

1994

## France

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(d) A Swedish corporation was a limited partner in a Dutch *commanditaire vennootschap* which may be considered a form of limited partnership. The partnership interest was an integral part of the corporation's business, and the corporation was "directly entitled" to the partnership's profits. The partnership's activity, seen by itself, constituted a permanent establishment in the Netherlands.

The Supreme Court held that under such circumstances the business and permanent establishment of the partnership should be considered as the business and permanent establishment of the corporate partner. The corporation's share in the partnership's profits then could be taxed in the Netherlands under the business profits article of the Dutch-Swedish Income Tax Treaty of June 18, 1991. The Court held that this result accorded with the objective of the provision to allocate the right to tax business profits to the country where such business profits arise.<sup>15</sup>

## France\*

### I. New Rules for Takeover Bids

On May 15, 1992, the Ministry of Economy and Finance issued an implementing regulation on takeover bids. The regulation is applicable to the law of August 2, 1989, which also triggered amendments to the rules of the Conseil de Bourses de Valeurs (C.O.B., an equivalent to the U.S. Securities and Exchange Commission). The legal change has been instituted to protect investors, and a summary of the regulation's main provisions follows:

#### A. OFFERS ON 100 PERCENT

Public offers to purchase or swap listed or unlisted securities must be made in reference to all stock and to any other certificate or title redeemable with capital of the corporation or voting rights.<sup>1</sup>

However, an offer on 100 percent of securities is not required:

- (a) for the purchase of certificates of investment by a holder of voting certificates or for the purchase of voting rights by a holder of investment certificates; or
- (b) for an enterprise's purchase of its own stock.

15. Judgment of Mar. 10, 1993, Dutch S. Ct., BNB 1993/—.

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1. Regulation art. 5-2-2.

## B. PROCEDURE APPLICABLE TO TAKEOVER BIDS

Under the standard procedure a minimum of twenty days is required for authorization of a purchase offer. The new rules introduce a simplified procedure that reduces the minimum time to ten days in case of a regular takeover bid and fifteen days in case of a public offer to swap securities. These reduced delays may also be authorized by the C.O.B. for an offer to acquire a controlling block of shares of an enterprise.<sup>2</sup>

A guarantee must be posted for securities that are not publicly traded. The buyer must commit himself to purchase all securities offered to him at a price equal to that of the controlling block.

## C. MANDATORY OFFERS

The limits for mandatory public offers are maintained (over one third of the capital or voting rights of an enterprise where the stock is quoted on the stock exchange or in secondary markets). However, exceeding the limits may result even beyond any purchase of securities in voting agreements among shareholders. Agreements of this type would envisage the purchase or transfer of voting rights, or a particular way of voting to establish a common corporate policy.<sup>3</sup>

In any event, the C.O.B. may excuse the obligation of filing for a public offer<sup>4</sup> if:

- (a) the purchase that exceeds the limits is due to a capital increase reserved to certain people; or
- (b) the limits are exceeded pursuant to a voting agreement filed with the C.O.B., according to which the parties commit themselves not to significantly modify the proportion of the stock they hold for a period of two years.

## II. Update on the Rome Convention on the Applicable Law to Contractual Obligations

The Rome Convention of June 19, 1980, became effective on April 1, 1991, and is applied currently by the ten European states that have ratified it: Germany, France, Belgium, Ireland, Italy, Luxembourg, the Netherlands, Denmark, the United Kingdom, and Greece. Once the Convention is applicable, the court must apply the law designated by the Convention, even if such law does not belong to one of the contracting states.<sup>5</sup> The designated law may be disregarded only if its

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2. *Id.*

3. *Id.* art 5-4-1.

4. *Id.* art. 5-4-6.

5. Convention on the Law Applicable to Contractual Obligations 80/934/EEC, *opened for signature* June 19, 1980, art. 2, 1980 O.J. (L 266) 1, 2.

application would obviously violate the forum's public policy.<sup>6</sup> The Convention includes the following main principles:

#### A. LAW CHOSEN BY THE PARTIES

The parties are free to choose the applicable law. Such choice must be express or discernable with certainty from the contractual clauses.<sup>7</sup> The designated law provides all the principles necessary to rule the contract.

##### 1. *Substance*

The applicable law rules, specifically:

- (a) The existence and validity of the contract; however, the party who raises lack of consent may plead the law of his or her habitual residence in cases where it would be unreasonable to subject such party's behavior to the law of the contract;<sup>8</sup>
- (b) performance of contractual obligations;<sup>9</sup>
- (c) consequences of total or partial nonperformance;<sup>10</sup>
- (d) the various ways to discharge the obligations, as well as statute of limitations and forfeiture of rights based on the lapse of a term;<sup>11</sup>
- (e) consequences of contractual nullity;<sup>12</sup> and
- (f) proof concerning legal presumptions or the burden of proof.<sup>13</sup>

Capacity is determined by the personal law of the parties. However, according to the Convention, if the contract is concluded between parties who are in the same country, the physical person who would be guilty according to the law of that country may only raise his incapacity according to another law if, at the time the contract was signed, the other party knew of the incapacity or was unaware of it due to his negligence.<sup>14</sup>

##### 2. *Form*

According to the Convention a contract is valid as to form when it satisfies the requirements of the applicable law<sup>15</sup> or:

- (a) the law of the place where the contract is concluded, if both parties are physically there; or

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6. *Id.* art. 16, at 5.

7. *Id.* art. 3, at 2.

8. *Id.* art. 8, at 4.

9. *Id.* art. 10-1(b), at 4.

10. *Id.* art. 10-1(c), at 4.

11. *Id.* art. 10-1(d), at 4.

12. *Id.* art. 10-1(e), at 4.

13. *Id.* art. 14-1, at 5.

14. *Id.* art. 11, at 4.

15. *Id.* art. 9, at 4.