

# THE NATURE OF THE “CORPORATE RELATION” BETWEEN ITALIAN JOINT STOCK COMPANIES AND THEIR DIRECTORS

**ABSTRACT:** *For the last twenty years, Italian joint stock companies’ directors have been generally qualified as quasi-employed fiduciaries, whose management position stemmed from, and could be formalized in, a bilateral contractual relation with the company. With their decision no. 1545/2017, the United Chambers of the Supreme Court of Cassation definitively overturned this qualification and clarified that the directors’ attitude to manage the company directly originates from the shareholders’ meeting appointment resolution, since the directors are associated to the company by means of a “corporate relation” and not as part of a different centre of interests.*

CONTENT: 1. Introduction. – 2. The contractualistic theory. – 3. The organic theory.  
4. The outcome of the decision. – 5. The scenario after the decision.

## **1. Introduction**

With their decision no. 1545/2017, the United Chambers of the Supreme Court of Cassation overturned their twenty-year settled case-law approach to the issue concerning the qualification of the existing relation between Italian joint stock companies and their directors.

The legal nature of such relation has been broadly discussed for a long time by scholars and courts and this decision – though, as will be discussed later, it still leaves

---

\* Law school graduate; Assistant in the course of Commercial Law II, Roma Tre University.

some uncertainties – represents an important opportunity to the progress of such debate.<sup>1</sup> The opportunity to address the issue was provided to the United Chambers of the Supreme Court of Cassation by a referral (*ordinanza di rimessione*)<sup>2</sup> identifying the problem of whether the limit set forth in Article 545, paragraph 4, Italian Civil Procedure Code, should also apply to joint stock companies' directors. In a nutshell, this latter provision, providing that the salary of a debtor is attachable within the limit of 1/5 of its amount, is widely considered applicable only to the remuneration accrued in connection with an employment (*rapporto di lavoro subordinato*) or quasi-employment relation (*rapporto di lavoro parasubordinato e assimilati*).<sup>3</sup>

Therefore, since in the case in question the attachable amount originated from the office of director of an Italian joint stock company, the Supreme Court had to preliminarily identify the nature of such relation to properly address the merit and rule on the case.<sup>4</sup>

In light of the above-mentioned scenario, the Court took the opportunity to reconstruct the debate on the nature of such relation by examining the two different doctrines on the point: the contractualistic theory and the organic theory.

## 2. The contractualistic theory

From a strictly private law standpoint, the contractualistic theory identifies directors and the company as two different, autonomous (and often also opposing) parties of a fully effective contractual agreement.<sup>5</sup>

Following this approach, it may be easily appreciated how the directorship position could not be regulated ab origine by the law or the articles of association nor anywhere else if not in an agreement entered into by and between directors and the

---

1 The United Chambers of the Supreme Court of Cassation addressed the issue last time in 1994 with the judgment no. 10680/1994 (Corte di Cassazione, Sezioni Unite, 14 December 1994, no. 10680, in *Foro Italiano*, V, 1995, p. 1485), which qualified the directorship position as a quasi-employment relation. To reach such conclusion, the Supreme Court considered the management activity carried out by directors as continuous, coordinated and personal. The same Court deemed also the partial entrepreneurial component of the management activity as well as the possible inexistence of a position of contractual weakness of the directors *vis-à-vis* the company not relevant.

2 Referral no. 3738 dated 4 December 2015.

3 On the contrary, Art. 545, paragraph 4, Italian Civil Procedure Code, is not considered applicable to independent working relations such as self-employment or other different autonomous relations (including those arising from corporate relations).

4 Consequently, had the Court decided for the qualification of the office of director as an employment or quasi-employment relation, the limit of 1/5 set forth in Art. 545, paragraph 4, Italian Civil Procedure Code, would have applied. Alternatively, had the Court differently qualified the relation, the salary would have been attachable in the overall amount.

5 Cf. G. MINERVINI, *Gli amministratori di società per azioni*, Milano, 1956, p. 70; G. COTTINO, *Diritto commerciale*, I, Padova, 1999, p. 404; P. SPADA, *Preposizione e assunzione dell'amministratore di società per azioni*, in C. AMATUCCI, *La remunerazione degli amministratori nelle società di capitali*, Milano, 2010, p. 60.

company at the same time of the appointment resolution.<sup>6</sup> The contractualistic theory faces some complications from a legal standpoint while being well supported on the factual/practical level.

Firstly, the entire directorship position and the exercise of the office of director are indeed regulated by law and, for the purposes of being appointed as director, the appointment resolution of the shareholders' meeting is *per se* self-sufficient (therefore not requiring an additional agreement to be validly carried out).<sup>7</sup> In addition, the entire exercise of the office of director is also regulated by the law and, in principle, does not need any integration from different sources of regulation. On the other hand, the practice of entering into management agreements to contractually regulate the fiduciary position of directors is well settled and no one has ever doubted (at least until this decision) its legitimacy.

Another important implication of embracing the contractualistic theory also comes from a labour law perspective: if the relation between directors and company is regulated in an agreement, what is the type of contract that connects their positions? In this regard, the early supporters of the contractualistic theory originally affirmed that the director's position was characterized either by an employment component or by an autonomous worker component.<sup>8</sup>

However, such an approach was strongly criticized and those who agreed with the contractualistic theory developed two doctrines regarding the type of contract governing the company/directors relation.<sup>9</sup>

The first doctrine identifies the contractual relation between directors and the company in an employment relation on the grounds that directors are subordinated to shareholders, who have the power to appoint and revoke them, and on the basis of

---

6 Under Italian Law, a contract is an agreement of two or more parties to establish, regulate or extinguish a patrimonial legal relation among themselves. Of course, it is not required that such contractual agreement materially exists, being the theory aimed at using the notion of agreement to indicate two contraposed centres of interests.

7 Pursuant to Art. 2383, paragraph 1, Italian Civil Code, the appointment of directors takes place at the shareholders' meeting except for the first directors, who are appointed in the articles of association. For the sake of completeness, it should be noted that some exceptions apply (see Arts. 2351, 2449 and 2450, Italian Civil Code).

8 Cf. G. MINERVINI, *Gli amministratori di società per azioni*, Milano, 1956, p. 71; P.G. JAEGER - F. DENOZZA, *Appunti di diritto commerciale*, Milano, 2000, p. 341.

9 Cf. P. CECCHI, *Gli amministratori di società di capitali*, Milano, 1999, p. 13.

---

directors’ fiduciary duties toward the company.<sup>10</sup> The second doctrine – based on the vast autonomy and independence of the director’s position<sup>11</sup> (as well as on the fact that fiduciary duties would not be strong enough to assess a subordination of the director so as to qualify him as an employee<sup>12</sup>) – identifies the contractual relation between directors and the company in an autonomous relation.<sup>13</sup>

However, after these doctrinal discussion and case law evolution, courts – until this decision – shared the first doctrine and acknowledged the director position as a quasi-employment contractual relation.<sup>14</sup>

### 3. *The organic theory*

If the contractualistic theory emphasizes a dualistic dimension in the relation between directors and the company, the organic theory firmly denies such dualism.

Pursuant to this theory, because the company identified is in and represented by, the directors, they would constitute a part of the same entity with the consequence that the internal prerogatives of directors and their company couldn’t be regulated since their positions are reflected in a sole centre of interests. Consequently, the power to manage the company would arise directly from the article of incorporation (*contratto di società*) entered into by and between the founding shareholders. Directors’ appointment would then represent a way for the company itself to pursue its corporate purpose.<sup>15</sup>

Therefore, the appointment of directors and their consequent acceptance of

---

10 V. PETINO, *Rapporto di amministrazione e rapporto di lavoro subordinato*, Milano, 1968, p. 215.

11 Cf. F. FERRARA JR. - F. CORSI, *Gli imprenditori e le società*, Milano, 1987, p. 504. See also G. MACRÌ, *A proposito del rapporto amministratori-società: la c.d. parasubordinazione*, in *Le Società*, 5, 1995, p. 635; Cf. F. GALGANO, *Le nuove società di capitali e cooperative*, in *Trattato di diritto commerciale e di diritto pubblico dell’economia*, Padova, 2004, p. 259.

12 Cf. P. CECCHI, *Gli amministratori di società di capitali*, 1999, p. 13.

13 This scheme is supported on the basis of the doctrine of the Supreme Court of Cassation which – incidentally – affirmed the autonomous nature. See in particular Corte di Cassazione, 26 February 2002, no. 2861, in *Foro Italiano*, I, 2003, p. 273; Corte di Cassazione, 1 April 2009, no. 7961, Giust. civ., I, 2009, p. 1242; Corte di Cassazione, 13 November 2012, no. 19714, in *Foro italiano – Repertorio*, item “Società” no. 540.

14 See United Chambers of the Supreme Court of Cassation decision no. 10680/1994, which clarified that in the director’s position the elements of continuity, personality, and coordination that identify the quasi-employment relations referred to in Article 409, no. 3 Italian Civil Procedure Code, may be found.

15 The notion of the company agreement (*contratto di società*) is provided in Art. 2247 Italian Civil Code which evokes the concept of association contract by qualifying it as an association between two or more persons to contribute property or services for the exercise in common of an economic activity for the purposes of sharing the profits thereof.

the position would not constitute a specific contractual agreement but it would rather represent an act designating corporate body (i.e., the shareholders' meeting),<sup>16</sup> making the directorship position a unique legal position under Italian law.<sup>17</sup> Within this deeply divided framework, the case law that shared the organic approach motivated it also based on the assumption that the acts performed by the directors represent acts of the company and not acts performed on behalf of the company.<sup>18</sup>

#### **4. The outcome of the decision**

After having scrutinized in depth the doctrinal and jurisprudential doctrines formed on the issue, the Supreme Court, overruling its previous position,<sup>19</sup> embraced the organic theory. In particular, in view of the organic identification that transpires between the natural person (i.e., the director) and the entity for which such person serves (i.e., the company), the Court firstly clarified that the directorship position is neither an employment relation nor a quasi-employment relation.

Afterwards, the Supreme Court noted that, while the contractualistic theory surely permits considering the relation as quasi-employment, such an approach – especially after the 2003 company law reform – would be inconsistent with the legal framework governing the directorship position, because the directors are not subject to the coordination of the shareholders' meeting.<sup>20</sup> In the reasoning of the Court, indeed, directors and the company form a sole and undistinguishable position in which the directors represent the real hegemonic part.<sup>21</sup> Therefore, the Supreme Court embraced the organic theory and concluded that the sole director or a member of the board of

---

16 Cf. F. GALGANO, *Le nuove società di capitali e cooperative*, in *Trattato di diritto commerciale e di diritto pubblico dell'economia*, Padova, 2004, p. 260.

17 Cf. G.F. CAMPOBASSO, *Diritto Commerciale, Diritto delle società*, Torino, 2009, p. 360.

18 Cf. Corte di Cassazione, 21 May 1991, no. 5723, in *Giurisprudenza Italiana*, I, 1992, p. 1344.

19 See note 1 *supra*.

20 Accordingly, the Court expressly excluded the application of the coordination requirement – which characterizes the quasi-employment relations and consists in an a priori determination of the modalities in which the activity shall be carried out – to companies' directors.

21 The Supreme Court recalled that directors are in a position of supremacy, as the management of the company pertains exclusively to them, having the power needed for reaching the corporate purpose (Art. 2380 *bis* Italian Civil Code) and since the power of representation is granted to the directors general (Art. 2384, paragraph 1, Italian Civil Code).

---

directors of an Italian joint stock company are connected to the company by a “corporate relation”, which makes the directors an integral part of the same centre of interest (i.e., the company itself) and which permits the company, through the directors acting in the name thereof, to act and to pursue the corporate purpose<sup>22</sup>.

### ***5. The scenario after the decision***

It is essential to note that it is a well-settled practice for joint stock companies to enter into management agreements with their directors for the purpose of regulating therein some aspects of the directorship position (such as remuneration, non-compete, confidentiality, golden parachutes, termination clauses, etc.).

If the newly asserted corporate relation between directors and company is clear, it may be easily appreciated how, immediately after the United Chambers of the Supreme Court of Cassation decision, scholars raised their concerns and started to question the validity of management agreements under Italian law. Indeed, it has been asked whether – notwithstanding the fact that directors are appointed and remain appointable only by means of the shareholders’ meeting resolution – it would still be possible for companies to integrate such a resolution with ancillary provisions set forth in a management agreement.<sup>23</sup>

Moreover, since the decision juxtaposed two theories and ultimately embraced the organic one, it has been also asked what effect such judgment could provoke on the practice to enter into management agreements and whether those in force should be considered invalid or void.<sup>24</sup>

Under this scenario, some commentators have clarified that – notwithstanding the decision – the management agreements should be, in any case, considered legitima-

---

22 As a consequence of this approach, the Supreme Court ruled for the possibility to attach the director’s salary without the limitation of 1/5.

23 Cf. F. TOFFOLETTO, *L’amministratore di società non è un parasubordinato*, in *Quotidiano del Lavoro – Il Sole 24 Ore*, 9 February 2017; G. FALASCA, *Amministratori, non c’è spazio per il “contratto”*, in *Quotidiano del Lavoro – Il Sole 24 Ore*, 28 February 2017; O. PATANÈ, *La natura del rapporto tra amministratore e società*, in *Guida al Lavoro*, 10, 2017, p. 14.

24 Cf. S. CARRÀ, *La natura (ancora contrattuale) del rapporto di amministrazione dopo la pronuncia delle Sezioni Unite della Suprema Corte di Cassazione* (Cass., Sez. Un., no. 1545/2017), in *Argomenti di Diritto del Lavoro*, 3, 2017, p. 672.

---

te and completely consistent with the outcome of the decision,<sup>25</sup> since the affirmation of the organic theory is neither an element in favour nor contrary to the management agreement practice.<sup>26</sup> In particular, the main point in favour of the validity of management agreements would be represented by non-compete clauses: since a non-compete will be effective only once the directorship position has ceased and, therefore, it couldn't be regulated in the appointment resolution, entering into an external agreement (i.e., the management agreement) would constitute the only way to bind a director to a non-compete obligation.<sup>27</sup>

On the contrary, it has been noted that – after the decision – with regard to contractual aspects like compensation and termination, the issue becomes crucial, being indisputable that the remuneration (both fixed and variable) and the *ex-ante* causes of termination may be well regulated in the appointment resolution. Under this standpoint, management agreements would then be rendered impractical and worthless, since these are, in any case, unable to replace the appointment resolution<sup>28</sup> and now definitely in contrast with the Supreme Court approach: if directors and the company are a sole part, and therefore coincide, it would not be possible for the company to enter into an agreement with itself (*rectius*, with the directors acting on behalf of the company).<sup>29</sup>

In conclusion, for the time being, there is an uncertain situation regarding the effects and consequences of the “corporate relation” approach affirmed by the United Chambers of the Supreme Court of Cassation.

25 Cf. S. CARRÀ, *La natura (ancora contrattuale) del rapporto di amministrazione dopo la pronuncia delle Sezioni Unite della Suprema Corte di Cassazione* (Cass., Sez. Un., n. 1545/2017), in *Argomenti di Diritto del Lavoro*, 3, 2017, p. 672 at 693. The same author also notes that – in any case – because Italy has a civil Law system, management agreements in force couldn't be considered invalid or void only by reason of the new qualification affirmed by the United Chambers of the Supreme Court of Cassation.

26 Cf. S. CARRÀ, *La natura (ancora contrattuale) del rapporto di amministrazione dopo la pronuncia delle Sezioni Unite della Suprema Corte di Cassazione* (Cass., Sez. Un., n. 1545/2017), in *Argomenti di Diritto del Lavoro*, 3, 2017, p. 672 at 693.

27 Cf. M. TECCHIA – S. TOZZOLI, *Il “nodo gordiano” della natura contrattuale ovvero organica del rapporto tra società di capitali ed amministratore: un dilemma (apparentemente) risolto dalle Sezioni Unite*, in *Diritto delle Relazioni Industriali*, 4, 2017, p. 1167.

28 Cf. O. PATANÈ, *La natura del rapporto tra amministratore e società*, *La natura del rapporto tra amministratore e società*, in *Guida al Lavoro*, 10, 2017, p. 14 at 16.

29 Cf. M. TECCHIA – S. TOZZOLI, *Il “nodo gordiano” della natura contrattuale ovvero organica del rapporto tra società di capitali ed amministratore: un dilemma (apparentemente) risolto dalle Sezioni Unite*, in *Diritto delle Relazioni Industriali*, 4, 2017, p. 1167. However, in light of the new approach by the Supreme Court, this logical obstacle could be overcome by making directors enter into the management agreement with the majority or controlling shareholder (instead of with the company) and then making the shareholders' meeting or the board of directors (depending on the case) resolve to “absorb” such agreement, therefore making it part of the “corporate relation”.

At such an early stage, it is too soon to draw any far-reaching conclusions. Nevertheless, the decision is likely to affect, in one way or another, the practice of entering into management agreements it remains to be seen how companies and directors will react to the Supreme Court’s approach.<sup>30</sup>

---

<sup>30</sup> However, in the final part of the decision, the Supreme Court clarified that the director’s position may co-exist with another executive position (which, in that case, may be formalized in a contractual agreement) as long as the competences attributable to each position remain different and do not overlap.