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# SESSION FOUR: THE BOARD OF DIRECTORS' ACCESS TO AND USE OF INFORMATION

Session Four of the Colloquium considered the board of directors' need for information and the access of the board to information. The session also focused on the duties of confidentiality and loyalty pertaining to such information.

Mr. Douglas Hawes of the International Faculty introduced the subject. Mr. Hawes explained that directors require information sufficient to enable intelligent voting on specific matters, to provide perspective on the company and the industry, and to effectively monitor the corporation. Moreover, the recent rise of class action and shareholder derivative suits in the United States has placed greater significance on the amount and quality of information received by the board. Directors use this information to demonstrate that they exercised due care or due diligence in performing their duties. Mr. Hawes compared the directors' right to receive information in the United States, Brazil, Germany, France, and Japan.

Mr. Hawes next considered the proposal that a board should have its own staff and counsel to review and evaluate information coming from line management and to conduct independent investigations. This suggestion has been resisted in the United States. Mr. Hawes also discussed the extent to which Britain, Japan, and Brazil have accepted the use of an outside staff.

The duties of confidentiality and loyalty imposed on individual board members necessarily accompany the board's access to information. A director may not violate his duty to maintain the confidentiality of information obtained in his official capacity, nor may he use such information for personal enrichment. Mr. Hawes presented two hypotheticals to illustrate some of the constraints these duties impose on a director's use of information. Professor Michel Vasseur and Professor Friedrich Kübler intervened with comments from the French and German perspectives, respectively.

Mr. Jean-François Serval concluded this portion of the Colloquium with an overview of the French law respecting directors' access to information. He commented that the composition of the board and background of individual board members determine what information is automatically received from management. Mr. Serval next focused on an individual director's request for more information. Under French law, the board is collegial; information must be given to the board as a whole. And even if a director has access to the company accounts and records, he cannot use outside experts to help interpret the information. Thus, the individual director's access to information is quite limited.

*Mr. Hawes:*

I would like to consider what information the board of directors is entitled to have, what information it actually receives, and how this information may be used. Once I have completed my introductory remarks, we will consider two hypotheticals dealing with the issues of confidentiality of information and divided loyalty of directors, two of the more interesting questions in this area.

I start with the director's legal right to obtain information. Most state laws [1] do not specifically provide directors with the right to inspect the books and records of the corporation, although each state does grant such rights to shareholders [2]. California does give the director absolute power to examine the corporation's books [3]. This statute fairly states the common law as it exists in some jurisdictions [4], although other jurisdictions require that the inspection must be in good faith and for some purpose related to the corporation's affairs [5]. Thus, the "good faith" jurisdictions would not allow a director to copy a customer list in order to give the list to a competitor [6].

Most nations have legislation in this area. Brazil, for example, grants the board the power "to supervise management's performance, inspect books and records of the company at any time, [and] request information on any matters related to corporate affairs, including contracts held or to be held" [7]. The same statute requires the board to issue its opinion on management's annual report and financial statements. Even though the board acts as a unit, each of its members may request and obtain from corporate officers any information deemed necessary for the board's exercise of its surveillance power.

In Japan, the directors have the right to inspect the company books. Shareholders with 10% or more of the voting stock also have this right. The board is entitled to a report on the business at least quarterly. And the statutory supervisor [8], known as the *kansayaku*, may at any time request a director to give a report or may investigate any aspect of the corporation.

The supervisory board in Germany has a statutory right to inspect the corporation's books and records. Although no statute addresses the issue in France, the Minister of Justice has said that the director has a right to examine the company books. In sum, most countries represented by the International Faculty authorize either the board or the individual directors to inspect company records to obtain information. In practice, of course, much information is given to the board automatically [9].

The board of directors requires information for a number of reasons. First, the mere flow of information between management and the board can create a climate of confidence in which to manage the company. Second, background information about the company and the industry provides the board with a necessary, long-term perspective. Third, having adequate information allows the board to vote intelligently on specific matters. Fourth, information helps the board to perform properly in its monitoring role [10]. None of these purposes will be achieved, of course, if the board receives too much or too little information. Too much information will overwhelm the directors, who will be unable to discern the important from the trivial. Too little information, on the other hand, will preclude informed judgement about specific proposals and reduce the directors' general oversight of the company. A balance must be struck.

The recent rise in class action and shareholder derivative suits alleging lack of due care [11] and due diligence [12] on the part of directors [13] has created a new purpose for the information given to the board: directors use this information to demonstrate that they exercised due care or due diligence in performing their duties. In a suit alleging lack of due care, state statutes usually permit the director to raise as a defense his reliance on information prepared or presented by management or an expert, such as an accountant or an attorney [14]. While the federal securities laws do not explicitly provide that reliance on information is a defense to a suit alleging lack of due diligence, the cases recognize that reliance on information can contribute to due diligence and good faith defenses [15].

There have been suggestions in the United States that the board of directors (or at least the outside directors) should have its own staff and counsel in order to review and evaluate information and to conduct its own investigation of any problems. This and other ideas were considered in four regional conferences on corporate governance and structure [16]. A substantial majority of the participants in those conferences felt that a separate staff for the board would create more problems than it would solve:

(1) it would foster an adversary relationship between management and the directors, chilling the climate of confidence created by information flow [17];

(2) it would contribute to a blurring of the responsibilities and authority of management and the board, reducing the board's effectiveness in the monitoring role [18]; and

(3) it would not be cost efficient [19].

On the other hand, most commentators would agree with the view of the *Corporate Director's Guidebook* [20] that directors may, on occasion, require outside advice [21]. In other cases, it may be necessary to retain outside advisers to assist the board with a particular matter [22]. Somewhat along these lines, the International Telephone and Telegraph Company (ITT) has established a legal affairs committee of outside directors which, with the assistance of its own outside counsel, reviews major litigation by and against the corporation.

In Britain, the outside directors would normally go through management in requesting information, even from an outside expert such as the auditor.

Outside directors would not be assigned any tasks requiring staff help, although directors often have personal assistants. In Japan, the statutory supervisor may attend board meetings, ask questions, and give his opinion. Under a recent amendment to the commercial code, the corporation must pay expenses for the hiring of any outside staff needed by the statutory supervisor. In practice, it appears that inside staff are used. A Brazilian board would usually act through committees, which have access to both inside staff and outside counsel and auditors, as needed. Thus, the Brazilian system is similar to the French Commission d'Etudes.

Another issue which recently has received attention is the possible misuse of information due to breach of confidentiality [23]. There are a number of reasons for maintaining the confidentiality of information. National security and industrial espionage may be relevant concerns, for example. Confidentiality also reduces leaks that facilitate trading on material nonpublic information. The proper balance must be struck between what directors need to know to fulfill their roles and what information would be likely to leak. One technique here is to use visual aids in presentations to prevent any "hard copy" from leaving the board room.

Under U.S. law the requirement of confidentiality arises from the director's fiduciary duty to the corporation [24]. The fiduciary duty implies that degree of confidentiality which will prevent improper disclosure of corporate secrets. Confidentiality with respect to the corporation, however, may require that the director conceal information from other persons to whom he also owes a duty – the auditors, corporation counsel, banks, suppliers, perhaps a union. Occasionally, a director will receive information indicating that he may be facing some personal liability. But communication with his personal counsel may well destroy any privilege attaching to the information vis-à-vis the corporation. This puts the director in a very difficult position.

In an attempt to avoid these sorts of problems, some corporations do not allow investment or commercial bankers to sit on the board. Under U.S. law, the confidential information received by the director might be imputed to the director's firm, even if the director did not transmit the information [25]. Another method for resolving this problem is to have the director withdraw from the board meeting during discussion of relevant matters in which he has an interest separate from his directorship.

Other countries repesented on the International Faculty impose a duty of confidentiality at least as stringent as the U.S. duty. In Japan, for example, the director may not reveal information given to him in his capacity as director (even to the constituency he represents) if the revelation would harm the corporation's interests. The Brazilian statute is equally forceful [26].

The situation in the United Kingdom is similar to that in the United States. If the director were put in a position such that he could not maintain confidentiality and still serve as a director [27], the director would resign from one entity or the other.

In addition to maintaining confidentiality, the director owes a duty of loyalty to the corporation. The *Corporate Director's Guidebook* would require: (1) disclosure of conficts of interest; (2) granting to the corporation a right of first refusal concerning any corporate opportunities; and (3) taking care that all conflicts of interest are resolved with fairness to the corporation as a primary concern [28]. The duty of loyalty also forbids the director from using his position to make a personal profit or gain personal advantage, even if the corporation is not directly harmed [29].

At this point, I would like to consider two hypotheticals which will illustrate some of the constraints these duties impose on a director's use of information. The facts of the first hypothetical are as follows:

> Mr. X is a labor representative on the board of directors. The company could be a German company with co-determination, a French nationalized corporation, or a U.S. company with a labor leader on the Board (such as Douglas Fraser, President of the United Auto Workers, who sat on Chrysler Corporation's Board). Mr. X asks for detailed information regarding hidden reserves or an important industrial plant that management plans to close. (Assume for the purposes of the hypo that Mr. X asks as a member of the board and not under some labor legislation.)

What issues are presented by this hypothetical? Briefly;

(1) Is management obliged to provide the information?

(2) Must X keep the information confidential, or may he disclose it to the union?

(3) As a practical matter, can the union maintain the confidentiality of the information?

(4) What legal or practical justifications.exist for treating the labor representative differently from any other director, either in terms of the information he receives or the confidentiality requirement?

The U.S. experience with this problem is limited. When Mr. Fraser sat on the Chrysler Board he absented himself from those portions of board meetings during which labor negotiations were considered. Perhaps Professor Vasseur would give us the French view on this hypothetical.

*Professor Vasseur:*

In France, workers attend board meetings as delegates of company committees. The degree of confidentiality which is expected from these employee representatives is a very difficult problem. French corporate law requires that all board members keep information confidential to the extent requested by the chairman. A confidentiality requirement for labor representatives was supported by the SUDREAU committee during its meetings in 1974–75.

The trade unions, on the other hand, objected to the confidentiality rule. While union representatives were willing to assume all the duties associated with board membership, they refused to remain silent. The primary reason for their presence on the board was to relay information back to their constituency. In essence: "We would rather not know, but if we do know, we cannot remain silent."

The issue is still unresolved. The practical problems are quite serious. If, for example, the president initiates an important project, such as a merger, he must inform the board. If the labor representatives violate the confidentiality rule, the project will fail. This leaves the president with only one option. He can inform some board members privately of the project; but this is tantamount to withholding information at the level of the board of directors. The problem is thorny, and the debate continues.

*Professor Kübler:*

I have a brief comment on the German situation. German corporate law requires all members of the board of directors to respect company secrets [30]. The predominant view is that this rule should apply to employee-selected directors as well [31]. But the trade unions maintain that labor representatives should have a special status because they must answer to their constituents. Thus, the duty of secrecy is occasionally violated, but no litigation has occurred to date.

I would note that the classification of what is confidential and what is not confidential is made by the courts rather than the board. The Bayer Company, for example, enacted a by-law that all discussions during board meetings were confidential and could not be communicated by labor representatives to the company committee or employees. The Federal Court struck down the by-law as contrary to the law [32]. The court ruled that only necessary information should be confidential under the Code, and that a judge should pass on the confidentiality of information [33]. A criminal penalty for disclosure does exist [34], but no cases have yet been decided.

*Mr. Hawes:*

The first hypothetical dealt with confidentiality of information. The second hypothetical raises the problem of a director's divided loyalty and possible misuse of information. The facts of the hypothetical are as follows:

> Mr. Y is a commercial banker and a representative of his bank on the board of directors. At a board meeting he learns that the company has sustained a substantial loss of undetermined magnitude. Management will not disclose the fact of the loss until the extent of the damage is known, which may be

days or weeks. But the loss will force the company to default on its loan from the bank. The bank is about to close a new loan with the company, or perhaps is about to sponsor a public or private offering.

This hypothetical raises three issues:

(1) Could management simply not tell the banker about the loss, but tell all the other directors outside of the board meeting?

(2) If the banker is told about the loss, must he keep the information confidential from the bank?

(3) If the banker is told, but the lending bank is a different bank, one with which the banker has no ties, can the banker–director allow the loan to go through knowing that full disclosure would cause the lender to cancel the loan?

The first issue of whether management could tell some but not all directors about a sensitive matter was mentioned by Professor Vasseur in the context of a merger. I have nothing to add to his comment. With respect to the second issue, I believe that a U.S. banker would ask to be released from his duty of confidentiality. If the board refused, he would resign. The resignation would alert his bank that something was amiss. The banker still could not disclose the information, of course, but the loan would not go through. This would protect both the bank and the banker–director.

The third issue really goes to the director's duty to ensure that material nonpublic information is disclosed to third parties. There have been some attempts in the United States to impose this duty on directors.

In *Lanza v. Drexel & Co.* [35], the plaintiffs attempted to recover damages for a defendant director's failure to discover certain false and misleading statements made to the plaintiffs by other directors. The court held that a director has no duty to discover and correct such statements. Although no duty was found in the *Lanza* case, the fact that the Circuit heard the case *en banc* suggests that a duty to convey such information to interested parties might be created at some future time.

*Mr. Serval:*

I would like to make a few comments on the French law dealing with information and the board of directors. Two issues arise frequently in this area. First, what information should the board receive automatically from the company? Second, what additional information may the directors request from the company? These questions are important because the role and effectiveness of the board depends on the quality and quantity of information it receives.

Consider the issue of what information the board will receive from management. The structure of the board and the background of its members will determine the type of information that the board will handle. Some boards are "family boards", comprising three or four members of the president's family. Other boards may have a large number of company employees. And some boards have members from outside financial institutions and banks; such members are selected for their expertise and reputation. Finally, there are boards of "entreprises publiques" [36] which, according to the spirit of the law, represent a Ministry, the employees, and the consumers. Thus, there is great variety in board composition.

To illustrate the relationship between the board's composition and the information the board receives, consider two very different boards. A board composed of management personnel will receive all relevant information - all the issues can be debated. On the other hand, a board with two directors from competing companies will receive very limited information. This board would be given only publicly available information: annual accounting figures, the president's salary, restructuring decisions, and resolutions submitted to shareholders. Providing information to the board is merely a formality; the top staff have already made the important decisions.

There is another point here: the backgrounds of the individual board members determine in part what information can be presented to the boards. For example, many directors are not financial wizards. In these cases, the auditor, who is responsible for presenting the accounts to the board and vouching for their accuracy, becomes more of a teacher than a bearer of information. Occasionally, an auditor will attend a board meeting but get no farther than a lecture on tax credits. In such a situation a very limited amount of information will be communicated to the board.

The second issue before us is the director's request for more information. Under French law, the board is collegial [37]; information must be given to the board as a whole [38]. Obviously, this does not prevent the director from questioning the president, perhaps over the telephone, about the company. But generally, management will refuse to disclose information to the board outside of a board meeting.

Even if he has access to the company accounts and records, the director usually cannot comprehend these accounts on his own, nor draw information from them. Because the board members cannot demand outside experts to help them [39], their access to information is effectively limited.

Another possibility would be for the board members to ask the auditors for information. The auditors, however, have a legal duty of confidentiality [40]. This duty of confidentiality is very important. The audit is facilitated when the parties under investigation know that the auditor must maintain confidentiality or face legal sanctions. In the absence of a judicial decision on the matter, I believe that the auditor is not required to disclose information to the individual director. The National Organization of Accountants has made this perfectly clear in a number of interpretative texts [41].

Before I close, I would like to comment on the mechanics of the information flow between the board and management. The board is a collegial body that acts as a unit. Thus, the auditor should report on the financial situation of the company to the board as a whole. Often, however, the auditor does not know exactly to whom he should disclose information. The president, for example, might postpone the board meeting, or organize a meeting without all the directors being present. Should the auditor report to the president in these cases? Or should he communicate with the individual directors?

It would help matters greatly if the auditor could address a committee of the board, in a manner similar to the U.S. practice of an auditor's report to the audit committee. This solution seems to have been favourably received, but no legislation has been passed. The National Organization of Accountants recommends that the auditors send their report to each director [42]. Thus, all directors would receive the information at the same time.

My second comment concerns nationalized companies, which are quite numerous in France. These companies are subject to a permanent monitoring system [43]. Because the monitoring system involves so many people, most important decisions are prematurely communicated to the outside world. In one case, a strategic operation involving a foreign country was communicated to hundreds of people in the administration [44]. These leaks limit management's autonomy and effectiveness. They sometimes make a mockery of the board members' duty of confidentiality.

To combat this problem, management often limits its communications to the monitoring board. This is not always a political measure to increase management's autonomy, but a disinterested attempt to help the company, as when internal financing is not sufficient to meet the company's need for growth capital. The Auroux laws [45] are going to change the practice in this area. A great many people associated with large companies are wondering how these laws will affect them.

## Notes

[1] In the United States corporation law is determined in large part by the individual states. Some aspects of corporation law, however, are governed by federal law. *See, e.g.*, the Securities Act of 1933, 15 U.S.C. section 77 a *et seq.* (1982) [hereinafter cited as 1933 Act], and the Securities Exchange Act of 1934, 15 U.S.C. section 78a *et seq.* (1982) [hereinafter cited as 1934 Act].

[2] *See, e.g.*, Del. Code Ann. Tit. 8, section 220 (1975): Any stockholder...shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose the corporation's stock ledger, a list of its stockholders, and its other books and records, and to make copies and extracts therefrom. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder.

[3] Cal. Corp. Code section 1602 (West 1977) provides: Every director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director and also of its subsidiary corporations, domestic or foreign. Such inspection by a director may be made in person or by agent or attorney and the right of inspection includes the right to copy and make extracts.

[4] *See* Cary and Eisenberg, Cases and Materials on Corporations 352 (5th ed. 1980); *see also Dusel v. Castellani*, 43 A.D.2d 799, 350 N.Y.S. 2d 258 (1973).

[5] *See, e.g., State ex rel Farber v. Sieberling Rubber Co.*, 168 A.2d 310 (Del. 1961).

[6] *See, e.g., State ex rel Farber v. Sieberling Rubber Co.*, 168 A.2d 310, 312 (Del. 1961) (director's right to inspect arises from his need for information in order to fulfill his fiduciary duty; a violation of the fiduciary duty forfeits the right to inspect).

[7] Law No. 6.404/76 §142.

[8] The statutory supervisor performs a function similar to that of the audit committee of the U.S. board of directors. *See* Session Three of this Colloquium, at pp. 234, 235, for a discussion of the role and function of the audit committee.

[9] The following information probably would be provided to the directors of publicly held companies:

(a) monthly, quarterly, and annual financial statements;

(b) cash flow, capital and operating budgets;

(c) materials on business and financial aspects of major proposed actions such as mergers, sales of securities, or investment in new plants;

(d) salary and pension information, in general terms;

(e) information on major litigation by or against the corporation;

(f) information on labor negotiations;

(g) copies of important documents filed with government agencies, and important press releases;

(h) an agenda for the Board meeting, with minutes of the past meeting;

(i) analyses of the company done by outside sources, and information about the industry;

(j) perhaps, manufacturing or marketing data;

(k) in the United Kingdom, tax information. Directors of privately held companies would receive the same sort of information, especially the information in categories (a)–(c). Directors of such companies, however, usually receive less detailed information than their counterparts in publicly held corporations.

[10] *See* Session One of this Colloquium, at pp. 205–207, for a discussion of the monitoring function of a board of directors.

[11] The director's fiduciary duty of due care is imposed by state law. *See, e.g.*, N.Y. Bus. Corp. Law, section 717 (Consol. 1963) ("a director shall perform his duties as a director, including his

duties as a member of any committee of the board upon which he may serve, *in good faith and with that degree of care which an ordinarily prudent person in a like position would use in similar circumstances*") (emphasis added); *see also* Model Bus. Corp. Act, section 35 (1982) (imposing the additional requirement that the director act "in a manner he reasonably believes to be in the best interests of the corporations").

[12] The director's duty to exercise due diligence is imposed by the federal securities laws under:

(i) section 11 of the 1933 Act, 15 U.S.C. section 77k (1982) (duty to make "reasonable investigation" as to truth and non-misleading character of a statement in the registration statement);

(ii) section 14(a) of the 1934 Act, 15 U.S.C. section 78n(a) (1982) (concerning false or misleading proxy statements); and

(iii) sections 10(b), 18(a) of the 1934 Act, 15 U.S.C. sections 78j(b), 78r(a) (1982), and rule 10b-5, 17 C.F.R. section 240.10b-5 (1983) (concerning documents such as the Form 10-K Annual Report filed with the Securities and Exchange Commission).

[13] *But see* Jones, *Empirical Examination of the Incidence of Shareholder Derivative and Class Action Lawsuits, 1971–1978*, 60 B.U. L. Rev. 306, 309, 321 (1980) (suggesting that the number of such suits has increased only slightly while the number of defendants has grown dramatically because all members of the board are named as defendants).

[14] *See, e.g.*, N.Y. Bus. Corp. Law, section 717 (Consol. 1963) ("[a director] is entitled to rely on information, opinions, reports or statements including financial statements and other financial data prepared or presented by: officers or employees of the corporation, [or] counsel, public accountants, or other persons as to matters which the director believes to be within such person's professional or expert competence, or a committee of the board on which [the director] does not serve"); *see also* Hawes and Sherrard, *Model Act Section 35 – New Vigor for the Defense of Reliance on the Advice of Counsel*, 32 Bus. Law. 119 (1976).

[15] *Compare Shidler v. All American Life & Financial Corp.*, Fed. Sec. L. Rep. (CCH) ¶98,875 (S.D. Iowa 1982) (reliance on opinion of counsel that one class, rather than separate class, voting was required in a merger, although ultimately disagreed with by the highest state court, was a defense to the scienter element of a rule 10b-5 claim, to a negligence claim under rule 14a-9 (proxy rules), and to a breach of fiduciary duty claim) *with Pittsburgh Terminal Corp. v. Baltimore and Ohio Railroad Co.*, 680 F.2d 933 (3d Cir. 1982) (opinion of counsel that notice of extraordinary dividend of property did not have to be given to holders of convertible debentures because not specifically required in the bond indenture was not a defense to the scienter element of a Rule 10b-5 claim; court stated, "where [the directors] know the materiality of the concealed information and intend the consequences of the concealment, advice of counsel that they will not incur liability cannot be recognized as a defense"); *see also* Hawes and Sherrard, *Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases*, 62 Va. L. Rev. 1 (1976).

[16] The conferences were a prelude to the American Law Institute's project "Principles of Corporate Governance and Structure: Restatement and Recommendations" (Tent. Draft No. 1, April 1, 1982). A composite record of the conferences is found in *Commentaries on Corporate Structure and Governance, The ALI–ABA Symposiums 1977–1978* (D. Schwartz ed. 1979).

[17] *Id.* at 401.

[18] *Id.* at 429.

[19] *Id.* at 431–32.

[20] *The Corporate Director's Guidebook*, 32 Bus. Law. 5 (1977), was published by the Committee on Corporate Laws, Section of Corporation, Banking and Business Law, American Bar Asssociation, to assist the corporate director in performing his duties. The American Bar Association is a national association of lawyers; membership is optional and is open to any lawyer in good standing in his own state.

[21] [T]here may be occasions when there is need for the corporate director to have outside advice. The director should be assured that, in appropriate circumstances, he (alone or together

with fellow directors) has a direct channel of communication with the enterprise's principal advisors, including its auditors, its regular corporate counsel and, when such a relationship exists, its investment banking advisors and its executive compensation counselors. *Id.* at 23.

[22] [T]here may be occasions when an outside advisor should be specially retained to assist the board or a committee in connection with a particular matter. The need for outside advice should be infrequent, arising most often in the unusual or corporate crisis situation. *Id.*

[23] *Confidentiality* – the director should deal in confidence with all matters involving his corporation until such time as there has been general public disclosure or unless he knows that particular information is a matter of public record or is a matter of common knowledge. This presumption of a need for confidence treatment should apply regarding all current information concerning board or corporate activities. The importance of confidentiality cannot be over-emphasized, not only because of financial exposure for both the corporation and the individual under the Federal securities laws in the event of improper use of so-called "inside information," but also because of the potential for jeopardy to the enterprise in terms of competitive disadvantage.
*The Corporate Director's Guidebook, supra* note 21, at 14.

[24] *See, e.g.*, W. Fletcher, 3 Cyclopedia of Corporations, section 857.1 (1975).

[25] *Cf., e.g., Slade v. Shearson, Hammill & Co., Inc.*, 517 F.2d 398 (2d Cir. 1974) (investor brought 10b-5 claim against brokerage house whose retail sales division recommended a certain stock at the same time that the underwriting division possessed adverse material nonpublic information about the issue; case remanded for further fact-finding).

[26] Law No. 6.404/76 section 155.

[27] The problem would arise, for example, if the director sat on the boards of two companies, one of which had made a tender offer for the other.

[28] *The Corporate Director's Guidebook, supra* note 19, at 13.

[29] *Id.*

[30] Section 33 par. 1 AktG (Stock Corp. Law).

[31] Hanau/Ulmer, *Mitbestimmungsgesetz* (1981) at 461 s.

[32] BGHZ 64, 325 ("*Bayer*").

[33] *Id.* at 327.

[34] Section 404 AktG (Stock Corp. Law).

[35] 479 F.2d 1277 (2d Cir. 1978) (*en banc*).

[36] "Entreprises publiques" includes nationalized companies and public services involved in industry or trading.

[37] L. Art. 89 al.1 states: "The limited company is administered by a Board of Directors composed of at least three members." L. Art. 100 al.2 states: "The Board can only make decisions if at least half of its members are attending the meeting." L. Art. 100 al.2 provides that if articles of association do not require a higher majority, decisions are taken under majority ruling. On the collegial body, see case Paris April 13, 1934, Sem. Jur. 1934.896.

[38] L. Art. 230 states: The auditors report to the Board of Directors:
- on the controls and verifications which they made;
- on the balance sheet and other accounting documents which need modifications with all necessary modifications;
- on the accounting mispractices, frauds and mistakes which they may have discovered;
- on the conclusions resulting from the hereabove modifications –

The auditors have a duty of confidentiality and, as a director individually has no power to act for the company, that information must be disclosed by the auditors to the Board as a whole.

[39] A director who has no power as an individual to act for the company and who is not a manager of the company, is not entitled to make individual investigations in the company. The auditors are appointed by the general meeting of shareholders (Art. 223 al.1 and 3). As a shareholder (directors must have a minimum number of shares, Art. 95), he could ask a court for the designation of an expert if he owns at least 10% of the share capital (Art. 226 al.1).

[40] L. Art. 223 al.3 states: "Auditors have a duty of confidentiality on all matters or information they might be aware of, because of their audit work." Of course, this duty of confidentiality does not concern the various cases covered by a specific obligation of disclosure (revelation of fraudulant behavior to the public prosecutor for instance).

[41] Compagnie Nationale des Commissaires aux Comptes Bulletin (1976) 538. *See also* Compagnie Nationale des Commissaires aux Comptes, étude juridique no. V, 7&8.

[42] Conseil National des Commissaires aux Comptes Bulletin no. 23, March 1978.

[43] The monitoring system is very complicated. To simplify, it consists of: permanent representatives in the firms (Contrôleur d'Etat or Commissaire du Gouvernement), and review of the firms' accounts by an administrative court (Cour des Comptes); limitations on management's power to make important decisions without prior authorization from the relevant ministers.

[44] A French company cannot invest abroad more than two million French Francs ($250000). Such investment must receive prior authorization from the Treasury Department.

[45] The Auroux laws were enacted in 1982. They consist of various laws governing all the relationships between enterprises, employees and trade unions. Some of these new laws reinforce the flow of information concerning financial statements and important management decisions to the various bodies representing the employees and provide these bodies with expert assistance. The Auroux laws comprise:

Law of 4 August 1982 concerning the liberty of the workers in the enterprise.

Law of 28 October 1982 concerning the reform of the right to collective negotiations, and the way of dealing with work conflicts.

Law of 23 December 1982 concerning the hygiene and safety committee, work conditions, and way of dealing with dangerous situations.