French Judges' Far Reaching Powers in Partners and Shareholders Disputes

Jean-Charles Bancal

Available at: https://works.bepress.com/jean_charles_bancal/1/
FRENCH JUDGES’ FAR REACHING POWERS IN PARTNERS AND SHAREHOLDERS DISPUTES

Jean-Charles Bancal∗

I) INTRODUCTION

II) CONCEPTUAL FRAMING
   A) BUSINESS ORGANIZATIONS UNDER FRENCH LAW
   B) CORPORATE LEGITIMACY AND JUDGES’ DISCRETIONARY POWERS

III) REMEDIAL POWERS
   A) MEDIATION AND PROVISIONAL DIRECTORS
   B) REVOCATION OF MANAGERS
   C) JUDICIAL WITHDRAWAL OF PARTNERS OR SHAREHOLDERS
   D) EXCLUSION OF PARTNERS OR SHAREHOLDERS
   E) ABUSE OF MINORITY OR OF EQUALITY

IV) TERMINAL POWERS BY JUDICIAL DISSOLUTION
   A) CIVIL CODE PROVISION AND RELATED CASE LAW
   B) FINDING JUDGES’ RATIONALE

V) CONCLUSION: ARRETS DE REGLEMENT, ARRETS D’ÉQUITE

I) INTRODUCTION

The bicentennial of the French Code of commerce¹ may be the occasion to assess the considerable evolution of the judges’ powers in partnerships and corporate matters since the Napoleonic codification. From the revolutionary turmoil three main political consequences emerged: the monarchy was overthrown, the aristocratic privileges were abolished and the judges’ powers were drastically reduced. The new regime abhorred and feared the gouvernement des juges. The memory of Parlements² defying kings’ authority scared the young republic. Deprived of any people’s legitimacy – the judges bought or inherited their offices – they were fundamentally opposed to reforms. When created, the Tribunal de cassation, the highest French court in the new system, was considered merely as an auxiliary to the legislative power³. This distrust has persisted until the making of the constitution of the V° Republic in 1958. Its Title VIII, which refers to the justice organization, is named: “Of the judicial Authority” and not “Of the judicial Power”.

∗ of Counsel, Gravel Leclerc & Associés, Paris; LL.D University of Lille, LL.M Harvard Law School.

¹ The Code of commerce was promulgated on September 15, 1807.
² The French Parliaments had both judicial and political parts. Aside from judging civil and penal matters, they were also entrusted with the task of registering the royal edicts. When they refused to do it, the kings used to hold lits de justices (beds of justice) which were hearings where they appeared in person and dictated the text of the edict to members of parliaments who, then, had no choice but to register the edict. The last time this procedure was applied was on August 6th 1787. Louis XVI came to the Parliament of Paris and requested the magistrates to register a tax bill. They obeyed silently. But, the day after, as an incredible fact in that time, they canceled the edict. On August 14th all the members of the Parliament of Paris were banished by the king to the city of Troyes ( BERNARD VINCENT, LOUIS XVI 209 (Gallimard ed., 2006) )
³ At that time, the institution of the référe législatif (procedure of legislative reference) by article 21 of the Law of November 27th — December 1st 1790, obliged the Tribunal de Cassation, if referred to for the third time after two successive quashing, to suspend its decision until the Corps législatif issues an interpretative decree.
In this vision, the judge is only considered as an applicator or illustrator of the law. Article 5 of the civil code\(^4\) prohibits judges to decide by way of general and regulative provisions on cases submitted to them. The judges may not, contrary to the Parlements in the old regime, enact “arrêts de règlement”, that is to say, assign to their decision the force of a general rule applicable to all similar cases to come\(^5\). Previously, the law of November 27\(^{th}\) 1790 compelled the Tribunal de Cassation, when quashing a decision, to cite the text of the legislation on which the decision was based. On the other hand, Article 1351 of the civil code\(^6\), echoing article 5, says that cases do have binding authority over the parties, but not on future cases. Taken together, these texts could lead to think that the judges’ mandate is merely to interpret the law and that there is no room in French law for precedents, case law or jurisprudence\(^7\).

The corollary of this conception is, on a methodological ground, the principle of “judicial syllogism” by which the French judge is supposed to be bound: the major is the rule of law — the application of which is envisaged; the minor is the assertion by the judge that the facts of the case fulfill the conditions set in the major and the conclusion consists in the logical deduction that the rule of law applies to the facts.

This initial conception has not survived and, as years went by, the judges’ decisions became an autonomous source of law. One of the most stirring examples of this trend appears in the creation by the courts of the abuse of right rule, heretofore foreign to the civil code. According to this notion, the damages caused to a person by an abuse of law must be repaired. The first cases decided during the XIX\(^{th}\) century were mainly about neighborhood and real estate problems. In one of the first cases, the Doerr case\(^8\) (commonly called “the fake chimney case”), a landlord was held liable for having built a fake chimney on his land with the sole purpose of masking the landscape to his neighbors. Other comparable decisions followed in the same domain\(^9\). Then, the rule expanded to other fields of the law\(^10\) notably, and this point will be developed in this article, regarding the use of voting rights in business organizations. Interestingly, the abuse of right has remained a pure case law matter. The legislature did not enact any law on the subject,

---

\(^4\) CODE CIVIL [C. CIV.] art.5: “Judges are forbidden to pronounce decisions by way of general and regulative disposition on causes which are submitted to them.” translated in JOHN H. CRABB, THE FRENCH CIVIL CODE (Fred B. Rothman & Co ed., 1995)

\(^5\) The Parlements under the old regime had certain powers equivalent to a legislative function. The arrêts de règlement were issued either on request from the Crown or on Parliaments’ initiatives.

\(^6\) “The authority of res judicata arises only with regard to what was the subject of the judgment. It is necessary that the thing claimed be the same, that the claim be founded on the same grounds, that the claim be between the same parties, and brought by them and against them in the same capacity.” Crabb, supra note 4

\(^7\) See Yvon Loussouarn, The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law, 18 TUL. L. REV. 235 (1958)

\(^8\) Cour d’appel [CA] [regional court of appeal] Colmar, May 2, 1855, RECUEIL DALLOZ PERIODIQUE ET CRITIQUE [D.P] II 1856.2.9

\(^9\) Although article 544 of the civil code states that “ownership is the right to enjoy and dispose of things in the most absolute manner” (Crabb, supra note 4), property law was the first venue of the abuse of right cases and debate. It has inspired the greatest doctrinal controversies and given rise to the most numerous and vivid cases (see RÉPERTOIRE DE DROIT CIVIL, Abus de Droit, § 47 (Dalloz ed., 2007) )

\(^10\) The main domains where the abuse of right theory has applied are: sureties, intellectual property, contracts (especially in the breach of labor contracts), competition law, litigation (abuse of judicial actions), corporations (see RÉPERTOIRE DE DROIT CIVIL, supra note 9 at § 65)
absent few sparse provisions\textsuperscript{11}. The doctrine, on the other hand, remained divided and did not develop a consistent and dominant paradigm.

Indeed, like the French civil code’s requirement of good faith in the execution of obligations, the abuse of right is supposed to allow the judge to correct certain situations which appear inequitable and therefore contrary to the law. The judges created other case law rules in the name of \textit{Principes généraux du droit}\textsuperscript{12} (general principles of law) in civil matters, such as the rule of unfair enrichment or the \textit{fraus omnia corrumpit}\textsuperscript{13} rule. Those rules, however, were precisely general rules aimed at protecting the ordinary layman. More surprising is their overreaching intrusion, by self assigned powers, in the life and functioning of business organizations where partners and shareholders are supposed to set forth clearly, on the basis of developed technical legal provisions, the rules that must bind them. More and more, business organizations are assimilated to democratic organizations where rules of good governance must prevail. If this is true, the following paragraphs might show that French judges, ignoring sometimes the application of corporate or partnership internal rules, are committing what common lawyers could consider as legal \textit{coups d’Etat}. Prior to assess French judges’ powers in remedial situation (II) or when a business organization is dissolved (IV), it is necessary to understand the conceptual framing that guides their reasoning and action (II).

\textbf{II) CONCEPTUAL FRAMING}

\textbf{A) BUSINESS ORGANIZATIONS UNDER FRENCH LAW}

\textbf{1) SOCIÉTÉ, A GENERIC TERM}

Under French law, the matrix of all forms of business organizations lies in article 1832 of the civil code which describes the institution and contract of “société”\textsuperscript{14}. Société is the generic term which defines a large spectrum of business organizations such as: “sociétés en nom collectif”, general partnerships; “sociétés en commandite simple”, limited partnerships; “sociétés en commandite par actions”, limited share partnerships; “sociétés anonymes”, “sociétés par actions simplifiées”; “sociétés à responsabilité limitée”, or “sociétés en commandite par actions”, altogether correspond to corporations in U.S. law. In addition, French law knows a great variety of forms of organizations or genders unknown to U.S. laws such as “sociétés civiles”\textsuperscript{15} as opposed


\textsuperscript{12} HENRI MAZEAUD ET AL., LEÇONS DE DROIT CIVIL 128 (Montchrestien ed., 1963)

\textsuperscript{13} Fraud corrupts everything.

\textsuperscript{14} C. CIV. art. 1832: “A partnership is formed by two or more persons who agree by a contract to devote to a common enterprise property or their skill for the purpose of sharing the benefits or profiting from the economies that may result therefrom” Crabb, \textit{supra} note 4. With all the respect I have for the work of John H. Crabb, I disagree with the term partnership used to translate the French word \textit{société}, see discussion § I. A. 2. The translation made by Legisfrance, \url{http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=556}, utilizes the word “firm”.

\textsuperscript{15} Sociétés civiles carry out « civil » activities such as real estate ownership and development, agriculture or professional affairs (lawyers, doctors etc.) whereas sociétés commerciales perform industrial and trading activities. One of the main consequences of the distinction is that the first ones are subjected to civil courts and the second ones to commercial courts.
to “sociétés commerciales” or other specific types\(^{16}\) or, even more alien to the U.S. system, such as the “sociétés en participation\(^{17}\”).

Such versatility, and perhaps confusion for the common lawyer is, in theory at least, compensated by a unitary conceptual architecture. All sociétés, whatever their forms or purposes, are supposed to be regulated by the same principles. However, the situations they cover are so diverse that the ideal Cartesian edifice has been scattered into sub-categories and is thus subject to conflicting theories. It is not the aim of this article to enter into such a debate but some conceptual background is necessary to understand French judges’ decisions.

2) OPERATIVE NOTIONS: PERSONNE MORALE, SOCIÉTÉ AS INSTITUTION OR CONTRACT, SOCIÉTÉS DE PERSONNES AND SOCIÉTÉS DE CAPITAUX, AFFECTIO SOCIETATIS

Any debate in French law is, first, conceptual. The medieval quarrel of universals seems to have reappeared when French law professors clashed, in the XIX\(^{\circ}\) century, about the question whether personnes morales (legal entities including sociétés) have or not a real existence\(^{18}\). If this debate is now over, another related discussion is still unsolved: whether the société is a contract or an institution. Fittingly, case law has not settled it. Only two courts of appeal have tackled the question without electing between the two qualifications\(^{19}\). The relevant legislation gives mixed signals\(^{20}\). The practitioners’ position\(^{21}\) is now that the contractual conception is predominant at the time of creation but the institutional conception rules the preservation of the société. It is also widely recognized that sociétés de personnes (organizations created by persons) are governed rather by the contractual conception and sociétés de capitaux (capital corporations) by the institutional conception.

Sociétés de personnes are organizations where the identity of each associé or partner is an essential consideration. The admission and departure of any member is subject to restrictive rules. Partners’ liability is unlimited. Sociétés de capitaux are organizations

---

\(^{16}\) The legislation has created specific rules notably for: sociétés coopératives, sociétés à capital variable, sociétés à participation ouvrière and sociétés d’économie mixtes locales.

\(^{17}\) Société en participation is a business organization which is occult and is used, most of the time, for some specific and temporary business. It is not a legal entity and sometimes translated as joint venture but the term has obviously no equivalent in U.S. law.

\(^{18}\) “Je n’ai jamais dîné avec une personne morale” (I never had dinner with a moral person) (author’s translation) said Professor Duguit, one of the opponents to this notion. For an account of this passionate debate see: JEAN CARBONNER, DROIT CIVIL 282 (Thémis ed., 1967)

\(^{19}\) CA Paris, March 26, 1966, REVUE TRIMESTRIELLE DE DROIT COMMERCIAL [RTD COM.] 1966, 349, note Houin : a société : “much more than a contract, is an institution whose constitution and functioning are regulated in the whole juridical system by imperative legal provisions” (author’s translation); CA Reims, Apr. 24, 1989 BULLETIN RAPIDE DE DROIT DES AFFAIRES [BRDA] 1989, 18, 20 : the exclusion pronounced against an associated is in accordance with «the institutional notion of the société according to which a société is not a contract abandoned as such to the willingness of those who gave birth to it but rather an institution, that is to say a social body going beyond individual wills.” (author’s translation).

\(^{20}\) Article 1832 underlines the institutional conception and article 1844-5 states that the reunion of all shares in one hand does not entail the dissolution of the société. On the “contract side” article 1842 of the civil code sets forth that until registration with the registry of commerce the “relationships between the partners are governed by the partnership contract and by the general principles of law applicable to contracts and obligations” Crabb, \textit{supra} note 4

\(^{21}\) MEMENTO PRATIQUE FRANCIS LEFEBVRE, SOCIETES COMMERCIALES §50 (Lefebvre ed., 2007)
where capital dominates and the personality of the shareholder is of much less significance and their interests are freely transferable. In those organizations, shareholders’ liability is limited to the equity capital brought by them. Also, the former ones are said *intuitu personae* while the latter ones are considered as *intuitu pecuniae*. At this point, we are facing a semantic difficulty: the French word *associé* designates a member both of a *société de personnes* (partnership) and of a *société de capitaux* (corporation). For practical reasons, and although this interpretation is not strictly correct, I will use sometimes the English term “associated” to translate it. It will then correspond to partner or shareholder. Similarly, *société* will be utilized as equivalent for partnership or corporation.

The notion of *affectio societatis* is obviously more related to *sociétés de personnes*. It can be defined as the intent of partners or shareholders to collaborate in good faith and on an equal basis in view of a common purpose. It is deemed to be an essential element of the *société* the absence of which, whether at the creation of the *société* or during its life, would nullify its existence.

One can guess that those notions are not merely conceptual but also instrumental: we will see the judges referring to one or the other when they have to make a decision, especially when they are led to decide on the dissolution of a *société*.

**B) CORPORATE LEGITIMACY AND JUDGES’ DISCRETIONARY POWERS**

**1) DIRECT DEMOCRACY**

Conceptually, *Sociétés anonymes*, one of the equivalent forms of corporations in U.S. law, are meant to be organized on the model of direct democracy according to some basic principles: hierarchy of corporate organs, separation and equilibrium of powers. Three cases have illustrated these principles. In the first one, the *Cour de Cassation* on June 4th 1946 cancels a shareholders’ meeting resolution that vested the *président-directeur-général* (Chairman and C.E.O.) with the board of directors’ powers. The second, heard by the commercial chamber of the *Cour de Cassation* on June 11th 1965 similarly nullifies an agreement where a *président-directeur-général* relinquished his rights and powers in favor of a third party (in that case a predominant stockholder). The third decision, *Tribunal de commerce de Paris*, August 1st 1974, opposed two companies that had set up a common holding company in order to control a third company. A shareholders’ agreement stated that decisions should be taken unanimously and, further, that in case they cannot reach an agreement, the decision would be taken by an independent arbitrator “amicable compositeur” (*ex equo et bono*). This last clause was nullified by the court on the ground that imposing the
arbitrator’s decisions to the shareholders would be illicit and contrary to the “principle which does not allow to deprive corporate organs of their powers”\textsuperscript{26}. The arbitration clause was deemed contrary both to shareholders’ freedom of vote and to the hierarchic organization of the corporation that implies proper powers for each of the organs\textsuperscript{27}.

2) JUDGES’ INTERVENTION POWERS

The widely publicized Fruehauf case decided by the Court of appeal of Paris\textsuperscript{28} on May 22nd 1965 at first recalls the principle of judicial non intervention in corporate decision making process but ultimately confirms the appointment and powers of a provisional director designated by the first judge and invited by him to take decisions contrary to the majority stockholders’ wishes. The case concerns a conflict between the stockholders of Société Anonyme Fruehauf-Corporation. Two third of the corporation’s shares were held by American stockholders and one third by French stockholders. The American stockholders were represented at the corporation board by 5 directors and the French by 3. Like its parent company in the U.S., the company manufactured trailers and exported them.

A French company, Berliet, a trucks manufacturer, ordered from the subsidiary 60 trailers to be exported to People’s Republic of China. The U.S government was informed about the transaction and ordered the American stockholders to rescind the sale. Berliet, on its part, refused to cancel the order. The consequences were dramatic for Fruehauf-Corporation and risked to lead to the eventual winding-up of the company. The French président-directeur-général resigned and the majority appointed a new one. However, the French directors went to the Commercial court and obtained from the Juge des référés (judge acting on urgent matters) the appointment of a provisional director. His mission was: « to manage the credit and debit operations of the company and notably to carry out the current orders ». The case was appealed and the court of Paris confirmed the lower judge. What was striking for the commentators\textsuperscript{30} was that while the first degree judge justified the appointment of the provisional director by the fact that the company was not functioning normally, the higher court said, on the contrary, that the company was run normally, but that the judge had to take into account the corporate interest preferably to stockholders’ personal interests, even though they hold majority shares. Further, the court of appeal alluded to the fact that its decision was in accordance with the majority stockholders’ real interest.

III) REMEDIAL POWERS:

A) MEDIATION AND PROVISIONAL DIRECTORS

\textsuperscript{26} Author’s translation
\textsuperscript{28} CA Paris, May 22, 1965, JCP 1965, II,12472bis note Nepveu
\textsuperscript{29} Author’s translation
\textsuperscript{30} JCP 1965.II.12472bis note Nepveu, D. 1965 149 note Contin
Private mediation and Alternative Dispute Resolutions are much less developed in France than in the U.S. On the other hand, courts may appoint a mandataire ad hoc (ad hoc mandatory) who is entrusted with a specific task such as enquêteur-conciliateur (investigator-conciliator) in charge of finding a solution to a conflict between partners or shareholders. He is not assigned with management or administration powers but he may have a specific mission and corresponding powers. For example, in a recent case before the Cour de Cassation a mandataire ad hoc is appointed in order to assist the board of directors in the search of a solution to a stockholders conflict.

Far more important is the assignment of an administrateur provisoire (provisional director) which consists of the temporary substitution of a court appointed director to the normal administrative organs of a partnership or corporation. The administrateur provisoire is a pure case law creation. There are some sparse provisions for the designation of a mandataire de justice (mandatory of justice) in some specific cases such as the default of summoning the shareholders’ assembly. But, there is still no general legislation enabling the judges to deprive the legal representatives of their powers.

After World War One, the Juge des référés self assigned the power to appoint a mandataire de justice in charge of administering the société instead of the legal managers or directors. At the beginning, the administrateur provisoire was entrusted with punctual missions. Then, progressively, the judges have granted to such administrateur the same powers as the legal managers and directors.

The appointment of an administrateur, however, requires exceptional circumstances. It is submitted to two conditions: 1) the functioning of organs is impeached and 2) the société is in imminent threat. “Whereas the appointment of a provisional director is justified only if the conflict between the stockholders prevent the functioning of the corporate organs and if the corporate interest, as distinct from stockholders personal interests, are threatened by an imminent danger.” However, the deadlock of corporate organs by the opposition of an equal number of shares is enough to justify this appointment even though the financial situation of the company is not in danger.

Any person having an interest in the cause may solicit the judge but the Cour de cassation requests that the appellant have a link with the société. This category

---

31 The conditions of enforcement of judiciary mediation were defined by the legislator only in 1995, N.C.P.C. art. 131-1 to 131-15. For statistics about the practice of mediation in Paris, see the website of the Centre de Médiation et d’ Arbitrage de Paris: http://www.mediationetarbitrage.com/cadre.asp?sommaire=6&rubrique=144&rubrique1=160&niveau=1
33 C. COM. art. L 225-103
34 Cass. civ., June 29, 1925, DALLOZ HEBDOMADAIRE [DH] 1925, 593
36 Author’s translation
39 CA Versailles, 14e ch., Nov. 6, 1992, Jurisdata No. 046173; Cass. com., Feb.16, 1988, BULL. JOLY 1988 §68
includes: managers (whether or not shareholders or partners), partners or shareholders, creditors (but only when the société is deprived from corporate organs\textsuperscript{40}), and employees.

According to the law, and except specific circumstances, provisional directors are designated among persons registered on the \textit{liste nationale des administrateurs judiciaires} (national list of judicial directors). This is a regulated legal profession under judicial control. Experts’ assistance is possible and even sometimes obligatory. Their mission is to manage the company with the same powers as the legal representatives. Such assignment is temporary and granted powers are limited. In principle, they are not authorized to sale or otherwise dispose of the assets of the company. When the normal functioning of the société is restored, the judge puts an end to their assignment. In case of failure of their mission, they may request the court to declare the bankruptcy or receivership of the company.

\textbf{B) REVOCAITION OF MANAGERS}

The revocation of managers of \textit{Sociétés à responsabilité limitée}, of \textit{sociétés en commandite par actions} and of \textit{sociétés civiles} by the courts is governed by specific pieces of legislation\textsuperscript{41} that are aimed at solving conflicting situations when those persons can not be removed from their positions because of lack of majority. A request is receivable only if it is based on a legitimate cause. Case law provides some examples of such notion: a manager who holds half of the shares and does not attend the annual meetings and obliges his co-manager to summon twice such meeting what hinders the company’s management and paralyzes its life\textsuperscript{42}, or two co-managers that refuse to cooperate and cancel each other decisions\textsuperscript{43}.

\textbf{C) JUDICIAL WITHDRAWAL OF PARTNERS OR SHAREHOLDERS}

The withdrawal of a partner or shareholder by court decision is authorized by law in the case of \textit{civil sociétés} and of \textit{sociétés à capital variable}\textsuperscript{44}. As to the civil companies, such right is set forth by article 1869 of the civil code\textsuperscript{45}. The associated that withdraws is entitled to be reimbursed for the value of his shares. Such value is determined by parties’ agreement and in case of failing agreement, by an expert designated by the parties or by the Judge. The withdrawal conditions are set in the by-laws, by unanimous associated agreement or by default by judicial procedure. In this latter case, the judges assess the basis of the request in function of the legitimate motives presented by the associated wishing to withdraw. Such wording is the same as the one used by the law concerning the revocation of the managers (see discussion paragraph B) or judicial dissolution of a company (see discussion paragraph IV).

\textsuperscript{40}Cass. com., July 11, 1988, REV. SOC. 1988, 521
\textsuperscript{41}C. COM. art. L 223-25; C. COM. art. L 226-2; C. CIV. art. 1851
\textsuperscript{42}T. com. Paris, réf., June 18, 1974, BULLETIN JOLY 1974, 596
\textsuperscript{43}CA Aix-en-Provence, July 9, 1982, BULLETIN DES ARRETS DE LA COUR D’AIX 1982, 97
\textsuperscript{44}In \textit{sociétés à capital variable}, according to C. COM. art. L 231-6, « each associated will be entitled to withdraw from the société whenever he will find it appropriate” (author’s translation)
\textsuperscript{45}C. CIV. art. 1869 “without prejudice to the rights of the third parties, a partner may withdraw totally or partially from a partnership, within the conditions provided by the articles or, in default, after authorization given by a unanimous decision of the other partners. Such withdrawal may also be authorized for just reasons by a decision of law” Crabb, supra note 4
Legitimate motives are non performance of its obligations by an associated or disagreement between associated paralyzing the company's functioning.

**D) EXCLUSION OF PARTNERS OR SHAREHOLDERS**

In principle, any associated is entitled to remain a partner or a shareholder and cannot be compelled to transfer his shares or stock against his will. The judicial exclusion of an associated is provided by law only in a few specific cases. First, in certain professional sociétés. Other provisions edict the sale of stock belonging to stockholders who default in their obligations. Besides, in public companies a group holding more than 95% of the shares may force the minority stockholders to sell its shares. Finally, in the framework of a receivership procedure, the court may order the transfer of shares belonging to managers or directors.

Indeed, despite this principle, a part of the doctrine upholds the idea that judges should have power, when called to dissolve a company, to exclude the appellant shareholders or partner. Such an opinion is based on sound arguments: the company interest must prevail over associated claims and its existence should be preserved.

A judgment by a court of appeal sustained this opinion but the Cour de Cassation has settled the question: “no legislation confers power to the court referred to of compelling an associated that requests the dissolution of a société by application of article 1844-7, 5° of the civil code, to transfer its shares to the société or to other associated who are offering to buy them.”

**E) ABUSE OF MINORITY OR OF EQUALITY**

Sometimes, the law or the by-laws request a super majority for a vote on certain decisions. For example, by law, in a Société à responsabilité limitée, any increase of capital must be approved by shareholders representing at least seventy five percent of the shares. Such a rule might enable a minority of shareholders to block any proposed capital increase. Although shareholders have the formal right to do it, the Courts have rendered numerous decisions relating to “abuse of minority” or even, to a lesser degree, to “abuse of equality” sanctioning the alleged misuse of their voting rights. According to jurisprudence, a vote is qualified as an abuse when it is motivated by the

---

47 For example : architects, lawyers, accountants, medical doctors, pharmacists…when a partner no longer qualifies to practice his professions.
48 In the cases of : default of paying up the shares, default of conversion of bearer share certificates into nominative share certificates and default of presenting share certificates for exchange in case of merger or capital reduction.
49 CA Reims, Apr. 24, 1989 : GAZ. PAL. 1989, 2, somm. 431, note De Fontbressin
50 Author’s translation.
pursuit of a selfish interest detrimental to the business organization and when it prevents the realization of an operation essential to it\textsuperscript{54}. The most common sanction to such abuse is the award of damages to the business organization. The judge may also appoint\textsuperscript{55} a mandataire ad hoc in charge of representing the minority shareholders or partners to a next assembly in order to vote in their names towards the organization’s interest but, at the same time, in preserving their interest.

VI) TERMINAL POWERS BY JUDICIAL DISSOLUTION

A) CIVIL CODE PROVISION AND RELATED CASE LAW

Most of the remedial powers of the judges, — as appointment of provisional directors, exclusion of associated or abuse of minority — were created by case law. In those situations, the société remains in existence. Dissolving a company is a far more drastic measure that only the legislator could have authorized. However, courts have extensively interpreted the legislation and gone beyond the intent of the legislator.

According to article 1844-7, 5° of the civil code: “a partnership comes to an end (...) through anticipated dissolution pronounced by a court on demand by a partner for justified reasons, particularly in case of a partner’s inexecution of his obligations or of discord among the partners paralyzing the functioning of the partnership\textsuperscript{56}”. The two motives cited by the civil code are merely illustrative and there could be other ones.

As a matter of fact, an abundant jurisprudence\textsuperscript{57} relates to situations where the systematic and irreconcilable opposition between two groups of equal shares or stocks locks the collective decisions and notably the appointment of directors\textsuperscript{58}. The impossibility of electing a manager is also a motive for dissolution\textsuperscript{59}. In a majority of cases\textsuperscript{60}, the courts pronounce dissolution only if the société is directly threatened to collapse. Exceptionally, prosperous sociétés might be judicially dissolved\textsuperscript{61}. Sometimes, the courts find that there is paralysis without deadlock of the corporate organs\textsuperscript{62}.

\textsuperscript{56} Crabb supra, note 4. Again, the word “partnership” used to translate société seems inappropriate especially since a large number of cases of judicial dissolutions pronounced by the courts relates to société anonymes which cannot be assimilated to partnerships but clearly to corporations in U.S. law.
\textsuperscript{58} Cass. com., Feb.16, 1970, BULL. CIV. IV, No.156
\textsuperscript{59} CA Rennes, May 3, 1977, RTD COM. 1978, 391 note Champaud
\textsuperscript{62} CA Paris, Nov. 12, 1985, BRDA 1986, 5, 8; CA Versailles, May 18, 1995, BULL. JOLY 1995, 869, note. Daigre : the manager does not summon the general meetings any more, what is considered as paralysis by the judges; also, the absence of société’s accounts approval is equivalent to paralysis, CA Paris, Jan. 26, 1996, BULL.
Aside from theses deadlock situations clearly aimed at by the civil code, the judges have added several cases which seem remote from the original legislator’s intent. That was the case when, in 1982, in a landmark case the Cour de Cassation for the first time decided the dissolution of a société on the ground of abuse of majority which is not, by definition, a case of paralysis. The legal basis referred to was the lack of affectio societatis.

B) FINDING JUDGES’ RATIONALE

The Cour de cassation recognizes the right of juges du fond (lower courts who decide on the facts) to assess the seriousness of motives and the opportunity of deciding dissolution and this power is sometimes described as arbitrary. The result is that, at first blush, case law in connection with article 1844 of the civil code appears confused and uncertain. Some commentators stated that “Far presumptuous would be the author that could set out a general, sure and recognized definition of the terms “paralyzing the functioning of the société”. Indeed, an attentive study of the courts decisions seems to reveal that the judges, irrespectively of the civil code, apply a relatively simple rule. In société de personnes counting a small number of partners they decide dissolution whenever the lack of affectio societatis makes the life of those partners impossible. Is it not common sense to separate two pharmacists united in a partnership to operate a laboratory or two veterinarians sharing the same office or a group of medical doctors operating together radiology equipments when circumstances reveal a degree of animosity that makes impossible for them to work together? In that sense, admitably, the disappearing of affectio societatis becomes per se a right motive for dissolution.

But this shows another facet of French judges self assigned extensive powers. In the Fruehauf case, social interest was at stake and allegedly justified denying stockholders’ rights. Such a justification is not the done thing in small sociétés. The explanation could be found in a far more discreet case of the Cour d’appel of Paris. A husband and wife created a société civile in view of purchasing a chalet. The husband possessed 75% of the shares. After divorce, the ex-wife requested the dissolution of the société, which was not paralyzed in any way. The judges, nevertheless, accepted dissolution probably because the husband closed the door of the chalet to his ex-wife and was keeping for himself the use of the premises. Affectio societatis and marital link had disappeared together.

65 Cass. com., Dec. 4, 1968, JCP 1969, IV, 23,
66 RTD COM. 1963, 666, note Champaign & Danet
67 Author’s translation
71 CA Paris Mar. 6, 1996, D.1996 somm. 344
In all cases the message seems to be: “We, judges, whether the matter is important or not, whether it concerns business people or laymen, have the power to intrude in your arrangements, whatever you have contemplated in your by-laws or agreements, with or without a legislative basis, to decide on your situation and even on your life according what we think is your interest or the social interest.”

VII) CONCLUSION, ARRETS DE REGLEMENT, ARRETS D’EQUITE

French judges powers in partners and shareholders disputes are discretionary and of mysterious origin. All judgments rendered by French courts start with the words: “In the name of the French people” asserting the theoretical democratic basis of the judges’ power to render justice. What we know from the above discussion is that this vision is idyllic and that, often, French judges act not according to the legislator’s willingness but dependent on what they think is right. What is the essence of such an autonomous power? A recent thesis: “L’équité dans la réalisation méthodique du droit privé – Principe pour un exercice rationnel et légitime du pouvoir de juger”72 tackles the matter of the juge de droit divin tradition in French law. Before the French revolution prohibited the arrêts de règlement, French kings had tried to forbid the arrêts d’équité by which the judges attempted to issue decisions based on God’s authority and not on royal ordinances. This thesis further shows that prohibiting arrêts de règlement did not prevent French judges from asserting an arbitrary power. That leads us to a more general conclusion concerning the permanence of behaviors through institutional changes. The word revolution has two meanings. Today, it is universally used to mean the destruction of a political regime and the fundamental changes in a society. Its first acceptance, however, was the invariable rotation of a mobile around an axis. Two centuries after the enactment of the Code de commerce how have things changed? The executive power remains the strongest of all western democracies to such an extent that the French president is called a republican monarch; if aristocrats have lost their privileges, another noblesse d’Etat, sociologically hereditary, is running the country and, in a more subtle way that their ancestors of the Parlements openly defying kings, French judges today still act, sometimes, as if their powers had no other sources than their own conscience and judgment.
