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Comparative Corporate Law:
The US Corporation and the French SA

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INTRODUCTION

There has been a large interest these past years toward comparative law and especially comparative company law. Still, the subject is not largely known neither taught especially in French universities whereas this vision on the other aims to extend our thinking and put to question the approach we have about our own conceptions and legal knowledge. Hence this thesis aims to participate to fill a gap that has been for decades but that is also reducing along the recent years, especially thanks to the globalization of the world. Therefore, the comparative legal approach is "an intellectual activity with law as its object and comparison as its process"[1]meaning a scientific tool allowing the comparatist to study in an efficient way the distinctions and similarities occurring between different legal systems. For that purpose, exists seven main categories in the field of comparative company law[2]. Our study will only focus on two of them, firstly the rule-based approach and finally the transnational approach. The first on which this thesis is mainly focusing is the both academically and in the legal practice the "natural starting point", making a description of the different legal rules that exists throughout the different legal systems. This category is also seeking a universal rule laying behind all these rules which is naturally leading us to end this thesis with the transnational approach that is looking for harmonization among the legal systems.

Studying company law, it is study the legal answer given to economic problems and especially the one of doing business under an organized form in order to get confidence in the transactions and more efficiency. Company Law according to Armour, Hansmann and Kraakman[3] is willing to tackle five main issues shared by most of business organizations around the world such as legal personality, limited liability, transferable shares, and delegated management under a board structure and investor ownership. Hence our approach will see how the rules of two different legal system provide for these issues. These different systems are the American one and the French one. Each of these countries has different rules but also some like organize business on their territories (and abroad sometimes…) relying on common law for the first one and on civil law for the second one. The last question remains as why a focus on corporations? Corporations is the main form of

[1] Zweigurt & Koetz, *Introduction to comparative law*, Oxford University Press, 1998
[2] Mathias Siems, *The Methods of Comparative Corporate Law*, Working paper, Durham Law School, 2016.
[3] Armour, Hansmann and Kraakman, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, Oxford University Press, 2009

business in the United States, generating more than 85% of money made by business entities across the country. Corporation is seen as “the major vehicle for the development of capitalism” by Suzanne Corcoran[4], a vision shared by Georges Ripert saying that the French *Société Anonyme* (the alter ego of the U.S Corporation in the French legal system) is “the most wonderful tool for modern capitalism”.

Therefore, we will see the Regulatory and Legal Framework of corporation (Chapter 1) firstly with the United States of America and then through the French example before saying a word on the importance and influence of Europe in the French example. Then, we will study the Corporation’s organization (Chapter 2) through its incorporation as a legal birth, the way it is capitalized in order to do business and finally how people invest in the corporation. These analysis will lead us toward the Corporate Governance (Chapter 3) and the analysis on the place and role of directors and the powers of shareholders in a corporation in order to then make a Focus on Specific issues (Chapter 4) in the life of a corporation such as tax, mergers and the termination of the corporation. To conclude, we will enlarge the thinking on the attempts and the trend of harmonization of corporate law.

[4] Suzanne Corcoran, *Comparative Corporate Law Research Methodology,* Canberra Law Review, 1996

Chapter 1: Legal and Regulatory framework of corporations

In order to understand the comparison between two different business organizations in two different countries, having two different legal systems, it appears essential to set up the legal framework of each country and the legal landscape in which corporations will fit. An analysis of the American legal framework (I) will be followed by the analysis of the French legal landscape (II) before having a word on the influence and the importance of the European Union (III) on the French legal landscape.

I. The American Legal and Regulatory Context

The United States of America is defined as a common law country, with the particularity of being a federal country. First governing principle of the United States legal system, the common law is different from the civil law by having a focus on case law and a casuistic approach opposed to the abstract approach of civil law systems. The judge will have a centrality in the legal system that will not have the judge from civil law legal systems who is reduced as "the mouth of the law"[5] only and not its actor, thinker.

Second particularity of the United States, federalism can be defined as a "system of government in which the authority to govern is split between a single, nationwide central government and several regional governments that control specific geographical areas." The United States have a written Constitution at the Federal level but each of the 50 states that composes the U.S also do have their own Constitutions having therefore a Supreme court in each State and one at the Federal level. Federal system is competent upon U.S constitutional issues, Federal statutes pass by the Congress, and regulations made by Federal agencies such as the SEC (Security and Exchange Commission) or the FTC (Federal Trade Commission). All the other legislation is left to the states such as organization of family rules and divorce or business organization. Hence, the law can vary a lot from a state to another in the United States of America.

Still it exists the doctrine of implied powers that will extend the authority of the federal government to rule on a particular area of the law that is not clearly defined as relevant of the federal power in the Constitution. The most famous implementation of the implied powers doctrine is the one of

[5] Montesquieu, *De l'Esprit des Lois,* Paris, Flammarion, GF, 1993

the Interstate commerce clause. In *Gibbons v. Ogden*[6], the Supreme Court of the United States defines this clause as the power for the federal government to regulate anything that has an "effect upon" interstate commerce which could give wide range of authority to the federal government. A more recent case, *Gonzalez v. Raich*[7], the Federal government extended the interstate commerce clause to the illegal personal consumption and production of marijuana by passing a law preventing the intrastate (not interstate) manufacture, distribution or possession of marijuana instead of letting the State of California ruling about this topic. The Supreme Court held that it could have an impact on national demand of this product and others and thanks to the interstate commerce clause, it was of the authority of the federal government.

Therefore, business organizations must deal with several rules both at state level and at federal level. Still the federal government delayed much of the organization of the corporate law to the state level, each one having its own rules. The Federal government only put minimum standards for trade in company shares and governance rights such as the Security and Exchange Act of 1934 or the Sarbanes-Oxley Act of 2002. Other initiatives arise in order to give uniformity to American corporate law such as the American Bar Association's MBCA (Model Business Corporation Act) of 1950 that propose standards for corporate law that states can tailored to suit their particular needs. Followed in 1984 the RMBCA (Revised Model Business Corporation Act) that is now widely adopted throughout the U.S. Still it is not a mandatory model and some states are still using different rules such as Delaware.

The Delaware State is a pro-corporation state as half of the publicly traded corporations in the U.S are incorporated in the State of Delaware. The state isn't following the RMBCA and has more pro-business rules such as no state income tax if the business is conducted elsewhere than in Delaware, limited liability for directors, no need to hold meetings in persons for the directors… Moreover, the State of Delaware's Court of Chancery is worldwide renowned since 1792 for its expertise on business cases. Former Chief Justice Rehnquist even stated that "the Delaware state court system has established its national preeminence in the field of corporation law..."[8]

[6] 22 U.S. 1 (1824)
[7] 545 U.S 1 (2005)
[8] Lewis Black Jr., *Why corporations choose Delaware?* Delaware Department of State, 2007

Throughout the United States, several business courts with specialized judges emerged in order to attract businesses and solve cases more efficiently. Still, these specialized courts remain departments of existing classical trial courts and judges are still professional judges.

Corporations are therefore framed in a legal landscape of different laws but also of different business entities. Indeed, if the corporation is the form making the most money in the U.S as previously said, it isn't the most common. Limited Liability Companies (equivalent to the French SARL) are becoming the most common form of business entity in the U.S thanks to the limited liability it gives to the company's. On the other hand Sole Proprietorship (equivalent to the French EIRL) are suited for people willing to work on their own but has to disadvantage to held the owner personally liable as there is no any creation of a legal person. Finally, the Partnership (equivalent to the French SNC or SCS) either general or partly limited will held in the first case liable of all the shareholders while in the second only one of them, this form of business is generally for medium size companies.

II. The French Legal and Regulatory System

France is a Civil Law country and has most of its laws codified in Codes.
The French law is both national with codified law and possible interventions from the Minister of Economy, and supranational, observing directives from the European Union. Hence, the Codified rules are embedded in the Civil Code (1804) and the Commercial Code (1807).

These two Codes conditioned the general rules applicable to companies and also to corporations (Art. 1832 to 1873 of the Civil Code) and also special rules applicable to each type of business entity (*Livre II* in the Commercial Code and especially the articles L. 225-1 to 225-270 and L.242-1 to L.242-31 for the *Société Anonyme*) Other Codes exists such as the Monetary and Financial Code (CMF) but mostly complete the Commercial Code on specific issues.

Contrary to the American judiciary system, the French corporate litigation benefits its own jurisdiction and special judges trough the *Tribunal de Commerce* (Or Commercial Tribunal). The Commercial Tribunal is competent over business cases thanks to the article L.721-3 of the

Commercial Code. This exception is based upon the principle *specialia generalibus derogant*, literally meaning the special rule has priority over the general one, for two main reasons: necessity of rapidity and the complexity of the law applicable to business entities with the dangers it carries. (Insolvency…). Differing from the U.S judiciary system but also from the common French judiciary system, the judges from the Commercial jurisdiction are merchants elected (for two years for the first election then 4 years) among their peers and not professional judges appointed by the government. They give justice in total autonomy, as no professional judge intervene in the process.

Other participants are intervening in the corporation's legal framework. The Independent Administrative Authorities such as the *Autorité des Marchés Financiers* (French version of the SEC) and the *Autorité de la Concurrence* (French version of the Federal Trade Commission) are part of the daily life of a corporation as they rule specific part of the business and can put sanctions over corporation without trial. However, their decisions can be appealed before the French administrative courts.

As in the United States, French Sociétés Anonymes are competing with other business forms such as the *Société par Actions Simplifiées* (SAS) which is becoming the most common form of business for companies in France thanks to its flexibility in the *Statuts*. The *Société à Responsabilité Limitée* (SARL) is also a very trendy form of company, adapted to medium size companies and giving a limited liability to the shareholders. The *Entreprise Indivividuelle à Responsabilité Limité* (EIRL) is however different than the Sole Proprietorship as it grants limited liability to the owner but similar in the fact that there is no creation of a legal person. Finally, the *Société en Nom Commun* (SNC) and *Société en commandite simple* (SCS) are business form becoming less and less used in France as their do not grant a limited responsibility to the shareholders.

If the laws are national and not differing over the country, the French legal system must implement the European directives and regulations.

I. A word on European Union

The European Union is a supranational organization composed of 27 states, (including France) since the Brexit in 2016, originally based upon the Treaty of Rome from 1957 which is now codified in the Treaty on the Functioning of the European Union that came in vigor since the Lisbon Treaty was signed in 2007.
The European Court of Justice, the EU judicial branch, ruled as a landmark decision in *Costa c/ Enel, 15 of july 1964* the supremacy of European Union law over the laws of its member states. Therefore the laws enacted by the European Union are superior in hierarchy to the laws of the member states such as the French laws.

Hence the Treaty provide about different types of rules applicable to the Member States such as Regulations and Directives both referred to in article 249 "*In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions*."

The referred Regulations have a general application and "*shall be binding in its entirety and directly applicable in all Member States*" according to this same article. This, put in parallel with the *Costa v. Enel* case, make it mandatory for member states to implement directly these regulations as their own laws. The Directives then **"***shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods***."** According to the article 249. The meaning is that the member state has some time to implement the directive in its own law by making a national law with the same extend as the directive in its own national legal system.

The European Court of Justice has also established in another landmark case, *Van Gend & Loos, 5 of february 1963 case. 26/62,* the principle of direct effect of directives. The direct effect means that Union law may, if appropriately framed, confer rights on individuals which the courts of member states of the European Union are bound to recognize and enforce. For that purpose, the Court has stated several criteria for the article such as clear, unconditional, no dependent on any national implementing measure and containing no reservation on the part of the member state. If these criteria are satisfied, then the Directive may be enforced before national courts both by natural and legal persons.

These few words on the European Union law show the importance of the rules enacted by European Union on the national legislation and the way these one are making their own rules. Some could then talk about a kind of federalization of the law and a slow harmonization of it that will be talked about later.

Chapter 2: Corporations' organization

Corporations and French *Sociétés Anonymes* are business entities allowing persons to conduct business in a proper way. Several rules frame the creation of such entities and their structuration in order to ensure a fair conduct of the business life in a society under the Rule of Law or *Etat de droit*. Therefore the Incorporation (I) as the process of creation of the company is framed as the Capitalization (II) of the company and the Investment (III) from people in the business structure.

I. Incorporation

The incorporation process is the one giving legal birth to the company and creating its legal personality or "*personne morale*" as a legal fiction for a fictitious legal being inserted in the legal structure of the whole society. This is the time where shareholders will unite in order to conduct business through this legal person. The incorporation of the company is preceded by a pre-incorporation process (1) that will require the issuance of public and also private documents (2).

1. Pre-incorporation in France and USA

The preincorporation process in France is regulated by a formal regime given by the tribunals, the "company in incorporation". This means that the corporation is not yet registered in the Commercial and Corporate Charter (*Registre du Commerce et des Sociétés*) of the regional area of which the *Société Anonyme* has chosen to incorporate in France. Hence the corporation doesn't have any legal personality and cannot act on the legal world (cannot conclude contracts, sell products…) The Preincorporation process will include several steps such as raising money, setting up a business plan, finding shareholder and confirm the will to conduct business together. Indeed, the associates of the *Société Anonyme* make an act of will to do business together, as the spirit of the article 1832 of the Civil Code requires the *affectio societatis or the will to associate*, and will be bind by the Articles of Incorporations (Statuts) they will sign. The Articles of Incorporations are considered as a common contract while they are not registered under the rule of the article

1134. The European Court of Justice also recognized[9] as a contract the signed but not registered yet Articles of Incorporation. Hence, to protect anyone contracting with the associates of the company, the Article 1843 provide for it by holding personally and in solidarity with each other (when the company is for profits) for any contract or expense made in the name of the company. Still, the associates can recover their expenses and see their responsibility waived from the contracts concluded at two conditions: The contracts or expenses must have been made in the name of the company, and the company once registered can ratify these contracts and expenses if they are not tortious. If one of these conditions fail, the contracts are not voided and the associates will still be held liable[10].

As in France, the process of preincorporation in the United States, is the precedent to the formal incorporation of the company and the beginning of its existence as a legal being with rights and duties.

The preincorporation process will be, here too, the crucial step of raising money, setting up a business plan, finding shareholders, directors, managers, employees… The founders of the corporation are here called the promoters, they will also make all the expenses, decisions and contracts necessary on the behalf of the future created corporation. These preincorporation contracts in the United States also raise the issue of the contractual liability. The promoters will be held liable until the corporation is duly formed and possess a legal personality. Indeed, the corporation may, once it is registered, ratify or adopt the contracts made by the promoters on its behalf.[11] The adoption may be formal or express act but also inferred or implied by the conduct or the acquiescence of the corporation or by one of its authorized agents[12] for instance a payment made under the terms of a contract made by the promoters.[13] The theory underlined is the agency theory, that promoters can't be agents of the corporation as the corporation doesn't exist yet. Therefore, the corporation couldn't pay the debts or be solvent if anything happens during the preincorporation process whereas the promoters are solvent, exist, and possess a legal personality,

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[9] CJCE, decision 10th of March 1992
[10] Cass. Com, 20th of February 2007, n°05-14058
[11] *Wall v. Niagara Mining & Melting Co. of Idaho* 20 Utah 474, 59 P.399 (1899)
[12] *McArthur v. Times Printing Co*., 48 Minn. 319, 51 N.W. 216 (1892)
[13] *Bankers Const. Co. v. American National Bank of Cheyenne,* 30 Wyoming 449,223 P.33 (1924)

hence they can repair the damages in a court and face off a trial. When incorporation is properly done, the Secretary of State will issue a certificate of incorporation to the company.

2. Public / Private Documents

Some documents are mandatory to incorporate such as the articles of incorporation which will constitute the "constitution" of the corporation. These Articles of Corporations are a public document available to third parties. These documents are filed at a state level, with the office of the Secretary of State from the state the corporation wants to incorporate in (but not necessarily do business in), not a federal level. There has been some development to work on a federal incorporation but this is still a doctrinal debate.[14] Still, some similarities exist between states as much of them use the basis of the Model Business Corporation Act.
The articles of incorporation are the starting point for the corporation legal life, and is a *prima facie* evidence of the corporation's existence. They must include several informations such as the name of the corporation (which should have been checked available and the, reserved among the states the corporation wants to do business in), the duration, the names of the associates, the purpose of the corporation (which must be lawful), but also items dealing with shares and their composition (common/preferred) and the registered agent for service process. This latter information is mandatory in order to file correctly the articles of incorporations, indeed the registered agent for service process is a physical person whom will receive lawsuits and documents on the behalf of the corporation in order to respect the fourteenth amendment of the Constitution and the Due Process Clause that the defendant (here the corporation) must be provided with adequate notice of any proceeding to be accorded finality as stated by the Supreme Court of the United States[15].

Another document that might be mandatory are the bylaws. Corporation's bylaws is a private documents, not available to the public contrary to the articles of incorporation, seen as a contract between the shareholders, the directors and the corporation in order to fix the corporation's internal organization. Bylaws are mandatory in some states such as Georgia but not in others such as

[14] Georges W. Dent Jr., *For Federal Incorporation*, Journal of Corporation Law 35 J. Corp. L. (2009-2010)
[15] *Mullane v. Cent Hanover Bank & Tr. Co*, 339 U.S 306, 314 (1950)

California. Bylaws are easier to change than articles of incorporation and will therefore discuss in detail several aspects of the corporation's internal organization such as the shareholder meetings, voting and inspection rights, the potential liability for directors, their salary and their steps for removal and also the issue of dividends and stock.

As in the U.S, some documents are mandatory in France in order to incorporate properly a corporation. The *Statuts* are the French equivalent to the U.S Articles of Incorporation. According to article 1835 of the Civil Code and the article L.220-2 of the Commercial Code the *Statuts* must be written and must include the name of the corporation, the name of the associates, the purpose of the corporation (that must also be lawful), the duration, the headquarters and the capital of the corporation. There is no need of having a registered agent for service process in France contrary to the U.S. The *Statuts* needs to be registered at the nearby Company's incorporation Center which will transfer the demand of registration to the relevant Registry of the Commercial Tribunal. If the corporation fails to respect one of the legal obligations in the statutes, the company can be voided.[16]

Under French Law bylaws (or *Règlement Intérieur* in French) are not a mandatory requirement in order to incorporate. It is more an at will document that will also stays private. Publicly traded corporations in France may be required to adopt bylaws as suggested by the soft law AFEP-MEDEF code but it is not a requirement even if for practical reasons and because it is much easier to change than the *Statuts* which would necessitate an extraordinary general assembly (or special meeting) of the shareholders and a vote in order to modify them.[17] Indeed it has been judged that is not possible for directors to change the *Statuts* by their own[18] but they still can modify the bylaws without the consent of the shareholders which make them far more flexible.

II. Capitalization

Once properly created, the corporation needs money as a starting point in order to properly conduct business. It is the corporation's capital structuration. This money can either come from investors or can be borrowed. Hence rules of minimal requirements exists for corporation and *Sociétés Anonymes* (1) that will mostly be financed through stock and equity-debt (2).

[16] CA Lyon, *Chambre civile* 1 B, 4 mars 2014, n°12/08841
[17] C. Com. Article L. 225-96
[18] Cass. civ., 4th of June 1946 (case Motte)

1. Minimal requirements

A *Societé Anonyme* is a capital society. Meaning it will have capital and especially a minimum capital requirement of 37 000 euros[19]. This minimum requirement is set to protect creditors if the corporation is going on liquidation. But still the former requirement for a reinforced minimal capital toward public offering *Sociétés Anonyme* of 225 000 euros has been suppressed in 2009.[20]
As a capital business organization, shareholders must make capital contribution either in “nature” or trough money when they start the business. The amount of money put in the company must be freed from half of its amount the moment the company is incorporated then the rest must be get back by the corporation through 5 years.[21]
The *Société Anonyme* is able to issue par value stock or to decide not to. If the *Société Anonyme* decides to issue par value stock, the amount of this stock must be written in the *Statuts* and it is impossible to sell below this amount a stock. Only the shareholders can modify this amount by modifying the *Statuts*[22]. If the Corporation as issued all of its stock, it needs to raise the amount of the capital, an operation that needs to be validated by the shareholders in an extraordinary meeting or the shareholders can also delegate this ability to the board of officers under conditions.[23]

As in France, in the United States stock is authorized if it has been formerly provided for in the articles of incorporation. The articles of incorporation must state the classes of stock, the number of authorized shares (meaning the number of shares that could be issued), and the rights of each class of stock.
Issues common to stock include dividends, liquidation rights, voting rights, conversion rights, and redemption rights. If a corporation issued all its authorized shares and it wanted to issue more, it would need to amend the articles to include more authorized shares. Also, as in France, Shareholders approval is necessary for amending the articles of incorporation.

[19] C. Com. Article L. 224-2
[20] *Ordonnance* of 22 January 2009
[21] C.Com. Article L. 225-3
[22] C.Com. Article L. 225-96
[23] C.Com. Article L. 225-129-2

In the beginning, par value was close to the going rate for stock. The corporation could not cut a deal and sell stock to insiders at less than par. Par value has now usually nothing to do with going rate. Some states have eliminated the concept of par value such as California others put par value at a nominal amount, such as dollars. However even if there is no any minimum amount required for a capitalization, the "corporate veil" protecting the incorporators then shareholders might be pierced for undercapitalization if conducting business without enough money in the corporation's capital in order to protect the contractors from insolvency.

2. Stock and Equity-Debt Capital

There is generally two type of stock issued by corporations, common stock and preferred stock. Common stocks hold by a stockholder get a percentage interest in the corporation which is based upon the total number of shares he owns in the company. These stocks give voting rights and several other rights to the stockholders such as the right to dividends. Common stockholders get paid last after the bondholders and even the preferred stockholders. Common stockholders will be paid only after the creditors, the employees, and the preferred stockholders if the company goes bankrupt following the "absolute priority rule".[24]

Preferred stocks have the advantage of being first in rank before the common stocks to receive dividends and assets if the company dissolves. Still the bondholders, people seen as creditors having only a money right, will be paid before the preferred stockholders.[25] Usually preferred stock, having a preferential security about receiving the dividends, these stocks are usually without voting rights and having less value than common stock (as they are more secure).

Creditors can lend money to the company, for it to develop when capital contributions are not sufficient. These creditors get an interest on the amount they lend to the company and get paid before preferred stockholders and common stockholders. Two types a debt exists in the U.S, the unsecured debt and the secured one. An unsecured debt is based on a promise to repay the debt called a *debenture* when it is more than 30 years and a note when it is 5 years or less. These debts mostly go to court to get reimbursed as they have no any security.[26] Debentures are mostly like

[24] Walter J. Blum, Stanley A. Kaplan, *The Absolute Priority Doctrine in Corporate Reorganizations*, University of Chicago Law Review, Vol. 41, Issue 4 (Summer 1974)
[25] Ibid.
[26] *Boeing Company v. Van Gemert et al*. (78-1327), U.S. Sup. Ct. Cas. 1 (1979-1980)

bonds but without any security, being far more hazardous. Facing trials cost money and time, which is the reason why secured debts will be preferred to unsecured one. Secured debts are usually bonds secured by property such as shares of the company. Bonds are usually long term debt that have a maturity date signifying the principal of the bond must be paid.
This financing way can be costly for the company. Equity capital allows the company to raise money by issuing new shares and attracting new investors. Shareholders are usually opposed to equity capital and prefer the company going into debt as most of the common shareholders do not have a preemptive right meaning that when the company will issue new shares, their percentage of ownership in the company will decrease so as their benefits. For the company to issue new shares, the corporation needs to get the approval of the majority of the shareholders.

French corporations can also issue common stock if these was allowed in the *Statuts*. These stocks are following the same applications than the one described in the United States Legal system having voting rights (Article L. 225-122) and having no privileges on the rank toward the payment of dividends or on the assets if the company dissolves. The French corporate law has aligned itself on the United States in 2004 (Ordinance of 24 June of 2004) in codifying the preferred shares (*action de preference* in French) to the articles L. 228-11 to L.228-19 in the Commercial Code. These preferred are vows to get a preferential rank in the payment of dividends, on the assets if the company is going to dissolve… They are some very adaptable shares in able to give special voting rights (Article L.228-11 al.2) or special rights to dividends originally destined to financial investors.
As in the United States, French *Sociétés Anonymes* can go in debt in order to finance themselves, but this option has a cost (creditors interests) and can also have risk of conflicts with creditors ending to courts. The *Sociétés Anonymes* could then prefer to raise money through equity capital. Contrary to the United States, the shareholders will be less reluctant to allow the issue of new equities by an extraordinary assembly in France thanks to the article L. 225-132 of the Commercial Code. This article creates a preemptive right to the shareholder if any capital increase occurs on the new shares issued. This right is guarantee by the law and said irreducible, if a company voluntarily unknown this preemptive right then the attribution of the new share through the general assembly can be voided[27]. Still this right can be suppressed if the shareholders have consented to

[27] Cass. Com, 18th of April 2000, n° 97-21.569

or even sold. These possibilities left to the shareholders makes them far more receptive to vote in favor of a capital increase by the issue of new shares than in the United States.

III. Investment

The principal aim of a corporation or a *Société Anonyme* is to accumulate and create wealth. The business form of the corporation is just a legal medium allowing to conduct business in a more organized and more efficient way. It is also the business entities that allows the best investment in it thanks the multiple tools it offers such as stock-options and dividends (1) but also thanks to the protection it grants to the investors (2).

1. Stock options and dividends

While many corporations might prefer cash in exchange of shares, some could exchange shares against knowledge and labor in order to attract the best employees and especially the best managers. These exchanges are called stock-options as they are stock sold at a fixed price to the managers or another person. This price is known as the striking price. These stock-option are generally part of a "Management package" that's principal's aim is to get the manager more involved in the company, the price of his stock received being linked to the success of the company. Stock-options are even the principal form of compensation for CEO's in the United States[28]. It is worthy to note that stocks are depending of the market value of the corporation, in financial crisis period of time, this way of compensation might not be the most favored one as the global market value will decrease and then the price of the company's stock.[29]

In France, Stock options are codified under the article L225.177 of the Commercial Code. The issuance of stock-options by the *Société Anonyme* must be validated by an extraordinary general assembly after reports from the Administration council and the Certified accountant. As in the U.S,

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[28] Richard A. Booth, *Why stock options are the best form of executive compensation (and how to make them even better?)*, New York University Journal of Law & Business, Vol. 6, Issue 2 (Spring 2010)
[29] Joseph E. Bachelder III, *What Has Happened To Stock Options*, Harvard Law School Forum on Corporate governance and financial regulation, October 2014

these stock options are a way to attract great managers. The sell price of such stock mustn't be less than 20% of the stock's initial price. However, since the financial crisis, the stock-options are losing their appeal and criticized for the short term view they might give to the managers, that is why "free shares" or *Actions Gratuites* are more often given by *Sociétés Anonymes* now to attract managers with an inalienable time under which these shares cannot be sold, thus forcing the managers to involve themselves in long term actions beneficial for the company.

However, the most awaited result from investment in a company's shares are the dividends. The dividends are the way the corporation will share its profits with its shareholder by cash, shares or even property. The dividends should not come from the capital of the company but only from its profits, the directors will have the decision-making authority regarding the issuance of dividends. This decision isn't only restrained on common shares but on all types of shares, including the proffered ones.[30] Two test need to be passed by companies in order to allow the issuance of dividends. The Balance sheet test and the solvency test. The first one refers to the fact that the assets of the corporation must be equal or superior to its liabilities before the dividends are issued. The second test refers to the ability of the corporation to be able to pay its liabilities and debts after the issuance of dividends. If these tests are validated, the issuance of dividends is possible (but not mandatory) by the board of directors. The share dividend is typically from the same class of stock as the shareholder already owns. However, it is commonly held by courts that preferred shareholders have a cumulative right to dividends if the articles of incorporation are silent.[31] This means that the preferred shareholder will received the dividends unpaid from the prior year and the one of the actual year.

The issuance of dividends in France is codified in the Commercial Code at the article L. 232-12. However, the decision to issue the dividends according to the latter article rest in the hands of the shareholders contrary to the United States. Still it is possible to state otherwise in the *Statuts*. Similarly, as the United States, the dividends are reserved to stockholders[32] and the stocks are typically reserved to the type of stock the stockholders own. Also, the dividends can either be

[30] *Morse v. Boston & Maine R. R.*, 263 Mass. 308, 160 N. E. 894 (1928)
[31] *Whabarton v. John Wanamaker, Philadelphia*, 329 PA. 5, 196 ATL. 506 5 (1938)
[32] C. Com, 10th of September 2014, N°13-13957

delivered in cash or in shares (Article L.232-18 of the Commercial Code) or even in property as the Court de cassation implicitly stated it.[33] However, the cumulative right to dividends held by the preferred shareholders in the U.S isn't commonly held by French courts. These right needs to be specified in the Statuts, there are only eventual.

2. Investor protection

These stocks and the rights granted with them alongside with bonds and other titles are governed by investment rules in order to protect the investor, especially when these titles are offered to the public on the financial markets. As relevant to the interstate commerce it is the Federal government that rules about these subject throughout federal agencies such as the Security and Exchanges Commission. The SEC operates under the Securities act of 1933 and the Securities Exchange Act of 1934. The first statute provides for basic information toward the public, the registration of a "prospectus", through the EDGAR, system which is the document having these information, such as the stock options of the company, its ongoing litigations, its current operations, its financial viability all of them certified by a public accountant. If the corporation fails to properly register these information, it could be held liable for it. Corporations with a turnover superior to 10 of millions of dollars needs to do additional reporting. The Securities Exchange Act of 1934 regulates the annual report of the corporations, mandatory at least ninety days after the end of the fiscal year. Also, section 10(b) of the latter, prevent insider trading which is characterized by the possession of material information not available to the general public.[34] Are also regulated at section 16(b) short swing profits earnings which are the making of profits by the selling of shares in the first 6 month after their purchase for a director or shareholder owning at least 10% of the company.
If the Federal government is competent to rule the interstate commerce, intrastate commerce still belongs to the States. In order for a corporation to make an intrastate offer, the corporation must be a resident of the State, making at least 80% of its revenues in the State and the majority of the profits earned through the sale of the shares also in the state according to the Securities Act of 1933. Once the offering is intrastate, state rules apply. Most of the States have "Blue Sky Laws"[35]

[33] C.Com, 31 of May 1988, Bull. Civ. IV N°181
[34] *United States v. Stewart* (Stewart I), 305 F. Supp. 2d 368, 378 (S.D.N.Y. 2004)
[35] First used in: *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917)

which are laws prohibiting the sale of valueless shares of a company to prevent shareholders to acquire a part of the blue sky. Still each State has its own definition of the word valueless. Four exceptions exist to the registration of such offerings; it must be an isolated offer, private, limited to a certain number of people in a limited amount of time or a certain number of people after the purchase of all shares available to the sale.

The French authority regulating public offerings is known as the AMF (*Autorité des Marchés Financiers*) which is the French equivalent to the SEC with also, sanctions powers. The AMF is an independent administrative authority aiming to protect the investors and the public in general. Its independent character means that the authority is able to edict its own rules toward the market under to approval of the French Minister of the Economy (Article L. 621-6 of the Financial and Monetary Code). Such rules include the deliverance of a prospectus if the corporation is willing to make a public offer of its shares to the public, the prospectus similarly to the one mandatory to file with the SEC must include “complete and understandable informations” according to the article L.621-8-1-1 of the Financial & Monetary Code. The AMF has also authority to pursue insider trading thanks to the article L.465-1 of the CMF. The fraud is characterized when someone has access to privileged informations, unavailable to the general public, upon the company that is making the public offer and use this information or sell it in order to make profits. However, French officers and directors are exempt from the short swing profit recovery system of the article section 16(b), no such rule exists in French law.

Chapter 3: Corporate governance

Corporate Governance is a topic widely studied over the United States but also in Europe, especially the most efficient way to run a business in respect of both the shareholders and the directors. In our study we are confronted to two types of governance (I) impacting the role of the Directors and Officers (II) but also the one of Shareholders (III).

I. Type of governance in USA and France

The United States and France have both different ways to organize corporations especially at the level of the boards of directors. The corporations in the U.S is directed by a one tier system (1) while the *Sociétés Anonymes* in France have the choice of a one tier system or a two tier system (2) more close to the German way of corporate governance.

1. U.S corporation, the supremacy of the One-tier system

Corporations, in the U.S, will have generally a board of directors that will control effectively the company, collegially, and officers being the administrative agents of the corporation. If the corporations are usually governed by a board of directors it is not always the case, some states don't require corporations to be managed by a board of director. Indeed as there is no any minimum of number of shareholders required to start the corporation, hence it would be difficult for a sole shareholder in a small corporation to assemble a board of director. The Code of Delaware admits expressively the possibility for corporations to choose another way of governance in Section 141(a) as said: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."[36] The officers, handling the day to day management of the corporation are also usually regulated by the bylaws of the company or by the board of directors. The MBCA of 2011 hold that: "A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws."[37] Hence, again it

[36] Delaware, Delaware General Corporation Law (DGCL), Title 8:"Corporations",§141(a)
[37] MBCA, §8.40(a)

appears that a large contractual liberty is given to the corporations in order to govern and organize themselves.

2. French *Societé Anonyme*, the choice between one-tier and two-tier system

On the other side, the French *Société Anonyme* it can choose its way of organization between a "traditional" one tier or a "German" two tier system. The first system, the one tier system is composed of an administration council and its President and a General Director. The first one is in charge of the administrative control of the company and over the action of the executive direction of the company of the General Director. Before 2001, the President of the administration council was also the general director of the company (*PDG*) but since the NRE law in 2001[38], there is the possibility to separate these functions. Indeed, has been criticized the fact that the organ of control was also the direction one. Some analysts saw the direct influence of the American law and the distinction between the board of directors and the officers, hence between the control power and the executive power.[39]Still, contrary to the U.S corporation and its liberty given in the choice of its own organization, the "traditional" or one tier system *Société Anonyme* has to be governed by an administrative council[40] and a General Director.[41] The President of the Administrative council also needs to be elected accordingly to the letter of the law, as every other stipulation will be voided.[42] This way of management of the company is the most popular among *Sociétés Anonymes* in France as we count 30 one tier system for each two tier system *Société Anonyme*.[43] However, some of the biggest *Sociétés Anonymes* of the CAC 40 prefer to use a dual system (either separated functions with the NRE law between President and General Director or the two tier system) as much as 24 over the 40 of the CAC[44]. The two tier system has been copied over the German system in order to have a true and watertight separation between control and direction functions since 1966.[45] Thenceforth, the *Société Anonyme* could have the choice between the two types of

[38] *Loi relative aux Nouvelles Régulations Numériques* (NRE), 15th of May 2001, n°2001-420
[39] M. Cozian, A. Viandier, F. Deboissy, *Droit des sociétés*, Lexis Nexis, 26ème Edition, 2013
[40] C.Com, Article L.225-17
[41] C.Com, Article L.225-51-1
[42] C.Com, Article L. 225-47
[43] Bruno Dondero, *Droit des Sociétés*, Dalloz, 3rd edition, 2013
[44] Ibid.
[45] *Loi sur les Sociétés Commerciales*, 24th of July 1966, N°66-537

governance that must be written in its *Statuts* according to the article L.225-57 of the Commercial Code. This two tier system is composed of a Board of Directors also called *Directoire* and a Supervisory Board. The first one, is composed of a maximum of 5 persons (7 if the SA goes public)[46] persons and among them a President elected by the Supervisory Board. Here again, the law prohibits any change and any provision made by the *Statuts* to the hierarchy of the *Société Anonyme* is considered voided[47]. The Board of Directors is ensuring the direction of the company and is controlled by the Supervisory Board, but a director cannot be in the Supervisory Board[48] other as in the one tier system allows it.

Therefore the French system appears to have more flexibility by leaving to the company the choice of a one tier or two tier system but in fact, the law restrains more its liberty and options of governance whereas the American system is giving more liberty and flexibility to companies by allowing them to adapt their organizational options to their particular needs.

II. Directors and Officers

Directors and Officers are the executive arm of the company, the people enforcing actions and directing the company in a way or another, conducting the day to day business. Therefore they are granted several powers and are usually more powerful than the shareholders while they are supposed working for them under the firm's mandate ("*Mandataires sociaux*"). Hence there nomination and removal process (1) as much as their compensation (2) are crucial topics for the company, still Directors and Officers also have duties and liabilities (3).

1. Nomination and Removal

Directors and appointed Officers are the leaders of the corporation, also they are not necessarily shareholders. However they are elected by the shareholders following the bylaws or the article of incorporation. The first board of director will be usually elected by the incorporators at the

[46] C. Com Article L.225-58
[47] CA Versailles, 8th of July, 1993 Bull. Joly 1993. 1024
[48] C. Com Article L 225-74

organizational meeting[49]or designated by the articles of incorporations[50]. Then they will be regularly elected since the first shareholder's meeting and at the general assembly of the shareholders held each year[51]. The officers will be appointed by the directors without any decision from the shareholders. However the officers can be removed by the directors or the shareholders at-will and not need a cause in order to do so. Directors are more protected by the American law. The MBCA and some other states' legislation such the one of Delaware allow the shareholders to revoke the directors "with or without cause"[52]. However this is only in the absence of provisions in the bylaws or the articles of incorporation. Thenceforth, bylaws are almost always mentioning the necessity to revoke with a cause the directors making it more difficult for the shareholders. The dismissal might also be judicial if the director is "engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation and removal is in the best interest of the corporation."[53] Still, the dismissal is only subsidiary and if the shareholders want to reelect or choose not to dismiss the director the judge, according to the *business judgment rule*, can't intervene in the direction of the company.[54]

In France, the nomination is similar between the French Administrators and the American Directors. The administrators in a one tier system corporation are designated by the *Statuts* or by the incorporators after the organizational meeting and are in office until the first general assembly and the vote of the shareholders.[55] The president of the Board of Directors ("*Conseil d'administration*") is elected by the directors among them. Then the *Statuts* have to provide, since the NRE law[56], if the President of the board of directors will also occupy the functions of Chief Executive Officer[57] ("*Directeur Général*"). If not, the Chief Executive Officer will be nominated by the Board of Directors.[58] The Chief Executive Officer can also ask to be assisted by a maximum

[49] MBCA §2.05(a)(2)
[50] H.G. Henn and J. R. Alexander, Laws of Corporations and Other Business Enterprises, Hornbook Series, Westlaw, 3rd edition, 1983
[51] MBCA, §7.01 (a)
[52] DGCL, §141 (k) ; MBCA, §8.08
[53] MBCA, §8.09(a)(1) and (2)
[54] MBCA, §8.09, Official Comment
[55] C. Com Article L.225-18
[56] See Supra Note 33
[57] C.Com, Article L.225-51-1
[58] Ibid.

of five executive officers, nominated by the Board of Directors under proposal of the Chief Executive Officer [59]

In two tier system, the first members of the Supervisory Board are designated in the *Statuts* or designated by the incorporators in the organizational meeting standing in office until the first general assembly held by the shareholders.[60] Once elected, the Supervisory Board will nominate the members of the Management Board ("*Directoire*") and nominate among them the President of the Management Board.[61] In France three ways of dismissal exist but the law isn't as protective toward the directors as in the United States, in order to equilibrate the factual power of the directors upon the company. First is the *ad nutuum* dismissal that allows the shareholders to revoke at will any of the directors[62] or members of the Supervisory Board[63] without the need of any cause.

The Chief Executive Officers are more protected and can only be dismissed under a "right cause" ("*juste motif*") which can as easily be constituted as a difference between the views of the future of the company or of its daily management.[64] The Chief Executive Officer in a one tier system if he is different from the President of the Board of Directors and the members of the Management Board in a two-board system are dismissible only by the general assembly of the shareholders[65] or also by the Supervisory Board for the latter if the *Statuts* provided for.[66]

2. Compensation

The CEO of the company (both control and direction) are usually highly rewarded for their work. The amount of compensation they received might sometimes shock the public especially during the financial crisis. Some doctrines such as the "Say on Pay" emerged in 2010, in the U.S thanks to the Dodd-Franck Act[67], in order to "regulate" these compensations. However some scholars disapproved the tool of control arguing it gives little information to the Board of Director and isn't

[59] C. Com Article L.225-53
[60] C. Com Article L.225-75
[61] C. Com Article L.225-59
[62] C. Com Article L. 225-47
[63] C. Com Article L. 225-75
[64] Cass. Com, 17th of July, 1994
[65] C. Com Article L. 225-55 ; C.Com Article L. 225-61
[66] Ibid.
[67] Dodd-Franck Wall Street Consumer and Protection Act, 124 Stat.1376-2223, (2010)

fully necessary to the corporation.[68] Usually compensations in the U.S are decided by a compensation committee composed from member of the Board of Directors, thus deciding of their own compensations. Still, the articles of incorporation or the bylaws can provide otherwise.[69]The compensation of the Officers are also decided by the Board of Directors. The Say-On-Pay provisions of the Dodd-Franck Act allow the shareholders to vote on the amount on the pay package of the executives.

The French compensation of the executives has also inherited the restrictions from the financial crises. Indeed since the Loi Sapin II[70] executives' pay package from publicly traded *Sociétés Anonymes* are submitted to mandatory vote from the shareholders. However this conception is in contradiction with the *Motte*[71] case of 1946 which is imposing a strict respect of the hierarchy of the organs in a *Société Anonyme* and a clear separation of powers hence the opportunity of the control of the executive's compensation is still questioned[72]. Otherwise, the CEO from common *Sociétés Anonymes* have their compensations decided either by the Board of Directors [73] or by the Supervisory Board[74]. The Supervisory Board[75] and the Board of Directors [76] only receive attendance fees of which the price will be fixed by the shareholders in a general assembly.

3. Duties / Liability

With great compensations come great responsibilities. This sentence can sum the duties related to the Directors that are multiples in the United States. These duties also apply to officers. The directors can be held liable for torts, crime, gross negligence or any break of the law, still there is special duties that apply to them. The first one is the duty of due care[77] by which the directors are

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[68] Krause, Ryan; Whitler, Kimberly A.; Semadeni, Matthew (2014-02-01) "*Power to the Principals! An Experimental Look at Shareholder Say-On-Pay Voting*"
[69] MBCA, §8.11
[70] Loi 2016-1691 of 9th of December 2016 "*sur la transparence, la lutte contre la corruption et la modernisation de la vie économique*"
[71] See Note 17
[72] Pierre-Louis Périn, *L'opportunité d'un contrôle de la rémunération des dirigeants*, Revue Droit & Affaires, 12th edition, Paris, 2015
[73] C. Com Article L.225-54
[74] C. Com Article L.225-63
[75] C. Com Article L.225-83
[76] C. Com Article L.225-44
[77] MBCA, §8.30

expected to run the company as an ordinary prudent director would have done. In *Smith v. Van Gorkom*[78], the duty of due care due to the corporation and the shareholders is find breach by gross negligence from the directors who didn't even informed themselves about all the elements of a merger. In case of gross negligence, the directors will be held liable as even the business judgment rule can't apply. This notion, has been created in order to protect the liberty of decisions of the directors, still it cannot protect the directors against gross negligence. The fiduciary duty is very close to the notion of the Business Judgment, in *Dodge v. Ford*[79], the Business Judgment rule has been defined as to tend to the maximization of shareholders' wealth and cannot cover all the decisions of the directors if it is clearly seeable that the latter decisions were taken by forgetting this aspect. Here is the duty of loyalty[80], which prevent directors to compete with the corporation they work for but also prevent them from self-dealing as exposed in *Guth v. Loft.Inc*[81] where the director has acted only toward his own interest and not toward the ones of the company he managed.

In France, executive officers also have a duties and can also be held liable for tort, crime or gross negligence. The U.S law seen above has been of a great influence on the French corporate law such as the duty of loyalty. This duty isn't precisely defined by the Commercial Code but has been by the jurisprudence trough the *Vilgrain*[82] case in which the duty of loyalty towards the shareholders has been first recognized. It consists of a duty to act in good faith and to put the interests of the Company and its shareholders ahead of any interests persona might have.

The duty of care or "*devoir de diligence*" is another key point duty of the executive officers/directors which requires that the manager is doing his work as a reasonably prudent manager would have done it, meaning in an informed manner and by being among other things assiduous. As the duty of loyalty, the duty of care isn't specifically codified in the Commercial Code and is contained in the scope of the duty of loyalty previously seen. This duty comes directly from the U.S law and is gaining influence in France, however, the American business judgment rule as yet no concrete and real counterpart in the French judicial system.

[78] *Smith v. Van Gorkom* 488 A.2d 858 (Del. 1985)
[79] *Dodge v. Ford Motor Company*, 170 NW 668 (Mich 1919)
[80] MBCA, §8.60
[81] *Guth v. Loft. Inc*., 5 A.2d 503, 23 Del. Ch.255 (1939)
[82] Cass. Com, 27th of February 1996, *Vilgrain*

III. Shareholders

Shareholders are the people or companies owning the corporation trough shares or stock and therefore the quintessence of the corporation's goal, create wealth for the owner of the structure that created the structure. In the pursuit of this aim, shareholders are entitled rights (1) and organize themselves by Meetings (2). In corporations, shareholders enjoy a limited liability (3).

1. Rights

If the Directors are managing the corporation, they are doing so on the behalf of the owners of corporations that are the shareholders that are not agents of the company. If their role in the corporation is usually restricted to the election of directors, approval of their decisions through assemblies, they also have rights which they can enforce.

As investors, the shareholders have a right to information and inspect the documents of the company. This right is considered fundamental by many peoples and courts as the absenteeism is the main factor of decrease of the shareholder's power onto the corporation. Indeed the Delaware Supreme Court explains in *Williams v. Geir*[83] that "*the stockholders control their own destiny trough informed voting. This is the highest and best form of corporate democracy*." The right of information is regulated by the federal government and also by the States and their common law. The Code of Delaware for instance grants the right to access copies of documents or to the list of shareholders[84] as well as the MBCA recognize implicitly the right of information [85]by making it mandatory for the directors to assemble a list of shareholders available prior to any meeting by the shareholders. However the American law requires a "proper purpose" for the shareholder to access these informations, a purpose relative to "the shareholder's interests".[86]The law of Delaware, more pro-business is linking directly the quality of shareholder to the right to have access to the company's informations. If the company refuses to give access to these documents, it will have to

[83] *Williams v. Geir*, 671 A2d 1368, 1381 (Del.1998)
[84] DGCL, §220(b)
[85] MBCA, §7.20(b)
[86] Smith and Robertson, *Business Law*, 6th edition, West, 1985

prove the shareholder wasn't acting in his own interest.[87]There is also a duty of information towards the shareholders[88] arising from the duty of care and loyalty of the directors which must give updates to the shareholders about the company's activities.[89]

The second major right of the shareholders, which can only be implemented if the first one is respected is the right to vote, which is considered, the essence of the shareholder. Indeed the vote is its only possibility to have a control over the actions of the directors. The right to vote is considered arising from the property right of the shareholder[90] as part of his investment in the capital. Are considered invalid all the provisions of State law[91] forbidding the right to vote to a shareholder, moreover without his consent[92] by the amendment of the articles of incorporations or in the bylaws.[93] To this guaranteed liberty of vote, the equality of vote is usually also guaranteed as one share equals one vote in the United States[94]. However this right can be subject to exceptions provided for instance in the bylaws.[95] Preferred shares can also modify this rule.

Across the pond, the French law clearly exhibits several rights dedicated to the shareholder. The right of information, the right to participate, the right to obtain dividends and the right to sell or not his shares. The right to information of the shareholders in the *Sociétés Anonymes* is embedded in the Commercial Code and set as permanent[96] and contrary to the United States, the shareholders do not need to have a "proper purpose" and personal interest to access to the company's document, which protect in a better way this right for the shareholders. The shareholders also have a reinforced right to information prior to each shareholders' meeting[97] in order to exercise in the most informed way their right to participate in the company's decisions set at the article 1844 of the Civil Code. Hence, the right to participate include the right to vote and exercise as in the United States an equal and free vote. All provisions included in the *Statuts* that bind the shareholders to vote in a certain way are considered voided and the corruption in order to buy votes are civilly and

[87] DGCL, §220 (c)
[88] *Pfeffer v. Redstone*, 965 A2d 676, (Del.2009)
[89] *Krasner v. Mofett*, 826 A2d 277, (Del.2003)
[90] *Brown v. McLanahan*, 148 F2d 703, (1945)
[91] *Preston v. Allison*, 650 A2d 646, (Del. Supr. 1994)
[92] *In re Hausner's Petition*, 22 Misc 2d 969, 198 NYS2d, (1960)
[93] *Kidsco Inc. V. Dinsmore*, 674 A2d 483, (Del. Ch. 1995)
[94] MBCA, §7. 21 (a) and *In re American Elevator and Machine Co*., 73 F Supp. 473, 1947
[95] *Providence & Worcester Co. V. Baker*, 378 A.2d 121 (Del. 1977)
[96] C. Com Article L.225-17
[97] C. Com Article L.225-115 and C.Com Article L.225-16

criminally repressed[98] as well as the obstruction to a shareholder to participate in a meeting.[99] Indeed, the preferred shares might suppress the right to vote for shareholders but cannot prevent shareholders to attempt the meetings. If the French Supreme Court, the Cour de cassation firstly held that any attempt to the right to vote was forbidden or can be only did trough a valid law[100]and secondly, admitted the separation of the right to vote and the right to participate to the shareholder's meeting, the latter remaining an unalterable right of the shareholder.[101] The shareholders also enjoy the right to profits which is essential for the shareholder, investment and profits being one of the only reasons of being of corporations. This right include the right to dividends which no specific text bind the company to give but the *Statuts* can impose such distribution[102], the right to reserves of the company and the right to the liquidation bonus if one exists, accordingly to the rank of the shareholder.

2. Meetings

In order to exercise their right to vote, it exists two types of shareholder meetings, the annual meeting[103] and special meetings[104]. These meetings are usually discussed in the bylaws of the corporation, the annual meeting being held yearly, generally at the principal place of doing business of the corporation. The special meetings are summoned in order to vote an unusual decisions that will affect the corporation itself and the shareholders' investment such as mergers, liquidation, and raise in capital among several items. For a shareholder meeting to be valid, a quorum is necessary which the number will be determinate by the state where the meeting will be held. Before each meeting a notice will be sent to all the shareholders to inform them on the place, the time and the purpose of the meeting. This allow a normal exercise of the right to vote of the shareholders. Still, if the shareholders cannot attend the meeting, it is possible for the shareholders to vote by proxy which under U.S state law[105] can be provided both by the law or the bylaws[106].

[98] C. Com Article L.242-9
[99] Cass. Crim, 26th of May 1994, n°92-83095
[100] Cass. Com, 9th of February, 1999, *Château d'Yquem*
[101] Cass. Com. 22th of February 2005, JCP E 2005. 1067
[102] C. Com Article L.232-12
[103] MBCA, §7.01
[104] MBCA, §7.02
[105] MBCA, §7.22
[106] *Eliason v. Englehart*, 733 A2d 944, (Del. 1999)

Still the Federal government, trough the *Securities Exchange Act* of 1934 and especially its Section 14(a), ensures true and faithful informations are given to the shareholder's in order for them to make proxies accordingly to their informed decision.[107]

Under French law, annual meetings ("*Assemblée Générale*") have the ability to vote on every aspect of company excepting the one modifying the *Statuts*[108], which aspect will be reserved to special meetings ("*Assemblée Générale Extraordinaire*") as under U.S law. There is also a quorum necessary for the votes of the shareholders to be considered valid. This quorum is fixed by the law both for the special meeting[109] and the annual meeting. However, if the quorum isn't reached in the first annual meeting then another has to be set up where there is no quorum will be required[110] in order to let the company go forward and not be stopped in its business. As in the U.S a notice needs to be sent prior the meetings in order to inform the shareholders about the date, place and purpose of the meeting, they can also reply with questions to the directors that will be answered during the meeting. If the shareholders cannot attend it, proxies system also exist in France. Indeed, for unlisted companies, the shareholders need to choose another shareholder or their spouse to give the proxy[111] whereas listed companies have a wider possibility and it can be any physical person[112].Still the proxy can only be given for a precise meeting and can't be a perpetual given right[113]

3. Liability

It is often said that the Corporation is a limited liability company, which also makes it form of business organization attractive to shareholders. Indeed, in the United States, shareholders see their liability limited to their investment in stock, they benefit from the "Corporate Veil". The Corporate Veil is a legal fiction separating the shareholders from the creditors of the company, avoiding the creditors to take on their personal assets in case of a lawsuit. However the corporate veil can be

[107] *TSC Industries Inc. V. Northway, Inc*. 426 US 438, (1976)
[108] C. Com Article L.25-98
[109] C. Com Article L.225-96
[110] C. Com Article L.225-98
[111] C. Com Article L.225-106
[112] C. Com Article L.225-71
[113] CA Paris, 12th of December 2006

pierced if the shareholders commit torts or crime. Indeed in case of commingling of assets, undercapitalization or even illegal distributions, the shareholders can be held liable and do not benefit from the corporate veil. Some shareholders, called the controlling shareholders (shareholders controlling the company or having substantial shares of the company) might also be more exposed to this liability as they can have the same duties as directors and officers[114]

French shareholders have a strict limited liability and the theory of corporate veil also exists protecting the shareholders from creditors. Only the directors and officers are undefinably liable in case of torts or lack of management. The concept of controlling shareholders having the same liabilities as the directors (*Pepper v. Litton* supra) doesn't seem to exist in France, giving more protection to the shareholders and investors. However shareholders can be found liable if the committed torts or crime.

[114] *Pepper v. Litton*, 308 US, 295, 60 S. Ct 238, 84 L. Ed. 281 (1939)

Chapter 4: Corporations' issues

Beside the daily business of the corporation, some remaining issues impact the corporation's structure or business. Among these Miscellaneous (I) issues are, but are not limited to, tax and mergers. Sometimes the corporation also needs to Terminate (II) either voluntary or involuntary through dissolution and then liquidation of the corporation.

I. Miscellaneous

There are many issues related to the corporation's conduct of business but among the most important and debated are taxation (1) as the interface between the private and the public power and mergers (2) as the encounter between two private entities and the creation of a new one.

1. Taxation

Among the events in the company's daily activities, taxation is one of the important. In the United States, corporations are taxed at the Federal level but can also be taxed on their income at State level. It is the Constitution's 16th Amendment that allows the Federal power to levy taxes among the states which is done by the IRS (Integral Revenue Service) in charge of collecting taxes around the country. The IRS Form for the corporations is the Form 1120. The maximum Federal corporation tax rate in the United States is at 35% on all of its taxable income. The IRS also developed the accumulated earning tax[115] which prevents corporations to avoid double taxation upon shareholders by keeping the benefits in the corporation and not issuing dividends. The double taxation is the fact of taxing the income of the company and then the personal assets of the shareholder when he receives dividends. However, Federal law prohibits States from interfering in the Interstate commerce as previously seen.[116] Hence, especially in the tax area, the residuum of State's power to enact laws is very restricted in order to protect goods in commerce from discriminatory and cumulative State taxes. Interstate and foreign commerce are not in the scope of

[115] IRS, 4.10.13.2, *Accumulated earning tax* (IRC 531)
[116] See Note n °6

the State to tax on as explained by the Supreme Court in *Northwestern States Portland Cement Co. v. Minnesota.*[117] De facto, taxation upon intrastate commerce is possible for States which can choose a revenue based tax or even a flat tax. There is also the "pleasure of doing business"[118] fees that are the privileges offered by the State such as state highway, emergency system at the disposal of the corporation. The latter tax can be an exception to the Interstate Commerce Clause and the *Northwestern States v. Minnesota* case if the operation and the tax meet the criteria found as the four-prong test in the *Complete Auto Transit, Inc. v. Brady case* (Substantial Nexus, Nondiscrimination, Fair appointment, and Fair relationship to services provided by the state)[119].
If these four requirements are completed, then the tax on an interstate operation isn't unconstitutional regarding the Commerce Clause. However, this judgment has been challenged in a more recent case, *Commonwealth Edison Co. v. Montana*[120], where the four-pronged states has been considered by scholars[121] undermined by the decision of the Supreme Court. Nonetheless the four-pronged test is still accurate in order to judge if a tax in relation with an interstate operation is constitutional or not.

French corporate tax doesn't suffer from two tax levels as it doesn't exist yet any European tax. Hence, only the French State is authorized to levy taxes on the French territory trough laws as provided by the Constitution.[122] French *Sociétés Anonymes* are taxed under the General Tax Code on a territorial basis[123], meaning that only the incomes made in the country will be taxed in France with a general tax rate of 33,33% for French commercial companies, this level will decrease to 28% in 2020. As in the United States, shareholders in France will also be taxed upon the dividends they receive from the company, however there is no equivalent in France with the accumulated earning tax made up by the IRS in the United States. The company will only be taxed once.

[117] *Northwestern States Portland Cement Co. V. Minnesota*, 358 U.S. 450 (1959)
[118] Emily Lynch Morissette, *Business Law and Organizations for Paralegals*, Carolina Academic Press, USA, 2013
[119] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)
[120] *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981)
[121] Leonard Williams Levy; Kenneth L. Karst; and Adam Winkler. *Encyclopedia of the American Constitution, Volume 4.* 2d ed. New York: Macmillan Reference USA, 2000
[122] Constitution, Article 34
[123] CGI, Article 209

2. Mergers

Another major issue in the life of a corporation is the merger process. A merger occurs when a corporation (the surviving company) will buy out all of the assets but also all of the liabilities of another corporation (the merged company) with only one company lasting as defined by the MBCA.[124] The corporation lasting will so be liable for all of the debts and liabilities of the merged company.[125] Therefore the operation will affect profoundly the shares of the company and the shareholder's investment, which is why the United States requires a special meeting with the shareholders and the directors in order to cast a vote and approve or not the merger. Indeed the articles of incorporation will need to be modified in order to process to the merger.[126] However only a simple majority of the present shareholders is required as provided in the MBCA[127] and also by the State of Delaware,[128] but some states may require a higher quorum for the vote. Some mergers don't even require a vote from the shareholders of a company, for instance when there is an upstream merger (the parent company taking total control over the subsidiary company) when the parent company is holding more than 90% of the subsidiary shares, then the shareholders of the subsidiary don't need to vote. This merger is called a "short-term merger", the State of Delaware even allowing this form of merger when the bidder only has a majority of the outstanding shares of the target company. However if some shareholders vote against the merger they may be able to get an appraisal right which is the fair value of his stock in cash buy out by the corporation. The appraisal right depends on the State as some follows the provisions of the MBCA[129] considering that the corporation must give the "undisputed fair value" of shares to the shareholders whereas other States are close to the Delaware's provisions[130] where it is the court that will define the amount of the fair value of shares the corporation will have to pay.

When the merger is agreed on by directors, a letter of intent is declared by the company and then will be issued a plan of merger that will include several detailed informations on the merger such

[124] MBCA, §11.01 and MBCA, §11.02
[125] *Tretter v. Rapid American Corp*. 514 F. Supp. 1344 (E.D. Mo. 1981)
[126] DGCL, §251(f)
[127] MBCA, § 7.25(c) and §10.03(e)
[128] DGCL, §216(2)
[129] MBCA, §13.24
[130] DGCL, §262(h)

as the date, the stocks, assets, liabilities…The articles of merger, if agreed by both companies' shareholders, will be filed with the Secretary of State of the merger state.

These mergers, however are regulated by the Federal government especially upon sales and transfers of securities through the Securities and Exchange Commission (SEC), and polices competition matters through the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC).Other federal agencies might impose additional requirements over acquisitions in certain regulated industries (Food and Drug Administration..)

French mergers are embedded in the same logic than U.S mergers. The French Commercial Code describes the merger process as the transfer of a company's assets to an existing company or a new company.[131] Indeed, the company will transfer all of its assets but also all of its liabilities and debts to the existing or new company. This is called as the "*transmission universelle du patrimoine*" (Universal assets transfer)[132]. In order to process the merger a plan of merger will also be issued by the company's executives. Then the merger will have to be approved by the shareholders in a special meeting[133].Contrary to the United States the quorum for the approval is set by the law in France and is of 2/3rd of the present or represented shares.[134] Hence, the decision to approve a merger is much heavier in France than in the U.S where a simple majority can validate the operation. Moreover, every provision aiming to modify the quorum required to approve the merger is deemed unwritten and the merger would be voided,[135] making the balance of powers seeming more respected in France than in the U.S. Still, the same rule as the one toward the parent company acquiring the subsidiary company exist in France. If a company owns more than 90% of the shares of the targeted company, then the shareholder's approval from the targeted company isn't required.[136] Once the project has been approved by the shareholders, the articles of mergers need to be send to the Tribunal of Commerce in order to get registered.

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[131] C. Com Article L. 236-1
[132] C. Com Article L. 236-3
[133] C. Com Article L. 225-96
[134] Ibid.
[135] C. Com Article L. 235-1
[136] C. Com Article L. 236-11-1

Contrary to the American legislation, the French law doesn't provide any mandatory appraisal rights to the shareholders. Indeed, this appraisal right will be usually discuss trough a shareholder's agreement but isn't required by the law. Hence the shareholders appear to have a broader scope of protection in the United States than in France in private companies.

These mergers, are regulated also by several entities in France but also might be regulated by European entity. If the merger exceeds 500 million of euros then the European Commission will be competent otherwise, the *Autorité de la Concurrence* will be competent for merger cases to avoid concentrations. If the companies are public listed then the *Autorité des Marchés Financier* will also be competent. As in the U.S some other agencies might have a competence following the particular area of the merger.

II. Termination

A corporation as a legal person has a "birth" by incorporation but also a "death" through its dissolution. The termination of the corporation might as well be voluntary (1) and proceed from the will of the shareholders or involuntary (2) because of a particular event most of the time unwanted.

1. Voluntary dissolution

Voluntary dissolution is the most common way of termination among U.S corporations. It is triggered either by the Incorporators, the Board of Directors and the Shareholders or by time in a way of administrative dissolution by the Secretary of State. Indeed, if the corporation finally doesn't start business after being incorporated, the incorporations are able to dissolve the company without the agreement of the shareholders.[137] Otherwise if the company has effectively started business but for a reason, want to stop the company, the Directors can call for a shareholder's special meeting I order for them to vote, on a majority basis on the termination of the corporation's life.[138] Once it has been accepted, the corporation will have to file the articles of dissolution which

[137] MBCA §.14.01
[138] MBCA §.14.02

will allow the company to liquidate and paying off the creditors and then the remaining money to the shareholders. However if some shareholders don't vote for the dissolution, the, they may attempt to get their appraisal rights for their shares.
Time is also another factor than can trigger a voluntary dissolution. As stated in the articles of incorporation, the company may have a limited amount of duration, hence once this time is reached and the articles of incorporation not amended, the Secretary of State will administratively dissolve the corporation.[139]

French *Sociétés Anonymes* are also most commonly terminated through voluntary dissolution. The French Civil Code provides two main type of voluntary dissolutions as the automatic dissolution trough time[140] and a provoked dissolution trough the will of the directors and shareholders.[141]
As in the U.S, the *Société Anonyme* can end up because the company will reach its limited amount of time provided for in the *Statuts* if they have not been amended in order to pursue the company. However, usually the dissolution after the time period ends is unrecoverable and a formal act is needed in order to amend the *Statuts*, but in 2007[142] the judges stated that a tacit prorogation can be tolerated when the company is still actively doing business. According to Professor Bruno Dondero, this decision might well not fit the rights of third parties, who are entitled to the letter of the *Statuts* (which provide a precise date of termination)[143]. The other main way of voluntary dissolution is by the will of directors and shareholders through a decision voted in special meeting.[144] These dissolutions will trigger the liquidation of the company.

2. Involuntary dissolution

However, dissolutions are not always ending peacefully and they can be involuntary. Indeed, in the United States, three main actors are responsible for involuntary dissolution, the Secretary of State, the creditors and the shareholders. The Secretary of State might trigger dissolution of the corporation by the General Attorney of its State if the corporation lacked its duties such as filing

[139] MBCA §.14.20
[140] Civil Code Article 1844-7
[141] Ibid.
[142] Com. 23rd of October 2007, Bull. Civ. IV, N°224
[143] Bruno Dondero, *Droit des Sociétés*, Hypercours,3rd edition, Dalloz, Paris, 2013
[144] C. Com Article L225-246

the annual report, not paying its income tax or if the corporation doesn't have a registered agent for a long period of time. This is called an administrative dissolution. Also the shareholders, might by a majority vote in a special meeting, dissolve the company in court for instance if the directors committed fraud or if the directors are deadlock in the management and will suffer the company's assets.[145] Finally the creditors might also trigger a dissolution in court if the company isn't paying them and is insolvent.[146]Such dissolutions ordered by the courts open the liquidation of the company's assets and also mandate a liquidator in order to monitored the process as the courts doesn't trust the corporation's executive following a judgment ended up in dissolution.

Creditors and shareholders might also triggered involuntary dissolution in France, however there is no such a thing as an administrative dissolution in France except in regulated markets where the administrative authority might dissolve the company such as the ACPR (Autorité de contrôle prudentiel et de resolution) in the banking market. Shareholders might also trigger an involuntary dissolution for "*Justes motifs*" (just cause) before courts for lack of *affectio societatis* and paralysis of the company[147] meaning that the situation is definitely compromised and that the business can't run anymore. This situation is very similar to the "deadlock" under U.S law. However, it mustn't be triggered by the shareholder at the origin of the paralysis.[148]

Finally creditors might, as well as in the United States, go before courts (the Tribunal of Commerce) in order to seek payment of their debts, then the courts might put the *Société Anonyme* into liquidation and nominate a liquidator in order to protect the interests of the unpaid creditors.

Hence the involuntary dissolution of the company is quite similar in both countries except for the procedure itself of liquidation and the administrative dissolution which is rarer in France.

[145] *Callier v. Callier*, 61 Ill. App.3d 1011 (1978)
[146] *Sartori v. S&S Trucking, Inc.*, 2006 MT 164 (2006)
[147] Civil Code Article 1844-7 5°
[148] Civ 1st, 25th of April, 1990

CONCLUSION

The rule-based approach of the legislation of two countries from different legal landscape is a great first step in order to understand the particularities and differences of each system. Still, the rule-based approach might also be limited as it restrict the analysis to the particular situation of the country studied. A transnational approach and comparative approach as defined by Mathias Siems[149] completes well our study as it gives us a broader perspective and allow us to draft trends in the evolution and harmonization of company law (I) but also of the common and civil law (II).

I. Harmonization of Company Law

1. United States

A wide movement of harmonization has been seen in the United since the end of the World War II notably with the Model Business Corporation Act that was promulgated in 1950 more than 22 years after the first attempt of a first harmonization of American company law trough the Uniform Business Corporation Act[150] fully adopted by only three states (Louisiana, Washington and Kentucky) in 1928. The Model Business Corporation Act, as previously seen is attempt to unify the corporate law from non-governmental organizations such the powerful American Bar Association and the American Law Institute[151]. Hence it answers to a need of practitioners but also to a theory of unity of the law led by some scholars.[152] However if the attempt is praiseworthy is has been resulted as quite ineffective. Indeed, these proposals of Act are not mandatory and therefore local statutory change as much as the different judicial appreciation of the proposed acts. States are tailoring theses model to suit their particular needs even if the majority of the MBCA is common to more than 24 four states. A revised version occurred in 1984 called the RMBCA which modernized greatly the MBCA, giving us the version we actually know in the 24 States. Several minor modernization occurred in 2002 and 2011. Still, the best way to have a uniform business

[149] See Note N°2
[150] *Uniform Business Corporation Act*, National Conference of Commissioners on Uniform State Laws, 1928
[151] Richard A. Booth, *A Chronology of the Evolution of the MBCA*, 56 Bus. Law. 63 2000-2001
[152] Morris Shanker, *The American experience on Harmonization (Uniformity) of State Law*, 12. Can. Bus. L.J. 433 1986-1987

law in the United States is trough federal legislation according to Professor Morris Shanker[153]. Indeed as previously seen, the federal power can preempt the State sovereignty on several subjects limited by the constitution. Also, the Federal power made an extremely wide extension of the Interstate commerce Clause, dealing "with almost every facet of human activity"[154] as the case *Edgar v. MITE Corp.*[155] illustrates it. Therefore, a reform of company law might come from the Federal power in the future, ripping of the last part of sovereignty the States have on the economic aspects.

2. France and Europe

Contrary to the United States and their increasingly powerful Federal Power, France is a single state with not variation in its law (excepting for two provinces, Alsace and Lorraine which inherited their special status since WWII). Instead, France is seeing a harmonization of its law trough the European Union. Indeed as previously seen, each European directives needs to be implemented in national law but the European Union has also created the *Societas Europea*, a form of company tailored to ease cross-border European business and hence harmonize corporate law in Europe through this form of business. Enacted by a directive in 2001[156], the *Societas Europea* has been implemented in France in 2005[157].The SE is submitted to European law and its own articles of incorporation only, the national law of the State where the SE is incorporated is only subsidiary. Copying the model of the French *Société Anonyme* and the one-tier system, this model is popular in Germany, giving the corporations of this country the flexibility they might lack because of their two-tier system. Thus, it is a powerful tool for harmonization across the European Union, however the SE didn't encountered the success it has been promised. Indeed, and ironically, because of a lack of harmonization (Tax harmonization especially) and because of cultural differences across the European States (different languages) the SE is heavier to practice than national corporations such as the French *Société Anonyme*. However, we can clearly see a trend

[153] Ibid.
[154] Ibid.
[155] *Edgar v. MITE Corp*., 457 U.S 624, 643 (1982)
[156] Reglement (CE) N°2157/2001 from the Council of the 8th of October 2001
[157] Loi N°2005-842 of 26th of July 2005

toward harmonization of corporate law throughout the European Union and its countries, as France, by such attempts.

II. Common Law and Civil Law: Convergence or Competition?

The question of the convergence or competition between these two legal systems in the field of corporate law but even in a broader dimension needs to be ask. Each system reflects a culture, mentality, spirit but also a history and therefore is laudable. However we assist since the end of World War II to a process of globalization unprecedented in the history of humankind, in the fields of the economy, transportation, communication but even in the field of the law. Of the two main legal system that we studied a phenomenon of convergence[158] of the law is occurring according to Guy Canivet, Supreme Justice of the French *Cour de Cassation*. Convergence might be seen as to transplantation of a pragmatic and efficient legal tool from one legal culture to another and is mostly the fact of practitioners such as the plea bargaining process imported form the US Common law to the French Civil Law because of its efficiency. A wide movement of harmonization is also occurring between Common Law and Civil Law, each system benefiting from the lacks of the other system. For instance, the Common Law is said to be very pragmatic and tailored for the particular case, this is a casuistic law having the doctrine of stare decisis, a doctrine giving a central place to the judge and his thinking. In contrary, the Civil Law is said more organized especially trough codification. The harmonization movement has seen therefore a large movement of codification of the Common Law along the recent years especially in the U.S as Judge Calabresi observed in 1982 that the United have entered in the “age of statutes”[159]. For instance, the Uniform Commercial Code regulating the commercial law and especially contracts alongside the increasingly power of Federal government in enacting statutes are examples of this movement. The Civil Law has been giving slowly more weight to the jurisprudence and therefore is going closer to the stare decisis doctrine of the Common Law. The two system benefit from each other’s. The clear trend appearing is therefore convergence and more, harmonization of the law, a movement that is destined to expand over the years.

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[158] Guy Canivet, *The Interrelationship Between Common Law and Civil Law*, Louisiana Law Review, Volume 63, Number 4, 2003
[159] Calabresi G, *A Common Law for the Age of Statutes*, Harvard University Press, Cambridge/ Mass 1985

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