# THE LIMITED LIABILITY COMPANY UNDER FRENCH LAW

The limited liability company *(société à responsabilité limitée),*[1] a very popular form of business enterprise,[2] was introduced in France from a foreign legislation[3] by the Law of 7th March, 1925.[4]

The rapid success of this form of business association[5] is due to several reasons. A limited liability company is often established in order to suit the need of the enterprises of medium size by offering limited liability to the members for the purpose of attracting capital and, at the same time, by reducing the expenses and difficulties which the organisation and operation of a corporation would entail. But, more than the negative aspect of the limited liability and the organisational problem of the structure of the company, a limited liability company presents the advantage for the manager that he is, practically, irrevocable, and his powers are so broad that he is the *dominus* of the company, yet avoiding personal liability.

1. This name is not to be confused with that of the joint stock company (also called *société à responsabilité limitée*) repealed with the coming into force of the Law of 24 July, 1867 on joint stock companies (thereafter called *sociétés anonimes*).

   On commercial companies in France, see: Church, *Business Associations under French Law,* (London, 1960); Escarra et Rault, *Les Sociétés Commerciales,* (Paris, 1950-1951); Hamel-Lagarde, 1 *Traité de Droit Commercial,* (Paris, 1954); Pic-Kheher, *Des Sociétés Commerciales,* (Paris, 1948); Ripert, 1 *Traité Elementaire de Droit Commercial,* (Paris, 1959) ; and also the works of David, Gain et Delaisi, Lemeunier, Michel, Moreau, Parisot, Rousseau.

2. It is very common as a form of family company, better known as "close corporation", and has been received in the legislation of many countries. See further Appendix I.

3. The French company is patterned after the *Gesellschaft mit beschränkter Haftung* of German law originally established by Law of 29th April, 1892. For comparative study see: Cheron, *Les sociétés à responsabilité limitée en droit allemand et en droit français,* (1925) *Annales de droit commercial* (hereinafter referred to as *Annales)* ; Baudoin-Bugnet, *La société à responsabilité limitée en France et en Allemagne,* (Paris, 1950); Lehnard, *Quelques points de comparaison entre le régime français et le regime allemand des sociétés à responsabilité limitée,* (Paris, 1955).

4. As subsequently amended or modified by Law of 13th January, 1927, Law of 28th February, 1933, Decree-Law of 8th August, 1935, Decree-Law of 30th October, 1935, Decree-Law of 14th June, 1938, Ordinance of 2nd November, 1945, Decree of 9th December, 1948, Decree of 9th August, 1953, Decree of 4th June, 1954, Decree of 20th May, 1955, Decree of 13th November, 1956, Decree of 23rd February, 1957, Law of 1st August, 1957, Ordinance of 29th December, 1958, and Law of 2nd July, 1963.

5. There are today in France over 300,000 limited liability companies.

The organisation of a limited liability company is less difficult and less expensive than that of a corporation. No previous government authorisation is required. Such company may be more closely held and controlled than a corporation and its operation is less complicated. Finally, the fiscal treatment of a limited liability company is more favourable.

But there are also disadvantages. Very often this form of company does not offer sufficient security to potential creditors. Despite the provisions of the Decree of 9th August, 1953, aiming at correcting certain abuses in increase of the capital and of the amount of the members' quotas by requiring a wider form of publicity for these operations and by introducing a liability of the managers analogous to that of the directors of a joint stock company, the capital of this companies is very often nominal: hence, the desire in third parties dealing with the company to see the managers personally bound.

A limited liability company is neither a company of persons nor a company of capital, such as joint stock companies. It is a hybrid form, which is normally called a mixed company or a *société par intérêts.* The distinction between this type of company and the joint stock company lies in the nature of the right of the company's member. The quota of a member in a limited liability company cannot be assigned to third parties non members of the company without the consent of a majority of the members, representing at least three-quarters of the capital.[6] Although the expressions *sociétés des personnes* (companies of persons) and *sociétés par intérêts* have been used interchangeably, the limited liability company presents exclusive characteristics: for instance, the company is not dissolved by the death of a member[7] but his quota normally passes on to the heirs. This does not happen in companies of persons.

The Law requires a special majority in certain cases, such as the transfer of quotas,[8] and the amendment of the by-laws.[9] Other provisions in the law, such as the duty to entirely pay in the quota at the moment of the organisation of the company,[10] to call a meeting of the members at least every year when they are more than twenty,[11] the duty to establish a board of auditors if the company comprises more than

6. Law of 7th March, 1925 (hereinafter referred to as Law of 1925), Art. 22. See also: Decision of the Commercial Tribunal of Paris (hereinafter only the name of the jurisdiction will be indicated for judgments of commercial tribunals) 21st November, 1951, *Recueil de Sirey* (hereinafter referred to as S.) year (hereinafter omitted) 1952, volume (hereinafter omitted) 2, page (hereinafter omitted) 105; Rev. Soc., 1952, 169; (1955) *Journal des Societes* (hereinafter referred to as J. Soc.) No, 844.

7. Law of 1925, art. 36.

8. Law of 1925, art. 22.

9. Law of 1925, art. 31.

10. Law of 1925, art. 7.

11. Law of 1925, arts. 26 and 29.

twenty members,[12] the duty to set aside one-twentieth of the yearly profits for the formation of a reserve fund,[13] make this company resemble a joint stock company and even more closely the private company of English law.

Whatever its purpose may be, a limited liability company is a commercial company and subject to the laws and customs of commerce.[14] Thus, a company — not the members, —even if they are its managers, may be declared bankrupt.[15]

A limited liability company is called either by a name based on the purpose of its enterprise, or by a name which includes the names of one or more members.[16]

For the purpose of informing third parties dealing with the company about the nature of it, the Law requires that "in all instruments, invoices, announcements, publications, or other documents emanating from the company, the company's name must always be preceded or immediately followed by the words legibly spelled out in full: *société à responsabilité limitée,"* and by a statement of the amount of capital.[17]

In practice the abbreviation S.A.R.L. instead of the words legibly spelled out in full, is considered sufficient; but the abbreviation must be inserted, otherwise the manager would be both civilly and criminally responsible,[18] and the members would be held responsible as if they were partners of a general partnership,[19] unless they could prove that third parties dealing with the company knew of its real nature.[20]

The location of the head office determines the nationality of a company. While the nationality of the members may be irrelevant, the nationality of the manager may be deemed as an indication of foreign control over the company.

12. Law of 1925, art. 32.

13. Law of 1925, art. 33.

14. Law of 1925, art. 3.

15. See: Seine, 14th January, 1927, *Dalloz périodique* (hereinafter referred to as D.P.) 1928, 2, 26.

16. Law of 1925, art. 11.

17. Law of 1925, art. 18.

18. See: Paris, 5th May, 1936, *Gazette du Palais* (hereinafter referred to as Gaz. Pal.) 1936.I.901.

19. See: Colmar, 14th October, 1932, S. 1933.2.43; Le Havre, 20th February, 1933, Gaz. Pal., 1934. I. 138; Menton, 30th March, 1934, S. 1934.2.162; Montpellier, 29th November, 1935, S. 1936.2.147; Paris, 5th May, 1936, S. 1936.2.148.

20. See: Decision of the Court of Cassation, Civil Chambers, 7th March, 1955, *Bulletin des arrêts de la Cour de Cassation, Chambres civiles* (hereinafter referred to as Bull. cass.) 1955.I.95.

1. ORGANISATION OF A COMPANY.

A limited liability company is established either by an instrument before a notary or by an instrument under private seal. Founders must know each other, as the company's contract is entered *intuitu personae.* A company is forbidden to issue, on its own account through public subscription, any movable securities.

Only the company, and not its members, may undertake a commercial activity; the quotas must be fully paid in, and the members incur no liability beyond such payments. These circumstances explain why founders of a limited liability company quite often solicit contribution from persons within the family, and conversely, why this company is the type preferred when a close company is called for.

A limited liability company may be set up by only two members.[21] The maximum number of members is not provided for by the Law, but when there are more than twenty members the company must meet certain requirements. However it is rather unusual that at the beginning there are more than four or five members.

An emancipated minor, whether or not authorised to engage in commerce,[22] may invest his income in a limited liability company. If he is investing from capital he needs his guardian's consent. The guardian of an unemancipated minor can freely invest the minor's funds in quotas of limited liability company. A minor is somewhat restricted from making contributions in kind.

The articles of association must contain an appraisal of the contributions in kind, and the members are jointly and severally liable toward third parties for the purported value of the contributions in kind at the moment of the organisation of the company.[23] While every limited liability company, organised contrary to the provisions of art. 8 of the Law, is void and without effect on interested parties, although this nullity cannot be pleaded by the members,[24] an action for liability is available under art. 8.[25]

If the property contributed is evaluated higher than its actual value, contributors become liable for a further payment. Contrary to a long standing case law,[26] the courts seem to have considerably restricted the capacity of a minor to enter into a limited liability company.[27] But a

21. Law of 1925, art. 5.

22. See: art. 2, Commercial Code (France, 1808).

23. Law of 1925, art. 8.

24. Law of 1925, art. 9.

25. Law of 1925, art. 8, par. 2.

26. See: Paris, 21st November, 1929, J. Soc., 1930, 594; 11th April, 1930, J. Soc., 1934.221.

27. See: Paris, 23rd December, 1939, *Dalloz critique* (hereinafter referred to as D.C.), 1941, 45.

more recent decision has reaffirmed the right of a minor to enter into this kind of company if there is a certainty that the value conferred to the contribution in kind is at least equal to that declared in the articles of association.[28]

A married woman need not get her husband's authorisation to engage in a commercial activity, as long as she commits property of her own, as she cannot dispose of property held in common with her husband without the latter's consent.

While it is now settled that husband and wife cannot form a limited liability company,[29] judicial decisions hold different views about the position of husband and wife as members with others in such a company. The Court of Cassation has repeatedly held a company between spouses and third parties to be void,[30] whatever be the matrimonial regime between the spouses, and irrespective of whether the company has been established before or after the marriage.[31] Some decisions, however, admitted the possibility of the existence of companies between spouses where the companies had been formed before the marriage, or where spouses found themselves in this position as a result of hereditary succession.[32] Members of certain professions are prevented from taking part in any business activity except as shareholders or silent partners. This disqualification does not mean or entail incapacity; therefore a contract entered into by any such person is not necessarily voidable. Rather, the law requires that any such person choose between his profession and a commercial activity. Accordingly, judges,[33] barristers and

28. See: Civil Tribunal of Rouen, 12th December, 1949, *Recueil Dalloz* (hereinafter referred to as D.) 1950, 289. See also: Civil Tribunal of Belfort, 26th January, 1951, *Jurisclasseur périodique et Semaine juridique* (hereinafter referred to as J.C.P.), 1952.2.6794.

29. But. *contra,* see: Auger, *Recueil Juridique des Sociétés* (hereinafter referred to as Rec. Jur. des Soc.), 1926, 143.

30. See: Decision of the Court of Cassation, Criminal Chambers, 25th January, 1950, D. 1950.212. See also: Douai, 3rd February, 1953, *Rev. Soc.,* 1953, 155.

31. Originally laid down for and applied to personal companies (See: Decision of the Court of Cassation, Civil Chambers, 5th May, 1902, D. 1903.I.207; S. 1905.I.41; Decision of the Court of Cassation, Civil Chambers, 23rd January, 1912, D. 1912.I.481; S. 1912.I.148; Decision of the Court of Cassation, Civil Chambers, 3rd July, 1917, D. 1917.I.127; S. 1921.I.201; Decision of the Court of Cassation, Criminal Chambers, 25th January, 1950, D. 1950, 212; Douai, 3rd February, 1953, *Rev. Soc.,* 1953, 155) this principle has been extended to limited liability companies.

32. See: Lyon, 3rd May, 1948, J.C.P. 1928.2.4508; Civil Tribunal of Limoges, 17th February, 1949, J. Soc., 1949, 198; Gaz. Pal., 1949.2.41; J.C.P. 1949.2.4951; Civil Tribunal of Strasbourg, 25th May, 1951, J.C.P. 1951.2.6494; Seine, 8th August, 1952, J.C.P. 1953.2.7867; Court of Appeal of Paris, 7th December, 1954, D. 1955, 353; J.C.P. 1955.2.8526; Gaz. Pal., 1954.2.409; J. Soc., 1955, 129; Rev. Soc., 1954, 374; and, Colmar, 17th June, 1955, D. 1955, 639; Gaz. Pal., 1955.2.216; J.C.P. 1955.2.8959.

33. See: Circulars of the Chancellerie of 16th August, 1848; of 31st December, 1849; and of 20th February, 1902.

solicitors,[34] notaries,[35] judicial officers,[36] employees of the State, such as teachers[37] or military,[38] or consular officials in foreign countries,[39] or internal revenue agents;[40] stockbrokers;[41] and forestry agents and wardens,[42] may subscribe to the quotas of a limited liability company, but cannot hold any administrative or managerial position.

"An agreement by which one of the parties is to receive all the profits is void.

Likewise a stipulation which exempts the sums or articles contributed to the capital of the partnership by one or several parties from participating in any part of the losses shall be void".[43] Provisions in violation of these dispositions of the law, particularly in violation of the latter, are often found in articles of association. They are, of course, void, even if made under a form aiming at guaranteeing reimbursement of contribution.[44]

The contract establishing a limited liability company may be made by an instrument before a notary or by an instrument under private seal.[45] If the instrument is under private seal it is drawn up in as many originals as are necessary so that one may be kept at the head office and the others in compliance with the several required formalities.[46] Within a month from the organisation of the company two originals of the articles, if they are under private seal, or two copies, if they are notarised, must be filed at the registry of the commercial court where the company has the head office.[47]

Attached to the articles are two originals or two copies, as the case may be, of the document certifying the appointment of the first managers,

34. See: art. 42 of Ordinance of 20th November, 1822.

35. See: 12 of Ordinance of 4th January, 1843.

36. See: art. 41 of Decree of 14th June, 1813.

37. See: art. 25 of Law of 30th October, 1886.

38. See: Circulars of 27th May, 1895 and of 15th November, 1904.

39. See: art. 34 of Ordinance of 20th August, 1833.

40. See: art. 18 of Decree of 31st May, 1862.

41. See: art. 85, Commercial Code (France, 1808).

42. See: art. 21, Forestry Code.

43. See: art. 1855, Civil Code (France, 1804).

44. See: Decision of the Chamber of Requests of the Court of Cassation (hereinafter referred to as Req.), 9th April, 1941; *Dalloz analytique* (hereinafter referred to as D.A.) 1941, 275; S. 1941.I.41; J. Soc., 1943, 248.

45. Law of 1925, art. 4, par. 1.

46. Law of 1925, art. 4, par. 2.

47. Law of 1925, art. 12, par. 1.

if they are designated by a later instrument conforming to the Law.[48]

Within the aforesaid period of time, an extract of the articles and of the attached exhibits, if any, is published in the Bulletin of Legal Notices[49] and in a journal qualified to receive legal notices for the region where the head office of the company is located.[50]

The extract must mention:

1. the form of the company;

2. the company's name or the trade name of the company ;[51]

3. the company's purpose;[52]

4. the head office;

5. the surname, given name, occupations and home addresses of the members or of third parties having the power to manage or administer the company, and of the members of the board of auditors if one exists;

6. the amount of company's capital, the amount of contributions in cash and at the same time a brief description and an appraisal of contributions in kind;

7. the clause which allows interest to the members even in the absence of profits;[53]

48. Law of 1925, art. 12, par. 2 with reference to art. 24, par. 2.

49. I.e.: *Bulletin des Annonces Légales obligatoires.*

50. Law of 1925, art. 13, as modified by Decree-Law of 9th August, 1953.

51. See also: Law of 1925, art. 11. "A limited liability company is qualified either by the name based on the purpose of its enterprise, or by the company's name including the names of one or more members", and

art. 18 "In all instruments, invoices, announcements, publications, or other documents emanating from the company, the company's name must always be preceded or immediately followed by the words legibly spelled out in full: *"société à responsibilité limitée",* and by a statement of the amount of capital. Each violation of the preceding provisions is punishable by a fine from 12,000 [old] to 240,000 [old] francs." Moreover, failure of indicating the nature of the company, if amounting to deceit of a third party acting in good faith, may entail joint and several liability of the members who acted under the company's name (See: Colmar, 14th October, 1932, J. Soc., 1933, 339).

Prior to the 1st January, 1960 all amounts were expressed in old francs. On that date the new franc (N.F.) was introduced; its value was one hundred time the old one. But effective the 1st January, 1963 the designation reverted back to that of franc (F.) (See: Decree No. 62-1320 of 9th November, 1962 and Circular of 27th December, 1962, D. 1963.Leg.25).

52. The purpose of a limited liability company may be civil or commercial. However, insurance, investment, banking and saving companies cannot adopt this form (See: Law of 1925, art. 2; Law of 13th June, 1941, art. 6; Law of 27th December, 1943, art. 5; Ordinance of 13th October, 1945, art. 6, par. 3).

53. Under the provisions of art. 34 of the Law of 1925.

8. the by-laws' provisions, if any, relative to the establishment of special reserves;

9. the time when the company begins and that of its normal expiration;[54]

10. the registry of the commercial court where the aforesaid information has been filed, and the date of the filing.

If the company has a variable capital, the extract must mention this and indicate the amount below which the capital cannot be reduced.

Failure to observe the above mentioned formalities of filing and of publication will bring about nullity of the company without prejudice to the regularisation as provided by the Law.[55] However, the members cannot invoke this ground for nullity against third parties.[56]

No other formality need be performed at the offices of agencies and branch-offices, except those prescribed by the Law[57] and by the law creating a Commercial Register.[58]

The extract is signed by the notary who has received the articles of association, or, if this instrument is under private seal, by one of the members empowered to this effect with a special power.

The above mentioned provisions of filing apply to:

1. all documents and resolutions having as purpose the amendment of any clause of the articles of association;

2. all documents and resolutions for dissolution of the company before the expiration date, and fixing the manner of liquidation.

The following must be published according to the Law:[59]

1. all amendments of the provisions for which the Law[60] prescribes publication;

2. the nullity and dissolution of the company, along with the names and addressed of the liquidators and their powers.

54. For lack of a provision in the articles of association with regard to the time of expiration of the company, the situation will be governed by the Civil Code (France, 1804). See further Appendix II.

55. Law of 1925, art. 10.

56. Law of 1925, art. 14, as modified by Decree-Law of 30th October, 1935.

57. Law of 1925, arts. 13 and 17, par. 2.

58. Law of 1925, art. 15, as modified by Decree-Law of 30th October, 1935. See: art. 11 of the Law of 18th March, 1919. See further Appendix III.

59. Law of 1925, art. 13.

60. Law of 1925, art. 14.

Failure to observe the formalities of filing and of publication prescribed herein will bring about nullity of the company without prejudice to the regularisation as provided by the Law.[61] However, the members cannot invoke this ground for nullity against third parties.[62]

Each violation of the provision whereby in all instruments, invoices, announcements, publications, or other documents emanating from the company, the company's name must always be preceded or immediately followed by the works legibly spelled out in full: *"société à responsabilité limitée,"* and by a statement of the amount of capital, is punishable by a fine from 12,000 [old] to 240,000 [old] francs.[63]

Any person has the right to inspect the documents filed at the registry of the commercial court or those sent by the registrar to the National Institute of Industrial Property or to have a copy or extract delivered at his own expense by the registrar, by the director of the National Institute of Industrial Property,[64] or by the notary who keeps the original.

Likewise any member may require that there be delivered to him at the head office of the company a certified copy of the articles brought to date, on payment of a sum which shall not exceed 5 francs.[65]

The list of incumbent managers and, if there be one, the list of the members of the board of auditors, shall be attached to this copy.[66]

A company must be registered in the Commercial Register within the time, in the forms and under the sanctions determined by the establishing law.[67]

The registration must contain the items stated under Nos. 1, 2, 3, 4, 5, 7, 8, 11, 12, 13 and 14 of paragraph 3 of article 11 of the Law of 18th March, 1919, and, moreover, the first and last names, personal addresses of the members of the board of auditors, if one exists, and any clause which allows interest to the members in the absence of profits within the terms of Law.[68]

61. Law of 1925, art. 10.

62. Law of 1925, art. 17, as modified by Decree-Law of 30th October, 1935.

63. Law of 1925, art. 18.

64. Originally in pursuance of art. 10 of the Law of 18th March, 1919, and now in pursuance of art. 23 of the *Arrêté* of 27th July, 1963.

The present *Institut National de la Propriété Industrielle* was formerly called *Office National de la Propriété Industrielle.*

65. See now art. 2 of the *Arrété* of 5th January, 1963.

66. Law of 1925, art. 19, as modified by Decree-Law of 30th October, 1935.

76. See: Law of 18th March, 1919. See footnote 58, *supra.*

68. Law of 1925, art. 34.

See also: art. 2 of the *Arrêté of* 27th July, 1963.

The items indicated in article 7 of the Law of 18th March, 1919 must likewise be registered in the Commercial Register.

The company must also be registered in the Central Commercial Register, and a copy of its instruments must be filed at the National Institute of Industrial Property.[69] The provisions of paragraph 3 of Art. 10 of Law 18th March, 1919, apply to limited liability companies.[70]

## 2. DEFECTS OF ORGANISATION AND NULLITY.

A limited liability company is void if there is no *consensus ad idem* between the members, and if the purpose of the company is unlawful. This general provision applies to all companies. In particular, a limited liability company is void and without any effect on interested parties for other specific reasons provided for by the Law,[71] namely if:

1. it is organised for the purpose of carrying out an insurance, investment, banking or saving activity;[72]
2. it is organised with a non written contract, or if the number of the originals of the contract, when this is not drafted by notarial instrument, is insufficient;[73]
3. one or more of the members failed to sign the contract;[74]
4. it issued, on its own account through public subscription, any movable securities;[75]
5. the capital is less than one million [old] francs, or is reduced below this figure;[76]
6. the value of each quota (the quotas being of equal nominal value) is lower than 5,000 [old] francs;[77]
7. there are less than two members;[78]
8. all the quotas have not been issued to the members appearing

69. See footnote 64, *supra.*

70. Law of 1925, art. 20, as modified by Decree-Law of 30th October, 1935.

71. Law of 1925, art. 9, par. 1.

72. Law of 1925, art. 2; Law of 13th June, 1941, art. 6; Law of 27th December, 1943, art. 5; Ordinance of 13th October, 1945, art. 6, par. 3.

73. Law of 1925, art. 4.

74. Law of 1925, art. 4.

75. Law of 1925, art. 4.

76. Law of 1925, art. 6.

77. Law of 1925, art. 6.

78. Law of 1925, art. 5.

in the articles of association and have been entirely paid in, or if the founders have not expressly declared in the articles of association that the quotas have been entirely paid;[79]

9. the articles of association do not contain an appraisal of the contributions in kind.[80]

Anyone who has a lawful interest, with the exception of the members of the company who cannot plead the nullity against third parties, may exercise the action for nullity.[81]

When the nullity of a company has been adjudged according to the terms of the Law,[82] the members to whom nullity is chargeable are responsible toward the other members and third parties, jointly and severally among themselves and with the initial managers, for the damage resulting from this annulment. If, in order to cure the nullity, the members must be consulted, the action for nullity cannot be maintained for the date of regular call of the members' meeting, or after dispatch to the members of the test of the decisions to be taken.

An action for nullity of the company or of the deeds and resolutions subsequent to organisation is extinguished when the ground for the nullity has ceased to exist either before the filing of the complaint, or, in any case, on the day when the court decides on the merits. Notwithstanding a later regularisation, the expenses of actions for nullity brought previously will be chargeable to the defendants.

The court having jurisdiction over an action for nullity may, even of its own initiative, accord a period to cure the nullities.

An action for liabilities, for the acts from which the nullity results, also ceases when the ground for the nullity has ceased to exist, either before the filing of the complaint, or on the day when the court decides on the merits, or in the period allowed for curing the nullity and, moreover, when three years have passed from the day when the nullity was

79. Law of 1925, art. 7.

80. Law of 1925, art. 8.

The case law has tried to solve the problem whether the insufficient evaluation of contributions in kind amounts to no declaration of appraisal, as required by art. 8 of the Law. Confirming decisions of lower courts (see: Roanne, 17th April, 1935, Gaz. Pal. 35.2.23 and Bourges, 30th June, 1936, S. 1937.2.62), the Court of Cassation has laid down the rule that there is nullity if the articles do not contain an appraisal of the contributions in kind, but not in the case that the members made a mistake in the evaluation of the contributions. Members remain jointly and severally liable toward third parties. Unless there is fraud, nullity does not necessarily follow. (See: Decision of 25th April, 1939, Gaz. Pal., 39.I.982; Decision of 16th January, 1940, J. Soc., 1941, 179; Decision 16th December, 1941, Gaz. Pal., 1942.I.157; D. 1942, 90; Nancy, 7th July, 1950, Rev. Soc., 1952, 394).

81. Law of 1925, art. 9. See: Decision of the Court of Cassation, Civil Chambers, 10th July. 1961. D. 1962, Somm. 23; Seine, 25th June, 1935, Gaz. Pal., 1935.2.667.

82. Law of 1925, art. 9.

incurred. Actions for nullity prescribed by the Law are barred after the lapse of five years.[83]

3. COMPANY'S CAPITAL AND ITS PROTECTION.

The company's capital must be at least one million [old] francs.[84] It cannot be reduced below this amount.[85] If, due to losses, the capital is reduced below the minimum, the company must be dissolved, or transformed into a company of persons or a company of capital or, finally, increase its capital[86] through a re-evaluation of its assets.

The company's capital is divided into quotas of equal nominal value which cannot be lower than 5,000 [old] francs.[87] Each member has a number of votes equal to the number of the quotas he possesses.[88] Quotas are indivisible, and cannot be represented by negotiable certificates, whether nominative, to the bearer or to order.[89] Privileged quotas and enjoyment quotas may be issued. If a quota is owned by more than one person, the owners must appoint one of them to act in their relations with the company.

Ordinarily the by-laws provide for the criterion to be followed in the distribution of the profits. Short of this, distribution takes place according to the provisions of the Civil Code regarding partnerships.[90]

83. Law of 1925, art. 10, as modified by Decree-Law of 30th October, 1935.

84. The minimum company's capital, which was set by the Law at 20,000 francs, has been raised to 50,000 francs by art. 6 of Decree-Law of 14th June, 1938, and finally to one million francs by art. 1 of Decree-Law of 9th August, 1953. The figure of 50,000 francs has remained unchanged for newspaper publishing enterprises (see: Law of 1925, art. 6, para. 3).

85. Law of 1925, art. 6, par. 1, as amended.

86. Increase of the capital of a limited liability company requires the agreement of the members. If the increase is carried out through the admission of new members, the consent of a majority of the members, representing at least three quarters of the capital (see: Law of 1925, art. 22), is necessary.

87. Law of 1925, art. 6, par. 2, as amended by art. 1 of Decree-Law of 9th August, 1953. The minimum amount was originally one hundred francs.

88. Law of 1925, art. 28, second part.

89. Law of 1925, art. 21, first part.

90. Civil Code (France, 1804), art. 1853. "When the articles of partnership do not fix the share of each partner in the profits or losses, each one's share is in proportion to his contribution to the capital of the partnership.

As regards the one who only contributes his industry, his share of the profits or losses is fixed as if his contribution had been the same as the one of the partner who has contributed the least", and

art. 1854. "If the partners have agreed to leave it to one of them or to a third party to fix the shares, the adjustment cannot be attacked, unless it is manifestly contrary to equity.

No claim shall be admitted in this respect, if more than three months have elapsed since the party who pretends that he has been wronged has had knowledge of the adjustment, or if he has already commenced to carry it out".

Neither the number of the quotas nor the maximum of their amount has been determined by the Law.

It may be provided in the by-laws of limited liability companies that the company's capital may be susceptible to increase by successive payments of the members or the admission of new members,[91] and to decrease by the total or partial return of contributions made. Companies, the by-laws of which include the above provision, are subject, independently of the rules contained in the Law, to the provisions of the Law of 24th July 1867,[92] relative to companies with variable capital (arts. 48-54).[93] In case of conflict, which is quite possible in view of the different and contrasting provisions of the two laws,[94] the provisions of the Law of 1925 prevail.

Limited liability companies cannot be definitively reorganised until after all the quotas have been issued to the members appearing in the articles of association, and have been entirely paid in.[95]

Every company organised contrary to the above mentioned provision is void and without effect on interested parties.[96]

The founders must expressly declare in the articles of association that the conditions of the Law have been fulfilled.[97] Disregard of this provision is a violation of criminal law and is punishable by a fine of 120,000 [old] to 2,400,000 [old] francs and imprisonment of fifteen days

91. Law of 1925, art. 40, par. 1.

92. This Law, a conquest of French liberal capitalism, soon to influence the legislation of Spain (Law of 19th October, 1869), Germany (Commercial Code of 1861 as modified by a Law of 1870), Belgium (Law of 18th May, 1873), Italy (Commercial Code of 1882), Switzerland (Law of 18th December, 1936), as well as of many other European and South American countries (see, for instance, Argentina (Commercial Code of 1889, as amended by Law 30th December, 1902 and Decree 27th April, 1923), Brazil (Commercial Code of 1850, as modified by Decree of 10th April, 1899 and Decree-Law of 26th September, 1940, as amended), Bolivia (Commercial Code of 1831, as amended), Chile (Commercial Code of 1865, as amended, and in particular, Decree of 30th November, 1946), Colombia (Commercial Code of 1887, as amended), Mexico *(Ley Genera) de Sociedades Mercantiles* of 28th July, 1934), and Venezuela (Commercial Code of 1919, as amended in 1942 and 1955), "despite extensive amendment, remains the fundamental text governing the formation and functioning of the public company with limited liability. It was partly inspired by the success of earlier and contemporaneous company legislation in England, notably the Companies Act of 1862" (Amos and Walton, *Introduction to French Law,* (2nd ed. 1963), 352).

93. See further Appendix IV.

94. See articles cited in Appendix IV, and in particular compare: art. 6 of the Law of 1925, regarding the minimum capital, with art. 51; art. 7 of the Law of 1925, regarding full payment of the quotas, with art. 51; art. 10 of the Law of 1925, regarding liability of members, with art. 52.

95. Law of 1925, art. 7, par. 1

96. Law of 1925, art. 9, par. 1. See also: Decision of the Court of Cassation, Civil Chambers, 16th December, 1941, D.A. 1942, 90.

97. Law of 1925, art. 7, par. 3.

to six months, or by either of these penalties.[98] Founders must also state in the articles of association how and to whom the allocation of quotas among them or their payment took place,[99] under the same penalties in case of false declaration.[1] The same penalties apply to a straw-man who takes part in the organisation of the company or to a representative of a member who, in the name of his principal, issues a false declaration as far as the payment of the quota is concerned.

An action for nullity arising from the violation of the aforesaid provisions prescribes in five years.[2]

Contributions to a limited liability company may be made in cash or in kind, but cannot be made under form of technical knowledge or managerial activity, in other words of services rendered to the company, because the contribution must be conferred and fully paid in or evaluated at the moment of the organisation of the company,[3] whereas such services could be rendered only after the company has been formed.[4]

The amount of a quota must be fully paid in at the time the company is organised.[5] Payment may be made in any way; however payment made by the issue of a bill of exchange or of a cheque takes effect only when the instrument is paid.

Contributions in kind may be constituted by any thing which has a determined commercial value, or the value of which is capable of determination. Property,[6] or the enjoyment of it,[7] goods, patents and other

98. Law of 1925, art. 37, par. 1. See: Decision of the Court of Cassation, Criminal Chambers, 11th January, 1945, S. 1945.I.20; Decision of the Court of Cassation, Criminal Chambers, 12th March, 1957, D. 1957, 470; J.C.P. 1958.2.10405; Rev. Soc., 1957, 266. See further Appendix V.

99. Law of 1925, art. 37, par. 2.

1. Law of 1925, art. 37, par. 1.

2. See: Req., 2nd January, 1940, D.A. 1942, 78; Gaz. Pal., 1940.I.224; Decision of the Court of Cassation, Commercial Chambers, 29th November, 1948, S. 1948.I.42; Gaz. Pal., 1949.I.36; Rev. Soc., 1949, 387; J. Soc., 1950, 23.

3. Law of 1925, art. 8, par. 1.

4. See: Valenciennes, 12th February, 1935, Gaz. Pal., 1935.I.657; Amiens, 22nd July, 1952, J.C.P. 1953.2.7733. See further Appendix VI.

5. Law of 1925, art. 7, par. 2.

6. When the thing conferred to the company is not yet in the ownership of the contributor, or when it has already been sold by him, the contribution is considered fictitious and the company is void and without effect on interested parties, pursuant to art. 9 of the Law of 1925 (Lyon, 3rd February, 1949, J. Soc., 1949, 277).

7. If the property happens to be encumbered it may still be contributed, provided that the encumbrance does exceed the value of the property, in which case the contribution would be void, and so would the company (Nantes, 15th December, 1930, Rev. Soc., 1932, 116; J. Soc., 1934, 99), but the contributor must remove the encumbrance within a given time (Lyon, 18th December, 1931, Rev. Soc., 1932, 95).

industrial rights, and claims[8] may be contributed and the quotas corresponding in whole or in part to these contributions must always be entirely paid in at the time of organisation of the company.[9] An appraisal of the contributions in kind must be made in the articles of association.[10] There is no specific procedure laid down by the Law for this evaluation, and it is frequent that the members come to an over-evaluation, despite the provision of the Law whereby members are held jointly and severally liable toward third parties for the purported value of the contributions in kind at the moment of the organisation of the company.[11] In this case, the Law provides that those who have, with the help of fraudulent manoeuvres, caused a contribution in kind to be evaluated higher than its real value, are punishable with penalties prescribed by articles 405 of the Penal Code.[12]

In case of fraudulent over-evaluation the company is void and without effect on third parties.[13]

As the Law provides, the members are jointly and severally liable to third parties for the purported value of the contributions in kind at the moment of the organisation of the company.[14] A literal interpretation of the words used in the French text *("Les associés sont solidairement responsables vis-à-vis des tiers de la, valeur attribuée au moment de la constitution de la société aux apports en nature")* in the light of what

8. See: Amiens, 25th March, 1954, J.C.P. 1954.2.8372.

9. Law of 1925, art. 7, par. 2.

10. Law of 1925, art. 8, par. 1, first part.

11. Law of 1925, art. 8, par. 1, second part.

12. Law of 1925, art. 38.

See: art. 405 Penal Code (France, 1810): "Any person assuming a false name or identity, or using deceptive means, so as to induce belief in fraudulent ventures, or of fictitious power or credit, or to suggest hope or fear of success, accident or other imaginary event, and obtains or attempts to obtain any money, movables or obligations, releases, notes, promises or receipts, and by any such means shall swindle or attempt to swindle another out of his property, in whole or in part, shall be punished by jailing for no less than one nor more than five years and by fine of 360,000 [old] to 3,600,000 [old] francs.

Any person who commits such misdemeanor by floating a public issue of stocks, bond, shares or other negotiables, of any entity or industrial or trading enterprise, shall be punished by imprisonment up to ten years and by a fine up to 18,000,000 [old] francs.

In all such cases the perpetrator may, furthermore, be deprived of his civil rights provided by Article 42 of this Code for no more than ten years; he may also be restricted in his freedom of movement.", translated by Moreau and Mueller (London, 1960).

13. Law of 1925, art. 9, par. 1.

There are cases in which the over-evaluation is such as to make the contribution fictitious, although there may be no fraud on the part of the contributor. In these cases also the company is void (Paris, 21st December, 1933, D.P. 1935.2.30).

14. Law of 1925, art. 8, par. 1.

might have been the purpose of the legislator, may render even more obvious the problem of whether liability for damages is confined to the original members of the company or extended to those who subsequently become members for transfer of the quotas, either *inter vivos,* or *mortis causa.* The Law says that the members, *tout-court,* are responsible. Considering that this responsibility is provided to guarantee the creditors of the company for the existence of its capital, responsibility must be deemed to be on the original members for the contributions in kind at the moment of the organisation of the company, and for the following ten years,[15] and thereafter on those who happen to be members at the moment of the filing of the action for liability. A member who finds himself in this position of strict liability has an action against his assignor, who ceased to be a member.[16] The action for liability which prescribes in ten years from the organisation of the company is independent of the action for nullity which may be brought in case of fraudulent over-evaluation.[17]

Quotas cannot be assigned to a third party non member of the company[18] without the consent of a majority of the members, representing at least three-quarters of the capital.[19] By implication, quotas are freely transferable among members of the same company.

In case of sale outside the company, it is sufficient that the name of the transferee be known at the moment in which consent to the transfer is sought.[20] Consent may be tacit,[21] subsequently ratified if improperly given,[22] and need not be published.[23] Consent of the members is not

15. Law of 1925, art. *8,* par. 2.

16. See: art. 1382, Civil Code (France, 1804): "Any act by which a person causes a damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage."

17. Law of 1925, art. 9. See also, *supra,* on defects of organisation and nullity, and in particular, at footnote 80.

18. Case law deems as a third party non member of the company whoever is not a member at the moment of the transfer, even if he was a member before (Decision of the Court of Cassation, Commercial Chambers, 29th March, 1955. Bull cass., 1955.3.97).

19. Law of 1925, art. 22.

The provision of art. 22 of the Law applies to any transfer, whether it be a gratuitous or an onerous transfer, a voluntary or judicial transfer (Paris, 6th February, 1940, J. Soc., 1943, 267).

20. See: Lyon, 29th November, 1949, J. Soc., 1951, 103.

21. See: Aix, 25th May, 1954, Gaz. Pal., 1954.2.87; Rev. Soc., 1954, 176; J. Soc., 1954, 359.

22. See: Decision of the Court of Cassation, Commercial Chambers, 19th November, 1956, Bull. cass., 1956.3.253.

23. Art. 17 of the Law, as modified by Decree-Law of 30th October, 1935, "Subject to the filing prescribed by article 12 are:

1. all documents and resolutions having as purpose the amendment of any clause of the articles of association;

required for transfer of quotas following the dissolution or liquidation of the company.[24] Should the members of a company be motivated by bad faith in denying consent to a transfer, an order may be obtained by a court, ordering the members to authorise the transfer.[25] If the refusal to consent has caused damages to the prospective transferee, he is entitled to reparation for them.[26]

The by-laws of a company may render the transfer of quotas either more difficult, by providing for a higher majority, or even for the consent of all members of the company,[27] or easier, by providing for the free transfer or for the transfer *en blanc* of a quota.[28]

Equally, the by-laws may provide for pre-emptive rights, either in case of transfer of the quotas *inter vivos*[29] or in case of succession *mortis causa*.[30]

2. all documents and resolutions for dissolution of the company before the expiration date, and fixing the manner of liquidation.

The following are published conforming to article 13:

1. all amendments of the provisions for which article 14 prescribes publication;

2. the nullity and dissolution of the company, along with the names and addresses of the liquidators and their powers.

Failure to observe the formalities of filing and of publication prescribed in the present article will bring about nullity of the company without prejudice to the regularisation provided by article 10. However, the members cannot invoke this ground for nullity against third parties", does not apply to transfer of quotas. See: Decision of the Court of Cassation, Commercial Chambers, 9th May, 1951, Bull cass., 1951.2.123. See also footnote 58, *supra.*

24. See: Decision of the Court of Cassation, Commercial Chambers, 15th November, 1950, J.C.P. 1951.2.6146.

25. See: Civil Tribunal of Valenciennes, 13th July, 1933, Gaz. Pal., 1933.2.816.

26. See: Seine, 28th December, 1949, Rev. Soc., 1950, 430.

27. See: Alger, 13th May, 1954, Gaz. Pal., 1954.2.100. See also: Law of 1925, art. 43. "The provisions of the present law are applicable in Algeria and in the colonies".

28. See: Paris, 21st November, 1951, S. 1952.2.105, Rev. Soc., 1952, 169; Aix, 15th December, 1953, J.C.P. 1954.2.8066.

29. In this case the by-laws may contain a provision whereby the members have a pre-emptive right on the quota offered for sale, or, should a transfer be refused by some members, these will have the right to purchase the quota offered for sale.

See: Decision of the Court of Cassation, Commercial Chambers, 15th November, 1950, Bull, cass., 1950.2.240; Paris, 18th June, 1954, J.C.P. 1955.2.8723; Aix, 29th November, 1955, J.C.P. 1956.2.9603; J. Soc., 1957, 69 (judgment which was however, overruled by Decision of the Court of Cassation, 10th December, 1957, J.C.P. 1958.2.10406).

30. See: Law of 1925, art. 36. "The company is not dissolved by....death of a member, except, in case of death, where otherwise provided in the by-laws...." In this case the by-laws may contain a provision whereby either the remaining members have a pre-emptive right on the quota of the deceased member, or the consent of the remaining members is necessary for admission of the heirs to

Assignments of quotas must be certified by a notarised instrument or under private seal. Assignments can be pleaded against the company and third parties only after they have been notified to the company, or accepted by it through a notarised instrument, conforming to article 1690 of the Civil Code.[31]

The transfer of all quotas to one member entails dissolution of the company.[32]

4. MEMBERS' MEETINGS.

The decisions of the members are taken at meetings. However, the holding of a meeting is not necessary when the number of members is not higher than twenty. In this case, every member shall receive the text of the resolutions or decisions to be voted on, specifically set forth, and shall cast his vote in writing.[33]

This voting system has been introduced into the Law exclusively for the convenience of the management, as the members can always decide to hold a meeting for the purpose of passing the proposed resolutions.[34] Each member must either approve or disapprove a proposal and return his vote within the time limit set by the management. Should a member fail to signify his approval within such time, this will be interpreted as disapproval. Members cannot amend a proposal, nor can they approve it on condition; they cannot vote by proxy, unless expressly authorised to do so by the by-laws.

No resolution is validly passed unless it has been adopted by members representing more than one half of the company's capital. In the absence

the company. Lacking this consent, the surviving members may be forced to purchase the quota of the deceased member. See: Decision of the Court of Cassation, Commercial Chambers, 7th January, 1952, D. 1952, 229; J.C.P. 1953.2.7374; Rev. Soc., 1952, 160; J. Soc., 1953, 129; Decision of the Court of Cassation, Commercial Chambers, 18th October, 1955, D. 1956, 281; J.C.P. 1956.2.9057; Rev. Soc., 1955, 337; Gaz. Pal., 1955.2.353. See also: Decision of the Court of Appeal of Rouen, 14th May, 1957, D. 1958, 208; J.C.P. 1957.2.10102; Rev. Soc., 1957, 386; Decision of the Court of Cassation, Commercial Chambers, 19th November, 1956, Bull cass., 1956.3.253; J.C.P. 1958.2.10395.

31. Law of 1925, art. 23. See: art. 1690 of the Civil Code (France, 1804): "An assignee is only vested with regard to third parties when the transfer is notified to the debtor.

However, the assignee may be equally put in possession by the acceptance of the transfer made by the debtor in a notarised instrument".

32. See: arts. 5 and 9 of the Law. See also: Decision of the Court of Cassation, 21st November, 1955, D. 1956, 162; J.C.P. 1956.2.9082; Seine, 4th December, 1957, Rev. Soc., 1958, 80.

33. Law of 1925, art. 26.

34. A provision in the by-laws which exempts the manager from the duty of calling members' meetings, cannot be interpreted as a dispensation of the latter from the duty of consulting the said members on the business of the company (Decision of the Court of Cassation, Commercial Chambers, 4th February, 1952, Bull. cass., 1952.2.45).

of a contrary provision in the by-laws, if this total is not reached on the first ballot, the members are called a second time, by registered mail, and resolutions are passed by a majority of votes cast, whatever may be the proportion of capital represented.[35]

Notwithstanding any clause to the contrary in the articles of association, every member may take part in the resolutions. Each member has a number of votes equal to the number of the quotas he possesses.[36] In companies having more than twenty members, a members' meeting must be held at least every year at a time specified in the by-laws.

Other meetings can always be called by the manager or managers, or on their failure to do so[37] by the board of auditors, if one exists, and in failure by the latter, by members owning more than one half of the company's capital.[38]

## 5. MANAGERS.

A limited liability company is directed by one or more managers members or non-members.[39] Some types of company, however, require that the manager be one of the members,[40] and indeed the articles of

35. Law of 1925, art. 27. The case law on the grounds available for impugning resolutions of a members' meeting has developed along the line of the corresponding case law relative to joint stock companies, but the Courts have been rather liberal in interpreting provisions relative to the call of members' meetings (Decision of the Court of Cassation, 7th January, 1953, J.C.P. 1953.2.7728; Decision of the Court of Cassation, Commercial Chambers, 15th November, 1955, J.C.P. 1956.2.9089, Gaz. Pal., 1956.I.7).

36. Law of 1925, art. 28.

    A member may be represented by proxy, who may or may not be a member. The transferee of a quota may attend a members' meeting only if the transfer has been communicated to and approved by the company; approval need not be formal. In the case of quota subject to a pledge (or other form of guaranty of an obligation), or to a usufruct (a form of temporary enjoyment by someone of a thing belonging to someone else, provided the economic destination of said thing be respected) only the member pledgor or the member giving in usufruct may attend the meeting, unless the pledgee or usufructuary has been given a proxy, if the by-laws of the company consent the release of such proxy.

    When a quota is jointly owned by several persons, they must appoint a proxy who will represent them at the meeting.

37. On this point see: Poitiers, 17th July, 1951, J.C.P. 1952, 7152.

38. Law of 1925, art. 29

    The Law does not lay down provisions relative to the form of a convocation. This will be normally made by registered letter or by publication of a notice in a newspaper published in the place where the company has the head office and by indicating the day, time and place (usually the head office) and the agenda. The by-laws provide details as far as the lapse of time between the notice of convocation and the actual meeting.

39. Law of 1925, art. 24, par. 1.

40. Thus, for instance, arts. 576 and 596 of the Sanity Code and the Law of 8th July, 1948, require that the manager of a limited liability company of Pharmacists be a member of the company. See also: Decree of 5th October, 1953, carrying codification of the laws concerning Public Health.

association of any company may so provide.

Members themselves may manage a company, if they so prefer, provided they be appointed to the office.[41] In case of bankruptcy or judicial liquidation of the company they cannot avoid the liability incurred by a manager even if they were only *de facto* managers.[42] If no manager has been appointed by the members, they assume collective management of the company.[43]

A manager, being an agent of the members, must have full juridicial capacity;[44] interdicts, incapacitated persons, bankrupts and persons who have been given a sentence entailing even temporary disqualification from public office or from the exercise of managerial activities cannot be elected managers, and if elected, are debarred from assuming office.[45] A foreigner can be appointed manager but, in order to hold his office, must obtain from the proper authorities a trader's card *(carte de commercant)*.[46]

Managers are appointed by the members, either in the articles of association or in a later instrument, for a time which may be limited or

41. See: Rennes, 10th July, 1931, D.P. 1935.2.65; S. 1932.2.33.

42. Law of 1925, art. 25, second part, as modified by Decree Law of 9th August, 1953.

43. See: art. 1859 Civil Code (France, 1804):

"In default of special stipulations as to the mode of management the rules hereafter laid down shall be followed:

1. The partners are supposed to have given reciprocally to each other the power to manage. What each one does is valid, even as regards the shares of his partners, without their consent having been obtained; subject to the right which belongs to the latter, or one of them, to object to the matter before it is closed;

2. Each partner may make use of the things belonging to the partnership, provided he uses them for the purpose for which they are intended usually, and does not use them against the interests of the partnership, or in a way to prevent his partners from using them according to their rights;

3. Each partner has the right to oblige his partners to bear with him the expenses which are necessary for the preservation of the property of the partnership;

4. One of the partners cannot make any alterations in the real estate forming part of the partnership, even if he claims that they are to the advantage of such partnership, unless the other partners consent thereto."

44. See: Le Havre, 22nd April, 1931, Rev. Soc., 1931, 375; Paris, 12th March, 1931, J. Soc., 1933, 34; Paris, 18th May, 1928, Rev. Soc., 1928, 485; Seine, 14th January, 1927, Rev. Soc., 1927, 63.

45. See: Decree-Law of 8th August, 1935, and Law of 30th August, 1947, art. 2: "The incapacity provided in article 1 shall equally apply, without prejudice to the provisions of Decree-Law of 8 August, 1935, to the exercise of any activity of direction, management or administration in a commercial or industrial enterprise, whatever be its juridical structure, as well as to the exercise of the functions of member of the board of auditors or auditor in any company, whatever be its juridical structure." See further Appendix VII.

46 See: Decision of the Court of Cassation, Criminal Chambers, 4th July, 1956, D. 1956, 720.

without limit of duration.[47] This appointment is made by a resolution adopted by members representing more than one half of the company's capital. If this total is not reached in the first ballot, the appointment is made at a second call of the members, whatever may be the proportion of capital represented.[48]

Within a month from the organisation of a company an extract of the articles and of the attached exhibits containing the surname, first name, occupations and home addresses of the members or of third parties having the power to manage or administer the company[49] must be filed at the registry of the commercial court where the company has the head office[50] and published in the Bulletin of Legal Notices and in a journal qualified to receive legal notices for the region where the head office of the company is located.[51]

Except for contrary provisions in the by-laws, the managers have all the powers to act in the name of the company,[52] under all circumstances: any contractual limitation of the powers of the managers is without effect with respect to third parties.[53]

The manager of a limited liability company must present a balance sheet to the approval of the members,[54] and cannot assign property belonging to the company or enter into a transaction which, through the sale of the entire assets of the company, would entail the destruction of the company.[55]

47. Law of 1925, art. 24, par. 2 first part.

    See also: Law of 1925, art. 12, par. 2.

48. Law of 1925, art. 27.

49. Law of 1925, art. 14 No. 5.

50. See: Law of 1925, art. 12.

51. Law of 1925, art. 13.

52. See: art. 1859, Civil Code (France, 1804) at footnote 43, *supra.* Managers may oppose the action of another manager, but this opposition must be brought to the knowledge of third parties dealing with the company. The question does not seem, however, to be settled by the case law. In favour of the thesis, see: Seine, 22nd February, 1929, J. Soc., 1929, 503; Lyon, 20th May, 1940, S. 1940.2.49; J. Soc., 1943, 217; Douai. 2nd November, 1950, J.C.P. 1951.2.6273, Gaz. Pal., 1951.1.116. *Contra,* see: Saint-Etienne, 7th February, 1933, Gaz. Pal., 1934.1.137; Civil Tribunal of Metz, 25th April, 1951, J.C.P. 1951.2.6538, J. Soc., 1952, 129. To avoid this occurrence, many limited liability companies have a board of managers presided over by a general manager.

53. Law of 1925 art. 24, par. 2, last part.

    See: Poitiers, 23rd June, 1931, J. Soc., 1932, 574; Paris, 20th November, 1929, J. Soc., 1930, 420; Rouen, 16th June, 1961, D. 1962, Somm. 14. See further Appendix VIII.

54. Law of 1925, art. 30.

55. See: Lyon, 1st September, 1950, J. Soc., 1952, 38.

The office of manager may be a paid or a gratuitous one.[56] Practically they always receive a compensation, either in form of salary or through participation in the profits of the company. Under a provision of the Law (art. 42 now repealed) the compensation given to a manager was considered income from work, with a considerable advantage from a fiscal point of view.

The managers, whether appointed by the instrument of association or by a later instrument, may be dismissed only for lawful causes.[57] Among the lawful causes for dismissal there are incapacity of the manager.[58] Abuse of the powers conferred upon him,[59] mismanagement of the company business,[60] desire of the members to reduce the number of managers if there are several.[61] Dismissal may take place by a resolution of the members, passed with a majority required for the modification of the by-laws,[62] if the manager had been appointed in the by-laws,[63] followed by approval of the tribunal which must ascertain the fulfilment of the conditions required by law. If the tribunal refuses approval, it declares the resolution null and the manager re-instated in his office,[64] save any right of the manager to demand compensation for damages.[65] Any member has the right, not *uti socius* but *uti singulus,*[66] to ask for judicial declaration of dismissal of a manager. A manager, except for a foreign national who is considered a mandatary, is not free to resign, being bound by the company contract. But, in case of bankruptcy, a manager becomes disqualified to hold his office.[67]

56. Law of 1925, art. 24, par. 1.

57. Law of 1925, art. 24, last paragraph.

58. See: Req., 21st March, 1939, Gaz. Pal., 1939.I.974; J. Soc., 1940, 182.

59. See: Dijon, 2nd November, 1955, Gaz. Pal., 1956.I.42.

60. See: Aix, 13th November, 1945, J. Soc., 1949, 372.

61. See: Decision of the Court of Cassation, Commercial Chambers, 16th March, 1954, J.C.P. 1954.2.8172.

62. See: Law of 1925, art. 31: ".... In absence of a provision to the contrary, all other amendments (besides the change of the nationality of the company) in the by-laws are made by a majority of the members representing three-quarters of the company's capital....'"

63. See: Decision of the Court of Cassation, Commercial Chambers, 12th July, 1955, D. 1956, 593.

64. See: Req., 23rd February, 1944, S. 1946.I.9.

65. See: Nancy, 16th May, 1938, D.H. 1938, 427.

66. Thus, the member need no prior consent of the majority (Seine, 6th November, 1953, J.C.P. 1953, 2.7882), not even when a company has more than twenty members and there is a members' meeting.

67. See text at footnote 45, *supra,* and especially: art. 2 of Law 30th August, 1947 and art. 2003 of the Civil Code (France, 1804): "A mandate terminates: by dismissal of the mandatary, by renunciation of the mandate by the mandatary, by he natural [or civil] death, commitment or failure, either of the principal or of the mandatary". [Civil death has been abolished by the Law of 31st May, 1854].

Managers are civilly liable to the company and to third parties, according to the rules of ordinary law, individually or jointly and severally, as the case may be, for infractions of the provisions of the Law, for violations of the by-laws, or for faults committed by them in their management.[68] Although in principle responsibility is personal, managers must be held jointly and severally liable if they have failed to supervise the general trend of the administration of the company, or if, being cognizant of facts prejudicial to the company, have failed to do everything in their power to avert the occurrence of such facts or to remove or reduce their harmful consequences. But the liability for acts, or omissions of the managers does not extend to a particular manager who, not being at fault, causes his dissent to be entered in the minute book of the meeting and of the resolutions of the board of managers, if there is one.

Because a manager is not a trader, he cannot be declared bankrupt,[69] except when he has converted for his own use the funds of a company which has been declared bankrupt,[70] or unless he be declared to have carried out a commercial activity "veiled" by a ficticious company.[71] However, if bankruptcy or judicial liquidation show an insufficiency of assets, the commercial court may, upon the request of the trustee or of the judicial liquidator, decide that the company debts will be borne, to the extent of the total amount which it will determine, either by the managers, whether members or not, and whether salaried or not, or by the members,[72] or by some of the ones and some of the others jointly and severally or not, on condition that the members have effectively participated in the management of the company. In order to escape liability, the managers and members implicated must give proof that they have given to the management of the company's affairs all the activities and diligence of a salaried mandatary.[73]

Since he is an employee, a manager of a limited liability company is subject to the provisions concerning labour law and social security;

68. Law of 1925, art. 25, par. 1.

69. See: Paris, 13th October, 1954, D. 1955, 41.

70. Art. 1 of Decree Law of 8th August, 1935, as modified by art. 14 of Ordinance No. 1299 of 23rd December, 1958.

71. See: Decree Law of 8th August, 1935, as modified by Ordinance No. 1299 of 23rd December, 1935 and art. 10 of Decree of 20th May, 1955 which has been incorporated into the Commercial Code as art. 446.

See also: Angers, 13th October, 1954, J.C.P. 1954.2.8358; Rev. Soc., 1956, 258.

72. See: Niort, 6th February, 1957, Gaz. Pal., 1957.I.294.

73. Law of 1925, art. 25, par. 2, as modified by Decree-Law of 9th August, 1953 provides the applicability to managers of limited liability companies and to members who have effectively participated in the management of the company of the provisions relative to directors of joint stock companies contained in the Law of 16th November, 1940 (as subsequently modified by Law of 4th March, 1943, Law of 7th July, 1953 and Law of 22nd November, 1954).

See: Court of Appeal of Grenoble, 20th February, 1961, D. 1962, J. 100; Valenciennes, 7th April, 1959, Gaz. Pal., 959.2.93.

for the violation of these provisions he is criminally responsible and the company civilly liable.[74] Any conviction which has become final and has been obtained on a charge of having committed an ordinary crime, a theft, a breach of confidence, swindling, or a crime punishable by the laws on swindling or bankruptcy, or any conviction for embezzlement, or for extortion of money or values, the issue, in bad faith, of cheques upon non-existent funds, or attempt upon the public faith, or receiving goods proceeding from these violations, entails disqualification from the right to direct, administer or manage a limited liability company or a branch or subsidiary of it, or to carry out the functions of member of the board of auditors, or to have the company's signature.[75] The same provisions apply to those who have committed an attempt of or have been accomplices to such crimes,[76] and the same disqualification applies to bankrupts who have not been rehabilitated,[77] or to the managers if, in case of adjudication of bankruptcy of a limited liability company, gross faults are ascertained in the management of the company's affairs.[78].

Whoever is struck by disqualification, following a conviction, even under foreign law if the facts charged with would have been punishable under French law,[79] is punishable by imprisonment from six months to two years or by a fine from 360,000 [old] francs to 3,600,000 [old] francs, or by only one of these measures.[80]

Managers who, directly or through an intermediary, have opened a public subscription for any movable securities for the account of the company are punishable by a fine from 120,000 [old] francs to 2,400,000 [old] francs and imprisonment of fifteen days to six months, or by either of these penalties.[81]

Without prejudice to the application of art. 405 of the Penal Code[82] to any other facts constituting the offence of swindling, managers who, in the absence of inventories or by means of fraudulent inventories, have made distribution of fictitious dividends among members are punishable by that article.[83]

74. Decision of Court of Cassation, Criminal Chambers, 20th December, 1956, *Bulletin des arrêts de la Cour de Cassation, Chambres Criminelles* (hereinafter referred to as Bull. crim.), 1956, 1539; Decision of the Court of Cassation Criminal Chambers, 8th April, 1957, Bull, crim., 1957, 623; Decision of the Court of Cassation, Criminal Chambers, 26th June, 1957, Bull. crim., 1957, 957.

75. See: art. 6, par. 1, of Decree of 8th August, 1935.

76. See: art. 6, par. 2, of Decree of 8th August, 1935.

77. See: art. 6, par. 3, of Decree of 8th August, 1935.

78. See: art. 10 of Decree of 8th August, 1935.

79. See: art. 7 of Decree of 8th August, 1935.

80. See: art. 8 of Decree of 8th August, 1935.

81. Law of 1925, art. 37.

82. See footnote 12, *supra,* at p. 141.

83. Law of 1925, art. 38, first part.

Managers who, even in the absence of any distribution of dividends, have knowingly presented an incorrect balance sheet to the members in order to disguise the true condition of the company, or, in bad faith, have used the powers they possessed or the votes they held as managers in a way that they knew was contrary to the interests of the company, for a personal end and in order to favour another company in which they were interested in whatever manner, are punishable with the penalties prescribed by art. 405 of the Penal Code.[84]

6. BOARD OF AUDITORS.

In any limited liability company comprising more than twenty members there must be established a board of auditors of at least three members.[85]

Due to the fact that the provisions of the Law and the judicial decisions, as far as the board of auditors is concerned, have followed the analogous provisions for joint stock companies and limited partnerships with shares, it may be assumed that if the board of auditors does not have at least three members,[86] the company may be declared void,[87] unless the company has only two members. Should the numbers of the board fall below three because of disqualification, resignation or death of a member, and should there be no substitute auditors, or should there be no provision in the by-laws for the temporary appointment of co-opted members, subject to the approval of a special members' meeting, the remaining members must call a members' meeting to complete the board.

The Law is silent as to the requirement of membership in the company for a member of the board of auditors.[88] If the analogy with limited partnerships with shares still applies, then, should a non-member be elected to the board of auditors it is possible to assume that the company may be declared void if the board is composed of less than three members who are members in the company.

Interdicts, incapacitated persons, bankrupts and persons who have been given a sentence entailing even temporary disqualification from public office or from the exercise of managerial activities cannot be elected

84. See footnote 12, *supra,* at p. 141.

Law of 1925, art. 38, second part, as modified by Decree-Law of 30th October 1935.

The last part of this article provides that: "The members of the board of auditors, if one exists, are not civilly liable for the faults committed by the managers, unless, having had knowledge thereof, they did not expose them in their report to the members' meeting".

85. Law of 1925, art. 32, par. 1.

86. See: analogous provision of art. 5 of the Law of 24th July, 1867.

87. See: analogous provision of art. 7 of the Law of 24th July, 1867.

88. See: analogous provision of art. 5 of the Law of 24th July, 1867.

managers, and if elected, are debarred from assuming office.[89]

No provision is laid down by the Law concerning the duration of the first board of auditors,[90] which is appointed in the articles of association. It is subject to re-election at times determined by the by-laws.[91]

The powers of the board of auditors are specified by articles 10, paragraph 1 and 2 of the Law of 24th July, 1867.[92] Thus "[t]he members of the board of auditors verify the books, the cash, the portfolio, and the values of the company. They make a report, each year, to the general meeting, in which they must state any irregularities or inaccuracies that they have discovered in the inventories, and state, if occasion arises, the grounds which are unfavourable to the distributions of dividends proposed by the manager... .".[93]

Only if there is a provision in the by-laws, members of the board of auditors may receive a compensation; this may be either in form of attendance fee or participation in the profits of the company.

The members of the board do not incur any liability by virtue of acts of management and their results.[94] Every member of the board of auditors is liable, both to the company and to third parties, for personal faults committed in the performance of his mandate.[95] The liability of the members of the board cannot be subject to limitations by the articles of association or the members' meeting, nor can it be avoided by showing that the board acted upon the confidence entrusted in the manager, or was difficulted by the complexity of the company's bookkeeping and accounting documents, or was deceived by an ordinary fraudulent skill of the manager, or had resigned, if it is shown that the resignation had created or contributed to create embarrassment to the company, or — finally — had acted in good faith.

The board must perform its duties with the diligence of a mandatary; only in this case, circumstances as those just considered may be regarded as extenuating. The auditors are jointly and severally liable with the manager for the acts or omissions of the latter when the resulting injury would have not occurred if the auditors had exercised due vigilance in accordance with the duties of their office.[96]

89. See: art. 2, Law of 30th August, 1947; Decree Law of 8th August, 1935.

90. See: analogous provision of art. 5 of the Law of 24th July, 1867.

91. Law of 1925, art. 32, par. 2.

92. Law of 1925, art. 32, par. 3.

93. Art. 10, par. 1 and 2 of Law of 24th July, 1867.

94. Law of 1925, art. 32, par. 4. See also: Douai, 28th January, 1954, J.C.P. 1954.2.8101.

95. Law of 1925, art. 32, par. 5.

96. See: Decision of the Court of Cassation, Commercial Chambers, 26th January, 1953, J.C.P. 1953.2.7639.

Members of the board of auditors may be revoked at any time upon a resolution of the members' meeting, and without cause. Revocation may be decided upon by a resolution passed by the majority of the members, although the by-laws may require a higher majority as in case of modification of the by-laws.[97]

Members of the company and third parties may bring a suit against the members of the board of auditors for their faults.

7. DOCUMENTS, ACCOUNTS, RESERVE AND DIVIDENDS.

A limited liability company must keep at the head office the inventory, the balance sheet and the report of the board of auditors, which must be communicated to every member or to his authorised attorney-in-fact, either by mail or at the annual members' meeting.[98] When a company has less than twenty members anyone of them may examine at any time these documents, but in companies with more than twenty members this examination shall only be allowed during the fifteen days preceeding a members' meeting.[99]

The board of auditors, having verified the books, the cash, and the values of the company, must make a report, each year, to the members' meeting pointing out any irregularities or inaccuracies that they have discovered in the inventories, and stating, if occasion arises, the grounds which are unfavourable to the distribution of the dividends proposed by the manager.[1]

At least one-twentieth of the profits is taken out each year for the formation of a reserve fund.[2] The deduction ceases to be obligatory when the reserve fund has reached one-tenth of the company's capital.[3] The provision is patterned after that concerning joint stock companies and limited partnerships with shares.[4]

Profits of a limited liability company can be divided in any way provided that the distribution does not take place in violation of the

97. See: Law of 1925, art. 31, par. 1 second sentence. See also: Paris, 24th June. 1944, J.C.P. 1946, 2.3187.

98. Law of 1925, art. 30, par. 1.

99. Law of 1925, art. 30, par. 2.

1. See: Law of 1925, art. 30, par. 2, and art. 10 of Law of 24th July, 1867.

2. Law of 1925, art. 33, par. 1.

3. Law of 1925, art. 33 par. 2.

4. "A deduction of not less than one-twentieth must be made annually, out of net profits, to form a reserve fund.

Such deduction is no longer obligatory when the reserve fund amounts to a tenth part of the company's capital", art. 36 of the Law of 24th July, 1867. The purpose of the provision is to give a further guaranty, besides that offered by the capital of the company, to company's creditors.

general principles of the law,[5] and does not touch the legal reserve.[6]

It can be agreed in the articles of association that the members will have a right to interest at fixed rate, even in the absence of profits, but only for the period of time necessary for the completion of the works which, by the purpose of the company, must precede the beginning of its operation. The articles of association fix this period.[7] Sould these preparatory works be completed before the beginning of the company's operation, the interest will cease to run; otherwise, should these works continue beyond the commencing of company's activity, the members' meeting may resolve by a vote of as many members as represent three-quarters of the company's capital, to continue the running of said interest. The clause which provides for the interest at fixed rate must, under penalty of nullity, be inserted in the extract of the articles of association published in a journal of legal notices in accordance with the Law.[8] The total amount of interest thus paid must be included among the organisation expenses and, with these expenses, allocated to the years when there are profits, according to the mode, and within the time allowed by the by-laws.[9] The provision regarding fixed interest on quotas cannot be pleaded against third parties unless legal publicity has been given to it through inscription on the Commercial Register.[10]

Dividends not corresponding to real earned profits may be recovered from the members who have received them, but the action for such recovery prescribes in five years from the day fixed for the distribution of the dividends.[11]

Managers who, in the absence of inventories or by means of fraudulent inventories, have made distribution of fictitious dividends among members are punishable with the penalties prescribed by art. 405 of the Penal Code, without prejudice to application of that article to any other

5. See text at footnotes 1, 2 and 3, *supra,* at p. 153 and art. 1855 Civil Code (France, 1804) : "An agreement by which one of the parties is to receive all the profits is void.

Likewise a stipulation which exempts the sums or articles contributed to the capital of the partnership by one or several parties from participating in any part of the losses shall be void".

6. See: Law of 1925, art. 33, and text at footnotes 2 and 3, *supra,* at p. 153.

7. Law of 1925, art. 34, par. 1.

8. See: Law of 1925, art. 13.

Law of 1925, art. 34, par. 2.

9. Law of 1925, art. 34, par. 3.

10. Thus provided by arts. 63 and 64 No. 12 of the Commercial Code (France, 1808), as amended by Decree Law of 9th August, 1953.

Pursuant to art. 22, par. 3 of Decree No. 58-1355 of 27th December, 1958, arts. 47 though 65 and art. 68 of the Commercial Code (France, 1808) have been repealed and replaced by arts. 1 through 20 of said Decree.

11. Law of 1925, art. 35.

facts constituting the offence of swindling. The members of the board of auditors, equally liable to criminal penalties, are not civilly liable for the faults committed by the managers, unless, having had knowledge thereof, they did not expose them in their report to the members' meeting.[12]

8. AMENDMENTS OF ARTICLES OF ASSOCIATION.

Amendments of the articles of association, in absence of a provision to the contrary, are made by a majority of the members representing three-quarters, of the company's capital.[13] This provision has been the subject of frequent disputes and recent decisions seem to confirm that both a majority of the members and the votes of as many members as represent three-quarters of the company's capital are necessary for the passing of a resolution amending the articles of association. In other words, the "provision to the contrary" foreseen by the Law may be directed at the increase of the quorum required for an amendment, but never the Law or the by-laws may authorise an amendment to be carried through if either of the two elements (majority of one half plus one of the members and votes of three-quarters of them) is not present.[14]

A unanimous vote of the members is required for the change of nationality of the company and in order to increase the capital in a way that would force a member to increase his own capital contribution.[15]

9. INCREASE OF COMPANY'S CAPITAL.

The increase of the capital of a limited liability company presents some difficulties in so far as it must be carried out through a resolution passed by the majority (one half plus one) of the members whose votes represent at least three-quarters of the company's capital,[16] but it cannot take place by floating movable securities offered through public subscription,[17] and it can, only in special circumstances, be made by increasing the par value of the quotas already issued.[18]

The increase, therefore, is normally carried out through conversion

12. Law of 1925, art. 38.

13. Law of 1925, art. 31.

14. See: Bethune, 11th December, 1929, J. Soc., 1931, 21; D. 1931.I.153; Seine, 8th July, 1941, 181; *contra:* Marseille, 16th April, 1928, *Recueil Marseille,* 1928.I.86.

15. Law of 1925, art. 31.
See: Civil Tribunal of Pau, 24th December, 1935, S. 1936.2.54; J. Soc., 1937, 302.

16. Law of 1925, art. 31.

17. Law of 1925, art. 4, par. 4

18. *Ex argumento* of art. 31: the increase of the par value of the quotas would augment the obligation of each member, and this can only be done through a resolution passed by the unanimity of the members.

See also: Law of 1st August, 1957 which rendered compulsory the increase of the capital of limited liability companies to at least one million [old] francs.

of special reserves funds to capital,[19] by issue of new quotas[20] against payment in cash[21] or contribution in kind,[22] or, finally by cancellation of indebtedness.[23]

The procedure followed and the publicity required for the operations of capital increase are the same as those already considered with regard to the original organisation of the company.[24]

It may be provided in the by-laws of limited liability companies that the company's capital may be susceptible to increase by successive payments of the members or the admission of new members. Companies the by-laws of which include the above provision are subject, independently of the rules contained in the Law, to the provisions of the Law of 24th July, 1867, respecting to companies with variable capital (arts. 48-54).[25]

10. REDUCTION OF CAPITAL.

When a company is over-capitalised, or when the company's capital has diminished as a result of losses, the members can reduce the capital. The procedure is the same as for the increase of capital.

While the Law provides that the company's capital must be at least one million [old] francs, divided into quotas of equal nominal value which cannot be lower than 5,000 [old] francs, and cannot be reduced below this amount,[26] there is no provision in the Law as to what follows a reduction of the value of the assets of the company below the minimum capital of one million [old] francs. In such case the company would have to go into voluntary dissolution or risk dissolution by order of the

19. Only special reserves can be converted; the legal reserve cannot. The conversion takes place in two different steps: first, the amount of the special reserves is distributed to the members, then the same amount is returned to the company under form of new contribution.

20. In this case a vote of the majority (one half plus one) of the members who represent at least three-quarters of the company's capital is required, Law of 1925, art. 31.

21. See: Law of 1925, art. 7, par. 1: "Limited liability companies cannot be definitely organised until after all the quotas have been issued to the members appearing in the articles of association, *and have been entirely paid in"* (emphasis supplied).

22. See: Law of 1925, art. 7, par. 2: "Company's quotas corresponding in whole or in part to contributions in kind must always be entirely paid in at the time of organisation of the company."

See also: Law of 1925, arts. 8 and 14.

23. The cancelled debt cannot be conditional and the quotas issued in exchange for the cancellation must take into account the possible depreciation of the debt; quotas cannot be issued for a worth actually higher than the cancelled debt. In this connection, see: Law of 1925, arts. 8, 37 and 38.

24. See: Sec. 1 on the organisation of a company, p. 130, *supra.*

25. Law of 1925, art. 40.

26. Law of 1925, art. 6.

judicial authority upon request of some creditors who might see their claim impaired by such reduction; a third possibility is represented by the transformation of the company into a general partnership, where the unlimited joint and several liability of the partners could still constitute a sufficient guaranty for the creditors.

It may be provided in the by-laws of limited liability companies that the company's capital may be susceptible to decrease by the total or partial return of contributions. Companies the by-laws of which include the above provision are subject, independently of the rules contained in the Law, to the provisions of the Law of 24th July, 1867, relative to companies with variable capital (arts. 48-54).[27]

**11.** TRANSFORMATION FROM AND INTO AND MERGER WITH AND INTO LIMITED LIABILITY COMPANIES.

General partnerships, limited partnerships and joint stock companies, established before and after the entry into force of the Law, can be transformed into a limited liability company without prejudice to the rights of third parties.[28]

Considerable difficulties must be overcome in order to carry out transformation of a company into a limited liability company. For example, the unanimous consent of all partners of a general or of a limited partnership, is required for the transformation, unless the by-laws provide otherwise. Similarly the unanimous consent of the shareholders of a joint stock company or of a limited partnership with shares is required for the transformation into a limited liability company if such transformation, due to the fact that transfer of the participations of the members into a limited liability company is restricted, would entail an increase of the obligation of the shareholders.[29]

The Law provides that quotas cannot be assigned to third parties non-members of the company without the consent of a majority of the members, representing at least three-quarters of the capital. Thus, if a joint stock company or limited partnership with shares wishes to transform into a limited liability company, another problem will arise from the possibility that these companies have issued bearer shares. The holders of bearer shares might not be found and this may render impossible the conversion of his shares into non negotiable quotas.[30]

The managers of a limited partnership with shares may be reluctant to vote for the re-organisation of the company if this would, as in the case of a limited liability company, entail a heavier burden of duties and greater responsibility.

27. Law of 1925, art. 40.

28. Law of 1925, art. 41, par. 1.

29. See further Appendix IX.

30. See: Law of 1925, art. 21: "Quotas cannot be represented by negotiable certificates, whether nominative, to the bearer or to order...."

Ultimately, as the right of third parties must not be prejudiced by the transformation,[31] general members of a partnership will remain jointly liable with respect to the creditors of the deceased company for its obligations prior to the re-organisation.

With the same reservation as for the rights of third parties, limited liability companies formed under the Law may be transformed into joint stock companies.[32] This will only be possible by a resolution passed by a majority of the members of the company who represent at least three-quarters of the company's capital. Consent of all the members who shall have a position entailing unlimited liability is necessary for the conversion of a limited liability company into a general or limited partnership, while re-organisation into a civil partnership *(société civile)*[33] needs the agreement of all the future partners.

Amalgamation of several companies may be carried out through the establishment of a new company, or through the absorption of one or more companies into another. Should the change of nationality or an increase in the obligation of the members of the new company follow as a consequence of the amalgamation, this must receive the agreement of all the members of the interested companies.

If the amalgamation consists of the absorption of a partnership by a limited liability company, the joint liability of the members of the new company for the purported value of the contributions in kind to the limited company at the moment of the amalgamation[34] is borne exclusively by the former general partners in the absorbed partnership, and not also by the limited partners.

12. DISSOLUTION.

A limited liability company may dissolve, by operation of the law, for the expiration of time for which it has been formed,[35] for the extinction

31. Law of 1925, art. 41, par. 1.

32. Law of 1925, art. 41, par. 2.

33. Which is governed by arts. 1832 ff. of the Civil Code (France, 1804) :

Art. 1832. "A partnership is a contract by which two or several persons agree to place a thing in common, in view of dividing the profits which may result thereform."

34. See: Law of 1925, art. 8, par. 1.

35. Art. 1865, No. 1, Civil Code (France, 1804).

When the time for which the company has been formed expires, dissolution takes place whether the objectives for which the company was formed have been achieved or not, but the members may, before the expiration takes place, agree to continue their association in the company. Unless otherwise provided for in the by-laws, extension of a company must be agreed upon by the totality of the members and can only be proved by a written instrument, in the same form as the original company's contract (Art. 1866 Civil Code (France, 1804). The rigidity of this provision of art. 1866 has been attenuated by the decisions in cases in which the members have tacitely continued the business of the company after the expiration of it, and in the case in which a third party needs to prove said tacit extension. Then the party may use any means of proof.

of the subject-matter or the completion of the business for which the company has been formed [36] or, by decision of the members, by the wish expressed by one or more of the members not to continue the company,[37] by unanimous decision of the members, by judicial winding-up upon the showing of good reasons,[38] or, finally, when all quotas of a company are concentrated in the hands of a single member.[39] But a company will not dissolve by the interdiction, bankruptcy, and insolvency[40] or death[41] of a member, except in case of death, where otherwise provided in the by-laws.[42]

36. Art. 1865, No. 2, Civil Code (France, 1804).

37. Art. 1865, No. 5, Civil Code (France 1804).

Withdrawal of a member takes place pursuant to the combined application of arts. 1869 and 1870 of the Civil Code.

According to Art. 1869 "The dissolution of a partnership by the wish of one of the parties only applies to partnerships of which the duration is unlimited and takes place by a renunciation of which notice is given to all the partners, provided such renunciation is made in good faith and not at an inopportune moment". According to Art. 1870 "A renunciation is not in good faith when the partner renounces for the purpose of appropriating to himself alone the profits that the partners expected to earn jointly. It is made at an inopportune moment, when the business is not finished and it is important for the partnership that its dissolution should be deferred".

38. Art. 1871, Civil Code (France, 1804). The right to petition for judicial dissolution of a company is a personal one and inalienable; it cannot be made dependent on a resolution of the members' meeting (Decision of the Court of Cassation, Commercial Chambers, 23rd January, 1950, D. 1950, 300; Gaz. Pal., 1950.I.202; J.C.P. 1950.2.5355; J. Soc., 1951, 267). Jurisprudential interpretation has implemented the list of good reasons for dissolution. Thus a company may be dissolved when a member refused to participate in the activity of the company (Decision of the Court of Cassation, 15th November, 1876, D. 77.I.30), or, when taking part into it, operated negligently (Decision of the Court of Cassation, 13th March, 1922, J. Soc., 1923, 283), or fraudulently (Decision of the Court of Cassation, 21st February, 1888, S. 1888.I.152). Winding-up may be declared in case of disagreement, which must be serious and continuous (Seine, 16th March, 1953, S. 1954.2.117), between the members and the managers of a company (Decision of the Court of Cassation, Civil Chambers, 18th June, 1931, Rev. Soc., 1931, 382). In case of impossibility to function, due to the lack of funds and a refusal to increase the capital of the company, winding-up may be declared (Douai, 13th May, 1947, D. 1947, 275; S. 1948.2.125; J. Soc., 1948, 296).

39. See: Law of 1925, art. 5.

See also: Decision of the Court of Cassation, Commercial Chambers, 21st November, 1955, D. 1956, 162.

40. Unlike in the case of partnerships, where the partnership dissolves for the interdiction or the insolvency of one of the partners (Art. 1865, No. 4, Civil Code (France, 1804). Civil death having been abolished by the Law of 31st May, 1854, it is no longer a ground for dissolution of a partnership.

41. Unlike in the case of partnerships, where the partnership dissolves for the natural death of one of the partners (Art. 1865, No. 3, Civil Code (France, 1804).

42. "A dissolution of a partnership for a limited time cannot be asked for by one of the partners before the time agreed upon, unless there are good reasons therefor, such as when another partner does not fulfil his duties, or a permanent infirmity unfits him for the business of the partnership, or other such similar causes of which the soundness and importance are left to the discretion of the Court", Art. 1871, Civil Code (France, 1804).

In case of loss of three-quarters of the company's capital, the managers are bound to consult the members for the purpose of deciding whether dissolution of the company should be decided upon.[43] The decision of the members is in any case made public in conformity with article 13 of the Law.[44]

On failure of the managers to consult the members, or in the case where the latter are unable to hold a valid meeting, any interested party can request a court for dissolution of the company.[45]

13. LIQUIDATION.

Liquidation follows dissolution of a limited liability company in most of the cases. Purpose of the liquidation is to collect sums due to the company, to convert all assets in cash, to pay all debts and finally to distribute the remainder to the members in proportion to the original contributions, or otherwise if so provided by the by-laws.

Losses also are distributed proportionately to the contributions.[46] If there are more liabilities than assets, the company is declared bankrupt.

During dissolution the juridicial personality of the company continues to exist for the purpose of winding-up the company's affairs. This limited purpose of the survival of the company as a legal entity prevents the liquidators from entering into new transactions.[47]

A members' meeting elects the liquidator or liquidators, unless the by-laws provide otherwise. The quorum required in case of voluntary dissolution is that of the majority of the members representing three-quarters of the company's capital, unless the members have agreed on a higher majority. Otherwise a majority of more than one half of the company's capital is sufficient. When the majority is not reached, or when dissolution was ordered by a court, or when the person chosen by the members does not offer sufficient guaranties as to his capacity to carry out the liquidation, the court may appoint a different one. Copies of the resolution of the members' meeting or the judgment appointing the liquidator and all subsequent documents which indicate changes in the persons of the liquidators must be deposited for recordation, by the liquidators themselves, in the office of the Commercial Register. From the time of recordation of the appointment of liquidators in that register the representation of the company belongs, even in law suits, to the liquidators.

43. Despite the loss, members may decide to carry on the activity of the company (Seine, 19th November, 1956, D. 1957, 206).

44. Law of 1925, art. 36, par. 2, as introduced by Decree-Law of 14th June, 1938. See also: Law of 1925, arts. 12 and 17.

45. Law of 1925, art. 36, par. 3, as introduced by Decree-Law of 14th June, 1938.

46. See: Le Havre, 15th December, 1933, J. Soc., 1935, 237.

47. If liquidators do enter into new transactions they are personally jointly and severally liable for them.

Duties and rights of the liquidators are governed by the provisions concerning mandate.

While the managers must deliver to the liquidators the assets and the company's documents and must submit to them an account of the management relative to the period following the last statement of accounts, the liquidators must take delivery of such assets and company's documents and must make up, together with the managers, an inventory evidencing a statement of the company's assets and liabilities. The inventory must be signed by managers and liquidators.

Liquidators must perform all acts necessary for the liquidation including the power to perform conservatory acts for the preservation of the company's property, to pledge company's property, to collect debts, to demand from the members the contributions which are still due on their respective quotas and, if need be, the sums necessary for payment within the limits of the liability of such member, and, if the available assets are not sufficient, their proportional quota in the losses. Unless a members' meeting, by a majority representing three-quarters of the company's capital, provided otherwise, they may also proceed with bulk sales of the company's assets and make settlements and compromises.

Liquidators cannot distribute to the members, even partially, the company's assets, until the creditors of such company have been paid, or until the sums required for such payments have been set aside. Creditors of the company whose interests have been impaired by such advanced distribution have an action for recovery against the members, and an action for damages against the liquidators.

When the liquidation is completed, the liquidators must draw up the final balance sheet, indicating the apportionment of each quota in the partition of the assets. Said balance sheet, signed by the liquidators and accompanied by the auditors' report, is deposited in the office of the Commercial Register.

Since the liquidator is in a position of a mandatary *vis-a-vis* the members, he is entitled to compensation for his services and to reimbursement of the expenses incurred in the operations of liquidation. He is liable with respect to the members for negligent, imprudent or fraudulent actions, and with respect to third parties for torts. Actions for liability prescribe in thirty years.

For lack of any provision, art. 1872 of the Civil Code applies to division between members of a limited liability company: "The rules relating to divisions of successions, the manner of making the same, and the obligations resulting therefrom between co-heirs, apply to a division between partners".[48]

48. Art. 1872, Civil Code (France, 1804).

See also: Arts. 815 ff., 870 ff., 887 ff., 1686 ff., 2103 No. 3, 2109 of the Civil Code (France, 1804).

# APPENDIX I

Legislation establishing limited liability companies was passed in Austria (by Law of 6th March, 1906); in Czeckoslovakia (by Law of 15th April, 1920); in Luxemburg (by Law of 18th September, 1933), in Belgium (by Law of 9th July, 1935); see also: Van der Elst, *La situation des sociétés à responsabilité limitée en Belgique,* in (1956) *Revue des Sociétés* (hereinafter referred to as Rev. Soc.) 234; in French Morocco (by Order of 1st September, 1936); in Italy (by the Civil Code of 1942 which has merged civil and commercial matters and provides for this form of company in arts. 2472 through 2497 of Book V of the Code); in Spain (by Law of 17th July, 1953); in Egypt, and many other European countries. In South American the first country to adopt the *Sociedad de Responsabilidad Limitada* was Brazil by Decree No. 3708 of 10th January, 1919), followed by Chile (Law of 14th March, 1923), Cuba (Law of 17th April, 1929), Argentina (Law No. 11645 of 8th October, 1932), Uruguay (Decree-Law No. 8.992 of 26th April, 1933), Mexico (Arts. 58 ff. of *Ley General de Sociedades Mercantiles* of 28th July, 1934), Colombia (Law No. 124 of 24th November, 1937), Bolivia (Law of 12th March, 1941), Paraguay (Law No. 10268 of 29th December, 1941), Costarica (Law of 25th August, 1942), Guatemala (Arts. 445 ff. of the Code of Commerce (1942), Honduras (Decree No. 73 of 16th February, 1950), Venezuela (Arts. 312 ff. of the Code of Commerce (1955), Nicaragua (Art. 137 of the Code of Commerce) and Panama (Art. 327 of the Code of Commerce).

For a comparative study of limited liability companies in Europe, see: Association Nationale des Sociétés par Actions, *Apercu sur la société à responsabilité limitée en Europe,* 1956; see also: De Sola Canizares, *La société à responsabilité limitée en droit comparé,* in (1950) *Revue Internationale de droit comparé,* 49. There is some similarity between this form of doing business and the private companies of English law. They do not exist in the Netherlands. There is in the United States a similar form of business association, called limited partnership association. It is a second form of limited partnership authorised in some jurisdictions (See: 2 Barrett & Seago, Partners and Partnerships — Law and Taxation (Charlottesville, Va., 1956) 487-488; Crane, Handbook on the Law of Partnerships (St. Paul 2, Minn., 1952) 158 ff.; James, Cases on Business Associations (Indianapolis, Ind., 1949) 87, 94-95; Warren, Corporate Advantages without Incorporation (New York, 1929) 508 ff.; Pennsylvania, 59 P.S. Sec. 341; Michigan Compiled Laws (1929) Sec. 9910 ff.; New Jersey 3 Comp. St. (1910) Sec. 30 ff.; Ohio, Throckmorton's Annotated Code Sec. 8074 ff.

# APPENDIX II

Art. 1865. "A partnership comes to an end: . . . . . . .

5. by the wish expressed by one or more [of the partners] not to continue the partnership."

Art. 1867. "When one of the partners has promised to place the ownership of a thing in common, the loss of the thing produces the dissolution of the partnership with respect to all partners, if it has occurred before the thing was turned over.

The loss of a thing dissolves the partnership in all cases, when its use has alone been placed in common and the partner has retained the ownership. But the partnership is not dissolved by the loss of a thing of which the ownership has already been transferred to the partnership."

Art. 1869. "The dissolution of a partnership by the wish of one of the parties only applies to partnerships of which the duration is unlimited and takes place by renunciation of which notice is given to all partners, provided such renunciation is made in good faith and not at an inopportune moment."

Art. 1870. "A renunciation is not in good faith when the partner renounces for the purpose of appropriating to himself alone the profits which the partners expected to earn jointly.

It is made at an inopportune moment, when the business is not finished and it is important for the partnership that its dissolution should be deferred." of the Civil Code (France, 1804).

# APPENDIX HI

New provisions have been enacted, which modify or in part repeal the Law of 1919, with regard to application of Title IV of Book One of the Commercial Code (France, 1808), as modified by Decree of 9th August, 1953 [repealed by Decree of 27th December, 1958, art. 22] and carrying reform of the Commercial Register, and to the application of Decree of 30th October, 1935 concerning formalities of publicity of companies (Decree of 6th January, 1954) ; with regard to tariffs and charges by the registrars in connexion with the Commercial Register and the companies (Decree of 29th March, 1954); with regard to the repression of violations of provisions on the Commercial Register (Ordinance No. 58-1352 of 27th December, 1958); with regard to the Commercial Register (Decree No. 58-1355 of 27th December, 1958); with regard to the determination of charges for entries in the Commercial Register *(Arrêté* of 5th January, 1963) ; with regard to entries in the Commercial Register and organisation of local Commercial Registers and of the Central Commercial Register *(Arrêté* of 27th July, 1963); and with regard to new determination of charges for entries in the Commercial Register and to publicity of companies (Decree No. 63-837 of 12th August, 1963). See also: art. 48, par. 2, Commercial Code (France, 1808). Pursuant to art. 22, par. 3 of Decree No. 58-1355 of 27th December, 1958, arts. 47 through 65 and art. 68 of the Commercial Code (France, 1808) have been repealed and replaced by arts. 1 to 20 of said Decree.

# APPENDIX IV

Art. 48. "It may be provided in the by-laws of a company that the capital will be subject to increase by subsequent payments made by shareholders or by the acceptance of new shareholders, and to decrease by the withdrawal of all or part of the contributions made.

The companies whose by-laws contain the above provision will be subject to the provisions of the following articles, independently of the general rules relevant to them according to their special form."

Art. 49. (Repealed by art. 1 of Decree-Law of 29th May, 1955).

Art. 50. "Shares or fractional shares will be nominative even when completely paid in.

They will only be negotiable after the definite constitution of the company.

Negotiation can only be effected by transfer on the registers of the company, and the by-laws can give the right either to the board of directors or to the general meeting to refuse the transfer.

(Added by Decree of 5th May, 1950) : Joint stock companies and limited partnerships with shares which are governed by Title II of the Law of 24th July, 1867, cannot divide their capital into shares or fractional shares of less than 1,000 [old] francs."

Art. 51. "The by-laws will determine a sum below which the capital of the business cannot be reduced by the withdrawal of contributions authorised by article 48.

This sum cannot be less than one-tenth of the capital.

The company can only be constituted after the subscription of one-tenth."

Art. 52. "Each shareholder can withdraw from the company when convenient to him, unless there is an agreement to the contrary, and save the application of paragraph 1 of the preceding article.

It shall be provided that the general meeting has the right to decide, by the majority fixed for the amendment of the by-laws, that one or more of the shareholders shall cease to be part of the company.

A shareholder who has ceased to be part of the company, either by his own wish or by a decision of the general meeting, remains bound for five years towards the other shareholders and third parties on all obligations existing at the time of his withdrawal."

Art. 53. "A company, whatever its form, is validly represented in court by its directors."

Art. 54. "The company shall not be dissolved, by the death, withdrawal, interdiction, insolvency, or bankruptcy of a shareholder. It shall continue in full force among the other shareholders." of the Law of 24th July, 1867.

# APPENDIX V

Art. 24. "The provisions of articles 1, 2, 3, and 4 of this law are applicable to joint stock companies.

(Thus modified by art. 8 of Law of 25th February, 1953). The powers given to the manager by article 1 are given to the founders or the board of directors of a joint stock company. At the time of the organisation of a company the declaration (see: Law of 1867, art. 1, par. 2 and 9) is submitted with the documents to the first shareholders' meeting which verifies the truthfulness of the declaration. This formality is not necessary in case of increase of capital by payment of cash."

Art. 15. "(Thus modified by art. 1 of Decree-Law of 8th August, 1935); The following are punishable under article 405 of the Penal Code, without prejudice to the application of this article to any facts constituting the delict of deceit.

1. Those who, in the notarial declaration under the first article of this law. affirmed sincerely and truly subscriptions which they knew were fictitious, or declared in bad faith that funds not actually placed at the company's disposition had been paid;

2. Those who, by pretending to have made subscriptions or payments or by publications in bad faith of non-existent subscriptions or payments, or any other false facts, have obtained or attempted to obtain subscriptions or payments;

3. Those who, for the purpose of inducing subscriptions or payments, have published in bad faith the names of persons wrongfully described as being, or as about to be, connected with the company, under any title whatsoever;

4. Managers who, in the absence of an inventory, or by means of fraudulent inventories, have distributed fictitious dividends among the shareholders;

5. Managers who, in the absence of any distribution of dividends, have knowingly published or presented to the shareholders, an incorrect balance-sheet, to hide the real financial position of the company;

6. Managers who, in bad faith, have used the goods or credit of the company, contrary to the interest of the company, for their personal use or to favour another company in which they were directly or indirectly interested;

7. Managers who, in bad faith, have used powers vested in them or votes that they controlled in this regard, for a use that they knew to be contrary to the interests of the company and for their personal use or to favour another company, in which they were interested in any way whatsoever;

8. (Thus completed by art. 3 of Decree-Law of 31st August, 1937). Those who have, by fraudulent means, attributed an excessive value to a contribution in kind.

The members of the board of auditors are not civilly liable for delicts committed by the managers, except if, knowingly, they have not revealed them in the report to the general meeting." of the Law of 24th July, 1867.

## APPENDIX VI

Such services could be issued as "founders' parts", under certain conditions. "Founder's parts" or *"parts de fondateur"* have been introduced by the Law of 23rd January, 1929.

Art. 1 of said law reads:

"Commercial companies by shares may create, attribute and issue, both at the moment of their organisation, and subsequently, negotiable titles, under the name of *"parts de fondateur"* or of *"parts beneficiares"*.

These titles, which are not part of the company's capital, do not confer upon their holders the status of member. But they may be attributed, as a possible credit against the company, a right, either fixed or proportional, to the profits of the company.

If the creation, attribution, or issue of the "founder's parts" is made as remuneration of a contribution in kind, this operation must be made in performance of the formalities of verification required by the Law of 24th July, 1867.

There may be, in the same company, different categories of "founder's parts" or of *"parts beneficiares",* provided with different rights; each category forms a separate mass.

The right of parts' owners are determined in the by-laws of the company by shares or by the resolution of the general partholders' meeting which decides upon the creation of the parts.

Notwithstanding any stipulation to the contrary, the owners of the parts of a same mass may assemble in a general meeting, at any time, and pass, according to articles 3 and 11 thereafter, resolutions binding on all the owners.

A general partholders' meeting may only comprehend the owners of the parts of the same mass."

One can infer by implication that the issue of non-negotiable "founders' parts", not offered to the public (pursuant to art. 4, par. 4, of the Law of 1925), should be possible, without the difficulties forseeable by the application of art. 7 of the Law of 1925, whereby limited liability companies cannot be definitively organised until after all the quotas have been issued to the members appearing in the articles of association, and have been entirely paid in.

## APPENDIX VII

Art. 1. "Effective from the promulgation of this law, nobody shall, directly or through a third person, on his behalf or on behalf of others, enter into a commercial or industrial activity if he has been struck by:

1. a judgment become final which condemns him to a personal punishment or to one involving loss of civil rights or to imprsionment without stay of execution for facts qualified as crimes by the law;

2. a judgment become final which condemns him to imprisonment for three

months at least, upon conviction for theft, swindling, breach of trust, receiving stolen goods, substraction committed by depositories of public funds, offence to *mores,* outrage to good *mores,* as punished by arts. 119 and following of Decree-Law of 29th July, 1939, incitement to abortion and anti-conception propaganda, abortion, or upon violation of the laws on the sale of poisonous substances and upon conviction of the crimes provided by special laws and punished with the punishment laid down in articles 401, 405 and 406 of the Penal Code (Ordinance No. 58-1298 of 23rd December, 1958, art. 41) "and upon conviction for sale statements rendered in private, commercial or bank deeds as provided by articles 150 and 151 of the Penal Code";

3. a judgment become final which condemns him to imprisonment for three months at least without stay of execution upon conviction of the crime of usury, or upon violation of the laws on gambling houses, on clubs, on lotteries, on pawnbrokers' firms, and upon application of articles 34 and 39 of Decree of 28th December, 1926 carrying codification of the provisions which govern real estates and of the 1st article of the Law of 4th February, 1888, or in execution of the provisions of different law on fraud and forgery, as well as on trade mark and the laws on industrial property;

4. a judgment become final which condemns him to imprisonment for three months at least without stay of execution upon application of the Laws of 24th July, 1867, on limited partnerships with shares and joint stock companies and of 7th March, 1925, on limited liability companies;

5. a judgment become final which condemns him to imprisonment for three months at least without stay of execution upon conviction of the crimes punished by articles 177 through 179, 361 through 365, 400, 402 through 404, 412, 413, 417, 418, 419, 420, 433, 439, 443 of the Penal Code and by articles 594, 596, 597 of the Code of Commerce;

6. a judgment become final which condemns him to imprisonment for three months at least without stay of execution, either upon application of articles 83, par. 2 of the Penal Code, or by violation of article 4, No. 2 of the Ordinance No. 45-507 of 29th March, 1945, or to a punishment which entails loss of civil rights for at least twenty years, and upon application of the Ordinance of 26th December, 1944;

7. a judgment become final which condemns him to imprisonment for three months at least without stay of execution and to a fine of more than 60NF for the violations provided:

(a) by the Decree of 28th December, 1926, carrying codification of the legislative provisions concerning customs;

(b) by the Decree of 21st December, 1926, carrying codification of the legislation concerning indirect taxation;

(c) by the General Code of Direct Taxes, by article 65 of the Law of 31st December, 1936, as well as by the rules on attempt upon national credit and violation of exchange control;

(d) by the laws on concessions;

(e) by the article 5 of the Law of 4th June, 1859, on transportation of valuables by mail;

8. a judgment become final which condemns him to imprisonment for more than three months without stay of execution upon conviction of organising or unlawfully spreading a commercial or industrial establishment;

9. (Ordinance No. 58-1352 of 27th December, 1958, art. 4). — a judgment become final which condemns him to imprisonment for more than three months without stay of execution for the illegal exercise of a commercial or industrial activity or for one of the violations provided for by articles 1 and 2 of the Ordinance No. 58-1352 of 27th December, 1958, repressing certain violations in matters concerning the Commercial Register;

10. a judgment become final which condemns him to imprisonment for more than three months without stay of execution for violation of the economic legislation, of

the legislation on supply, or of the legislation on redistribution of industrial products;

11. a removal, by virtue of a judicial decision, from the functions of notary, registrar and law officer;

12. a declaration of bankruptcy, provided that rehabilitation did not follow. This incapacity applies to any person who has been declared bankrupt in pursuance of article 437, paragraph 4 of the Code of Commerce, modified by Decree-Law of 8th August, 1935.

Persons who will have obtained rehabilitation shall be relieved from the aforesaid incapacities" of the Law of 30th August, 1947.

# APPENDIX VIII

This is a feature taken from the German law. Under German law, a person having a "Prokura" (a word of Latin derivation, meaning "full unlimited power of attorney"), that is to say a "Prokurist", is an executive employee of a commercial or industrial enterprise, who has full power of attorney to administer the business or a specified part thereof and to represent it in any dealing with third parties, even in court (art. 49, par. 1 of the Commercial Code *(Handelsgesetzbuch)* (Germany, 1900) (hereinafter referred to as H.G.B.). The "Prokurist" has considerable discretion and is not limited to transactions in the normal course of business. He may even alienate or encumber real property, if expressly authorised to do so (art. 49, par. 2 H.G.B.). However, he cannot make entries into the Commercial Register, or dispose of the business as a whole.

As a "Prokura" is a wide and almost completely unrestricted power of representation, a power "to carry on a commercial enterprise", only persons possessing the qualifications to engage in business on their own account may be appointed (although small merchants cannot appoint a "Prokurist": art. 4, H.G.B.), and the "Prokurist" is empowered to do almost everything which may be done otherwise by the principal himself. He has been rightly called an *alter ego* of the principal. His powers are, however, restricted in the following three respects:

(a) he cannot alienate the whole enterprise or allow a third person to enter the business as a partner;

(b) he cannot appoint a second "Prokurist" (although a merchant may appoint more than one person as "joint Prokurists");

(c) he cannot sell or dispose of immovables belonging to the principal (art. 49, H.G.B.).

The "Prokura" is entirely unelastic, and the principal, once having appointed a "Prokurist", cannot restrict his power in any way. He cannot for example limit the "Prokura" to a certain time or a particular town, or certain types of commodities. If the principal nevertheless tries to restrict him, this may oblige him to abstain, but in relation to third parties the restriction is non-existent: the contract concluded by the "Prokurist" with a third party is valid even if the third party knew of the restriction imposed by the principal (See: British Foreign Office, 1 Manual of German Law (London, 1950) 229). The appointment of a "Prokurist" is strictly formal and all details regarding the scope of the power must be entered in the Commercial Register of the court in the district in which the principal is domiciled (art. 53 H.G.B.). In the case of a limited liability company the appointment is made either by the secretary of it or otherwise by the members of the company (arts. 35 and 46 of Law 29th April, 1892 originally establishing the German limited liability company *(Gesellschaft mit beschränkter Haftung).*

No other restriction of the power of procuration is effective *vis-a-vis* third parties, although the power may be restricted *inter partes* to any extent by agreement between the principal and the "Prokurist" (art. 50, pars. 1 and 2, H.G.B.).

If, however, the "Prokurist" exceeds or abuses his power to the detriment of his principal, a third party knowingly participating therein cannot claim any right

against the principal (art. 179, par. 3 of the Civil Code *(Burgerliches Gesetzbuch)* (Germany, 1900). For a parallel development of the theory in French doctrine, see: Pic et Baratin, *Société à Responsabilité Limitée,* (Paris, 1927) No. 295.

# APPENDIX IX

As far as a joint stock company or a limited partnership with shares is concerned, see art. 31 of the Law of 24th July, 1867:

"(The first six paragraphs thus modified by art. 3 of Law of 25th February, 1952): Notwistanding any contrary clause in the company's deed, the general meeting, deliberating as mentioned hereafter, can modify the by-laws in all their provisions. It cannot, however, change the company's nationality, nor increase the shareholders' obligations.

Notwithstanding any clause to the contrary, every shareholder, regardless of the number of his shares, can take part in general meetings, to deliberate on questions referred to in the next paragraph. At these meetings, the right to vote attached to the shares is determined by the Law of 13th November, 1933, without prejudice to limitations in the number of votes of which a member of the meeting can dispose as provided by article 27 of the present law and by the by-laws, and on the condition that the statutory limitation is the same for all shares.

General meetings, which are called both to verify the contributions in kind and also the special benefits, to appoint the first directors and to verify the genuineness of the declaration of the founders of the company, and to decide or authorise any increase of capital or to deliberate on all statutory changes, including one regarding the object and form of the company, are properly constituted and the resolutions are valid only provided they consist of a number of shareholders representing at least one-half of the company's capital. However, the company's capital which must be represented for verification of contributions does not include shares owned by persons who made the contribution, or stipulated special benefits submitted to valuation by the meeting.

If half of the company's capital is not represented at the first meeting, a new meeting may be summoned in accordance with the statutory forms and by two insertions, one made in the Bulletin of Legal Notices and the other in a newspaper entitled to receive legal advertisements for the territory of the head office. This notice reproduces the agenda, the date and the result of the preceding meeting. The second meeting can only be held ten days after publication of the last insertion. The meeting is valid, if composed of shareholders representing at least a third of the capital.

If this quorum is not obtained at the second meeting, a third meeting may be summoned, by an announcement inserted in the Bulletin of Legal Notices and in a newspaper entitled to receive legal advertisements for the territory of the head office, and also by two insertions placed with a week's interval in a daily newspaper published or distributed in the territory of the head office, these last two insertions being capable of being replaced by a registered letter, addressed to each shareholder, without prejudice to the application of article 35, paragraph 4, of this law. The insertions and the registered letter must reproduce the agenda, the date and the results of the former meetings. The third meeting can only be held ten days after publication of the last insertion, or mailing of the letter. The meeting is valid, if at least one quarter of the company's capital is represented. In default of this quorum, the third meeting can be postponed to a future date, not more than two months from the date set for the previous meeting. The notice and convocation of the postponed meeting are made in the manner described above; the meeting must include a number of shareholders representing at least one fourth of the capital.

In all meetings covered by this article, the resolutions, to be valid, must be supported by not less than two-thirds of the votes of the shareholders present or represented. The text of proposed resolutions must be available to shareholders at the company's head office at least fifteen days before the first meeting.

(Thus completed by art. 50 of Law of 24th May, 1951): As an exception to the previous paragraphs, the board of directors, with the permission of the Minister of Finance, notwithstanding the by-laws, and without having to meet again in the location determined by them, can transfer the company's head office to another place in the territory of the French Republic.

In the absence of statutory provisions settling the conditions for the validity of the board's resolutions, the resolution to transfer must be passed by an absolute majority of the directors, present or not.

The formalities for deposit and publication to which the resolution to transfer and Minister's permission are subject, in accordance with article 59 of the present law, as well as the formalities prescribed by article 6 and following articles of the Law of 18th March, 1919, creating the commercial register, must be made at the location of the new head office. They must be made as well, at the location of the former head office unless permission has been granted by order of the president of the commercial court of the new head office, which order is granted after request and cannot be appealed. The president of the commercial court may in this order prescribe special requirements as to publicity. The resolution to transfer deposited at the registry of the commercial court of the new head office must indicate the registry of the commercial court where the original documents and their amendments have been deposited.

When the company's head office has been transferred in virtue of a resolution of the board of directors subject to the preceding conditions, the president of the commercial court at the location of the new head office may, by order granted on request and not subject to appeal, if necessary, authorise the board to call any kind of general meetings in a location other than that determined by the by-laws.

If the general meetings of companies whose head office has thus been transferred cannot take place as prescribed by the by-laws, the president of the commercial court may in the above terms, permit the calling of the meetings in such other manner as may be determined by him; he may also fix at one fifth of the company's capital the quorum of the third meeting referred to in paragraph 4 above mentioned.

When a company, the head office of which has been transferred by a resolution of the board of directors under the provisions before mentioned, invites the public to invest, at least one of the auditors must be chosen from the list of the court of appeal in the jurisdiction of which the company's head office is located.

The provisions of the preceding paragraphs 7, 9, 10 and 11, are applicable to limited partnerships with shares, the functions conferred on the board of directors being exercised by the manager."

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