ABSTRACT

The minority shareholder in a non-listed limited by share company

The present work investigates the remedies the Italian law grants to the shareholder, who disagrees with the company's organizational and management resolutions he did not support.

The analysis focuses on the non-listed companies limited by shares, specifically with regard to the rights of control and information, the internal procedural guarantees, the legal remedies and the withdrawal rights provided by the Italian law, and the possibility of extending the protection by using statutory autonomy or shareholders agreements.

As we know, certain organizational and operative decisions of the company may sometime require a modification of the bylaws that shareholders unanimously approved at the time of the constitution of the company.

While the decisions taken by the board are not able to modify the company bylaws, on the contrary shareholders are entitled to amend the original rules set forth in the deed of incorporation, provided that such modifies are voted by the majority.

Consequently, the single shareholder opposing to the decision of the majority has two options: i) to challenge the decision using his power of *voice*; or ii) to leave the company, in virtue of his right to *exit*.

It worth noting that the shareholder meeting expresses its decisions through an unilateral and collegial act, to the adoption of which all the shareholders can concur. Any deliberation is the result of a procedure, whose phases are set by the legislator.

Therefore, the decision-making procedure is essential. Contrary to contracts, where the validity depends on the due expression of the will of the parties, otherwise the collegial deliberations depend on the majority rule. The deliberations are assumed valid as far as they are

taken in compliance with the rules governing its adoption (including all the requirements regarding the quorum).

This because the compliance with the shareholders meeting rules is deemed as a sufficient guarantee for the single shareholder. As long as such regulations are fulfilled, the shareholder is expected to abide by the decisions, regardless of his approval, because his right of *voice* has been safeguarded, even though his will has not prevailed.

Alongside, should the majority violate the shareholders meeting rules, the disagreeing shareholder shall be fully entitled to challenge the final decision.

In consideration of his right of *voice*, the shareholder (to be intended as the minority shareholder holding enough shares in accordance with the law) has the power to challenge the deliberation he considers damaging of his interests within the proper term, seeking for an injunction or a compensation.

Nevertheless, even if a deliberation is always subject to appeal, the positive outcome of the action promoted by the shareholder shall depend solely on whether or not the legal requirements are met, as they are developed by the doctrine and case law, (at least those regarding the voidability of the deliberation).

Otherwise, should the requirements not be fulfilled, then any action brought by the shareholder against the deliberation shall be just a pointless disturbance, nonetheless able to be detrimental for the interests of the company and the rest of the shareholders.

Besides the appeal, the shareholder - whether as a single or as a holder of a minimum number of shares - has additional remedies to rely upon as a reaction in front of an abuse not directly realized by the majority, but by the board, which, indeed, represents ultimately the majority.

The shareholder can denounce directly to the tribunal irregularities made by the board or by the internal auditors. Whether

there are the conditions he can act against the board members or seek for redress as long as he has been damaged by intentional or negligent acts of the directors.

Alternatively, the shareholder has the right to exit. Even in this case there are two options: the shareholder can assign his share in accordance with the rules on transfers or he can exercise the right of withdrawal as far as it is provided by the law or the by-laws.

In order to balance the implementation of the majority rule the legal framework has increasingly recognizes the right of the disagreeing shareholder to unilaterally untie from the company. In other words, it was deemed necessary to protect the shareholder from the consequences of the modifications of the by-laws, when he didn't take part in and he considers them as abusive. It is a form of reaction to the wrong imposition of the majority, granted by the law as long as certain requirements are met, even when there are not violations of procedural rules.

However, also the alternative choice to disinvest causes consequences and it is subject to various limits, due to the exigency to balance the interests involved, which can be opposite. These might be the interest of the majority to approve a certain deliberation, the interest of the creditors to the integrity of the company assets, as well as the interest of shareholders to protect the company equity.

As a consequence, the right to withdrawal is deemed as a way to prevent possible conflicts between majority and minority, as far as it is expressly regulated. This solution is also beneficial, because operated before and not after the conflict has emerged, as instead it is the case of the appeal. The majority when acts must consider the right of the single shareholder to retrieve the value of his investment, by virtue of the conditions governing the withdrawal. Specifically, this is certainly not comparable to the protection granted by the right to challenge the same resolution that authorizes the shareholder to withdraw.

The appeal may, in fact, always determine, even where unfounded, an action of disturbance against the company, by forcing it to defend its position. This outcome might be worsened due to the length of the judicial proceeding and the uncertainty of the result of any trial

In view of the above, the right to withdraw has experienced a substantial evolution, in respect of its original formulation (back before the civil code reform in 2003) as an exceptional faculty to be limited by the law, other than favored.

Until the last reform of the Civil Code, the right of withdrawal has been highly regulated as well as specifically limited to few cases, in order to globally take in account all the interests (e.g. the strict criteria for liquidating the shareholder's share).

Therefore, the law did not entrust the company statute with the faculty to add any other hypothesis of withdrawal, other than those expressly included in the Civil Code.

On the contrary, the reform of the Civil Code shifts the attention to such remedy, by modifying the approach.

Traditionally, the withdrawal from the company was deemed as an exceptional mean for protecting the shareholder, to be limited to those cases where the shareholder was forced to dissolve the bond with the company because of substantial changes affecting the original conditions of profitability or increasing the level of risks, as a consequence of decision taken by the majority.

Alongside, a new and different interpretation has emerged and then established. The right to withdraw is now perceived as a way for the shareholder to easily disinvest.

In view of the above, the right to withdraw, as currently regulated, modifies the bargaining position held by shareholders. Since the withdrawal deprives the company of part of its assets, the same

company is urged to ponder certain decisions before adopt them, in order to prevent the withdrawal.

The new provisions regarding the right to withdraw have multiple functions and are more flexible, especially considering the faculty of the company to provide the shareholder with additional exit chances.

At the same time, as discussed in detail further ahead, the withdrawal is clearly favored by the law, which makes more difficult for the shareholder to challenge the deliberations before the court. Consequently, this hindrance spurs the research for alternative ways of protection (for example the idea to grant a pre-shareholders meeting interim relief).

Such seek for alternative protection of the shareholder interests appears more relevant in relation with non-listed companies, where the shareholders have not the opportunity to transfer the shares as primary way to exit the company. It is precisely in this type of company that there is the need to make preventive information protections effective, as well as the controlling rights of the shareholder, as well as the use of statutory autonomy to balance the positions of imbalance between the different situations.

Moreover, the present work aims to analyze in detail the single ways how the law protects the minority shareholders within the non-listed companies limited by shares, with an eye to those situations that might be deemed abusive.

In conclusion, the present thesis intends to address, under a systematic evaluation, the rules governing how the shareholder can express, in good faith, his dissent. It analyzes in details the issues related to the enforcement of the majority rule and its limits, even in consideration of the risks regarding possible abuses, which can frustrate the aims pursued by the law.

The first chapter focuses on how the shareholders meeting takes its deliberations, with a special attention to the procedure, which acts as

a guarantee in order to secure that the will of the shareholders is properly formed, being the decision of the majority prevailing over the position of the minority, in accordance to the relevant rules.

However, whether the rules governing the decision making process are violated, the law vests the shareholders with the right to appeal. The second chapter gives a detailed overview of this matter, describing the requirements and limitations the action of the shareholder is subject to. Then the review follows the remedies provided by the law, such as the complaint (to the court or the board of statutory auditors), the action for liability or for damages against the directors.

The third chapter is about the withdrawal considered as special remedy the law offers to the shareholder in order to manifest disagreement with respect to certain occurrences, which are deemed so significant to need a protection, irrespectively of the recurring of a misbehavior by the majority.

The fourth chapter analyzes the protections that the shareholder can enjoy thanks to the choice of statutory autonomy to derogate from the law, through the widening of the individual rights of the shareholeders, the provision of election procedures for the administrative and control bodies plus favorable and the recognition of further special rights.