

1993

France

Recommended Citation

France, 27 INT'L L. 541 (1993)

<https://scholar.smu.edu/til/vol27/iss2/14>

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REGIONAL DEVELOPMENTS

France*

I. Criminal Liability of Juridical Persons

As of May 1, 1993, when the new Criminal Code becomes effective, juridical persons may be made criminally liable according to the following provisions:¹

(1) All private juridical persons, and especially business organizations, are included. Public juridical persons are also listed, but subject to certain exceptions. The new Criminal Code excludes the state from condemnation. Local government can only be condemned for breaches committed “while performing activities susceptible of being delegated as public service contracts,” that is to say, in the supply of public services to industrial and business consumers.

(2) The agents of the organization while representing the latter must have committed the illegality.

(3) A condemnation judgment can only be handed down if based on a pre-existing rule. This will occur, for instance, for manslaughter, an involuntary battery,² pandering,³ theft,⁴ fraud,⁵ and abuse of trust.⁶

(4) The punishment includes: fines, inability to practice a profession, closing down of a business, publication of the offender's name, exclusion from public markets, withdrawal of checking privileges, confiscation, prohibition of making offers to receive investments from the public, judicial monitoring, and dissolution.

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1. C. CRIM. art. 121-2.

2. *Id.* arts. 221-7, 222-21.

3. *Id.* art. 225-12.

4. *Id.* art. 311-16.

5. *Id.* art. 313-9.

6. *Id.* art. 314-12.

The fine will amount to that applicable to physical persons.⁷ The duration of most penalties will not exceed five years.

Dissolution results only if the organization was created for the commission of the criminal acts. However, if the punishment for the crime in question is the imprisonment of physical persons for more than five years, dissolution can be decreed even if the organization has been utilized to commit the acts in question.⁸

II. Shareholders' Agreements

More frequently, shareholders of a corporation make contracts among themselves outside the articles of incorporation or bylaws. Shareholders make these agreements in order to control the corporation and its capital structure. The validity of the principal clauses of such agreements is often challenged in France. The following clauses, however, are valid:

(1) *Voting agreements.* This modality includes, for instance, the unanimous consent or a veto right for key issues, to be decided by a specific voting bloc, or the election of a certain number of managers (*administrateurs*) among various stockholders. In the authors' opinion such agreements are legal provided they are not intended to run against the corporation's interest or those of minority or majority stockholders. As a public policy matter shareholders in France cannot abuse their voting rights.

(2) *Restrictions on the assignment of shares.* This type of clause aims to maintain corporate control in the hands of those who have control when the agreement is concluded. To this purpose the following are expressly recognized as legal:

a) clauses giving members of the group a preferential right to acquire the shares about to be transferred;

b) clauses among the members of the group;

c) clauses restricting the sale of shares for a limited time and warranted by justifiable reason;

d) clauses foreseeing that if a group member buys shares from another, and payment cannot be made immediately, the shares may be held in trust (*portées*) by a predetermined organization;

e) clauses limiting the ownership of shares to a certain maximum and for a determined time, if warranted by a justifiable interest.

(3) *Buy and sell agreement.* This type of clause facilitates the exit of a group member by allowing him or her to sell the stock to another group member. The validity of this clause, imported from U.S. practice, appears to be uncertain. The clause forces one party to buy or to sell at a price that has been set unilaterally by the other. Such agreements arguably run contrary to a fundamental rule of French law, namely, that the parties must consent to the price. This rule prevents

7. *Id.* arts. 131-38, 131-41.

8. *Id.* art. 131-9-1.