

France*

I. New Statutes

A. FOUNDATIONS

Law No. 87-571 of July 23, 1987,¹ has set up a system to encourage the support of arts and sciences. The law offers tax advantages and it defines, in particular, the legal structure of foundations. The foundation, until recently only ruled by administrative practice, is defined as "the act through which one or more persons, physical or juridical, decide the irrevocable allocation of assets, rights or resources, to the realization of a project of general interest and not for profit."² One very important trait distinguishes the foundation from other associations: a foundation can be set up unilaterally, by one person, while associations require the consent of more than one individual.

Foundations begin their existence on the date when the decree of the Conseil d'Etat granting their status as a project of public interest becomes effective. Such status allows the foundations to receive donations of all kinds. As a general rule, French law does not allow juridical persons to be donees. The reason for this rule is historical. Before the 1789 revolution, a great part of real estate was in the hands of foundations, which placed them outside the stream of commerce. This situation contradicted the economic liberalism that emerged with the revolution. Today foundations are seen under a different light and the legislature wishes to encourage enterprises to venture into general-interest, nonprofit projects.

B. GROUPS OF PUBLIC INTEREST

Groups with shared interests may form associations between private and public enterprises for a limited time period to undertake the development of special technical projects. The goal of these associations is to establish the administrative infrastructure or support service network necessary to accomplish the specific project. Under the new law, such groups may now be formed in the fields of culture, youth, technological teaching, health, and social action.³

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1. Conseil d'Etat, D.P. III Law No. 87-571, July 23, 1987.

2. *Id.*, art. 18.

3. *Id.*, art. 22.

C. PUBLIC TRADING OF SECURITIES IN SEVERAL STOCK EXCHANGES OF THE COMMON MARKET

To facilitate the flow of securities officially traded in the stock exchanges of various countries belonging to the Common Market, a directive of the European Community Council favors the Mutual Recognition of the Prospectus following the respective placement. Consequently, once the prospectus has been officially approved in the Member State where the issuer has his corporate domicile, the prospectus is valid in any other Member State where the securities are to be publicly traded. The Member States must implement this directive by January 1, 1990 (January 1, 1991, for Spain and January 1, 1992, for Portugal).⁴

II. Judicial Decisions

A. BUSINESS ORGANIZATIONS

An agreement concerning the transfer of majority participation rights on the capital of a *société anonyme* (corporation) in financial trouble included, on the one hand, as the transferor's duty, a warranty clause covering all debts predating the transfer that had not been registered in the books at that date. On the other hand, it was also stated that the transferor would be appointed the only general director of the enterprise now taking the form of *société à directoire* according him a contract as *directeur commercial* (general manager).

Held: There is no indivisibility between the two clauses. The warranty obligation assumed cannot be dissolved by the director's revocation of his labor contract.⁵

1. Abuse of a Majority Position

A decision voted by the shareholders' meeting can be annulled if it has been taken against the corporation's general interest and with the only purpose of favoring the majority members to the detriment of the minority. The Cour de Cassation has recently decided that such was not the case where dividends had been systematically withheld during eight successive years. The rationale was that such a prudent policy had allowed a substantial capitalization without resorting to a public offer, which had placed the corporation in a favorable situation. The lack of dividend distribution resulted in a raise of the share value which, in its turn, benefited all shareholders.⁶

4. Enactment No. 87-345 of June 22, 1987, J.O.C.E. Law No. 185 of July 4, 1987, at 81.

5. C. com., Apr. 7, 1987; see Lefebvre, 1987/10 Bulletin Rapide de Droit des Affaires 18.

6. C. com., June 23, 1987; see Lefebvre, 1987/14 Bulletin Rapide de Droit des Affaires 17.

2. *Liability of the Director (Gerant) of a Société Civile*

The director of a *société civile* had, on his own initiative and in the enterprise's name, ordered some construction work that ran afoul of the building permit. This caused an interruption of two years of work, together with a delay in the established production schedule. Two members, holding forty percent of the shares, filed a claim against the director for damages suffered personally by them.

Held: The action lies, even if at a meeting the shareholders had relieved the director of all liability (*guitus*). Such relief is only valid between the director and the enterprise, and is not a defense to a claim for personal damages filed by individual shareholders.⁷

3. *Nullity of By-Laws*

The by-laws of an S.A.R.L. (*société à responsabilité limitée*), later transformed into a *société anonyme*, contradicted the corporation's charter and the law of July 24, 1966 (changing the administration rules, quorum requirements and majority specifications).

Held: That contradictory by-laws were void and their nullity could be raised by any interested party, but such a nullity would not nullify the enterprise itself.⁸

4. *Liability of Members of a Société en Participation*

Article 1872-1 of the Civil Code states that: "if the parties act openly in front of third persons (case of *sociétés en participation ostensibles*) each one of those parties is held to be, in respect of such persons, solidarily liable for said acts."⁹ Applying this rule, the Lyon Appeals Court decided that a *société en participation*, to which a bank had made a loan, had ceased to be a *société occulte* in respect of the bank. Consequently, all its members became liable for the loan for the following reasons: The member who requested the loan had revealed, in writing, the existence of the *société en participation*. The bank after several meetings had agreed to the loan only after ascertaining the presence of solvent people among the members; further, the members had not reacted to a letter sent by the bank.¹⁰

The Cour de Cassation decided the case without characterizing the personal actions of the members. The latter, it can be concluded, behaved as regular members in front of the bank, nor had they intervened in the

7. C. civ., June 16, 1987; see Lefebvre, 1987/14 Bulletin Rapide de Droit des Affaires 19.

8. C. com., June 2, 1987; see Lefebvre, 1987/15/16 Bulletin Rapide de Droit des Affaires 21.

9. C. civ., art. 1872/1.

10. Cours d' appel Lyon arrêt, Dec. 20, 1985; see Lefebvre, 1986/13 Bulletin Rapide de Droit des Affaires 11.

agreement signed by the member defendant, leading the bank to believe that they guaranteed the transaction. The judgment was not reasoned.¹¹

B. BUSINESS LAW

1. *Agreement Not to Compete*

Agreements not to compete are not unusual in relation to sales of real estate or of an ongoing business (*fond de commerce*). Courts are often called upon to determine the validity or the extent of these agreements. The following three cases are representative of the most common problems caused by such contracts.

(1) In a suit against the acquirer of an ongoing business, based on an alleged breach of a contract not to compete, the Cour de Cassation held that to be valid, the agreement must be limited as to time and as to space.¹²

(2) The deed for the sale of some land, where a building was to be constructed, stipulated that the acquiring enterprise "formally bound itself, as well as all its successors, not to use the premises for the sale or marketing of oil-related products for vehicles."

Held: The contract was void. The clause tried to protect the commercial activity of the seller, who operated a similar business on a plot of land situated nearby. However, the lack of a specific time period during which the obligation was to be enforced rendered it void.¹³

(3) While transferring his shares, a former director of a corporation (*société anonyme*) agreed not to participate in any other enterprise that might compete directly with the corporation. The former director later signed as guarantor the lease contract of another corporation that sold exactly the same line of products as the first corporation.

Held: The former director breached his duty not to compete.¹⁴

2. *Jurisdiction Clause*

Article 48 of the new code of civil procedure forbids, except between merchants, agreements that would disqualify the general rules of territorial jurisdiction.¹⁵ The Paris Appeals Court has recently decided that article 48 concerns only domestic matters and is inapplicable to international cases.

11. C. com., July 15, 1987; see Lefebvre, 1987/17 Bulletin Rapide de Droit des Affaires 10.

12. C. com., May 19, 1987; see Lefebvre, 1987/12 Bulletin Rapide de Droit des Affaires 21.

13. Bull., Civ. III, Mar. 18, 1987, at 35.

14. C. com., June 2, 1987; see Lefebvre, 1987/14 Bulletin Rapide de Droit des Affaires 17.

15. C. pr. civ. art. 48.

In the case at bar, a British citizen, domiciled in Monte Carlo, had loaned some money to a French enterprise. The contract established that the loan would be ruled by the law of Monaco and that any dispute would be solved by the Monaco courts. The Paris court where an action for the reimbursement of the money was filed, correctly dismissed the case for lack of jurisdiction.¹⁶

3. *Liability for Inanimate Objects*

According to the Civil Code, article 1384, first paragraph, the person having the custody of a thing is liable for the damages caused by the thing.¹⁷ It has also been clearly established by precedent that the custodian of a thing is he who uses it, or he under whose direction or control the thing is. It has been consequently held that a supermarket who lends a shopping cart to one of its clients is not liable for the damage caused by the cart to another client, since the owner (the supermarket) cannot possibly ensure permanent control over the cart.¹⁸

4. *Penal Clause*

Article 1152 of the Civil Code states as follows: "When the clause indicates that the breaching party shall pay a certain sum for damages, a greater or a smaller amount cannot be awarded. However, the court can, even *sua sponte*, lower or raise the penalty if it is manifestly excessive or too small."¹⁹

An employer raised this article to request that the severance pay established in a collective bargaining agreement (applicable to printing and graphic industries workers), be reduced. The Appeals Court dismissed the case on the grounds that: "the court cannot use its moderating powers accorded by article 1152 of the Civil Code when such action would affect an indemnization established in a collective bargaining agreement."²⁰

5. *Ordinary Contracts*

Severance pay otherwise freely established in a labor contract can be reduced.²¹ The Cour de Cassation also held that a clause in the lease purchase of a truck, establishing that the nonpayment of any installment triggered the rescission of the contract, with the corresponding loss of all

16. Cours d' appel Paris, Mar. 11, 1987; see Lefebvre, 1987/12 Bulletin Rapide de Droit des Affaires 22.

17. C. civ. art. 1384.

18. C. civ., Apr. 6, 1987; see Lefebvre, 1987/140 Bulletin Rapide de Droit des Affaires 10.

19. C. civ. art. 1152.

20. C. soc., May 14, 1987; see Lefebvre, 1987/14 Bulletin Rapide de Droit des Affaires 22.

21. C. soc., Nov. 27, 1986; see Lefebvre, 1986/24 Bulletin Rapide de Droit des Affaires 23.

previous payments, was not in itself excessive. To obtain a reduction of the penalty, the interested party has the burden of proving the excessive nature of the clause.²²

6. *Sale Subject to a Trial Period*

The terms of sale of an agricultural machine established that the transaction would only become binding after the machine was tested, to the buyer's satisfaction, and that, in case of defects, said machine would be replaced by one of another model. In spite of certain mechanical troubles, the buyer had used the machine during a whole season (over four months) before he refused that model and further indicated that he would not accept another model either. The buyer was ordered to pay for the machine on the grounds that he had not exercised his option to rescind the sale during a reasonable trial period.²³

7. *Indirect Action*

Article 1167 of the Civil Code allows creditors to challenge, in their own name, acts committed by their debtors aimed at defrauding the creditors (known in procedural law as Paulian action).²⁴ This principle was used in the following case. The president of a corporation had personally guaranteed its debts with respect to a bank. Less than a month before the corporation became insolvent he formed, together with his wife, a real estate enterprise to which they then contributed a house that they owned jointly. The bank then requested and obtained the nullity of this contribution on the grounds that: such a contribution had weakened the warranty. The creditors, instead of attaching the building, now had to attach the shares representing half the capital, the value of which depended not only on the price of the building but also on other factors, such as general debts of the enterprise, etc. In addition, the fact of removing an asset from his patrimony when there was no other valuable asset to back his obligation towards the bank is, in itself, an indication of fraud.²⁵

22. C. com., May 12, 1987; see Lefebvre, 1987/13 Bulletin Rapide de Droit des Affaires 11.

23. C. com., June 16, 1987; see Lefebvre, 1987/73 Bulletin Rapide de Droit des Affaires 14.

24. C. civ. art. 1167.

25. G.V., July 21, 1987; see Lefebvre, 1987/18 Bulletin Rapide de Droit des Affaires 20.