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# French Sociétés Anonymes: striking the balance between the principle of the right to be heard and the principle that a director can be freely removed from office

## Even though a director of a *société anonyme* (French joint stock company, hereinafter "SA") can be removed from office *ad nutum* (i.e. at any time and without any justification), he/she must be informed beforehand of the reasons for his/her removal.

Directors of a SA can be removed **at any time** by the ordinary general meeting of shareholders[1]: contrary to the managers of *sociétés à responsabilité limitée* (French limited liability companies)[2], they may be removed from office "*ad nutum*" (Latin phrase that literally means "*by a nod of the head*"), in principle without any justification, without any indemnity and without any notice period, even if such a removal is not an item included on the agenda of the meeting of shareholders[3].

The only limit is the **abuse**, in which case Article 1382 of the French Civil Code[4] provides for the award of damages. As such:

- the removal must not take place in **circumstances that are insulting or vexatious**[5] and must not be decided upon **suddenly**, in breach of the duty of loyalty in exercising this right;
- the **rights of the defense** and the **principle that all parties should be heard** must be respected: directors must be given the possibility to make their observations to the general meeting of shareholders during the removal process[6] and, since recently, they must be informed of the reasons for their removal before the removal decision is made.

This is the general thrust of a decision handed down by the Commercial Chamber of the *Cour de Cassation* on May 14, 2013[7].

The facts of the case at hand are as follows:

A director of a SA who had been removed from office during a general meeting of shareholders held on June 30, 2008, claimed that his removal was abusive both because the principle that all parties should be heard had been infringed and because of the vexatious circumstances that had surrounded the adoption of the removal decision.

The Cour of Appeals of Paris, holding that "*the principle that all parties should be heard only requires that the director be given the opportunity to submit his comments before the removal decision is made*", dismissed the director's claims, having noted from the minutes of the general meeting of shareholders held on June 30, 2008, that:

- this director had benefited from the fact that "*the meeting had been suspended several times, for an overall period of suspension of more than three hours, in order to enable him to contact third parties and prepare a statement*", and
- the removal resolution was put to the vote only after he had submitted his written and oral comments[8].

The appeal lodged by the director against the judgment of the Court of Appeals was granted by the *Cour de Cassation*. The latter held that the Court of Appeals, by ruling so without having examined whether the removed director "*had had knowledge of the reasons for this removal before the vote was taken*", had failed to legally substantiate its decision.

For quite a long time, the *Cour de Cassation* used to consider that it was unnecessary to state any grounds for the removal of a director[9] because of the principle according to which directors can be freely removed from office.

It now considers that respecting the rights of the defenses and the principle that all parties should be heard requires that a director must be informed beforehand of the reasons for which his/her removal is contemplated.

To be on the safe side when a company contemplates removing one of its officers, irrespective of whether such officer can be removed "ad nutum" or not, it will henceforth be necessary, **in any event**, to make sure that he/she has been informed beforehand of the reasons that have led the company to contemplate removing him/her.

[1] Article L.225-18 §2 of the French Commercial Code. This is a public policy provision: by-laws may not include provisions to the contrary and any agreement to the contrary would be deemed null and void.

[2] Article L.223-25 §1 of the French Commercial Code: "*The manager may be removed pursuant to a decision of the shareholders in the conditions set forth in Article L. 223-29, unless the by-laws provide for a larger majority. If the removal is decided upon without good cause, it may give rise to damages*".

[3] Article L.225-105 §3 of the French Commercial Code: "*The general meeting of shareholders may not deliberate on an item which is not on the agenda. However, it may, in any circumstances, remove one or more directors or members of the supervisory board and replace them*".

[4] "*Any act whatever of a man, which causes damage to another man, obliges the one by whose fault it occurred, to compensate it*".

[5] Settled case-law. Cf. in particular Commercial Chamber of the *Cour de Cassation*, May 6, 1974.

[6] Settled case-law. Cf. in particular Commercial Chamber of the *Cour de Cassation*, February 24, 1998 n°95-12.349; Commercial Chamber of the *Cour de Cassation*, May 15, 2007, n°05-19.464.

[7] Commercial Chamber of the *Cour de Cassation*, May 14, 2013, n°11-22.845, n°486 FS – P + B.

[8] Court of Appeals of Paris, May 30, 2011.

[9] Settled case-law. Cf. in particular Commercial Chamber of the *Cour de Cassation*, January 3, 1985: Bull. civ. IV, no 6.