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***THE COURT'S INTERVENTION
OF VOLUNTARY JURISDICTION
IN CORPORATIONS***

- ABSTRACT -

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- ABSTRACT-

This work relates to the involvement of voluntary jurisdiction of the court in corporations. The research was focused on the identification of cases in which the judicial authority intervenes in corporate not to play the "normal" business dispute resolution but to carry out a check now, now additional or replacement of that organ social. In particular, it has addressed the issue from a historical-evolutionary, in order to observe the observation that, over time, the figure of the judge was under the company law and how it has changed over time. The thesis is divided into four chapters: the first is devoted to voluntary jurisdiction and the other to the specific assumptions of corporate voluntary jurisdiction. Therefore, the second concerns the process of homologous, the third, the additional powers and substitute the judge and, fourth, the complaint to the court.

In the first introductory chapter we have tried to illustrate the character of voluntary jurisdiction, highlighting discussions regarding his qualification. It is, in fact, by some, placed in the context of the contentious jurisdiction of which would constitute a species, while lacking the essential element of the right in question. Others believe that it has its own characteristics that they constitute a separate category to be placed between the civil and administrative jurisdiction. The most accredited, however, is the one that fits the voluntary jurisdiction under the administrative jurisdiction, sharing especially the discretion of the judge, calling it just "government private law exercised by the courts." The attention has therefore focused on voluntary jurisdiction corporate watching from the point of view of the interests protected. It has come, so, to see that the control by the judiciary is necessitated by the multiplicity of interests that revolve around the company; not only, therefore, the social but also the interests of those who, on a daily basis, come into contact with it and trust in an organization that operates within the law and rules that guarantee an efficient and productive.

The second chapter is home to one of the areas in which the court has had a major role: the approval. With this expression it was intended that control of law on constitutional documents (art. 2330 c.c.) and the resolutions (art. 2410 prev. c.c.) with which the judicial authority, verified the occurrence of conditions required by law, proceeded in enrollment register of companies producing different effects depending on the acts. In the first case, it was written, and is a prerequisite for the coming into existence of the institution and for the purchase of personality judges, and therefore, the perfect patrimonial autonomy; in the second case, however, it, now as then, is aimed at the production of the effects of the resolution. The approval, therefore, took the form of a check-called. Next you put downstream of an act already complete, capable of producing effects but still ineffective. However, it is critically noted that, although this control was later compared to the drafting of the act, was to be considered prior to the effectiveness of the same. This distinction has been proposed to emphasize, on the one hand, the control law of the court and, secondly, the importance of the same with respect to the effect that the act must produce. The choice, in fact, that led the Parliament to award in the Commercial Code of 1882 the above skills to the court rather than to the notary, was justified by the guarantee of impartiality and efficiency of control, which, thanks to its impartiality, would have been assured. However, despite the certainty of judicial review, requirements for speed and simplification led the legislature to find a subject that would have given the same guarantees, reopening again the "challenge" between the judge and notary, this time won by the latter. With Law Simplification n. 340/2001, in fact, that, in some respects, anticipated some of the guidelines that inspired the subsequent reform of society (d. Lgs. January 17, 2003 n. 6), the competence concerning the review of the constituent acts and resolutions Shareholders has been attributed to the notary, prejudice to the court on the homologous resolutions (art. 2436 cc), albeit only via residual. Despite this legislative choice, was alive the debate about the "substitution" of the notary to the judge, being doubtful his impartiality and his skills. The notary deters the resort to trials or other judicial proceedings cannot not put into question his competence in the field; moreover, the control that he is normally called to do in the receipt of corporate actions, avoid any subsequent intervention of the courts. It also cleared the

professionalism of the notary, the fact that, in the memorandum of association in which engages in the negotiation that is proper, covers the role of controller and consultant, because it is precisely this dual function that reinforces the success corporate competencies attributed him. Therefore, despite the judicial authority, with the approval reference, lost the powers that were his, it can be said to have been found a good substitute whose control is essentially equal to that played by the judge, to the point that someone believes that even with reference to the notary when speaking of approval.

In the third chapter were selected those interventions of corporate voluntary jurisdiction of the court in which he is primarily active now substitute now integrative corporate bodies, always working to ensure the smooth operation of the company. Article 2367 c.c. recalls the convening judicial assembly when, despite the request of shareholders representing one twentieth of the share capital, directors and auditors remain inert. The rule has remained almost identical in content to that contained in the Commercial Code and subsequent code of 1942 as, indeed, also its ratio. The judge's intervention is aimed, in fact, to protect minority shareholders against the mismanagement of the directors and the possible collusion of mayors. It is noted, however, this could be a hypothesis, perhaps the only one, in which through the protection of shareholders takes place also the social no accident convening art. 2367 cc work in relation "to those items on which the meeting resolves, by law proposed by the directors." Generally, to be mediated is the interest of the shareholders, because in the background compared to corporate interests that management decisions are aimed at implementing, while, in this case, overrides the interest of the shareholders in which the activities of ordinary administration are correctly and diligently carried out, thereby laying the groundwork for the proper functioning of the company in accordance with Art. 2247 cc and economic-organizational needs. In addition, a court hearing must operate within the limits allowed by the standard, and therefore, for those matters on which the Meeting resolves in accordance with the law proposed by the directors (art. 2441, 2463 n. 5 cc). In any case, the limit of control about, in my opinion, the assessment of the mandatory convocation, in matters permitted, can not be avoided in order to control and subsequent judicial intervention substitute

which operates only in the cases omitted obligation to call; at the time of the request, the court shall determine, conservatively, that falls in the last paragraph of art. 2367 c.c. avoiding to enter into areas and matters excluded from their area of expertise.

A further action to supplement the judicial recourse in their assessment with specific reference to the appointment of liquidators (art. 2487, paragraph 2, cc). In particular, this intervention is considered consequential omission of notice of the meeting by the directors but also requires, that has been publicized the cause of dissolution. In any case, according to art. 2485, paragraph 2 of the Civil Code the court may also be called upon to intervene, at the request of the directors or members, to proceed with the registration of the case in the register of companies, subject to verification of its existence. Therefore, it has come to observe that although the intervention of the court in the enabling act was included in the program of simplification and acceleration of the settlement procedure, the other seems more concrete steps to address the shortcomings of the body that would be competent: a role integrative that blends with the placement of the same in the context of voluntary and non-contentious jurisdiction, the absence of any reason for conflict. The need to always have a true representation of the financial position of the company and to have the resources necessary to continue to play the social activity but, above all, in accordance with the principle of integrity of the capital, led, consistently over the years, the legislature to provide for the intervention of the courts even in the reduction of capital for losses mandatory. This refers in particular art. 2446 c.c., paragraph 2, c.c., when, having needlessly postponed to the following year the reduction of the loss without resulting traced back at least to one third of the capital, the assembly fails to reduction of capital in proportion to the losses incurred. The peculiarity of this intervention is the possibility for the judge to proceed directly to the reduction of capital by decree without advance notice of the meeting to proceed: the decree has, therefore, the same content of the resolution had to be approved, substituting for it.

The need to protect the subjective position of the members of the supervisory board and the general interest of society and, consequently, the third party creditors and minority shareholder, for the proper management of the company, which is pursued by guaranteeing the independence of members the control

body and secured by a guarantee of stability for the duration of the assignment, except for the actual existence of good cause, are the reasons for the involvement of the court in the revocation of the mayors in art. 2400, paragraph 2, of the civil code notwithstanding, in fact, the general rule that there is parallelism between the legitimate body to the appointment and the one authorized to revoke, the intervention of the courts, which is embodied in the approval of the withdrawal after verification of the use of the requirement of the right cause (or any that makes unnecessary and intolerable the continuation of social relationship arising from breach), prevents the assembly remove the control body for reasons of convenience.

It is learned, finally, at the end of the chapter, the opportunity to reflect on the challenges filed by creditors (in the reduction of the share art. 2445 c.c., fusion art. 2503 c.c. and the lifting of the state of liquidation art. 2487^{ter} c.c.) . The doctrine has always oscillating about the exact location within the jurisdiction of the opposition proceedings or voluntary. The choice is not indifferent impacting on the nature of the application (statement of claim, in the first case, or appeal, in the second) and the application of the suspension of the working terms. Although the theory of the judicial nature of the opposition is currently prevailing, one can not cite a recent orientation of Notaries Roman accepted the argument that the nature of court, discussing the principle of freedom of form and presenting the most immediate form of protection, strong and cost for creditors than action, judicial, not applying the same terms of the suspension working. The text is supported preference this second orientation. Qualify the opposition as an act of court allows the court to examine the conduct of the company for the sole purpose of issuing a certificate which is always changeable, revocable and claimable; attributing the court services leading the judge to issue an order "mandatory" that should be implemented and that is not likely to be any reason to change.

The fourth, and final, chapter of the thesis relates to the complaint to the court governed by art. 2409 c.c., the subject at the center of debates about its legal nature and the danger of interference by the courts in corporate matters. The location of the institute in the proceedings of voluntary jurisdiction could prove under a dual perspective: the absence of a dispute and the interests

protected. In relation to the latter aspect, discusses how the doctrine is particularly oscillating, now justifying the intervention of the court in relation to public interests above and outside, now fearing the interest of the shareholders as a unique and irreplaceable, and finally concentrating the 'attention to the importance social, from which everything moves. The legitimacy of the prosecutor to proceed in accordance with art. 2409 cc led the interpreters, the line also with the nature of voluntary jurisdiction of the proceedings, to emphasize the need to protect not only the company itself but also anyone who came into contact with it. This interpretation, however, was too restrictive because of will and not likely to cause interference in public in the social moderate. Moreover, even the mere protection of minorities could lead to a mechanism of excessive protectionism; they, in fact, not only the only ones to benefit from the restoration of sound corporate management. The direct protection of the interest of the company and, indirectly, the protection of the members seems to be more vigorously the reasons underlying the complaint and whose implementation can only be ensured by a check carried out by a third party which the judge.

The reform of the society intervened on article 2409 c.c. making the news in relation to objective conditions and in relation to the process itself. In particular, if before the reform was sufficient grounds to suspect any serious irregularities to bring a court, today the legislature has limited the relevance of the irregularities only to those relating to the management, restricting them to the activities carried out by directors. Clearly, the major difficulty of the court to verify the presence of the irregularity; it has been observed, in fact, that some situations are within the scope of the operation of the organization are not excluded from management, indeed, to put in a relationship of *genus* to *species*. This happens, for example, in the omitted request permission of the assembly, concerning operations in which it is required or in the systematic meeting of the board of directors without the presence of the supervisory board or in the activities covered by the settlement phase. Furthermore, while *prediligendosi* remedies endoprocedimental, the judge retains part of the complaint under article 2409 c.c. a prominent role. He, in fact, marks the stages of the proceedings and, within the limits of the discretion accorded to it in the voluntary jurisdiction, emits measures (now the inspection, now the removal of

directors and auditors and subsequent appointment of the judiciary) which it considers most appropriate to elimination of serious irregularities and the reorganization and managerial.