

SESSION FIVE: LIABILITY OF OFFICERS AND DIRECTORS

The liability of officers and directors is of obvious concern to present and potential officers and directors. The public too is interested in this subject because the liability of officers and directors impacts on the desirability of holding positions of responsibility in the corporation and on the behavior of persons holding such positions. Ideally, liability law should be sufficiently strict to punish wrongdoing, yet not so harsh that it discourages qualified persons from accepting positions as officers or directors or frightens them into inaction.

While officer and director liability law encompasses liability for both mismanagement and fraud, the presentations and roundtable discussion focused on liability for mismanagement in the merger, acquisition and bankruptcy contexts. Professor Barthélémy Mercadal, a member of the International Faculty and moderator of this session of the Colloquium, led off with an introduction to French liability law. Much attention was devoted to France's unique Article 99 which presumes mismanagement in bankruptcy cases. Professor Mercadal rounded out his presentation by briefly commenting on officer and director liability in other contexts.

Professor Mercadal's introduction was followed by presentations by other members of the International Faculty: Professor Noyes Leech of the United States; Professor Alain Hirsch of Switzerland; and Professor Modesto Carvalhosa of Brazil. Mr. Henri Berthon and Mr. François Denisot then elaborated upon the French experience.

Professor Noyes Leech began his review of the U.S. law by briefly tracking the historical basis of the term "fiduciary duty". The concepts of "duty of loyalty" and "duty of care", which grew out of "fiduciary duty", were then examined, primarily by way of example. The duty of care discussion included an overview of the federal securities laws as they relate to officer and director liability. Professor Leech concluded by introducing the U.S. approach to liability in bankruptcy cases.

Professor Alain Hirsch explained that in Switzerland, questions of liability are adjudicated most commonly in the context of bankruptcy suits. As in France, the creditors usually claim that the company was operated longer than was prudent. Unlike France, Germany, and the United States, however, usually, the auditors are sued, not the officers and directors of the bankrupt corporation. The reason for this difference was explained and a recent example was given.

Professor Modesto Carvalhosa commented that in Brazil officers and directors are subject to civil liability as well as criminal sanctions and administrative penalties. Shareholders can sue in their individual capacities or on behalf of the corporation. Directors cannot be held liable in bankruptcy cases, however, unless there has been fraud. Professor Carvalhosa concluded by examining the effect of government ownership of a corporation on liability in the bankruptcy context.

Mr. Henri Berthon briefly reviewed Article 99's salient features. He observed that the scope of management personnel covered by the Article is undefined and often depends upon the facts of the particular case. Mr. Berthon presented the arguments made by commentators in favor of and against Article 99.

Mr. François Denisot discussed the liability of officers and directors under French law in the mergers and acquisition context. He examined the trend in the regulations from officer and director freedom to greater and greater administrative control. Tender offer regulation now involves the participation of several regulatory bodies. Merger regulations carefully monitor fairness in the pricing and valuation of the assets that each company contributes to the deal. Mr. Denisot concluded by summarizing the improvements which have been generated by the new regulations.

The roundtable discussion following these presentations focused on France's Article 99. Professor Mundheim's inquiry concerning the application of Article 99 to a hypothetical Chrysler-France led to an interesting comparison which reminded participants that at times corporate laws generate social and political effects which cannot be ignored. Article 99 was thoroughly reviewed; its strengths and weaknesses were exposed.

Professor Mercadal:

In France director liability is based primarily on the concept of mismanagement. Directors and officers who have been imprudent will be held liable for resulting losses. Common forms of mismanagement include negligence and business judgment error. Negligence is likely to be found in cases in which directors habitually fail to attend board meetings or fail adequately to supervise management. Business judgment errors can take many forms, one of which is committing a company to pay more than it can afford. This sometimes occurs in the heat of deal-making. At other times, an officer or director may overcommit funds to benefit another company in which he has an interest.

Another form of business judgment error is abuse of discretion in permitting a takeover of corporate control. This phenomenon has confronted the French courts over the last ten years, often making headlines. Well-informed Frenchmen are aware of the *Saupiquet Cassegrain* case, whose last episode took place in June 1983 before the Cour de Cassation. The approval of the

Saupiquet Cassegrain Board was required before control of the company could be acquired. The board majority that approved the takeover was also in voting control of the company through stock ownership. The question arose whether the board's approval was in the best interests of the company as a whole, including the minority shareholders. If not, the board's approval was an abuse of discretion. The Cour de Cassation's decision that the board did not abuse its discretion has left unanswered many questions in this area. The fiduciary duty that board members in the United States have toward minority shareholders will provide a useful comparison. The views of our foreign friends, particularly our American colleagues, will be helpful here.

I now turn to the liability of directors and officers in France who are found to have led their company to a cessation of payments [1]. Our famous Article 99 [2] holds board members *prima facie* liable for all or part of the company's excess of liabilities over assets. This applies to cases in which the corporation has stopped its payments, whether it is eventually bailed out, reorganized or liquidated. Officers and directors who are sued under Article 99 by the bankruptcy trustee may be held liable either individually or jointly and severally. The court has complete discretion over the allocation of the liability. Article 99 is a very strong deterrent: a director who has been held liable and does not meet his obligations is automatically declared personally bankrupt.

Many Frenchmen consider Article 99 to be not only formidable, but excessive. The preface to a recent report published by the Chamber of Commerce of Paris stated that some directors believe that Article 99 is economically counterproductive. These directors argue that Article 99 provides the bankruptcy trustee with such potent weapons against officers and directors that it may deter would-be officers and directors from assuming positions of responsibility and/or from making business decisions with otherwise acceptable levels of risk. Although statistics indicate that Article 99 has only been applied in 5–7% of bankruptcy cases, it should be noted that creditors stand no chance of recovering anything in approximately 80% of bankruptcy cases. Therefore, after adjusting for these latter cases, it is apparent that Article 99 is applied in a significant proportion of bankruptcy cases in which there are defendants with sufficiently deep pockets to repay creditors.

Directors have been held liable under Article 99 in the following cases: when they have demonstrated extreme negligence in habitually not attending board meetings or in failing to assure that written minutes of board meetings were kept; and when they have realized that the CEO-chairman of the board's mismanagement was leading the company to bankruptcy but in response merely resigned their directorships. With respect to this second class of cases, courts often have stated that directors have an affirmative obligation to remove the chairman from office. Directors are not permitted to absolve themselves from liability in such situations by attempting to wash their hands through resignation.

Article 99's presumption of directors liability has been successfully rebutted in cases in which the directors have demonstrated that they exercised due care. Due care has been established in cases in which directors had developed layoff plans that were not implemented because of reasons beyond their control. Two such reasons recognized to date are strikes in which the workers takeover the plant, and pressure from public authorities not to make layoffs. Pressure exerted by public authorities, an increasingly common phenomenon in the last five to six years, has been taken into account in several cases. However, to the best of my knowledge, this reason has been recognized only by lower courts.

A lower court recently accepted the argument that directors should not be held liable for losses that result from business decisions which were sound when made, based on then available information, but which proved to be economically unprofitable. This decision announces a new direction that courts may follow.

This concludes my brief overview of the French experience. I would like to invite our friends from the International Faculty to give us an overview of their countries' experiences in the area of officer and director liability.

Professor Leech:

The law applicable to corporations and to corporate managers in the United States has two levels. The basic law is the law of the individual states. This law governs the formation of corporations, the fundamental rights and duties of shareholders and directors, the issuance of shares, the distribution of dividends, and such major changes as amendments to the articles, mergers, consolidations, and dissolutions. Overlaying these basic state laws are federal laws enacted by the U.S. Congress in the 1930s, in particular the Securities Act of 1933 and the Securities Exchange Act of 1934 [3].

Let us look first to the law of the states. Each state has a basic statute governing business corporations, but much of the law is judge-made, either common law (*i.e.* without a specific statutory base) or developed by the courts in their interpretation of very general statutory provisions. The liabilities of directors and officers under state law fall principally under several headings: the doctrine of *ultra vires* [4], specific statutory liabilities, and the duties of loyalty and care.

The doctrine of *ultra vires* has fallen somewhat into desuetude. Under this doctrine, a corporation, and its directors and officers, may not act outside the purposes and powers of the corporation. For example, a corporation is prohibited from guaranteeing a loan to an individual if no corporate purpose is served by such a guarantee. As another example, the doctrine precludes a corporation organized for the purpose of making airplanes from going into the business of selling groceries. The judge-made law that was built on this doctrine is somewhat out of date. The doctrine is rarely applied today largely

because corporations are now organized under articles of incorporation that provide for very broad purposes; thus a corporation is empowered to engage in almost any business activity sanctioned by the board. Nevertheless, an unreasonable use of corporate powers may still subject members of the board to liability for “corporate waste”, such as making excessive charitable gifts [5].

Under state corporation law, directors may be found liable for specific statutory infractions. For example, state laws invariably define the fund from which dividends may lawfully be paid to shareholders, for example “surplus” or “earned surplus”. Directors who authorize dividend payments at a time when the corporation does not have such a fund may be sued to reimburse the corporation for amounts unlawfully paid [6].

The major bases for the liabilities of officers and directors under state law are the duty of care and the duty of loyalty. The duty of loyalty is frequently referred to as a “fiduciary duty”. Perhaps I should begin by briefly describing the historical basis on which the term “fiduciary duty” rests.

The English courts developed the concept of the trust and the trustee, for which, I understand, there is no parallel concept in civil law. A trust is a vehicle through which a person can transfer his property to another in an indirect way. Either during his lifetime or by will, a person can transfer his property to a third person, a trustee, to hold (or to operate if the property is a business) and to give the profits of this property to the intended recipient, the beneficiary. Ownership is thus divided between the trustee and the beneficiary [7].

The trust was an invention of the English Courts of Chancery, which applied the liberal and flexible rules of equity, rather than the strict rules applied in the law courts. The principal attribute of a rule of fiduciary duty, which can be distinguished from a rule of contract or tort law, is that a duty may be owed to the beneficiary even though there is no actual harm to the beneficiary. Rules are applied because there is a potential for harm.

When the corporation was created an analogy arose between the directors and officers of the corporation and their shareholders, on the one hand, and the trustee and the beneficiary on the other. Thus, actions to enforce the obligations that the shareholders thought the directors and officers owed them were brought in equity under rules similar to the rules that were applied in trust cases, namely the law of fiduciary duty.

The extension of the fiduciary duty to corporate directors results in the following: if a director or an officer is ordered to sell a piece of corporate property for one million dollars but sells it for one million twenty-five thousand dollars, he cannot keep the twenty-five thousand dollars for himself. He is required to account to the corporation for that twenty-five thousand dollars even though the corporation received the price it desired. It is believed that allowing the officer or director to keep the excess, or to accept bribes, might, in some other case, induce him to take action that would be harmful to

the corporation. *Irving Trust Company v. Deutsch* [8], a famous case that arose roughly fifty years ago, when the radio industry was still young, provides another example. In this case, a corporation in the radio business was interested in acquiring the stock of a company that held basic patents in that business. Directors of the corporation came to the conclusion that the corporation could not afford to buy the stock (with the underlying patents) and instead of having the corporation buy the stock bought it for themselves. They subsequently made large profits by selling the stock on the exchange. The court held that the directors were obliged to account for these profits to the corporation's trustee in bankruptcy, supporting the theory of the suit that "a fiduciary may make no profit for himself out of a violation of duty to his cestui [beneficiary], even though he risk his own funds in the venture" [9].

In a more extreme case [10], now of about thirty years' vintage, a controlling shareholder, who was also the company president and a director, was required to account for the premium he realized by selling his stock at a price that was in excess of its current market value. The court reasoned that by selling control of the corporation this shareholder had sold a corporate opportunity and, as a fiduciary, should not be permitted to retain his profit from the transaction. The plaintiff was not required to show a precise dollar value of damage to the corporation.

Lastly, in a more recent case [11] in the New York courts, corporate insiders (the chairman of the board of directors and the president) who engaged in insider trading in the corporation's shares were required to account to the corporation for their profits on those shares. While there had been cases in which persons engaging in insider trading had been required to account to the other party to the transaction, this case is noteworthy because here the corporation itself recovered the insiders' profits, even though it was unable to establish a fixed dollar loss to the corporation.

These examples demonstrate the significance of the evolution of fiduciary duty. In cases in which fairness is the benchmark, by allowing plaintiffs to recover without establishing a fixed dollar loss, courts have refused to allow fiduciaries to benefit from their relationships of special trust.

Duty of care cases involved alleged mismanagement of the corporation. Mismanagement can take many forms, one of which is the failure to supervise employees. For example, if a bank cashier embezzles funds, the directors may be held liable for having failed to review his qualifications adequately at the time he was employed or for failing to establish procedures designed to reduce the incidence of embezzlement. Liability based on the duty of care can be defeated if the director or officer can show that his actions were based on business judgment. The business judgment defense is most often used to excuse decisions which appeared profitable at the time they were made but which later proved to be unprofitable. The business judgment rule, however, is not an automatic foreclosure of liability. The defense is not established by

mere assertion that the matter in question involved a business decision. In order to substantiate the business judgment defense the defendant must show that a judgment was in fact made, based upon an adequate investigation of the facts and a thoughtful application of corporate procedure. Nevertheless, I think it can fairly be said that the duty of care cases that have gone to judgment against directors and officers and have been affirmed at the appellate court level are relatively small in number.

The liabilities that I have been describing for violation of the duty of care and violation of the duty of loyalty are liabilities owed to the corporation. It is said that the director owes a duty to the corporation. This is important because it gives rise to what I will refer to as a derivative suit, a suit brought by the corporation's shareholders on behalf of the corporation.

Beyond these violations of state law, there are also significant offenses under the federal securities laws. Resulting liabilities are owed in some cases to individual shareholders, in others to the corporation. The 1933 Act creates director liabilities for issuing false prospectuses and registration statements. These liabilities cover negligent omissions of material facts, as well as intentional falsehood. Directors can avoid liability by showing that they exercised due diligence; the burden is on the director to show that he was not negligent.

The 1934 Act creates liabilities for making false or misleading proxy statements. As is true of false prospectus liability, this liability can be imposed for falsehoods or omissions occasioned by negligence. There are special liabilities imposed on insiders under the 1934 Act for dealings in a corporation's shares that result in what are commonly referred to as "short swing profits" [12]. Corporations have a cause of action against insiders who profit by buying or selling shares within a period of six months. Those profits are recoverable whether or not the insider actually used inside information. If the corporation does not sue, a shareholder can sue on behalf of the corporation.

Liability can also be imposed for fraud under section 10(b) of the 1934 Act [13] and a rule of the Securities and Exchange Commission under that section, rule 10b-5 [14]. Fraud is broadly defined; the definition includes false representations as well as omissions of material facts in connection with the purchase or sale of a security. Section 10(b) and its accompanying rule have given rise to a great flood of litigation in the federal courts. Suits have been maintained not only by the corporation and shareholders, but also by the Securities and Exchange Commission.

These liabilities of directors and officers that I have described, arising under both state and federal law, have a significant effect on managerial behavior. We have a great deal of litigation in the United States. In the corporate field, individual shareholders may maintain suits in their own right when they have been directly defrauded. Possibly even more important is the ability of a shareholder to maintain a derivative suit to enforce a corporate claim. These derivative suits are numerous largely because lawyers have found them to be

very profitable. In a derivative suit, lawyers are compensated out of the fund that is developed in the suit. Furthermore, a series of claims by individual shareholders can be consolidated by one shareholder into a “class action” [15], in which the lawyers will be compensated out of the fund that is developed. Many of these suits do not go to judgment. Instead, they are settled by the parties. As a result, the volume of reported litigation represents only the tip of the iceberg. The fear of liability is very great indeed; it constantly haunts corporate directors and officers. Nor is this fear confined to cases involving bankruptcy. Liability can be imposed even in the case of the solvent corporation. It is true that liability insurance is available, although at very high premiums, and that some statutes [16] do provide for indemnification of directors in some cases – but the fact of the matter is that no one wants to be sued. It is of little comfort that someone else may help to pay the damages. This great potential loss exposure explains why American law has been moving toward preventive medicine rather than curative medicine by litigation. Preventive medicine primarily involves monitoring the management of the corporation to ensure that injuries do not occur to the corporation or to shareholders.

The effect of bankruptcy of a corporation in the United States is not to change the nature of the liabilities of directors and officers; it usually only changes the potential plaintiff in a suit to enforce those liabilities. When a corporation files for bankruptcy in the United States, a trustee in bankruptcy is appointed. This trustee may supervise the dissolution and liquidation of the corporation or he may supervise its reorganization. Reorganizations usually result in shareholders losing their rights, the interests in the corporation being divided among the former creditors. One of the duties of the trustee in bankruptcy is to pursue the causes of action which the corporation had before bankruptcy, including such corporate causes of action against officers and directors as I have described.

Professor Mercadal, this concludes my review of the American scene.

Professor Hirsch:

Liability suits outside the bankruptcy context are very rare in Switzerland. There are two reasons for this: the unavailability of information to shareholders relating to potential liability, and the lack of incentive for potential claimants to assert their claims. Bankruptcy suits, however, are very common. Information concerning bankruptcy is accessible and the need to initiate proceedings is obvious. As in France, creditors usually claim that those in control continued to operate the company longer than was prudent. The creditors argue that the losses would have been less had bankruptcy been declared earlier. German law is similar to French and Swiss law in this respect but such suits are less frequent in Germany.

Swiss bankruptcy law is somewhat unique in that, unlike France, Germany,

and the United States, suits are usually brought against the auditors rather than those in control of the companies. Auditors, as corporate entities, are better targets because they are usually solvent.

The primary problem in the determination of liability is ascertaining the point at which the company should have declared bankruptcy, thereby making the excessive debt of the company known to the public. Only rarely will a company continue to do business once its debt has been openly revealed. In many cases, the company's excessive debt is hidden due to the overvaluation of certain assets and/or the failure to account for some risks. A precedent-setting example, which created a well-known scandal, was a case judged by the Federal Tribunal three years ago involving a real estate company. This Swiss company, which also operated in Germany through its subsidiaries, had misjudged its investments in that country, and failed to prepare a consolidated balance sheet reflecting the investments of its subsidiaries. Although Swiss law does not generally require a consolidated balance sheet, the court held that such a balance sheet was indispensable in this case because this was the only way that the combined risks could have been measured. According to the court, it was the directors' responsibility to insure that such an assessment be made and the responsibility of the auditors to demand that it be made. The auditors were fined one million Swiss francs on this questionable basis alone. Since this case, it has become routine for the court to determine at the trustee's request: first, whether bankruptcy was declared later than it should have been; second, whether losses were incurred during that period; and third, whether there is someone within or without (auditors) the company with sufficiently deep pockets to justify bringing suit.

Professor Carvalhosa:

The law of Brazil governing the responsibility of directors is a combination of longstanding statutory provisions, such as the Bankruptcy Act of 1945 [17], and modern law. Over time, there has been an increase in the liability exposure of directors vis-à-vis shareholders and creditors. The personal property of directors is usually not sufficient to cover the company's debts; civil liability is not alone an effective sanction against infractions of the civil law and abuses of power. Thus, Brazilian corporate law establishes three penalties applicable to directors and officers for damages caused to the corporation, its shareholders, or the securities market. First, there is the civil liability suit, provided for in section 159 of Corporate Law No. 6.404/76, which is aimed at indemnifying the company for damages caused by misconduct of its officers or directors. Second, criminal sanctions consisting of imprisonment or fine, may be imposed where abusive or fraudulent acts have been practiced in connection with the incorporation or management of a company. According to section 177 of the Penal Code, acts such as fictitious distribution of dividends, false or misleading

information on the company's financial statements are considered to be fraudulent for that purpose. Finally, there are administrative penalties which may be imposed on members of management by the Securities Commission as a result of administrative proceedings. Such penalties include fines, temporary suspension from office, and declaration of inability to hold office as a corporate director or officer. They apply to cases of unfair market practices such as manipulation of securities prices, fraudulent acts in connection with the primary or secondary distribution of securities, regardless of possible criminal implications or of the existence of actual harm to the corporation, its shareholders or third parties.

In listed corporations and in state-controlled corporations [18] that are structured with a board of directors and officers [19], the liability of members of the board of directors is joint but not several. This rule applies whether civil liability or administrative penalties are imposed. However, as far as officers are concerned, liability is usually several; it is only joint in cases involving collusion or collective decision-making.

In the context of management liability, a distinction may be drawn between abuses of power and other violations of the law. Abuse of power occurs when management acts in breach of its fiduciary duties to the corporation and its shareholders. In such cases the company, directly or derivatively, has an action against the director or officer to recover the damages it suffered. Actual harm must be evidenced and the alleged damage must be capable of being quantified. On the other hand, violations of the law or the by-laws of the corporation have an objective nature, that is to say, they imply direct liability, regardless of evidence of the harm done. For instance, if a director or officer fails to give notice of a shareholders' meeting in the manner and time provided for in the law, or if a meeting is held without a proper quorum, such acts may be judicially invalidated and management be held liable to the corporation.

Directors and officers cannot be held liable in bankruptcy cases unless fraud has been established. Examples of fraud include excessive spending, insider trading, and delaying the declaration of bankruptcy by procuring funds in an irresponsible or fraudulent manner. In such cases the directors and officers will be liable for the amount lost. A state-controlled company cannot be declared bankrupt. In such cases, the liability of the controlling shareholder, the state, may be invoked. The state will be secondarily liable for commitments made by the managers. That the state should be ultimately liable for obligations incurred by management is rational and equitable, given the legal guarantee that companies would be immune from bankruptcy. However, directors and officers of said corporations are subject to the same liability rules as those of corporations not controlled by the state.

In Brazil there is no record of suits against the state for liability to pay debts of the corporations it controls. This is so because in emergency cases the government always supplies the companies it controls with necessary funds so that its credibility is maintained and court action avoided.

Mr. Berthon:

Officers and directors of French corporations are routinely subject to potential liability because of the large number of important decisions that they must make. They can incur criminal liability for violating civil code provisions or specific statutes concerning such areas as corporate law, labor law, social security law, tax law, and antitrust law. Civil liability, although wideranging in principle, usually is applied in cases of bankruptcy. In nonbankruptcy cases, the majority shareholders prefer simply to dismiss the management rather than to bring actions that are likely to impair the company's image.

Liability actions are brought under Article 99 [20] of the July 13, 1967, statute when bankruptcy procedures indicate that the corporation's assets are insufficient to meet its liabilities. Article 99 creates a dual presumption: it presumes that the officers and directors mismanaged the corporation, and that this mismanagement caused the excess of liabilities over assets. This law permits a court to hold some or all officers and directors liable for some or all of the corporation's debts, unless these persons can prove that they exercised due diligence in conducting the corporation's affairs. Such actions can be initiated by the trustee in bankruptcy or the court.

Article 99 does not specify which members of management it covers. Its presumption of liability has been applied to directors, the sole CEO (whether chairman of the board or not), the members of the supervisory board, if any and, sometimes other chief officers [21]. Whether chief officers other than the CEO-chairman can be reached by Article 99 will depend upon the facts of the particular situation. The resolution of this question is especially difficult in cases in which there are several CEOs, one of whom is the chairman of the board. Article 99 also covers outside persons or companies such as banks or parent companies that are substantially involved in the management of the company. The rationale here is that participation in the de facto management of a company properly subjects these entities to liability provisions aimed at protecting creditors from mismanagement. The deeper a potential defendant's pocket, the greater the likelihood that an Article 99 suit will be brought against him.

Those sued under Article 99 can successfully defend themselves by establishing that they exercised due diligence [22]. Although the directors are not required to prove affirmatively that they were not at fault, the burden of proof they must meet is heavy. Courts rarely find that due diligence has been proved. Interestingly, court decisions very often do not squarely rely on Article 99's fault presumption. Many opinions review in great detail the defendants' poor management, as if the action was based on ordinary liability law principles, and only subsequently dismiss the defendants' attempts to refute Article 99's presumption [23].

Article 99 is most important when there is some question whether mismanagement has occurred. In cases in which the directors may not have been

sufficiently at fault to impose liability, Article 99 is used to publicly sanction them. This practice reflects a policy decision that sanctioning some innocent officers and directors is preferable to allowing any fault to go unpunished.

The opinions of respected commentators concerning Article 99 vary. The proponents of Article 99 argue that the important consequences of management actions, which may be felt by shareholders and/or employees, suggest that society should encourage officers and directors to be cautious and prudent. Shareholders entrust funds while employees, in a sense, entrust their jobs to the management team. These commentators claim that Article 99 has improved creditor debt collection, and that it has served to deter careless management [24], largely because actions can be brought under Article 99 that could not have been brought otherwise. Indeed, creditors, and sometimes even the trustee in bankruptcy, often lack knowledge of the facts which would enable them to prove director mismanagement under the rules of tort law. These commentators are quick to point out that the courts have been very reasonable in applying the potent provisions of Article 99.

The opponents of Article 99 focus their criticism on the presumption of management fault which, contrary to fundamental principles of French law, imposes the burden of proof on the defendant. These commentators believe that the legal system should encourage officers and directors to be bold and daring: an economy that is not moving forward is, in fact, moving backward. Rather than encouraging such behavior, it is argued that Article 99 in fact operates to restrict managers by causing them to: refrain from pursuing their natural inclinations; remain deaf to the needs of employees or to the social or economic needs of a region; walk away from a company which stood a good chance of recovering (leaving the government to do as it wishes). An economy plagued by these forms of mismanagement is likely to fare poorly in the long run, relative to international competition.

The Article 99 presumption does not affect the behavior of all officers and directors. Those with no assets have little reason to fear Article 99. Article 99's effect on *de facto* directors, however, is far too great. Banks and salvage corporations are particularly fearful of being deemed *de facto* directors.

It is also claimed that the courts have been too severe in applying Article 99, and that judges (although often officers or directors themselves) may not be as moderate or as well qualified to judge the actions of directors as the proponents claim [25]. The following case [26] may be cited as an example. This case involved a corporation located in an industrially undeveloped area of France. The directors employed what are normally considered classic methods to fundamentally reorganize the company. They hired a new management team, consolidated the company's liabilities, obtained long-term extensions on loans, and significantly increased the company's capital by issuing new shares. Although financial stabilization was achieved, the company proved to be unprofitable in a short time, primarily because of a sharp and unforeseen

decline in the selling price of the company's product. Notwithstanding the unpredictability of such a price decline, the court decided that both the old and new officers and directors were liable under Article 99.

Article 99 is also criticized because it makes no allowance for the fact that corporate managers are not able to make their decisions free of governmental influence [27]. The government frequently intervenes through regulations and other means. For example, the state may refuse to authorize a foreign investment in France; the state may choose not to permit the corporation to lay off a large number of employees; the state may encourage the company to hire unqualified personnel; the state may make unexpected tax levies; or the state may simply fail to pay its bills on time.

I hope that I have demonstrated that there are persuasive arguments on both sides of this issue. It is up to the legislature to decide whether Article 99 should be retained in its present form.

Professor Mercadal:

Mr. Denisot will now discuss the liability of officers and directors with respect to mergers and acquisitions. He will give considerable attention to the impact of the regulations in force in this area.

Mr. Denisot:

There are two approaches to the concept of responsibility. One approach stresses management's ability to make a decision and the freedom of action thereby presupposed. The other approach is more liability oriented; it emphasizes management's duty to report, in particular, to shareholders.

Twenty years ago management enjoyed almost unlimited freedom in the area of merger and acquisitions. Their decisions were predicated on industrial, commercial and financial strategies which they alone determined. Responsibility to make a sound decision was self-evident, but the duty to inform shareholders was given little weight.

Regulations [28] enacted during the past fifteen to twenty years have greatly affected both aspects of the concept of responsibility. The freedom of officers and directors to make decisions has gradually been restricted, while their duty to inform shareholders has been increasingly emphasized. These regulations aim to strike a balance between these competing aspects of responsibility.

The change in France's tender offer regulations has been marked. In just a few years the regulations have evolved from total freedom for officers and directors to administrative control and need for authorization.

Until 1964, large blocks of stock could be sold in privately negotiated transactions. Thus, it was possible to purchase a controlling interest in a company without notifying anyone. Small shareholders often found themselves

facing a *fait accompli*. The first change was the 1964 Act [29] requirement that all transactions in quoted shares be made on the exchanges. Although this change was an improvement, it clearly was insufficient. In the absence of precise provisions regulating takeovers by purchase, overbidding and intense exchange battles often resulted.

Regulations dating back to 1966 give the Minister of Finance a veto power over such transactions and call for the participation of the association of broker/dealers and the Commission des Operations de Bourse (COB), in the process. The stock brokers' association reviews the appropriateness of the proposal under the control of the Minister of Finance, and ensures anonymity and equal treatment. Generally speaking, the COB enforces fair play rules by monitoring information disclosure, particularly in cases involving insider trading. For example, the prerogatives of the COB were given greater attention after a famous exchange tender offer involving Boussois, Souchon, Neuvesel and Saint-Gobain [30] in which there was inappropriate publicity.

In 1978, new statutes [31] were enacted which curtail manager and director freedoms even further by: (1) establishing a commission that monitors tender offers; and (2) enacting new regulations for competing bids and counter-offers, insider trading, and certain target company management decisions made during the offer period. These regulations are designed to protect shareholders in the decision-making process by providing complete and objective information concerning the purposes, terms, and consequences of the proposed transaction.

In the field of mergers, statutes [32] have long regulated the role of auditors as well as the requirement that shareholders ratify the transaction. In the past, these provisions had little impact because the auditors rarely challenged the terms of transactions that had been carefully negotiated.

Like the tender offer regulations, the COB merger regulations require managers and directors to provide complete information concerning the purposes, terms, and expected consequences of the transaction. In a 1972 regulation [33] the COB extended its regulatory power to pricing and valuation of each company's assets and liabilities. This regulation does not require the use of any particular method but does prohibit the use of valuations that are nothing more than *ex post facto* justifications. Valuations must be thoroughly supported by concrete, objective data whenever possible – such as profitability studies and/or stock market prices. With this regulation, the COB entered an area that had been solely in the domain of managers and directors.

Although the takeover regulations are pervasive in that they affect nearly all phases of a transaction, the decision whether or not to proceed with a proposed transaction still rests completely with management. The regulatory authorities should not become involved with this decision. The essence of managerial responsibility, the blending of intuition, business judgment, and conviction when making decisions, will always remain within the province of manage-

ment. However, once the transaction begins, the company representatives are guided by the three stock exchange authorities mentioned above. Guidance, however, does not include approving management decisions. The regulations call upon the COB only to review the disclosure documents associated with the transaction to ensure that they are complete and accurate. The COB's clearance of the documents should not be interpreted as an approval of the merits of the transaction itself.

It is difficult to determine the point at which regulations are so burdensome that they become constraining. Although this increase in the regulatory power of the stock exchange authorities has concerned some commentators, most agree that the regulations are an improvement over the prior state of affairs.

The new regulations have generated several improvements in this area. First, managers and directors are likely to make better decisions. They are acting on better information which they gathered in order to satisfy their duties toward shareholders. Moreover, the exposure of officers and directors to legal liability may decrease because they will be able to better support their actions. Second, this better information enables officers and directors to reduce the risk of opposition to their proposals in the form of a negative shareholder vote or a widespread acceptance of a counter tender offer. Third, comptrollers [34] ("commissaires" or auditors) now are more careful because they too may be held liable. Managers and directors often amend their plans based upon comptroller recommendations. Fourth, the COB's review of the documents does lend some credibility to the proposed transaction, particularly in the event of a subsequent suit against management. Since the introduction of takeover regulations, shareholders have seldom attacked such transactions. The COB probably discourages suits it considers unjustified.

In summary, the regulations currently in force governing mergers and acquisitions strike a healthy balance between managerial freedom and investor protection, the two approaches to managerial responsibility.

Dean Mundheim:

I would like to explore the practical implications of Article 99 by examining how it influences business practice. The Chrysler Corporation's bout with bankruptcy [35] provides an interesting setting. The Chrysler Corporation, a U.S. corporation, had experienced large losses for several years. Chrysler's ability to meet its current obligations was suspect and I believe that Chrysler's debts may have exceeded the value of its assets on liquidation. Nevertheless, Chrysler struggled to avoid bankruptcy, apparently because it believed that bankruptcy would have a very detrimental impact on its ability to sell cars. Consumers are likely to be hesitant to purchase automobiles produced by a bankrupt corporation because they realize that such a corporation may be unable to fulfill its warranty obligations. Although I believe Chrysler's direc-

tors were concerned about the appropriate disclosure of Chrysler's financial position, I do not think that they ever worried about personal liability. Had they harbored such fears, I do not believe that they would have gone to such lengths to avoid bankruptcy. I am interested in learning how French directors of a hypothetical Chrysler-France would have acted in light of Article 99?

Professor Mercadal:

In France, over the last few years, some of the large steel companies have found themselves in a situation similar to that of Chrysler. The deficits of these companies continued to grow despite the fact that the officers and directors had succeeded in obtaining government aid in the form of loans made on favorable, and sometimes unique, terms. It was inconceivable that these companies would close down because too many workers would have lost their jobs. As it was, the large number of layoffs had created serious social protests. In response to these developments the government bailed out the steel industry by forgiving large debts.

No one would seriously advocate the application of Article 99 in such a case, with respect to the company officers and directors, or the government officials who authorized the debt forgiveness. No manager's wealth would have been sufficient to pay off the company's debts. The government officials were protected from liability because they acted in their official capacity as public officers. In order to pursue the comparison I would like to ask: would Chrysler U.S. have been permitted to close down had the management not been able to improve its performance?

Dean Mundheim:

In hindsight, we know that there was a bailout, but in the late 1970s no one at Chrysler could have been sure that it would be bailed out. Let me press the question again. Mr. Berthon, if you had been counsel to Chrysler-France in my example, how would you have advised the directors in light of Article 99 and the potential liability which you described?

Mr. Berthon:

I agree with Professor Mercadal that France's steel industry provides an appropriate comparison. Had I been counsel to the directors of Chrysler-France, I would have informed the directors that they may be held liable for some or all of the excess of liabilities over assets should they continue to operate the business. But, I would have said no more. Counsel should not make, nor attempt to make, the decision for the management of the company. As for my personal view, I think, as I stated towards the end of my presentation, that it

may be unfair to apply Article 99's presumption to courageous managers who are trying their very best to reverse the bad fortunes of a company.

Mr. Denisot:

I question whether the steel industry in France provides a good example to illustrate the unfairness of Article 99. It was a huge affair that was extremely unusual in its dimensions and implications. The following common situation demonstrates the potential unfairness of Article 99. In France, we presently have large companies in financial difficulty that must lay off five to ten thousand employees if they are to overcome their financial difficulties, but the officers and directors of these companies know that it is unlikely that they will be authorized to lay off so many workers. Some officers and directors find themselves in still more difficult positions as a result of their memberships on the boards of other companies. These directors realize that the image of each company with which they are affiliated is likely to be tarnished by a decision made by them to lay off a large number of employees because the government will criticize them for causing high levels of unemployment. Nevertheless, the management may be held liable under Article 99 for unduly delaying the filing of a bankruptcy petition. The plight of these managers is unsolvable.

Professor Mercadal:

I would like to complete the answer to Professor Mundheim's question by stating how Article 99 should generally be interpreted.

Article 99 must be evaluated with reference to the economic climate in which it is applied. Article 99 was applied strictly while France's economic climate was favorable, until roughly 1978. Managers of bankrupt companies were presumed to be at fault and were often unable to overcome this presumption. Such an application was appropriate because nearly all bankruptcies were attributable to some form of mismanagement in a favorable economic climate.

Under the present poor economic conditions, courts inquire carefully into the behavior of the management. Courts review evidence such as the minutes of the board of directors in order to determine whether the decision to remain in business was the result of careful deliberation. Only those directors who acted without a reasonable degree of care are now held liable under Article 99. In a recent unpublished decision concerning a mid-sized company, the court of appeals found the officers and directors not liable under Article 99 because the court determined that they had acted reasonably. Under a standard of reasonableness, the officers and directors could not have been expected to avoid the company's failure. Professor Mundheim, would Chrysler have been permitted to lay off one-third of its personnel in an effort to salvage the company? This point is basic to the comparison.

Dean Mundheim:

In the United States, a private company can lay off personnel without governmental authorization. Indeed, the Chrysler Corporation laid off a substantial number of employees. The magnitude of these layoffs, as well as the projected layoffs from a Chrysler bankruptcy, was a factor in the government's ultimate decision to provide guarantees for loans made to Chrysler, because President Carter was hesitant to alienate voters. It was not irrelevant to the Administration's attitude toward the authorization of loan guarantees that the heavy unemployment in Detroit, in Michigan generally, and among blacks in particular, was potentially damaging to the President in the Michigan primary, a primary which deeply interested the President. Nevertheless, this layoff-related consideration was not the only factor of consequence.

A decisive consideration was that if Chrysler went bankrupt, the United States was likely to lose to foreign competition much of the then growing market for front wheel drive, fuel efficient cars. Because automobile purchasers tend to be repeat purchasers who develop an ongoing relationship with a single manufacturer, it was feared that this loss of the initial customer base would be permanent. Such a loss would have been all the more painful because Chrysler was on the brink of competing effectively in this market. Of all the U.S. manufacturers, Chrysler had made the most progress in the development of front wheel drive, fuel efficient cars – with the development of its K car.

Another factor in the ultimate decision to grant loan guarantees was that, were Chrysler to go out of business, the United States would be left with only two major automobile companies. This posed antitrust concerns.

From the floor:

Earlier today, Professor Carvalhosa referred to the secondary liability of the government in situations in which semi-public companies are concerned. During the past few years there has been considerable discussion concerning the government's status as a de facto director. I am interested in learning from our American, Brazilian, and French colleagues whether there have been any cases in which the government has been held liable in situations in which it was influential in delaying the bankruptcy filing of a company. This is an important question, especially today when governmental intervention in such areas is becoming more common.

Professor Mercadal:

Professor Carvalhosa, would you comment on the Brazilian experience?

Professor Carvalhosa:

In nearly every country, perhaps with the exception of the United States, the government is increasingly subsidizing business activity. As in Brazil, governments often control the country's largest companies. This control may take the form of active management of the company, which includes making investment decisions and establishing policy orientations. Decisions are sometimes made which are not in the company's best interests, but which are in the best interests of the country as a whole. In such situations it is appropriate for the government, rather than the directors or officers, to pay the company's debts because the government is managing the company.

Professor Mercadal:

In France, the government does not pay creditors of its own volition; it only pays creditors after receiving a court order directing such action. In fact, some observers believe that the government takes affirmative steps to avoid paying creditors. In the course of its deliberations in one case, however, the government did pay creditors. The court noted that the company involved, *Papeterie Chapelle-Darblay*, would be unable to avoid bankruptcy. Upon the government's application, the court agreed to permit the company to continue operating in return for the government's written commitment to provide the funds necessary to operate the business and repay new debts incurred. The court's decision stated that the government had been a *de facto* director and that this supported the court's requirement that the government pay the creditors. I believe that this was clearly an error on the court's part. The court's decision should have been based solely on the government's written commitment to pay creditors.

The government was particularly interested in seeing this company continue in business. It feared that if the company closed down, the two to three thousand employees laid off would hold the government responsible for the loss of their jobs and vote against the government in the coming election.

Professor Houin:

There are presently two cases before European courts concerning governmental liability. In the first case a public authority in a French possession financed a company which is now bankrupt with a very large liability. It will be interesting to see whether the public authority will be held liable.

In the second case, before the Belgian courts, a public authority was held liable to a bankrupt corporation's creditors on the theory that the authority's loans enabled the company to remain in business longer than it should have. Some commentators believe there is a trend in favor of imposing liability on public authorities which act like *de facto* directors.

From the floor:

My question concerns the potential liability of managers of subsidiaries that are wholly owned or controlled by other entities. The officers of such subsidiaries are often required to adhere to the policies dictated by the parent company or group. Are there any decisions concerning such situations in which the officers of the subsidiary have been held personally liable in the event of bankruptcy?

Professor Mercadal:

Officers and/or directors of subsidiaries could theoretically be held liable in such circumstances. A court would apply the following test: Did the officers and/or directors exercise due diligence? Did they take all reasonable precautions to avoid bankruptcy?

Subsidiary officers and directors may raise the defense that they were required to follow the parent company's or group's policies. This defence may well be successful if these officers and directors can establish that the interests of the parent company or group conflicted with their company's interests. Subsidiary officers and directors can also take steps in advance of bankruptcy which may relieve them of some or all liability. For example, a group of subsidiary directors who also served as officers of the parent corporation recently demanded and received from the chairman of the parent company a guarantee that he would assume a portion of any liability incurred by them as a result of pursuing the parent company's interests. The courts have yet to pass on such arrangements, but I do not believe that they will necessarily oppose them.

I would like to thank Professor Mundheim for stimulating this fruitful discussion. We have examined the ways in which our various countries react to actual and potential bankruptcies of corporations that have significant economic power. Once again we were reminded that these issues often have political ramifications that influence governmental responses.

I think we all agree that Article 99 is controversial, and that this is due in large measure to the presumption that those in authority are at fault. The most common, although not the only, fault hypothesis is that those in authority unjustifiably allowed a company to continue its operations. Professor Houin, as the leading French bankruptcy expert, do you think Article 99 should be retained in its present form?

Professor Houin:

I will answer this question by evaluating several of the significant features of Article 99. I believe Article 99 should be retained but, as I will explain, some features should be reconsidered.

We must remember that Article 99 was enacted in response to the tremendous difficulty that bankruptcy trustees experienced in attempting to prove mismanagement. Many clever officers and directors made it very difficult for bankruptcy trustees to discover management errors and to gather the evidence needed to establish fault. After several episodes in which it was clearly impossible for the trustee to prove mismanagement, the legislature introduced a fault presumption. At first the presumption applied only with respect to sociétés anonymes (corporations), but it was then extended to sociétés à responsabilité limitée [36], and ultimately it was extended to all companies.

One of the weaknesses of Article 99 is the near total discretion it vests in judges in determining the liability of individual officers and directors. Although this discretion was intended to serve the laudable purpose of proportioning liability based on relative fault, it was at times based upon ability to pay or other factors, rather than upon relative fault. The scarecrow of Article 99, which is often used, and which nearly amounts to blackmail, is threatening to force harsh terms upon management in the reorganization in return, for example, for creditor votes favoring reorganization as opposed to liquidation.

Another problem with Article 99 is that it may be too severe. Many managers and directors fear Article 99. This fear sometimes generates undesirable behavior; for example, some managers of companies headed toward bankruptcy have reasoned that since they are likely to be found liable under Article 99, they may as well keep the company in business for as long as possible because this allows them to continue to collect their salaries. A law that encourages such behavior is clearly counterproductive.

On balance, I believe that Article 99 should be retained. It is not without its problems, but it is an improvement over the pre-Article 99 laws. However, I believe that it should only be applied to bankruptcy cases that result in liquidation. This would serve to encourage officers and directors to file early, which would in turn increase the likelihood of a successful reorganization. Similar reasoning explains why Article 99 does not apply to agreements between or among creditors not to sue a company in financial difficulty in order to give the company time to recover.

Dean Mundheim:

Professor Houin, are managers and directors who exercise business judgment in good faith liable under Article 99 if their judgment results in bankruptcy?

Professor Houin:

This type of question arises in both the corporate and noncorporate law areas. It is one of the most difficult questions in our entire civil code. In the

situation you pose, Professor Mundheim, French law would ask the following vague yet convenient question: What would a reasonably competent officer or director have done in the same circumstances? It is extremely difficult for a judge to answer this question without being influenced by his knowledge of the events that have already taken place. Of course, this difficulty is always encountered when one engages in *ex post facto* reasoning. Application of this test explains why old, senile directors are often held liable for only a small percentage of the total liability.

From the floor:

I would like to briefly address a point raised by Professor Houin – the severity of Article 99. I am involved with the negotiations of the EEC Bankruptcy Convention. The severity of Article 99 has received a great deal of attention in the negotiations. The convention's desire to maintain a concept of unity – uniform application of the law of the State in which the bankruptcy has been opened to all officers and directors no matter what their citizenship – has been abandoned on this point because other countries feel that Article 99 is too harsh to be applied to their citizens.

Notes

[1] Cessation of payments refers to the state of a company which has defaulted on some of its obligations and which is unable to meet its short term obligations (*l'impossibilité de faire face à son passif exigible*). The Cour de Cassation also used to require that the company be in a "hopeless state" (*une situation désespérée*). Now the court only focuses on a comparison of the levels of liquid assets and short-term liabilities (*à l'importance de l'actif disponible par faire en passif exigible*). Cass. com., Feb. 14, 1978, *Bull. cass.*, 1978, 4, no. 66.

[2] Article 99 of Law no. 67-563 of July 13, 1967, states: When the reorganization or liquidation of the assets of a corporation reveals an insufficiency of net worth, the court may decide, on the request of the trustee in bankruptcy, or of its own accord, that the corporate debts will be borne, all or in part, jointly and severally or not, by all the directors and officers, *de jure* or *de facto*, apparent or real, compensated or not, or by only some of them.

The cause of action must be brought within three years of the court's ruling identifying creditor claims. In case of the cancellation or avoidance of a settlement with the creditors, the limitation period, tolled during the duration of the settlement, starts again. Nevertheless, the trustee in bankruptcy has a new limitation period within which to bring the cause of action. This time period cannot be shorter than one year.

To be relieved of this liability, the involved directors and officers must submit convincing evidence that they diligently and actively managed the corporation.

[3] The six federal securities statutes are: the Securities Act of 1933, 15 U.S.C. sections 77a–77aa (1976); Securities Exchange Act of 1934, sections 78a–78kk (1976); Public Utility Holding Company Act of 1935, 15 U.S.C. sections 79–7926 (1976); Trust Indenture Act of 1939, sections 77aaa–77bbbb (1976); Investment Company Act of 1940, sections 80a-1–80a-64 (1976); and Investment Advisors Act of 1940, sections 80b-1–80b-21 (1976).

[4] See generally H. Henn, *Law of Corporations*, 352–57 (1970).

[5] See H. Henn, *supra* note 4, at 450–459.

[6] See H. Frey, J. Choper, N. Leech and C. Morris, *Cases and Materials on Corporations* 1025 at 1. (2d ed. 5th printing 1977).

[7] See generally G. Bogert, *Law of Trusts* at 1–5 (1973).

[8] 73 F.2d 121 (2d Cir. 1934), *cert. denied*, 294 U.S. 708 (1935); *noted in* 35 Colum. L. Rev. 289 (1935).

[9] *Id.* at 123.

[10] *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955), *cert. denied*, 349 U.S. 952 (1955).

[11] *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969). But not all courts are willing to apply the fiduciary principle so broadly. See *Schein v. Chasim*, 313 So.2d 739 (Fla. 1975) (actual damage to the corporation must be alleged).

[12] Securities Exchange Act section 16(b), 15 U.S.C. section 78p(b) (1976). That section provides, in part, For the purpose of preventing unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months....

[13] 15 U.S.C. section 78j(b) (1976). Section 10(b) of the 1934 Act states: It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange -

...

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[14] 17 C.F.R. section 240.10b-5 (1982).

[15] Class actions enable many plaintiffs, each of whose claims is individually too small to justify the expense of litigation, to join together and pursue the same claim against the same defendant(s) in one lawsuit. For the federal procedural rules governing class action suits, see Fed. R. Civ. P. 23 and 23.1.

[16] See, e.g., ABA-ALI Model Bus. Corp. Act, sections 4(o), 4A; New York Bus. Corp. Law section 721–27 (McKinney Supp. 1983); Del. Code Ann. Tit. 8, section 145 (1983); Cal. Corp. Code section 317 (West 1977).

[17] Bankruptcy Act/1945. Law Decree No. 7661, June 21, 1945.

[18] The term “state-controlled corporations” refers to corporations in which the state owns a majority interest and the rest of the share capital is held by the public.

[19] The Brazilian bipartite corporate administration system was introduced by Company Law No. 6.404/76. Although the law in some aspects takes after the U.S. experience, its general structure follows the German and the French system. Thus, as with the German “Aufsichtsrat” and the French “Conseil de Surveillance”, the members of the Brazilian “Conselho de Administração” are elected by the general shareholders’ meeting. It is a collegial body entrusted with both deliberative and administrative powers. In that respect, however, the Brazilian system does not follow the German and French patterns according to which the authority of the Board is restricted to supervision or control of the company’s administration.

The second administrative body – “Diretoria” – corresponds to the German “Vorstand” and the French “Directoire” and its members are nominated by board of directors. As in the German and French systems, the members of the Brazilian “Diretoria” have authority to represent the company and manage its business and affairs.

[20] See *supra* note 2.

[21] Juris. Class. Stés. Traité. Fasc 41-E no. 38 (proposed definition: being managers but not wage-earning) – Mercadal and Janin: Memento Pratique des Stés Cales no. 3849.

[22] L. 13 July 1967, Art. 99 – Juris Class. Stés. Traité. Fasc 41-E no. 54.

[23] For example, Trib. Com. Verdun, July 15, 1976. Unpublished. 525 pages.

[24] J.L. Vallens, J.C.P. 1982.II.13697.

[25] Cf. Derrida, D.S. 1979.459 – J. Mauro Gaz. Pal. 1er Nov. 1979.

[26] Trib. Com. Verdun July 15, 1976. Unpublished, Nancy December 15, 1977. J.C.P. 1978.II.18912.

[27] J. Mauro, Gaz, Pal. November 1, 1979.

[28] Law no. 66-537 of July 24, 1966, on commercial companies; decree no. 67-236 of March 23, 1967, on commercial companies; ordinance no. 67-833 of September 28, 1967, creating the Commission des Opérations de Bourse (the COB – the French SEC); decree no. 68-30 of January 3, 1968, setting forth the functions of the COB.

[29] Law no. 64-1278 of December 23, 1964, a special act amending the budget: Articles 16 and 17 (Bulletin Législatif Dalloz 1965 – 2 B.L.D.).

[30] Articles: L'année Boursière 1969 VIII p. 197; "Un Renouveau pour les OPA" (A Renewal for Takeover Bids), le Monde, March 3, 1979; "La Réforme des OPA" (The Reform of Takeover Bids), Bulletin Joly d'informatin des sociétés, Doctrine, 1970 p.69.

Decisions: Addition to the general regulation of Compagnie des Agents de Change (Stockbrokers), decision of the Minister of Economy and Finances of January 21, 1970; general decision of the COB, approved by the Minister of Economy and Finances, January 21, 1970.

[31] General decision of the COB of July 25, 1978, relating to cash and exchange tender offers.

[32] Law no. 66-537 of July 24, 1966, on commercial companies.

[33] COB recommendation relating to receipt of money in return for contributions in kind in mergers, scissions and partial business transfers.

[34] See Articles 218-235 of Law no. 66-537 of July 24, 1966, on commercial companies. For an English translation of these articles see Commerce Clearing House, French Law on Commercial Companies 108-113 (1971).

[35] Cunningham, *Betting on Chrysler's Bankruptcy*, Business Week, March 16, 1981, at 128-129; Ross, *Chrysler on the Brink*, Fortune, Feb. 9, 1981, at 38-42; *Chrysler in Barreling Toward the Brink Again*, Business Week, Dec. 29, 1980, at 43-44; *Could Bankruptcy Save Chrysler?*, Business Week, Dec. 24, 1979, at 70-72; Beswick, *DOT: Chrysler Fall Could Cost 240,000 Jobs, \$33 Billion Loss to Economy*, Electronic News, Oct. 1, 1979, at 12S.

[36] Article 34 of Law no. 66-537 of July 24, 1966, on commercial companies defines a "société à responsabilité limitée":

A limited liability company is a company formed between associates who shall bear losses only to the extent of their contributions.

It shall be designated by a company name which may include the name of one or more associates and must be immediately preceded or followed by the words "*société à responsabilité limitée*" or the initials "S.A.R.L.," and a statement of the capital.

Commerce Clearing House, French Law on Commercial Companies 44 (1971).