The election of Company directors and its invalidity

1. – *Introduction*. – An important subject, which sometimes does not appear to have been discussed entirely is that of the elections and appointment of Company Directors, whether of corporations or cooperatives.

The author of these lines aims to complete the study with a series of thoughts, which also come from lengthy personal experience as Chairman and Director of companies, together with his sensibility as a jurist.

He recalls here that a large class of professional is developing who take and active part in meetings, in a role of defence or with a critical attitude, often showing skills and insight and orienting the opinions of the Shareholders.

The importance of the topic needs no commentary, when we think that the choice of the men invited to form the management is destined to influence the life of the companies and the fate of the corporations.

The Shareholders' decision that appoints the Directors follows a series of operations which precede it and form with it, to use a well known legal expression, « a procedural model fact situation ».

This term indicates that we are in the presence of a series of related and coordinated acts with specific functional characteristics, each of which influences the next one and gives rise to sequence of phases, which we will discuss.

2. – *The discipline*. – It is opportune to start with a summary of the normative sources of the various rules, which concretely discipline the procedure of appointing Directors, bearing in mind the specific diversity of the type of company (for example joint stock corporations or limited liability companies or cooperatives) where they will be.

The normative sources we have mentioned in hierarchical order are:

A) First of all general law such as that of the Civil Code which dictates some lines of discipline from article 2363 to article 2383 Civil Code for companies with share capital and from article 2532 to article 2535 Civil Code for cooperative companies, which play a significant role in Italy in important sectors such as the credit societies, in the credit sector.

From « Il Diritto Fallimentare e delle Società Commerciali », 2001, no. 1.

The general discipline is often completed by specific laws, issued by the legislator to ensure a balanced representation of the minorities at least in companies that have shares listed on the Stock Exchange, as has recently been the case of the Draghi law.

These laws are also supplemented by the specific instructions on the subject issued by the Italian national Securities' Commission and the Stock Exchange, again for companies with listed shares.

B) A further source of rules is the Memorandum of Association of each company.

For example, we have Memorandums of Association in which it is the Board of Directors that elects the Chairman, the Deputy Chairman and the Executive Committee or the managing Director, whilst in others the Shareholders' Meeting appoints the Chairman and one or two Deputy Chairmen (1) or of the Executive Committee.

C) Some companies have Rules of the Shareholders' meetings (2), which discipline the electoral operations for the appointment of Directors and in this case it represents a normative source.

D) Another source of rules is represented by the Shareholders' Agreements, as is the case in which they bind some groups of control of the majority of the capital or a share of reference.

One of the best known examples is that of the voting trust of Mediobanca and other public companies such as Assicurazioni Generali.

E) Another source is the practice or customs in use in the company which are valid as they are referred to by Shareholders' Agreements or are spontaneously observed until they are changed.

F) Lastly, in the absence of specific sources, some rules are taken for interpretation from the systematic principles of the public electoral system, by way of analogy.

This recalls the orientation expressed by the legitimate court some time ago.

3. – *The phases of the proceedings.* – Let us now go on to describe the various phases of the proceedings to appoint the Directors.

The rule of article 2388 Civil Code according to which the Shareholders' Meeting appoints the Directors, is deemed compulsory by legal literature and case law with the exclusion of new Directors who can be appointed by the subscribers on the deed of incorporation, in accordance with article 2383 Civil Code or by co-optation by remaining Directors if some of them are no longer in office, in accordance with article 2386 Civil Code (3).

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(1) This is the case of the Memorandum of Association of the Banca Popolare di Milano.

(2) This is the case of the Banca Popolare di Novara.

(3) Court of Cassation, 23rd January 1965, no. 136 *in Foro it.*, 1965, I, 427; Court of Cat-

Article 2368, section 1, Civil Code, provides that the Deed of Incorporation can establish particular rules for the appointment to company positions but this is reduced to special rules that discipline the Shareholders' Meeting, the majority quorums or the voting systems, to guarantee a possible representation for the minority (4).

The clause that attributes the appointment of the Directors to a limited number of Shareholders is generally deemed null and void (5).

4. – The election by the Shareholders' Meeting – The election by the Shareholders of the Directors takes place with the choice of the Directors from several different candidates by the Shareholders at their meeting.

The various phases of this proceeding are described here:

The convocation of the Shareholders' Meeting

The Meeting for the election of the Directors must be called first of all by the legitimized and competent body, such as the Board of Directors in accordance with article 2363, 2366 Civil Code, and in its absence by the Board of Auditors and if requested by the minority, by the President of the Court of Law in accordance with article 2367 Civil Code.

With the publication of the notice of convocation, the proceedings for the Shareholders' meeting start (Court of Civil Cassation, 2nd August 1977, no. 3422, in Riv. Società, 1977, II, 76, 77).

Failure to call the meeting with the aforementioned notice and according to the prevailing orientation of literature is a cause for non-existence of the resolutions (6).

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ania, 23rd July 1965, in *Dir. fall.*, 1965, II, 940; Court of Appeal of Milan, 27th August 1969 in *Giur. It.*, 1970, I, 2, 546; Court of Milan, 29th January 1982, in *Giur. Comm.*, 1983, II, 125 amongst the many.

In literature; MINERVINI, *Gli amministratori delle società per azioni*, Milan 1956, p. 14; MIGNOLI-NOBILI, *Enc. di Diritto*, entry *Amministratori di società*, in *Enc. Dir.*, I, Milan, 1954; FERRI, *Le società*, Turin, 1971, p. 492; COTTINO, *Diritto commerciale*, Padua, 1976, p. 881; FRE, *La società per azioni*, in *Commentario al codice civile* by Scialoja and Branca, under art. 2364 and 2389; SCALFI, in *Riv. Società*, 1971, p. 40.

(4) PEDUCCI-PACCHI, in *Riv. Società* 1976, 606; BIGIAVI, in *Riv. Dir. Civ*. 1956, 1023; SCALFI, *Riv. società*, 1971, p. 40.

(5) Court of Appeal, Milan, 27th August 1969; COTTINO, *Diritto commerciale*, p. 660; FERRI, *Le società*, p. 498.

(6) Court of Civil Cassation, 28th November 1981, no. 6340 in *Giur. comm.*, 1982, II, 424; *Court of Civil Cassation*, 25th January 1865, no. 136 in *Foro it.*, I, 1599; Court of Civil Cassation, 20th April 1961, no. 886 in *Foro it.*, 1961, I, 1711.

In literature; GIANATTASIO, in Giust, civ. 1961, I, 1305; CANDIAN in *Temi*, 1955, p. 69; ASCARELLI, *Riv. dir. comm.*, 1950, I, p. 169, TRIMARCHI, *Riv. società* 1957, p. 451*; contra* ROMANO PAVONI, *Le deliberazioni* in *Foro Padano*, 1953, I, 59.

A meeting called by a subject without legitimization, such as for example a Director or a de facto Board, according to some decision is non-existent and such are its acts and resolutions).

The call of the Shareholders' Meeting by a single Director in office and not by the Board would also determine the annullability and not the nullity (Court of Civil Cassation, 2nd August 1977, no. 3422).

It is debatable in case law whether an irregular convocation of the Shareholders' Meeting determines its non-existence (Court of Appeal, Milam, 23rd July 1957 in Mass. Giur. Civ., 1957, 61) or its annullability (Court of Civil Cassation 23rd February 1965, no. 175, in Dir. Fall., 1965, II, 298).

A Shareholders' Meeting and the following resolutions adopted, in the event that the body competent to call the meeting met irregularly have also been deemed non-existent in case law.

This is the case of Directors, some of whom, have met, without a plenary convocation with the fair notice according to the Memorandum of Association or with recourse to urgent means of communication, here foreseen.

The case of meetings attended by a minority of the Board of Directors or Auditors but followed by a regular convocation of all its members, is different, on condition that the Memorandum of Association does not exclude it.

The convocation of the Shareholders is by a notice published in a specific organ of information designated by the law or the Memorandum of Association, such as the Official Journal, the Sheet of Legal Advertisements, with the due notice with respect to the day fixed for the Meeting, established by the Memorandum of Association or the Law.

In case law, there has been a decision that « failure to communicate the convocation to some Shareholders causes only the annullability and not the absolute nullity (Court of Naples, 9th July 1957).

It can and must be completed, where the Memorandum of Association or practice so provides, by a personalized notice to be sent to the Shareholders' addresses, indicating the date and the time of the Meeting, the venue and the agenda of the meeting and other information.

If the legal period between the notice and the Meeting has not been observed, the resolutions are deemed annullable (7).

A resolution by a Meeting on a topic that was not shown in the notice of call has been deemed valid and effective is not impugned in accordance with article 2377 Civil Code i.e. it is annullable (Court of Civil Cassation, 11th march 1977, no. 989).

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(7) Court of Appeal, Bari, 3rd January 1978, in *Dir. Fall*, 1978, II, 230; Court of Naples, 20th June 1979, in *Giur. comm.*, 1980, II, 569.

The Shareholders are invited to express to the company their wish to attend the Meeting sending it a request for an admission ticket, which is usually pre-printed, possibly with a form for a proxy to another Shareholder.

The Shareholders are sent any material for their identification, access and exercise of the right to vote (such as the admission ticket to the Meeting and the number of votes, including by proxy) which presents similarities with the voting card for public elections.

The admission ticket to the Meeting can be sent to the Shareholder's address or collected from the appointed office which deals with the organization of the Meeting, possibly with other electoral material.

The composition of the Meeting

Articles 2369, 2369 and 2369 bis of the Civil Code for the Extraordinary Meeting establish a quorum of presences of Shareholders that represent at least half of the share capital, excluding from the count the shares with a limited vote.

If the quorum is not reached, the Meeting has been deemed non-existent by the Court of Naples, 10th February 1958 in *Dir. giur.* 1958, 917.

Similarly, a Meeting attended by extraneous persons, whose number is decisive by means of the test for presence, is non-existent.

Voting on any subject must be immediately preceded by ascertaining that the Meeting has a regular quorum.

It has been stated that «the invalidities relative to the composition of the Meeting, as they protect the interest of the Shareholders and not of the company, entail only its annullability» (Court of Civil Cassation, 13th march 1975, no. 938 in *Giur. comm.*, 1976, II, 14).

It passes resolution with the absolute majority, save a higher majority, if contemplated by the Memorandum of Association.

The rules states «for the appointment to company offices, the Deed of Incorporation can establish special rules.»

The quorum for the Meeting to be validly formed has been deemed as fixed under penalty of non-existence of the Meeting (Court of Naples, 10th February 1958 in Dir. giur. 1958, p. 917).

Vase law has deemed that the ascertainment must immediately precede the voting on a specific topic and, in the absence of this ascertainment, the resolution is null and void (Court of Venice, 18th May 1959 in *Giur. It.*, I, p. 278).

Resolutions at the Ordinary Meetings in first convocation require the absolute majority, for those at Extraordinary Meetings, at least half of the share capital is required.

The presence at the meeting of persons extraneous to the company body and not otherwise legitimized, is a reason to deem the resolutions

non-existent, where they are decisive to reach the quorum of presences of annul it due to the absence of a quorum.

The candidates and their presentation

The candidates for the positions of Directors or Auditors, to be voted by the Shareholders, at the Meeting, can or must have certain requisites, established by the law or by the Memorandum of Association or by the regulations of the Meeting.

The most frequent legal requisites in accordance with art. 2382 Civil Code are that the candidate has reached majority (on condition that he is not authorized for trade) he is not incompetent, disqualified, bankrupt or sentenced to a penalty that entails disqualification, even on a temporary basis, from public offices or the incapacity to hold managerial positions.

In general, non-shareholders can also be appointed, unless otherwise decreed by the Memorandum of Association, as is often the case of the memorandum of Association of cooperatives, for example cooperative banks.

The possession of the quality of Shareholder gives the candidate a condition of moral credibility, showing that he is interested in the company and in its good governance.

Particular requisites of professionalism and reputation are required by the competent authorities of the government and Italian Securities' Commission for candidates for functions of Director, management and control in banks or financial corporations (article 14 of Draghi Law).

A further requisite for the resolution of the Meeting to be valid is that the candidate has not previously been revoked from the position, for serious irregularities by the judiciary (Court of Milan, 9th May 1991, in Giur. comm., 1992, 342).

The candidate usually becomes such when he is introduced by other shareholders or groups of shareholders, but he can also propose himself, spontaneously, or be voted by the shareholders without being introduced by anyone.

Introduction is therefore a possible but not necessary phase and can be omitted; the candidate doe not have to be introduced by anyone.

The group that suggests a candidate cam be large or only a single subject, with significant interests of less and so on.

In general in a public company and in credit societies, the candidate is accredited in that he is supported by a number of credible supporters.

The candidate, to become a Director, must be voted by the Shareholders at a Meeting and reach the quorum necessary and sufficient to be elected.

The shareholders have the right of active electorate and the candidates that of passive electorate, i.e. to be elected.

The voting and its methods in general

The vote is an expression of will expressed, directly or through a proxy, free and homogeneous, according to conventional standards, which are fixed by the chair of the Meeting or by the Meeting itself if nit by the memorandum of Association.

The ordinary Meeting can be convoked to vote on several topics and usually the person who chairs the meeting chooses the method, assisted by the Secretary and the scrutineers.

There can be a wide variety of objects, for example the discussion and approval of the Annual Report, the Directors' Report, the Auditors' Report and more in general the different motions put to the Meeting, such as, for example, the resolution of an action against the Directors.

Sometimes, the Chairman may chair the meeting, according to the Memorandum of Association, and not the person designated by the Shareholders.

The appointment of the Secretary and the scrutineers is usually proposed by the Chairman and the resolution taken by the Meeting.

The Meeting may establish that the person who is to act as Secretary must be a member of the Notaries' Board, as we will se below.

The vote is an expression of will expressed, directly or through a proxy, free and homogeneous and is expressed through standard conditions which are fixed by the Chair of the Meeting or by the Meeting itself, if not by the Memorandum of Association or regulations.

The vote must have, above all, an expressed form and cannot be tacit, or implicit or presumed (8).

A vote that is not expressed in a non-vote.

The cases are often monothematic, and the choice of the voters is simple, being translated into « yes », « no » or « I don't know ».

The vote can be expressed by raised hands, a ballot paper in a ballot box or in another way.

The voting methods can be different although the voting criterion has to be uniform.

There is an egalitarian or democratic vote if the shareholder is asked to express one vote per head.

This is adopted in the case in which voting is by raised hand, by standing and sitting, by separation in the room, by name call or by electronic device, in the case of crowded meetings (9).

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(8) « Implicit resolutions » are not admitted: Court of Civil Cassation 24.7.1968 no. 2672 in *Riv. dir. comm.*, 1969, II, 181; Ferro Luzzi in *Riv. dir. comm.*, 1969, II, 181; Ferro Luzzi, in *Riv. dir. comm.*, 1969, II, 181; Grisenti, in *Riv. soc.* 1968, 598.

(9) A Shareholders' Meeting of this kind was that of Credito Italiano in Genoa, a few years ago, which aroused opposition on validation.

In cooperative companies, where the vote per head is that in line with its characteristic as a partnership, there may be a pluri-vote, as stated, in the case of proxies received from other shareholders or the shareholder is the legal representative of minor children and so on.

In this case the shareholder will exercise several votes depending on the proxies given to him, within the limits of the statutory regulations, or of those of whom he is the legal representative.

The number of votes expressed on onés own account and by proxy can be indicated with a distinctive card that shows the number of votes the elector has and is shown by raised hand.

The egalitarian vote may also be discretionarily adopted by the Shareholders' Meetings of joint stock corporations, where usually the shareholder has the right to vote in proportion to the shares held on his own account and by proxy.

A company which is a shareholder in turn can hold shares on its own account or by proxy and the vote is exercised by its representative pro tempore or by a person with a power of attorney.

The voting may also be unequal, as in the case in which it is exercised by shareholders who have met for the quantity of shares owned or represented. This vote may be expressed with the voting system by name call, where the chair will acknowledge the expression of the vote and attribute importance according to the shares held by each.

A method which is more suitable for different shareholdings is that with the use of cards which also express the amount of votes of each voter.

Voting by Directors in particular

The appointment of Directors depends on a much more articulate vote which consists of choosing the people to be elected by the Shareholders' meeting than in the case of a monothematic vote as above.

The characteristics indicated above are evident.

The vote must therefore be expressed, direct or by means of a proxy and ensure the freedom of expression for the shareholder and be homogeneous.

It is a compulsory principle that the Directors' vote, whether for, against or abstained, must be expressed and cannot be tacit or presumed.

A vote that collects only votes against and abstentions must be considered non-existent and the abstentions, whilst the shareholders present who have not voted against or have abstained are presumed « by difference » as in favour.

This is a non-existent vote because it is not expressed and is only supposed by conjecture, like every tacit or implicit manifestation.

This is what has happened at the outcome of some Meetings, with the justification of overwhelming demands of speed (10) which would justify that compulsory juridical principles were not respected.

Another requisite is that the vote must correspond to an ineliminable freedom of choice by the shareholder and therefore he must be able to erase or replace the candidates proposed with persons of his choice.

A vote that is also not homogeneous is non-existent, as in the case where the shareholders in favour are asked to express their vote in a different way with respect to those against and the abstainers, outside the logic of a vote and second vote.

The memorandum of Association may contemplate special voting systems and in the absence of this, their choice is established by the Chairman and by the Meeting, Some Memorandums of Association contemplate other systems that ensure the representation of minorities on the Board of Directors and on the Board of Auditors.

The vote can be egalitarian, as in the case in which the shareholder is asked to express a vote per capita.

This is, as mentioned, by voting with a raised hand, sitting and standing, by separation of the Shareholders in the room, by name call and by ballots in the ballot-box.

In the case indicated, the Shareholder can express several votes. only when he is acting as a proxy for others or was the legal representative of incompetent people.

In this case, a hand is raised, holding, for example a card. with the number of the votes carried.

In the electoral system. based on the vote by quantity of shares, the shareholder places in the ballot boxes the ballot papers which the shareholder has filled in with the name of the chosen people and with the quantity of electoral votes, whilst those that are used to identify the voter are placed in another ballot box.

A Memorandum of Association of a joint stock corporation which contemplated the secret vote was deemed contrary in case law to the imperative rules (11).

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(10) A vote of this kind was erroneously considered existing and valid by the Court of Varese, 1st March 1999, no.75/99, unpublished.

(11) Court of Milan 21st June 1988 in *Giur. It.*, 1989, 1,2, 12; Court of Trieste, 26th September 1985, 60; Court of Milan 27th September 1982, in *Società* 1983, 638; Court of Appeal Florence, 14th January 1965 in *Foro it.*, 1, 317. Legal literature is divided; for admissibility; GRAZIANI, *Diritto delle società*, Naples 1963, p. 311 FRÈ, *Società per azioni* in *Commentario dal codice civile*, Scialoja and Brnaca, Bologna-Rome, 1982, p. 350; GALGANO, *La Società per azioni*, Padua 1984, p. 214; whereas for inadmissibility, ROMANO PAVONI, *Le delibere delle assemblee delle società*, Milan, 1951, p. 204; SENA *Il voto nelle assemblee delle società per azioni*, Milan, 1961, p. 425.

Case law that is inspired by the principle of guaranteeing the freedom of the Shareholder to choose the Director deems null and void the votes expressed on pre-printed papers of candidates who do not attract the attention of the shareholder to his freedom of vote and do not allow one name to be erased and replaced by another or a blank space alongside the name proposed, (see note 17).

Voting by forms that contain a list of candidates who cannot be replaced, i.e. who are blocked must therefore be deemed null and void.

Some decisions have deemed valid the vote of a list of candidates (12), on condition that they respect the freedom to replace candidates by others preferred by the shareholder.

In this case, the voter can erase or make preferences, where contemplated, in the list.

Other shareholders could suggest an alternative list of candidates and in this case the Directors who receive the highest number of votes, above the quorum, would be announced the Directors.

Some Memorandums of Association have special electoral systems and guarantee a proportional representation for minorities or reserve a lower number of seats for the majority.

Directors who have failed to collect votes in favour but also votes calculated by conjecture, with deducting from the number of shareholders present those who have only voted negatively or who have abstained are generally excluded from being considered elected.

This can be the case in which the Shareholders' Meeting is only asked to express by raised hand the votes against or abstentions and not the shareholders in favour. It is fundamental to ensure the freedom of choice for the shareholder.

One thing is voting, recording the votes is something else

The shareholders vote and the Chairman of the Meeting or his Secretary (the latter in particular by his certification at the extraordinary meetings) records the votes.

Recording the votes is not expressed at the vote but in the counting of the votes (and therefore in the number of hands raised, in the raised hands, the people sitting or standing, or in different parts of the room, or votes according to the actions corresponding to the possession of who votes).

At Meetings where there are very many shareholders and where the count appears complex, scrutineers are appointed from the start of the

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(12) Court of Civil Cassation, 19th October 1990, no. 10121; Court of Appeal, L'Aquila, 24th August 1998 in *Giur. it.* 1999, 1252 and in *Rassegna* 1999 p. 252; Court of Appeal, Bologna, 4th May 1992 in *Giur. Comm.*, 1993, II, 621; Court of Appeal, Turin, 11th February 1987 in *Giur. it.*, 1987, I, 2, 389; Court of Bari, 20th December 1988 in *Giur comm.*, 1989, II, 74.

Meeting and they are asked to collaborate with the Chairman. Recording may be electronic as that which is done with an electronic system.

The voting and recording are often confused as though they were a single phenomenon.

It is true that the vote appears with its recording by the Chair, the Secretary and, if applicable, the scrutineers, with the counting of the votes, whether by head or by shares. However, these are two distinct phenomena.

Recording the votes is often complex as when there are many cancellations and replacements.

It can last for several house, especially in the overcrowded meetings and requires several scrutineers .In the end, the votes are recorded in the Minutes of the Meeting, which shows the number of votes each candidate received.

It was correctly taught in the past that « the fact that the resolutions must be recorded in Minutes signed by the Chairman and the Secretary or notary must be understood as having fixed the need for the written form *ad substantium* » (Court of Civil Cassation, 26th June 1956, no. 2286, in Dir. fall. 1956, II, p. 699).

The two steps of recording and taking the minutes can be fixed autonomously. The minutes are analytic or synthetic.

The minutes of an Ordinary Meeting are considered synthetic, even when a Secretary-Notary draws them up, because it is a para-notarial deed and not a public deed.

In this case the Secretary attests – as we have said – only the declarations of the Chairman of the wishes of the Meeting through his words, but not the consistency of the Minutes with the facts expressed.

The Minutes of the Extraordinary Meeting are different, which must meet the requisites of notarial law under penalty of nullity.

To have the efficacy of a public deed, it must be immune from those defects which would render it null and void because, in this case, the Minutes could not attest the events and even be an action for fraud.

A vote that is not recorded and not recorded in the minutes gives rise of a proceeding of non-existent appointment, on the juridical level (Court of Civil Cassation, 28th November 1981, no. 6340).

The attachments, required by the Italian Securities' Commission, which have the names of those who have voted against or abstained, also make up part of the Minutes, in order to prove the legitimization of those who are interested in impugnment.

The list of votes in favour is not required because the problem is not raised of their legitimization to impugn the resolution.

The proclamation of the result

This is the task of the person chairing the Meeting and the Secretary who together draw up the Minutes with the proclamation; if there are scru-

tineers, they also sign the Minutes, although this is not necessary under penalty of non-existence of the resolutions.

The proclamation is not just the communication of the numerical result of the votes form against or abstentions, but consists of the solemn declaration of the person chairing the Meeting, that the potion has been approved or defeated according to the count of the votes in favour or against, made by the Chair and recorded in the Minutes.

In the case of the appointment of the Directors, those who have been elected are announced and often the first of the non-elected in the event that they have to succeed those who have been announced as elected if someone steps down from the position or is declared barred from the office. Usually the quorum necessary and the votes won by each are also announced.

Failure to announce the result and the election gives rise to the non-existence of the appointment.

5. – *The invalidities of the Meetings and resolutions*. – There are three types of invalidities: the most radical is non-existence, followed by nullity and lastly by annullability (13).

There is invalidity when the Meeting and the resolutions are not taken in conformity with the law and the Deed of Incorporation, as article 2377, section 2, Civil Code states.

A) There is *non-existence* when the procedure of forming the resolution is not followed or is interrupted due to an intervening positive or negative factor which prevents its materialization, depending on the aim.

An authoritative source has specified that there is non-existence when the procedural model fact situation does not have the essential requisites for the formation of a resolution attributable to the company, with the result of determining an apparent model fact situation which is not admissible in the juridical category of resolutions of Shareholders' Meetings, due to structural or functional inadequacy with respect to the normative model.

Amongst the various cases, it is constant case law that « the company resolution is non-existent » (14) when: *a*) there is no convocation of the Meeting: *b*) there is no vote; *c*) the majority required by the law has not been reached; *d*) the votes have not been recorded and no minutes taken (Court of Civil Cassation 24th January 1995, no. 835 cit.). *c*) the result is not announced.

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(13) BIGIAVI in *Riv. dir. civ.*, 1956, 1023.

(14) Court of Civil Cassation, 28th November 1981, no. 6340, Court of Milan 14th November 1977 in *Rep. Giust, Civ.*, 1979, II, p. 3397; Court of Milan 9th October 1975 in *Giur. comm*, 1976, II, o. 521 amongst the many.

A resolution that has been adopted and in which persons without the right of vote participated has also been deemed non-existent (15).

When there is no majority required by the law for there to be a vote has also been deemed non-existent (16).

B) On the other hand, there is nullity when there is the infringement of a rule inspired by the protection of the general interest and not of the individual shareholder who is the holder of the right of impugnment (17).

This is the case of a resolution adopted by a non-plenary Meeting which has been called and has been held with an infringement of the rules of law (18). Nullity is of two types, i.e. usual that is, prescriptible and which can be validated or at least which can be converted and exceptional, under art. 2379 Civil Code which is such « due to impossibility or illicitness of the object », i.e. not prescriptible and for which validation is not admissible.

It is not infrequent in legal literature in particular to reduce nullity to the latter conjecture, whilst the one that the rule under examination considers prescriptible and eligible for validation is generalized with effects that are identical to those of annullability.

This opinion – as I see it – is inexact, because the *genus* of nullity cannot be reduced to the *species* of nullity due to impossibility and illicitness of the object and the normal one merge with annullability.

This last hypothesis occurs when the overall result is debatable, because, for example, votes which are decisive for the overall result have been considered valid or null.

The resolution of the Meeting has been considered null and void when, although acknowledging the existence of votes against, the names of those in disagreement are not shown for the purposes of the faculty of impugnment (19).

The non-plenary Meeting that has been called or is held with infringement of the rules of law or of the memorandum of Association is also null and void (20).

C) All the resolutions that are not non-existent or null and void are annullable.

The hypotheses of annullability considered by case law are highly varied and do not appear to have a unifying criterion.

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(15) Court of Cassation, 8th November 1974, no. 3491 in *Giur. comm*, 1975, II, 305.

(16) Court of Civil Cassation, 24th January 1995, no. 835; Court of Civil Cassation 14th January 1993, no. 3403; Court of Milan, 23rd May 1993 in *Giur it.*, 1996, 808; Court of Civil Cassation, 4th March 1963, no. 511, in *Dir. Fall.*, 1963, II, 255, in *Giur. it.*, 1963, I, 1, 576.

(17) Court of Civil Cassation, 4th January 1996, no. 45 in *Dir. fall.*, 1966, II, 226.

(18) Court of Civil Cassation, 9th November 1974, no. 3421 in *Giur. comm*., 1975, II, 305,

(19) Court of Appeal, Milan, 24th September 1967, in Giur. it., 1968, I, 2, 236.

(20) Court of Milan, 3rd September 1990, in *Riv. Notar.*, 1991, II, 499.

For example, it has been decided that in general « defects relative to the formation of the Meeting as they protect the interests of the Shareholders and not of the company » entail annullability (21).

A Meeting called by only one Director if not by the Board of Directors and in general with an irregular convocation is annullable (22).

So is « a resolution of a Meeting that has been adopted on an object with is not indicated in the notice of call ».

A resolution taken by all the shareholders meeting in a venue other than that shown on the notice of call, although the Board of Auditors in absent, is also annullable (23).

« Defects relative to the formation of the Meeting as they protect the interests of the Sharheolders and not of the company » also entail annullability.

Also by this author on the same subject:

– « *Alcune osservazioni sulle linee del progetto Pajardi di riforma dell'amministrazione controllata e del concordato preventive* » in Problemi attuali e prospettive di riforma del processo civile, p. 435.

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(21) Court of Genoa, 22nd October 18987 in *Società* 1988, 392.

(22) Court of Milan, 3rd September 1990 in *Riv. notar*,. 1991, II, 499, Court of Appeal, Milan, 24th September 1967 in *Giur. it*, 1968, I, 2, 236; Court of Appeal Milan, 22nd October 1987 in *Società* 1988. 39: Court of Civil Cassation, 13th March 1975, no. 938 in *Giur. comm*. 1976, II, 14.

(23) Court of Civil Cassation 2nd August 1977, no. 3422; Court of Civil Cassation, 11th March 1977, no. 989, Court of Milan, 27th January 1986, in *Dir. Fall*. 1986, 623.