CORPORATE BOND ISSUES UNDER THE NEW FRENCH BUSINESS ENTITIES LAW

*James P. Beggans, Jr.**

French corporate bonds, just like the Anglo-American variety, represent a fixed, interest-bearing indebtedness of the issuing company. They are sold at discount or premium, and are freely traded on the Bourse. They appear in bearer and registered forms, usually carrying coupons. Externally then, and without considering convertible bonds, the French bond market differs from our own only insofar as the differing economic facts might and do have different effects on the investing public.

From the point of view of the issuer, however, it is an altogether different story. France has a unitary legal system which means a single business corporation law. As a consequence, there exists none of the incentive toward purely "enabling" legislation which our States are in the process of creating and which leave the equity and debt structure of a corporation largely in the hands of its managers. We can engage in this contest of looser and looser corporate laws, at least theoretically, because of the existence of a highly developed body of federal securities regulations. Until a short time ago, however, no organism comparable to the Securities and Exchange Commission functioned in France and investor protection was to be found in various specific laws and decrees which together made up what we would call the business corporation law.[1]

Recently the French legislature codified such laws into a single Business Entity Act,[2] and, independently, created a Stock Exchange Commission[3] which is intended to function much like our S.E.C. and the Boards of Governors of the various securities exchanges combined. Despite the fact that legislators and commentators alike were quite well aware of the way in which American securities law has evolved, no clear effort was made to effectuate a similar division of functions be-

* A.B., St. Peter's College; LL.B. Harvard Law School; LL.M. New York University; University of Paris; Associate, Lowenstein, Sandler, Brochin, Kohl & Fisher, Newark, New Jersey; Lecturer, Seton Hall School of Law.

1 Laws of May 30, 1857, July 24, 1867, January 23, 1929, November 13, 1933; Decree-Law of October 30, 1935; Law of March 7, 1925, CODE DE COMMERCE (Dalloz ed. 1968), [appendice] 812 *et seq.* (hereinafter cited as C. COM.)

2 Law of July 24, 1966 (Law No. 66-537), C. COM. 950 *et seq.*

3 Ordonnance of September 28, 1967 (Ordonnance 67-833), C. COM. 72-73, 1085, 976.

tween the corporate legislation itself and the responsibilities of the Stock Exchange Commission.

Hence the French company intending to float a bond issue must look to both its governing statute and the regulations of the Commission for the complete regulatory picture. As might be expected, the statutory provisions tend toward a more restrictive scheme. Their purpose is not only to force the issuer to adequately inform the potential investor, but also to maintain in equilibrium the various existing interests, both creditor and equity, in the corporate structure.

But this is not all. Whether an issue is privately placed or offered to the public, the bondholders as a group will automatically and in all cases form a juridical entity represented by a sort of trustee. Compared to the Federal Trust Indenture Act,[4] these provisions leave little room for negotiation and give the bondholders a strong, legally enforceable, voice in the operation of the company under certain conditions.

All this has been discussed in the context of an ordinary bond issue. But should a French company wish to offer a convertible series, further complications ensue because of the traditionally rigid capital structure of a corporation under the Civil Law. In fact, this rigidity, as will be explained below, has led to the creation of an entirely new creature in the French bond market: the exchangeable bond.

The newly codified Business Entity Act, of course, did effect many ameliorations in the prior law. And a recent amendment[5] of that Act was directed specifically at eliminating some of the provisions relating to corporate finance that as a practical matter continued to hinder effective action. Nevertheless, the spirit of French legal thinking has not as yet given up the ghost to the American way of doing things.

This paper will examine in succession the presently applicable corporate legislation governing both ordinary bond issues and convertible issues, the operation and effects of the legal entity known as the *masse* of bondholders, and finally the role of the Stock Exchange Commission in the case of public offerings.

It should be noted that what is considered herein applies only to ordinary corporate issuers organized under French law and domiciled in France. Foreign corporations wishing to enter the French securities market must comply with special regulations if they intend to offer bonds denominated in French francs.[6] These regulations, as well as the amorphous situation known as the Euro-bond market, are not

---

4 Trust Indenture Act of 1939, 53 Stat. 1149, 15 U.S.C. § 77 aaa-bbbb (1964).

5 Law of January 6, 1969 (Law No. 69-12), [1969] B.L.D. [Bulletin Législatif Dalloz] 53.

6 *See* Beggans, *Mutual Funds in France*, 4 INT'L. LAW. 125, 126-7 (1969).

treated. Nor are the particular statutes applicable to State-controlled or State-assisted companies examined.[7]

I Ordinary Bond Offerings

Corporate bonds (*obligations*) are defined by Article 284 of the Law of 24 July 1966 as "negotiable certificates (*titres*) which, in a single issue, confer the same creditor rights for the same nominal value."[8] While American practice is to merge the legal rights into the physical instrument itself, under French law the debt evidenced by the bonds is considered unitary in nature, with each bondholder possessing only a quote-part therein.[9] Thus, the bond certificate does not in effect represent a separate debtor-creditor relationship but only evidences a proportional share in a single undivided debt. Such a debt may be secured by mortgage or pledge or not; French terminology, however, recognizes only one term, *obligation*. The importance of the "unitary debt" theory lies in its effect on the organization of bondholders into the legal entity known as the *masse*, and their representation within the structure of the issuing company.

Corporate bonds may only be offered by a *société anonyme* [S.A.],[10] which is the equivalent, in terms of formal requirements, of the American widely-held corporation. While there is nothing to prevent a closely-held business from being organized in this manner, the absence of any authority to manage such a corporation in an informal way usually leads to the creation of a *"société à responsabilité limitée"* [S.A.R.L.] (or limited liability company) for smaller affairs or those in which it is desirable to avoid publicity and for which public funds are not needed.[11]

Thus, the practice commonly is to begin a business in the S.A.R.L. form and, when a certain size has been reached, to transform it into an S.A. This is often necessary even if there is no desire to "go public,"

---

7 Until very recently Renault, the State-owned automobile company, did not even have a formal capital structure. *See* [1970] B.L.D. 43.

8 Law of July 24, 1966 (Law No. 66-537). C. Com. 996.

9 Ripert, Droit Commercial § 1409, at 714 *et seq.* (Roblot ed. 1968); (Hereinafter cited as "Ripert".)

10 Law of July 24, 1966 (Law No. 66-537), Article 285, C. Com. 996. Theoretically, bonds may also be offered by a *Société en commandite par actions* (A company composed of general shareholders, who are personally and unrestrictedly liable for company debts, and regular shareholders.) These are few in number, and as a practical matter, do not float bonds. *See* Ripert, *supra* note 9, § 1610 at 796-97.

11 Law of July 24, 1966 (Law No. 66-537), Article 34 *et seq.*, C. Com. 954 *et seq.*

since S.A.R.L. shares cannot be freely transferred to strangers to the company and the number of permitted shareholders is limited.[12]

Two prerequisites must be fulfilled before an S.A. can offer its bonds either publicly or privately:

a) Two years corporate existence, and the establishment and approval by shareholders of two balance sheets;
b) All subscribed capital fully paid up.

If, however, the issue is guaranteed by the State, a municipality or another company which meets the above-noted requirements of corporate existence and balance sheets, the issuing company need not comply with the first prerequisite. Moreover, companies which have established only their first balance sheet may, nevertheless, issue bonds if such bonds are secured by bonds or other forms of indebtedness emanating from the State, a municipality or an enterprise enjoying a State subsidy or public concession.[13]

The rule as to paid-up capital is stricter, and is only relaxed in the case of bonds issued as part of a worker's "participation" (or profit sharing) plan under Ordonnance No. 67-693 (1967).[14] The absence of authorized, but unissued, shares under French law leads to extensive use of deferred-payment purchases of stock. Since the unpaid portion of the subscription is effectively a debt in favor of the company, it was not considered proper to allow any further dilution of the average creditor's protection by the use of bonds. On the other hand, it was thought unnecessary to give management any additional excuses for not setting up a participation plan for their employees.

The issuance of conventional corporate bonds, whether to be publicly or privately placed, is decided upon at an ordinary meeting of shareholders, that is to say, the decision will be carried by a simple majority vote.[15] Special (or extraordinary) meetings are, technically speaking, those at which by statute or corporate charter a higher voting majority is required.

At the meeting authorizing the bond issue the shareholders may delegate to the management the power to spread the issuance over two or more stages (but not to exceed a period of 5 years) and to set the modalities therefor. In the event the company is organized in the form of a traditional (or pre-1966) S.A., this power will be exercised by the Conseil d'Administration (usually translated as "Board of Directors"

12 Law of July 24, 1966 (Law No. 66-537), Articles 36, 45, C. COM. 955-56.

13 Law of July 24, 1966 (Law No. 66-537), Article 285; C. COM. 996 RIPERT, *supra* note 9, at 718.

14 Law of January 6, 1969 (Law No. 69-12), Article 11 [1969] B.L.D. 53, 55.

15 Law of July 24, 1966 (Law No. 66-537), Article 286, C. COM. 996.

but in actuality a combination of the board and the executive officers), or if the new form is employed, the Directoire (executive committee, as opposed to the equivalent of a board of directors or Conseil de Surveillance) will receive these powers.[16]

In the case of a public offering, legal notice of the issue must be placed in the *Bulletin des Annonces Légales Obligatoires* (BALO), giving detailed information on the finances of the issuing company, as well as the characteristics of the bonds themselves.[17] This may be supplemented by additional publications, but any prospectus or announcement must reproduce the content of the legal notice and the reference number of the BALO issue in which it appeared.[18]

Most French bonds carry a straight interest provision, but some variation can be introduced. A purely variable interest rate is only permissible as part of a composition of creditors plan,[19] but sliding scale clauses have generally been allowed in the past if the scale was geared to an essential activity of the enterprise. Recent economic conditions have led to government refusal to authorize any variable interest bonds (where such authorization is necessary).

Sometimes bonds are made payable in several currencies at different financial centers at the option of the holder. The legality of this is uncertain since it seems to be a "gold clause," that is, an attempt to freeze the value of the national money.[20]

Once the issuance of a series of bonds is complete, any bonds left remaining in the hands of the corporation are automatically void by operation of law. The same is true should the company choose to repurchase any of its bonds on the market while the issue is outstanding.[21]

Bond certificates may be in registered or bearer form, and the latter under specified conditions may be deposited in a securities account with a commercial bank in a manner similar to the obtaining of bearer shares.[22] Generally all certificates must have a nominal value of at least 100 Francs.[23]

It should be noted, finally, that under special legislation, the French government has reserved the power to condition the offering

---

16 Law of July 24, 1966 (Law No. 66-537), Article 287, C. COM. 996.

17 Law of July 24, 1966 (Law No. 66-537), Article 289, C. COM. 996-97; Decree of March 23, 1967 (Decree No. 67-236), Articles 211-13, C. COM. 1067-68.

18 RIPERT, *supra* note 9, § 1418 at 719.

19 *Id.*, § 1430, at 722-23.

20 *Id.*, § 1436, at 726.

21 Law of July 24, 1966 (Law No. 66-537), Article 322, C. COM. 1000; RIPERT, *supra* note 9, § 1435 at 725-26.

22 Decree of September 14, 1964 (Decree No. 64-970), C. COM. 677.

23 RIPERT, *supra* note 9, § 1420 at 720.

of substantial amounts of corporate debt on specific authorization.[24] The level above which such permission must be obtained before proceeding with the placement of the issue varies from time to time depending on the then applicable credit policy.[25]

II CONVERTIBLE AND EXCHANGEABLE BONDS

Convertible bonds permit the holder, during certain periods when the issue is outstanding, to convert the debt instrument into equity shares on the basis of a pre-established ratio. Conceptually this poses few problems in American law because of the existence of authorized but unissued shares. True, the prior shareholders suffer an eventual dilution of their interest but this, just as the waiver of preemptive rights, was to be expected when the issue was authorized. Otherwise, the only effect on the formal (as opposed to stated) capital structure is to expand the number of outstanding shares. The charter remains unchanged in most cases.

The situation is more complex under the French Civil Law. In the first place, the corporate charter filed with the clerk of the local Court of Commerce is a combination of certificate of incorporation and by-laws;[26] it must specifically set forth a definitive capital structure. Just as the original filing requires certain formal documents in addition to the charter and is conditioned on prior publication of a legal notice, so any later changes must in principle follow the same pattern.[27] Thus, the shareholders must approve a formal modification of the charter when they desire to raise or lower the amount of capital. There is no "fund" of authorized but unissued shares upon which the management can draw. This is not unrealistic when one considers that it is anticipated that those doing business with a French corporation will obtain an official excerpt of the charter from the Court of Commerce before entering into any important transactions. Those individuals listed in the excerpt as the legally responsible officers are conclusively presumed to have the power to act in the name of the company. So also, the capital set forth in the registered charter is pre-

[24] Law of December 23, 1946, Article 82, C. COM. 872.

[25] *See* Mott, *Foreign Bonds Issues on European Capital Markets*, 24 BUS. LAW. 1285, 1289 (1969).

[26] Historically, the Civil Law corporation is based on contract rather than on a grant of governmental power. Thus the charter of a French company, at least in form, recites an agreement among the first shareholders, and contains all the elements normally found under Anglo-American law in the certificate and by-laws. *See* Title 9, CODE CIVIL (Dalloz ed. 1966); RIPERT, *supra* note 9, § 653 at 351.

[27] Law of July 24, 1966 (Law No. 66-537), Articles 4, 6, 74, 189, C. COM. 950, 962, 980.

sumed to exist and to have been properly approved, or those responsible for its absence or dilution will be personally liable.[28]

It is important to understand that French jurists, while recognizing that from an economic point of view, the formal "capital" of a business entity has minimal significance as an indicator of business strength, nevertheless refuse to concede any basic adjustments in the traditional theoretical arrangement of a corporation.[29] Thus, in addition to the absence of unissued but authorized shares, treasury shares are forbidden as being conceptually impossible.[30] No-par shares are also banned since there are no legal provisions for publication of stated capital.[31]

Secondly, in the absence of a developed body of securities regulation and more particularly a sophisticated investment community, it is extremely difficult to protect the holders of outstanding convertible bonds from having their potential position as shareholders diluted by subsequent corporate financing. It might be supposed that protection against such activity is something that would better be arranged on a private basis in the offering contract, but that would be to misapprehend the nature of such transactions on the French investment scene. While a private placement would, of course, be negotiated in a manner similar to American practice, a public offering is substantially dissimilar. Brokers authorized to effect transactions on the Bourse do not generally offer investment advice to the general public.[32] This is a function of commercial banks[32a] but, as might be imagined, such advice is limited in nature and tends to be proferred to preferred customers. Additionally, it will be several years before the new Stock Exchange Commission is able to formulate appropriate and adequate disclosure requirements.

Finally, the period during which conversion is possible poses certain problems peculiar to Civil Law corporate entities. Since it is legally impossible for the stockholders to authorize new shares without simultaneously bringing them into existence, it was originally thought that conversion periods had to be narrowly limited so that they might function in the same manner as an open subscription list. If conversion

---

28 Ordonnance of December 27, 1958 (Ordonnance No. 58-1352), Article 2, C. COM. 19; Arrêté of March 23, 1967, C. COM. 42 *et seq.*

29 HÉMARD, TERRÉ, AND MABILAT, LA DIXIÈME RÉFORME DE LA RÉFORME DU DROIT DES SOCIÉTÉS COMMERCIALES, D. 1969.41 at 49 (Recueil Dalloz); (Hereinafter cited as HÉMARD.).

30 *See* RIPERT, *supra* note 9, § 1154 at 592-93.

31 Except in the case of regulated investment companies; *see* Beggans, *supra* note 6, at 132.

32 *See* RIPERT, *supra* note 9, § 1852 *et seq.*, at 905.

32a HAMEL, LAGARDE, JAUFFRET, DROIT COMMERCIAL (Tome II 1966) § 1630, at 704.

were allowed at any time during the outstanding life of the bond, the paperwork and corporate meetings required for each small increase of capital would effectively discourage this method of financing.[33]

One way around the difficulty was to issue a sufficient number of bearer shares to cover all eventual conversions and entrust them to a depository bank. This initially occurred without statutory authorization and was not overly successful from a practical point of view.[34] The par value of the shares had to be advanced by the bank in order to avoid falsifying the capital account, and so the ultimate return to the issuer was significantly reduced. This technique resulted in what is legally termed "exchangeable" bonds. While the ratio of exchange was fixed in the bonds themselves, those who opted for exchange were not subject to prejudice from intervening financing of the company since the depository bank was commonly required to exercise all rights under the shares and hold in trust all dividends and other advantages.[35] Naturally the bank was reimbursed for any direct expenditures by the bondholder at the time of exchange if the latter wished to retain all or some of the options previously offered to the shareholders. Little reflexion is required to realize how cumbersome this procedure was. Were the condition of the equities market not so depressed in France, companies would never have been driven to this means of raising funds.

The Law of 24 July 1966 provides that convertible bonds can be issued only after approval by a special (or extraordinary) meeting of shareholders. Management is required to submit a detailed report on the operation and the company's statutory auditors (*commissaires aux comptes*) must set forth the proposed basis of conversion. The motion to approve carries with it an automatic renunciation of preferential subscription rights to the shares to be issued at the time of conversion but does not affect such rights as to the convertible bonds themselves unless expressly set forth.[36] These provisions remain unchanged to date.

Prior to the 1969 amendatory legislation, however, an issuing company was legally forbidden to engage in several important types of financial transactions during the period convertible bonds were outstanding and their conversion feature had not yet expired.[37] As a con-

---

33 The *Lorain Committee*, created by the Ministry of Finance in 1962, found that convertible corporate bonds played only a small part in company financing. HÉMARD, *supra* note 29, at 44.

34 *Id.*

35 Law of July 24., 1966 (Law No 66-537), Article 204, C. COM. 983.

36 Law of July 24, 1966 (Law No. 66-537), Article 195, C. COM. 981.

37 These interdictions were the following: issuance of a new series of convertible bonds, amortization or reduction of capital by reimbursement of shares, distribution of reserves in cash or portfolio stock and modification of the charter provisions relating to the distribution of dividends.

sequence, issuers generally limited the life of convertible bonds to a few years and restricted conversion periods to one or two months.

The amended law now prohibits only the following activities:

(a) amortization of capital or its reimbursement.
(b) modification of the charter provisions concerning distribution of dividends.[38]

The reasons for this change are related not only to a desire to encourage more rational use of this type of corporate financing but also to a recognition that the former type of protection may have been excessive and self-defeating.[39]

Nevertheless, holders of convertible bonds continue to possess the status of quasi-shareholders and their potential rights as to issuance of new cash stock, convertible or exchangeable bonds, capitalization of reserves, profits or premiums or their distribution, and the distribution of portfolio stock must be preserved against the eventuality of conversion.[40] Under the 1966 Act the company also had to take account not only of shares subject to preferential subscription and issued as of right but also excess shares.[41] The 1969 amendment eliminated the provision as to excess shares.

Should the issuing company decide to employ other financial techniques than those noted above, it now need only give notice to the outstanding bondholders.[42] Moreover, issuers are henceforth free to satisfy their obligation to preserve bondholders' rights by using equivalent means rather than being restricted to setting aside specific funds or securities for each financial operation.[43]

The most important modification made by the 1969 amendment was to allow a bond issuer to provide in the offering contract an adjustable conversion basis and thus eliminate the requirement of direct preservation of rights.[44] Hopefully, the anticipated increase in the use of this technique will be matched by the development of more sophisticated securities regulations on the part of the Stock Exchange Commission.

Perhaps just as important was the specific authorization of corporate bonds convertible at any time during their outstanding life. While all technical requirements for capital increases must still be

38 Law of January 6, 1969 (Law No. 69-12), Article 5, [1969] B.L.D. 54.

39 HÉMARD, *supra* note 29, at 45.

40 Law of January 6, 1969 (Law No. 69-12) Article 5, [1969] B.L.D. 54.

41 Law of July 24, 1966 (Law No. 66-537), Article 196, C. COM. 981-82.

42 Law of January 6, 1969 (Law No. 69-12), Article 5, [1969] B.L.D. 53, 54-55.

43 Law of January 6, 1969 (Law No. 69-12), Article 5, [1969] B.L.D. 53, 54-55.

44 However this provision is only applicable if the bonds are admitted for listing on the Bourse.

fulfilled in the case of restricted convertible bonds, those issued without definite conversion periods will escape these regulations. Increase of capital will take place automatically on the filing of a conversion demand, and appropriate modification of the corporate charter may be made either during the business year or at the time of closing of the company's books.[45]

From a substantive point of view, it is difficult to see how this procedure differs from one employing "authorized" shares. Once unrestricted convertible bonds have been approved by the shareholders there automatically exists a certain number of potential shares subject only to issuance on a demand for conversion. However, from a formal point of view, such shares are not recorded in the corporate charter but remain a simple bookkeeping entry.[46]

The legislature was mindful, nevertheless, that the motivation behind the practice of restricted convertible bonds would not be totally eliminated by these more liberal provisions.[47] To avoid unnecessary reluctance to employ such bonds, it is provided that so long as the point of departure of the conversion period is no later than the first redemption date nor the fifth year after issuance, an unrestricted convertible bond series will not lose its special status. The termination date is definitively fixed at three months after the final redemption date. Answering other objections, the legislature also provided that conversion rights of unrestricted convertible bonds may be suspended for a maximum of three months in the event of a capital increase or merger.[48]

Exchangeable bonds were not expressly recognized in French law until the 1966 Act. Their corporate authorization is effected in a manner similar to that obtaining for convertible bonds, with the additional requirement that the contract between the depository and the company must be expressly approved by the shareholders.[49] Financial restrictions on intervening activities of the issuer were always less burdensome than for convertible bonds. The 1969 amendment effectively eliminiated all the disparities.[50]

While the original Act foresaw only a financial institution as depository, the amendment now allows an exchange contract to be made with any third party holding the shares of the issuer.[51] As was

---

45 Law of January 6, 1969 (Law No. 69-12), [1969] B.L.D. 54-55.

46 *See* HÉMARD, *supra* note 29, at 49.

47 *Id.* at 48.

48 Law of January 6, 1969 (Law No. 69-12) Article 5 (New Article 196-1 of Law of July 24, 1966) [1969] B.L.D. 54-55.

49 Law of July 24, 1966 (Law No. 66-537), Article 201, 202, C. COM. 982-83.

50 *See* HÉMARD, *supra* note 29, at 51.

51 Law of January 6, 1969 (Law No. 69-12) Article 6 (New Article of Law of July 24, 1966) [1969] B.L.D. 55.

pointed out in the debates in the French Senate, this will permit a subsidiary to issue bonds exchangeable for shares possessed by the parent company.[52]

Also, before the amendment a company could not distribute cash reserves while exchangeable bonds were outstanding; this was permissible in the case of convertible bonds. Now exchangeable bonds are no longer subject to such a restriction.[53]

III MASSE OF BONDHOLDERS

All the bondholders of a single issue are formed by law into a juridical entity with civil personality known as the *masse*.[54] The legal capacity of the *masse* is necessary because of the absence in the Civil Law of the notion of trusteeship. Hence, should the bonds be secured, it will be the legal representative who will accept the sureties on behalf of the *masse*.

One or more representatives are elected by the bondholders, and the wording of the statute would appear to preclude any prior nomination by the company in the offering contract.[55] Representatives of the *masse* have the status of "agents" revocable at any time.[56]

While they are entitled to all legal communications to the shareholders and may attend their meetings, they have no right to vote.[57] However, in circumstances such as mergers, splits or spin-offs, or the issuance of new securities which impair the rights of prior bondholders, the approval of the *masse* must be sought through its representative as authorized in a general meeting.[58]

The *masse* is also competent to negotiate with the issuer for a moratorium or reduction of interest. While this may be done under less than unanimous voting requirements, the decision adopted must apply equally to all bondholders.[59]

The 1969 amendment to the Act set forth a specific time within which a representative of the *masse* must be named when the offering

---

[52] HÉMARD, *supra* note 29, at 50.

[53] Law of January 6, 1969 (Law No. 69-12), Article 8 [1969] B.L.D. 55.

[54] Law of July 24, 1966 (Law No. 66-537), Article 293, C. COM. 997.

[55] Law of July 24, 1966 (Law No. 66-537), Article 294 states: "The *masse* is represented by one or more agents elected by the general assembly of bondholders. Their number cannot in any event exceed three." Swiss law is more liberal in this regard; *see* C.O. [CODE DES OBLIGATIONS], Art. 1158 (Law of 1911, Federal Chancery 1967).

[56] Law of July 24, 1966 (Law No. 66-537), Article 299, C. COM. 997.

[57] Law of July 24, 1966 (Law No. 66-537), Article 302, C. COM. 998.

[58] Law of July 24, 1966 (Law No. 66-537), Articles 380, 313, 321, C. COM. 1007, 999, 1000.

[59] Law of July 24, 1966 (Law No. 66-537), Article 313(5), 317, C. COM. 999, 1000.

is made to the general public. Where several series of bonds contain the same terms, a single *masse* may be created.[60]

It would appear that in the case of a private placement, although the *masse* comes into existence automatically, a representative need not be named at any specific time.

The number of representatives cannot exceed three, and must be French nationals or nationals of a Common Market country whose domicile is in France.[61]

Excluded from being named as a representative are the following:

> (a) The offering company;
> (b) Companies which hold ten percent or more of the capital stock of the offerer or in which the offerer has such participation;
> (c) Guarantors of the issue;
> (d) Directors or officers (and their immediate family members) of the offerer or guarantors.
> (e) Persons interdicted from the exercise of the banking or company management professions [usually as a result of bankruptcy].[62]

Convocation of the *masse* may be made by company management, the representative or representatives, or by the "trustee" in bankruptcy. Also one or more bondholders possessing at least one-thirtieth of the outstanding debt can force a convocation.[63] A corporate bondholder possessing ten percent or more of the capital stock of the debtor cannot vote in bondholder assemblies.[64]

An extraordinary assembly of bondholders (three-fourths vote necessary to carry resolutions) may act on all motions relative to changes in the offering contract, specifically:

> (a) Change in the form or corporate purposes of the issuer;
> (b) Settlement or compromise of any litigation affecting bondholders' rights;
> (c) Proposed mergers, splits or spinoffs of the issuer;
> (d) Proposed issuance of bonds carrying a right of preference over the bonds in question;
> (e) Proposals to abandon totally or partially the sureties backing the bonds; moratorium on interest payments or modifications of the amortization schedule or rates of interest.[65]

Any such decisions of the extraordinary assembly of bondholders must be judicially approved.[66]

---

60 Law of January 6, 1969 (Law No. 69-12), Articles 12, 13, [1969] B.L.D. 55.
61 Law of July 24, 1966 (Law No. 66-537), Article 295, C. COM. 997.
62 Law of July 24, 1966 (Law No. 66-537), Article 296, C. COM. 997.
63 Law of July 24, 1966 (Law No. 66-537), Article 305, C. COM. 998.
64 Law of July 24, 1966 (Law No. 66-537), Article 308, C. COM. 998.
65 Law of July 24, 1966 (Law No. 66-537), Article 313, C. COM. 999.
66 Law of July 24, 1966 (Law No. 66-537), Article 316, C. COM. 999.

There are three general ways employed to secure a corporate bond under French law:

(1) a "real" surety—either a mortgage *(hypothèque)* on real property or a general security interest in the "going business" of the issuer;
(2) a third-party guaranty—by the State, a bank, or another corporation; and
(3) a self-constituted guaranty by assignment of debts owing the issuing company.[67]

If such sureties are created prior to issuance of the bonds, acceptance by the *masse* occurs automatically from the sole fact of subscription.[68] After issuance, such sureties must be expressly accepted by the representative of the *masse*.[69] Filing must always be accomplished through the medium of a notarial act.[70] This is a considerably more complex and expensive procedure than mere notarization under the Common Law.

Discharge of the sureties can be authorized by the representative of the *masse* before repayment of the bonds only upon resolution by an extraordinary assembly of the bondholders. He cannot be obliged to give a partial discharge in the case of normal amortization.[71]

In most other situations, the representative functions in a manner similar to that of a trustee under an indenture in American Law.

IV Public Offerings and the Stock Exchange Commission

Prior to 1967, when a public offering of securities was made in France by a French company, the only requirements as to publication were those contained in the business entity law. These requirements remain effective today; what has been added is an agency, frankly patterned after the American S.E.C., to supervise both the fact of such publication and the accuracy of its contents.[72] Moreover, the *Commission des Operations de Bourse* (Stock Exchange Commission) is not confined to those publications required by law but may extend its supervisory power over all information disseminated to the public by companies having outstanding securities, publicly traded.[73]

---

[67] RIPERT, *supra* note 9, § 1446 at 731-32.

[68] Law of July 24, 1966 (Law No. 66-537), Article 325, C. COM. 1001.

[69] Law of July 24, 1966 (Law No. 66-537), Article 329, C. COM. 1001.

[70] Law of July 24, 1966 (Law No. 537), Article 327, C. COM. 1001; Decree of March 23, 1967 (Decree No. 67-236), Articles 235, 236, C. COM. 1071.

[71] Decree of March 23, 1967 (Decree No. 67-236), Article 237, C. COM. 1071.

[72] *See* RIPERT, *supra* note 9, addendum § 1849-1 at 1058.

[73] Ordonnance of September 28, 1967 (Ordonnance 67-833), Article 1, 4, C. COM. 72-73.

Prior to making a corporate bond offering or applying for a listing on the Bourse, management must draw up and submit to the Commission for its "visa" a detailed prospectus.[74] The visa may be conditioned upon the addition, deletion or changing of any matter therein. Without a visa, the prospectus cannot be distributed to the public and the subscription lists may not be opened.[75]

The most recent regulations on the prospectus include Documents A and D.[76] Document A is an outline of the basic form for all prospectus; Document D contains the Commission's requirements and suggestions as to the content thereof. These are, in many cases, vague and, in some instances, purely exhortatory.

The prospectus is divided into two sections: the first is to give a detailed explanation of the type and modalities of the financial operation undertaken; the second will cover the general operation of the issuer, both from a financial and a commercial point of view. The latter section of the prospectus, as the Commission admits,[77] will not be fully protective of the public until uniform accounting standards, particularly for interconnected corporate groups, are promulgated and enforced.

Beyond this point the Commission has not gone. In time and with the gradual development of a body of expertise there will no doubt emerge a more detailed set of regulations. But until that time, it would appear that French companies will have to exercise a certain amount of good faith in complying with the prospectus requirement if the new system is to function as intended.

It should be mentioned that the Commission is also charged with the enforcement of "insider trading" rules.[78]

V CONCLUSION

For many reasons, both social (gold hoarding) and commercial (predominance of the artisan mentality), the French capital market has suffered from chronic anemia. In the past it was possible to live with the disease since its effects could be offset by exchange and tariff regulations. But now the Common Market has entered its final phase and those remedies are no longer available. The market, and French

74 Ordonnance of September 28, 1967 (Ordonnance 67-833), Article 6, C. COM. 1085.

75 Ordonnance of September 28, 1967 (Ordonnance 67-833), Article 7, C. COM. 1085.

76 Issued by the Commission as of March 1969.

77 *See* Document D (Directives) at 11 *et seq.*

78 Law of July 24, 1966 (Law No. 66-537), Article 162-1, C. COM. 976.

industry, must revitalize itself and to do that it must adopt, among other things, modern methods of corporate debt financing.

What has been outlined above shows a movement in the right direction. History and the development of the law have retarded some aspects, at least from a theoretical point of view. On the other hand, law is conditioned by the culture which gave it birth and it may very well be that the French will be more successful in the long run than we at the difficult task of reconciling investor protection with flexible corporate financing.