footnote 153. *C. mon. et fin.*, art. L.621-18-2, *General Regulation of the AMF*, arts. 223-22. Disclosure must also be made by persons having the power to make management decisions and who have access to privileged information, and by persons with close personal links to the corporation. *C. mon. et fin.*, arts. L.621-18-2 and R.621-43-1.

(n154)Footnote 154. *C.com*, art. L.233-11.

(n155)Footnote 155. *C.mon. et fin.*, art. L.621-18-4, *General Regulation of the AMF*, art. 223-27.

(n156)Footnote 156. *General Regulation of the AMF*, art. 222-8. If such information is included in the annual financial report, the company is exempt from publishing this *communique* (*General Regulations of the AMF*, art. 222-3 II).

(n157)Footnote 157. This rule is subject to certain exceptions.

(n158)Footnote 158. *C.com.*, arts L.228-1, L.228-2 and R.228-10 and *C. mon. et fin.*, art. L.211-3 through L.211-17.

(n159)Footnote 159. It should be noted, however, that the sale, assignment, exchange or transfer of shares of an SA is subject to a registration tax of 3 percent of the price capped at 5,000 euros (C. gen. imp., art. 726).

(n160)Footnote 160. *C. civ.*, art. 1843-4.

(n161)Footnote 161. Such purchase is not permissible if the reduction of capital is motivated by losses. *C.com.*, art. L.225-207 *see § 5.02[3][d][iii] infra.* Such reduction may be the consequence of the refusal by the corporation of a proposed transfer by a shareholder of his shares to a third party, which transfer is made subject to the corporation's prior approval by the terms of an Approval Clause. *See § 5.02[3][c][ii] supra.*

(n162)Footnote 162. *See § 12.05 infra; C.com.*, art. L.225-208.

(n163)Footnote 163. *C.com.*, arts. L.225-209 and L.225-209-1.

(n164)Footnote 164. *C.mon. et fin.*, art. L.451-3.

(n165)Footnote 165. *General Regulation of the Autorite des marches financiers, arts. 631-5 and 631-6; Commission Regulation (EC) No. 2273/2003 of December 22, 2003*, OJ L.336/33.

(n166)Footnote 166. If the SA is listed on a regulated market, the shares may be cancelled provided, however, that the shares cancelled do not represent more than 10% of the SA's registered capital per 24-month period. *C.com.*, art. L.225-209.

(n167)Footnote 167. *C.com.*, art. R.228-17. The Extraordinary General Meeting may delegate its power to issue preferred stock to the Board of Directors or the Directorate. *C.com.*, art. L.228-12.

(n168)Footnote 168. Preferred stock issued without the right to vote and granting a limited right to payment of dividends, distribution of reserves or assets in case of liquidation do not give rise to a pre-emptive right to suscribe to a capital increase in cash (*C.com.*, art. L.228-11

(n169)Footnote 169. *C.com.*, art. L.228-11. These provisions require, *inter alia*, that the right to vote be proportionate to the percentage of capital that the shares represent, each share giving rise to at least one vote (*C.com.*, art. L.225-122), and that the number of votes not be subject to any limitation unless such limitation is also applied to the common shares (*C.com.*, art. L.225-125). Double voting rights are permitted. *C.com.*, art. L.225-123.

(n170)Footnote 170. The dividend may be paid with shares in accordance with the terms laid down by the Articles or by the shareholders at an Extraordinary General Meeting. *C.com.*, art. L.228-18.

(n171)Footnote 171. The SA must hold, directly or indirectly, more than 50 percent of the subsidiary's registered capital, or be held, directly or indirectly, to the extent of more than 50 percent by the parent company. *C.com.*, art. L.228-13.

(n172)Footnote 172. *Id*, arts. R.228-18 through R.228-20. The Extraordinary General Meeting may delegate its power to redeem or convert preferred stock to the Board of Directors or the Directorate. *Id.* art. L.228-12.

(n173)Footnote 173. *See Sec. 5.02[3][a][iii] supra.*

(n174)Footnote 174. This condition does not have to be met where the shares not yet paid in have been subscribed

for by employees of the SA within the context of, *inter alia*, a company sponsored savings-investment plan (*plan d'epargne d'entreprise*). *C.com.*, art. L.228-39. *See § 12.05[3]* (company sponsored savings-investment plan).

(n175)Footnote 175. Private placements are those that do not involve the communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities or securities that have not been placed through financial intermediaries *C.mon.et fin.*, art. L.411-1. An issuance reserved to qualified investors (*investisseurs qualifies)* (*e.g.*, credit establishments and insurance companies) or to a limited group of investors (*cercle restreint d'investisseurs*) is considered a private placement as long as said investors are acting on their own behalf. *Id* arts L.411-2 and D.411-1 to D.411-3. A limited group of investors is deemed to be a group of less than one hundred investors not including qualified investors. *Id.*, art. D.411-4.

(n176)Footnote 176. *C. mon. et fin.*, arts. L. 412-1 and L. 621-8. *See § 14.01[3] infra* (offer of financial securities to the public); *see also § 14.01 infra* (role and functioning of the AMF).

(n177)Footnote 177. Such representatives must be French or nationals of an EC Member-State. *C.com.*, art. L.228-48.

(n178)Footnote 178. *See § 5.02[3][b] supra.*

(n179)Footnote 179. *See § 5.02[3][a] supra.* If provided in the Articles, videoconferencing and voting by electronic means apply to meetings of the debentureholders. *C.com.*, art. L.228-61. They may also vote by mail. *Id.*

(n180)Footnote 180. *See § 5.02[4] infra.*

(n181)Footnote 181. *See § 5.11[4] infra.*

(n182)Footnote 182. For example, the modification of corporate purpose or the transformation of the corporation into another form cannot be carried out without either the consent of the debentureholders or an offer by the corporation to redeem all outstanding debentures. *C.com.*, art. L.228-72.

(n183)Footnote 183. For example, the corporation may proceed with a proposed merger despite the refusal of the debenture holders to consent thereto. *C.com.*, art. L.228-73. The debenture holders, however, may sue to block the merger or to require the corporation to provide adequate security.

(n184)Footnote 184. *C. gen. imp.*, art. 119 bis(1 degrees).

(n185)Footnote 185. The Board of Directors or the Directorate, as well as the Statutory Auditor, must submit written reports to the Extraordinary General Meeting. *C.com.*, arts. L.228-92 and R,225-117.

(n186)Footnote 186. *See, e.g., C.com.*, arts. L.225-149 through L.225-149-2, L.228-103, R.225-132, R.225-133, and R.228-94.

(n187)Footnote 187. *C. gen. imp.*, art. 39(1)(3 degrees).

(n188)Footnote 188. *See § 13.02[3][b][ii][D]* (interest and other financial expenses).

(n189)Footnote 189. *C. mon. et fin.*, art. L.313-13

(n190)Footnote 190. *Id*, art. L.313-15.

(n191)Footnote 191. *See* Chapter 18.

(n192)Footnote 192. *C. mon. et fin.*, art. L.313-16.

(n193)Footnote 193. *Id.*, art. L.313-14.

(n194)Footnote 194. The Extraordinary General Meeting may delegate to the Board of Directors or the Directorate the power to increase the SA's capital; in such case, the Extraordinary General Meeting determines the time period during which the delegation power may be used (which may not exceed 26 months) and sets a cap on the amount of the capital increase. *C.com.*, arts. L.225-129, L.225-129-2 and L.225-129-5. Where the Extraordinary General Meeting decides itself to increase the SA's capital, it may delegate to the Board of Directors or the Directorate the power to establish the terms and conditions of the capital increase. *C.com.*, arts. L.225-129-1 and L.225-129-5. If the corporation is listed on a regulated market, the Board of Directors may authorize the General Manager or, with his consent, the Assistant General Manager(s) to increase the capital; the Directorate has the same power to authorize its President or, with the latter's consent, one of its members. *C.com.*, art. L.225-129-4. The issuance of the new shares must, with certain exceptions, be realized within five years of the Extraordinary General Meeting whereat the issuance or delegation was authorized. *C.com.*, art. L.225-129.

In order to encourage employee stock participation, in certain cases at the Extraordinary General Meeting called to increase the capital of an SA, a vote must be taken on a draft resolution to effect a capital increase for the benefit of employees participating in a company sponsored savings-investment plan (*plan d'epargne d'entreprise*). *C.com.*, art. L.225-129-6; *see sec. 12.05[3] infra* (company sponsored savings-investment plan). Moreover, if the Board of Directors' report to the Annual Ordinary General Meeting establishes that the shareholdings of the employees of the company represent less than 3 percent of the registered capital, an Extraordinary General Meeting must be called every three years to vote on a draft resolution to effect a capital increase for the benefit of employees participating in such a plan. *Id.*, art. L.225-129-6.

(n195)Footnote 195. *See § 3.02[2] supra.*

(n196)Footnote 196. Where the capital increase is made entirely by means of cash contributions, the full amount of such contributions need not, in all instances, be fully paid in. *See § 5.02[3][d][ii][A] infra.*

(n197)Footnote 197. An issuance premium is usually imposed to protect the rights of pre-existing shareholders whose stock, because of reserves or unrealized capital gains, is worth more than its par value.

(n198)Footnote 198. This general rule is not applicable to the issuance of stock pursuant to an employee stock option plan. *C.com.*, art. L.225-177; *see generally § 12.05[3] infra.*

(n199)Footnote 199. Holders of preferred stock issued without the right to vote and granting a limited right to payment of dividends, distributions of reserves and distributions in case of liquidation do not have a pre-emptive right to subscribe to a capital increase in cash (*C.com.*, art. L.228-11).

(n200)Footnote 200. *See § 5.02[3][d][i][A] supra.*

(n201)Footnote 201. This may also be set forth in the Articles. *C.com.*, art. L.228-16.

(n202)Footnote 202. At such meeting, any shareholders who would benefit from such waiver of preemptive right may not vote and may not be counted for the establishment of a quorum. *C.com.*, art. L.225-138. Corporations listed on a regulated market may replace the shareholders' preemptive right with a temporary priority right (*delai de priorite*) of not less than three trading days. *C.com.*, arts. L.225-135 and R.225-131.

(n203)Footnote 203. *C. mon. et fin.*, art. L. 412-1; *see § 14.01[3]* (offer of financial securities to the public).

(n204)Footnote 204. Such negotiation to third parties may be subject to the provisions of an Approval Clause. *See*

§ 5.02[3][c][ii][B] supra.

(n205)Footnote 205. However, the Board of Directors may in addition, upon its own initiative, reduce the amount of the capital increase to the amount of the subscriptions actually received if the non-subscribed for shares amount to less than 3 percent of the capital increase. *C.com.*, art. L.225-134.

(n206)Footnote 206. The capital increase must be disclosed in the legal newspaper of the jurisdiction in which the registered office of the SA is located. *C.com.*, art. R.210-9. Such increase must be reflected in the registration of the SA in the Register of Commerce and Companies, *C.com.*, arts. R.123-105 *et seq.*, and must be the subject of a filing with the Clerk of the Commercial Court. Both of these formalities may be accomplished by a declaration to a Corporate Formalities Center (*Centre de Formalites des Entreprises*). *See § 5.02[1][g] supra.* In addition, a filing with the relevant tax authorities is required. *C. gen. imp.*, art. 635, ann. IV, art. 23B.

(n207)Footnote 207. *C. gen. imp.*, art. 810(I); *see § 13.03[2] infra.*

(n208)Footnote 208. *See § 5.02[3][d][v][A][I] infra.*

(n209)Footnote 209. *See § 5.02[3][a][i] supra* (quorum and majority requirements at an Ordinary General Meeting of the Shareholders). The other requirements for an Extraordinary General Meeting of the Shareholders, *e. g.*, access to information, are still applicable. *See generally § 5.02[3][a][ii] supra.*

(n210)Footnote 210. This information may also be set forth in the Articles of Incorporation.

(n211)Footnote 211. It should be noted, however, that the Extraordinary General Meeting of the Shareholders may decide that such scrip is not negotiable and that the corresponding shares are to be sold. *C.com.*, art. L.225-130. In such case, the sums obtained from the aforementioned sale are allocated to the appropriate shareholders within a specified period of time.

(n212)Footnote 212. *C. gen. imp.*, art. 812(I); *see § 13.03[2] infra.*

(n213)Footnote 213. Such contract is executed on behalf of the SA by the Board of Directors or the Directorate, but remains aleatory until approved by an Extraordinary General Meeting of the Shareholders.

(n214)Footnote 214. An expert appraiser need not be appointed where the capital increase is conducted within the framework of a tender offer (*offre publique d'echange*) involving listed corporations. *C.com.*, art. L.225-148.

(n215)Footnote 215. *See § 13.03[2] infra.*

(n216)Footnote 216. *See § 5.02[3][d][v][A][II] infra.*

(n217)Footnote 217. *See § 5.02[3][c][ii][C] supra.*

(n218)Footnote 218. The President and the Directors or members of the Directorate are subject to fines of 9,000 euros for failure to respect this principle. *C.com.*, arts. L.242-23 and L.242-30. *See also Judgment of June 18, 2002*, Cass. com. [2002] Bull. Civ. IV.

(n219)Footnote 219. *See § 13.03[3] infra.*

(n220)Footnote 220. *See § 5.02[3][d][v][A][II][a] infra.*

(n221)Footnote 221. *See § 5.02[3][d][v][A][II][c] infra.*

(n222)Footnote 222. *C.com.*, art. L.123-13.

(n223)Footnote 223. The Articles may call for a credit to the Legal Reserves account of more than five percent of the corporation's net profits for each fiscal year.

(n224)Footnote 224. *See § 13.02[3] infra.*

(n225)Footnote 225. Moreover, the SA may offer to pay the interim dividends in shares of stock instead of cash where same is authorized by the Articles and the shareholders convened at the Annual Ordinary General Meeting called to approve the financial statements for the preceding fiscal year authorized the making of such an offer for the next fiscal year. *C.com.,* art. L.232-18. Such offer must be made to all shareholders entitled to receive interim dividends.

(n226)Footnote 226. The shares must have been in nominative form both throughout the two-year period and at the time the dividend is declared. *C.com.,* art. L.232-14.

(n227)Footnote 227. Where the corporation is listed on a regulated market, a shareholder may only receive a *prime de fidelite* for that portion of the shareholding which represents no more than 5 percent of the corporation's registered capital. *Id.*

(n228)Footnote 228. Dividends must be paid no more than nine months after the end of the fiscal year for which they were declared. *C.com.,* art. L.232-13.

(n229)Footnote 229. Such failure to make full payment also causes the extinction of the pre-emptive rights of the shareholders. *C.com.,* art. L.228-29.

(n230)Footnote 230. *C. civ.,* art. 2277.

(n231)Footnote 231. This rule also applies to interim dividends. *C.com.,* art. L.232-19.

(n232)Footnote 232. Because the SA cannot know how many shares it is to issue as dividends until the end of this three-month period, it would be unable, were it not for the following rule, to proceed with a capital increase during said period. Consequently, a rule was adopted permitting the Board of Directors or the Directorate of the SA to suspend the shareholder's right to receive a stock dividend for up to three months if the SA is to proceed with a capital increase during said period. *C.com.,* art. L.232-20.

(n233)Footnote 233. This rule also applies to interim dividends. *C.com.,* art. L.232-19.

(n234)Footnote 234. *C. gen. imp.,* art 810(I); *see § 13.03[2] infra* (registration tax).

(n235)Footnote 235. For example, the SA is not required to carry out the legal formalities of publication which must normally be effectuated before the offer to subscribe to a capital increase is made, *see § 5.02[3][d][ii][A] supra;* further, the SA may issue the new share certificates as soon as the shareholders have elected to accept the offer of a stock dividend. *C.com.,* art. L.242-17.

(n236)Footnote 236. *See § 5.02[5][a] infra.*

(n237)Footnote 237. Such disclosure must be made by publishing a notice in a legal newspaper of the jurisdiction in which the registered office of the corporation is located, by filing a notice with the Commercial Court of such jurisdiction and by making a notation in the Register of Commerce and Companies. *C.com.,* arts. L.225-248 and R.225-166.

(n238)Footnote 238. Remedial steps must be taken to increase the net asset value of the corporation before the end of the second fiscal year following the fiscal year during which the shareholders approved the financial statements on which was reflected the diminished net asset value of the corporation.

(n239)Footnote 239. *See § 5.02[3][d][ii] supra.*

(n240)Footnote 240. *See § 5.02[3][d][iii] supra.*

(n241)Footnote 241. *See § 5.02[5][a] infra.*

(n242)Footnote 242. *See* Chapter 18 *infra* for a detailed discussion of the liability imposed on management by bankruptcy law.

(n243)Footnote 243. *See §§ 5.02[3][d][v][B]* and *5.02[1][a][vi] supra* .

(n244)Footnote 244. These two conditions precedent need not be satisfied if the SA is to be transformed into an SNC. *C.com.*, art. L.225-245; *see generally § 5.05[1] infra.*

(n245)Footnote 245. *See § 13.03*[2 and 11] *infra.*

(n246)Footnote 246. If the transformation is accompanied by substantial modifications of the SA's business activity or tax status which are not required by the adoption of the new corporate form, the tax authorities deem that the SA has been liquidated and that all taxes relating to a liquidation are due and payable. See *§ 13.03[10] infra* for a detailed discussion of the taxation of transformations.

(n247)Footnote 247. *C. gen. imp.*, art. 635.

(n248)Footnote 248. This condition precedent need not be satisfied if the SA is to be transformed into an SNC. *C.com.*, art. L.225-245; *see generally § 5.05[1] infra.*

(n249)Footnote 249. *See § 5.03 infra.*

(n250)Footnote 250. *See § 5.03[3][a][i][B] infra.*

(n251)Footnote 251. *See § 5.05[1] infra.*

(n252)Footnote 252. *See § 5.10[4][b] infra.*

(n253)Footnote 253. *C. civ.*, art. 1832-1(1).

(n254)Footnote 254. *See § 5.05[2][a] infra.*

(n255)Footnote 255. *See § 5.05[2][b] infra.*

(n256)Footnote 256. Such vote must be taken pursuant to the quorum and majority requirements applicable to Extraordinary General Meetings of the Shareholders of an SA. *See § 5.02[3][a][ii] supra.*

(n257)Footnote 257. *See §§ 5.05[2][a][ii]* and *5.05[2][b][ii][A] infra* .

(n258)Footnote 258. *See § 5.07 infra.*

(n259)Footnote 259. *C. civ.*, art. 1844-7(1 degrees, 2 degrees and 8 degrees).

(n260)Footnote 260. *Id.*, art. 1844-7(7 degrees). Dissolution is automatic upon the court's declaration of liquidation in bankruptcy (*liquidation judiciaire*) or upon the transfer of all of the SA's assets. *Id. See generally* Chapter 18 *infra.*

(n261)Footnote 261. *C. civ.*, art. 1844-7(3 degrees).

(n262)Footnote 262. *See § 5.02[3][d][v][B] supra.*

(n263)Footnote 263. The Commercial Court may, upon the petition of any interested party, order the dissolution of the SA for just cause. Just cause is deemed to exist where one of the shareholders fails to respect his obligations to the corporation, which obligations were, at least in part, the basis of the creation of the SA; a fundamental disagreement among the shareholders creating a deadlock and thereby preventing the normal operations of the corporation is also deemed just cause. *C. civ*., art. 1844-7(5 degrees).

(n264)Footnote 264. *C. civ.*, art. 1844-5(3). The creditors may object to the dissolution within thirty days of the publication thereof. *Id.* The appropriate court has the option either to reject the claim, to order the immediate satisfaction thereof or to require that sufficient security devices are put into place guaranteeing payment of the underlying debts. *Id.* The transfer of the SA's assets and liabilities to the sole shareholder and the disappearance of the corporate entity do not become final until the completion of the aforementioned thirty-day period or upon the court's rejection of the creditors' claims, or his ordering the payment thereof or the putting into place of security devices. *Id.*

(n265)Footnote 265. *See § 5.02[1][a][vi] supra.*

(n266)Footnote 266. *See § 5.02[4] supra.*

(n267)Footnote 267. As to third parties, however, the SA is in liquidation only upon accomplishment of the appropriate formalities of publication. *C.com.*, art. L.237-2. It should be noted that liquidation is not declared in certain cases. *C. civ.*, art. 1844-5(3). *See § 5.02[5][a] supra.*

(n268)Footnote 268. While the powers of the Board of Directors and the President, of the Directorate and of the General Manager are annulled, the Supervisory Board and the Statutory Auditor(s) continue to exercise their functions. *C.com.*, art. L.237-16.

(n269)Footnote 269. The six-month period may be extended to twelve months if requested by the liquidation and authorized by a decision of the appropriate court. *C.com.*, art. L.237-23.

(n270)Footnote 270. Such decisions must be individually communicated to each shareholder and publicly disclosed. *C.com.*, arts. L.237-31 and R.237-16. If the liquidation is not terminated within three years of the dissolution, any interested party may petition the court to liquidate the company, or if the liquidation is already in process, to terminate the liquidation. The court may revoke and replace the liquidator even if such liquidator was appointed by the shareholders and not by the court. *C. civ.*, art. 1844-8, 4.

(n271)Footnote 271. The powers of the Board of Directors and President of a *societe anonyme* set forth in the provisions of law regulating *societes anonymes* are carried out by the President of the SAS or the member(s) of management designated for this purpose in the SAS's Articles. *C.com.*, art. L.227-1.

(n272)Footnote 272. Economic interest groups and associations may thus hold shares in an SAS. *See § 5.06* (economic interest group) and *§ 5.08 infra* (not-for-profit association). A foreign company may be a shareholder of an SAS if it complies with the rules applicable to the making of a direct investment in France.

(n273)Footnote 273. SAS composed of a sole shareholder who is also the sole president are subject to simplified formalities of incorporation (*C.com.*, art. L.227-1).

(n274)Footnote 274. *See § 5.02 [1][b] supra*. However, unlike in the SA, contributions may be made in cash, in kind, but also in the form of services to be rendered (*apports en industrie*) *C.com.*, art. L.227-1; the modalities of subscription and of evaluation of such contributions must be set forth in the Articles. *Id*

(n275)Footnote 275. If the President is a not a national of a Member-State of the European Union, Norway,

Liechtenstein, Iceland or Switzerland, he must obtain a temporary residence card authorizing the conducting of a professional activity (*carte de sejour temporaire autorisant l'exercice d'une activite professionnelle*) or file a Declaration with the local authorities (the *Prefet*). *C. ent. sej. etr.*, arts. L.313-10, L.121-1 and R.313-16, and *C.com.* arts. L.122-1 and D.122-1. *See § 3.03* supra.

(n276)Footnote 276. If the Articles of the SAS provide for the appointment of one or more General Managers or Assistant General Managers, the Articles may grant them the same power to represent the company vis-a-vis third parties as that attributed to the President. *C.com.*, art. L.227-6.

(n277)Footnote 277. Where a legal entity is appointed President of the SAS, the legal entity's representative can be its legal representative, a permanent representative or a person expressly appointed to represent it for purposes of the SAS. If the representative is a not a national of a Member-State of the European Union, Norway, Liechtenstein, Iceland or Switzerland, he must obtain a temporary residence card authorizing the conducting of a professional activity (*carte de sejour temporaire autorisant l'exercice d'une activite professionnelle)* or file a Declaration with the local authorities (the *Prefet*). *C. ent. sej. etr.*, arts. L.313-10, L.121-1 and R.313-16, and *C.com.* arts. L.122-1 and D.122-1.. *See § 3.03 supra*.

(n278)Footnote 278. For example, the Articles may require that the President be elected by all or only some of the shareholders; where the President is to be elected by only some of the shareholders, the Articles may specify that he shall be elected by a unanimous vote of said shareholders or only a certain majority thereof.

(n279)Footnote 279. The fact that the Articles are filed with the Clerk of the Commercial Court is not considered sufficient proof that a third party knew or under the circumstances was not unaware that an action was outside the scope of the corporate purpose. *C.com.*, art. L.227-6.

(n280)Footnote 280. Various methods can be envisaged for the appointment of the members of management. For example, the shareholders may appoint the members by a majority they determine or they may decide that all of the shareholders shall be members of management. Other possibilities would be that such appointment be made by a nominating committee, an agreement between the two largest shareholders, or the unanimous approval of all of the shareholders.

(n281)Footnote 281. The President may delegate certain of his powers to members of management but may not give a general delegation of powers.

(n282)Footnote 282. *See § 5.02[2][e]* supra (liability of management of a *societe anonyme*). In addition, the President or member of management of the SAS is subject to six years imprisonment and a fine of 7,500 euros for the failure to consult the shareholders in certain cases required under *C.com.*, art. L.227-9. *See § 5.05[3][f][i] infra* (shareholder decisions).

(n283)Footnote 283. *See § 5.02[2][c] supra* (statutory auditors).

(n284)Footnote 284. Agreements which relate to the "normal operations" of the SAS and are entered into upon "normal terms" must be submitted to the Statutory Auditor. The shareholders may receive a copy of these agreements. C.com., art. L.227-11.

(n285)Footnote 285. The temporary non-transferability clause, approval clause, squeeze-out clause, and change in shareholder control rules are discussed in greater detail in *§ 5.05[3][e][ii] infra*.

(n286)Footnote 286. The sole shareholder is not obliged to file the management report with the clerk, but this report must be accessible to any person requesting same. C.com., art. L.232-23. A management report need not be prepared where the sole shareholder is the sole manager of the company and the company, at the end of a fiscal year, does not exceed two of three thresholds fixed by decree (total of the balance sheet, turnover and average number of

employees of the company). C.com., art. L.232-1.

(n287)Footnote 287. In the event that the SAS has only one shareholder, Articles L.227-13 through L.227-19 of the Commercial Code do not apply. C.com., art. L.227-20.

(n288)Footnote 288. The transfer can be declared null and void even in the absence of fraudulent collusion between the parties. Rapport AN P 258, p. 24.

(n289)Footnote 289. C. civ., art. 1843-4.

(n290)Footnote 290. *See, e.g., Judgment of July 7, 1992*, [1992] Bull. Joly no. 359 at 1100 (exclusion of a member of an economic interest group).

(n291)Footnote 291. Control within the meaning of art. L.233-3 may be direct or indirect and may be the result of an action in concert. *See § 5.12[3] infra* on issue of control under art. L.233-3.

(n292)Footnote 292. *C. trav.*, art. L.2323-66.