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THE BUSINESS JUDGMENT RULE: a safe harbor for the directors against the liabilities in the U.S. System, but in Italy?

SUBHEADING: 1. A brief overview of the two systems. – 2. The business judgment rule in the U.S. – 3. The business judgment rule in Italy – 4. Conclusion

1. A brief overview of the two systems.

As far as the "piercing into the veil" theory is concerned, the "business judgment rule" has been theorized by U.S. Federal and State Courts and has been acknowledged by our Courts.

However, as usually it happens when a juridical system copies another one, the results are not so perfect especially if the two systems are so different as the Italian and the U.S. ones are.

By comparing Italian corporate law and U.S. corporate law it is evident that in the above mentioned two systems the directors are entrusted with a different role.

In Italy, also after the 2003 corporate law reform (hereafter only the 2003 reform), the director's tasks might be divided in three big areas:

1. Executive tasks: directors have the powers to do everything necessary to reach the corporation's goal[1];
2. Propulsive tasks: it is up to directors to call the shareholder meeting;
3. Tasks as a mere executor: directors must carry out the resolutions taken by the shareholder meeting.

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[1] Art. 2380 *bis* Italian Civil Code, I paragraph: "*The corporation management is exclusively up to the directors, who perform the necessary actions to fulfil the corporation goals.*"

Consequently, after the 2003 reform directors have a huge decisional power[2] and the day-to-day management is up to them.

On the contrary, in the U.S. system the day-to-day management is not included in the director tasks because such duty is up to the officers.

However, it is not completely true that American directors are not involved in the day-to-day management of the corporation.

In fact, directors must identify the strategic planning process[3], appoint the officers, who are the material executors of the directors' strategic plan, supervise the officers' activities by directing and giving them their assistance and, above all, directors must ensure that shareholders can exercise their statutory rights and the corporation is in compliance with federal, state statutes[4].

Given the above, it seems correct to affirm that for American directors there are two huge areas of tasks[5]:

1. Strategic tasks: as specified above, directors must plan the corporation's strategy, implement it, should it be necessary, and verify that such strategy is carried out;
2. Control tasks: directors appoint the material executors of the strategic plan. Please consider that the director duties are not confined to appointing the officers, but they must oversee them in order to verify that their actions are correct and remove the officers, if they do not act in compliance with the interests of the corporation.

It seems also very important to stress out that, although the directors appoint the material executors of the business operation and the day-to-day management (that is to say the officers), however the directors are not allowed to delegate all their powers and responsibilities to the officers because they have the final authority[6].

[2]F. GALGANO, *Diritto commerciale – L'imprenditore – Le società*, Bologna, 2011, 298.

[3]Also the Italian directors have a similar duty. Art. 2381, III paragraph, Italian Civil Code: "*omissis*. O*n basis of the received information they* (that is to say the board of directors) *weight whether the organizational, administrative and accountant structure of the corporation is adequate; if planned, they analyze the strategic, industrial and financial plans of the corporation; they weight , on basis of the reports of the managing directors, the general trend of the management*."

[4] F. TROY, *Basic Principles*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007,10.

[5]Some authors (see F. TROY, *Basic Principles*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007, 10 and W. M. MCKENZIE jr, *Advising the board*, *Counseling California Corporations*, Vol. I, 200,) state that the areas of the director's duties are three: strategic tasks, selecting management task and overseeing management task. However, because the appointment of the officers does not discharge directors from the duty of overseeing the appointed officers, but it is such appointment to compel the directors to control the officers, it seems opportune to deem as one area the last two general categories of duties.

[6]See *Smith v Van Gorkom* (Del. 1985), 488, A2d, 858. In this case the directors were found liable because they relied on the CEO for identifying the sale price of the corporation without controlling carefully the CEO conduct.

Also the qualification of the relationship among directors and the company is different in the two systems.

After the 2003 reform and the amendments made to the rules governing the relationship among directors and shareholders and the directors' liabilities, the majority of the scholars agrees upon that the relationship between directors and the corporation is a special one which cannot be compared with the "*mandato*" agreement.

In particular, the scholars[7] agree that the powers of directors must be deemed as original and inalienable because these powers arise from the corporation agreement and are linked with the position taken by directors.

It can be said that the 2003 reform tries reflecting the economic situation and the separation of the ownership from the control of the corporation: a separation which recently happens in Italy where usually the ownership and the control of a corporation is up to the members of the same families.

Eventually the director becomes a high skilful professional person.

In the U.S. where the relationship between the owner of the corporation and the director does not use to be very strong and the separation between the ownership and the control of the corporation is clear, case law prefer to qualify directors as fiduciaries[8] and not as trustees[9].

Although case law reach the conclusion that the director is a "*fiduciary*" because he/she manages a corporation whose he/she is not the owner, however case law and the scholars point out that the director owes his/her fiduciary duty to the corporation [10], as the sum of the shareholders[11].

Consequently, the director must safeguard and promote the interests and the rights of the corporation and performs his/her task without preferring the interests of the controlling shareholders or damaging the interest of the

[7] F. GALGANO, *Diritto commerciale – L'imprenditore – Le società*, Bologna, 2011, 324; L. NAZZICONE, *Commento all'art. 2380 c.c.*, in AA. VV., *La riforma del diritto societario*, a cura di G. LO CASCIO, Milano, 2003, 8 e ss.

[8] *Pepper v Litton* (1939) 308 US 295, 306, 84 L Ed 281, 289, 60 S Ct 238.

[9] *Guth v Loft, Inc.* (Del Ch 1939) 5 A2d 503, 510; *Cohen v Beneficila Indus. Loan Corp.* (1949) 337 US 541, 549, 93 L Ed 1528, 1538, 69 S Ct 1221.

[10] J. F. TROY, *Basic Principles*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007, 15; G. V. VARALLO, A. DREISBACH, B. ROHRBACHER, *Fundamentals of Corporate governance, A guide for directors and Corporate counsel*, 2nd Ed., 2; W.G. KNEPPER and D.A. BALEY, *Liability of Corporate officers and directors*, 8th ed., Vol. I, 2010, 26 e ss..

[11] Under this issue the U.S. system is close to the "Istitutionalist theory". Under such theory, widely spread in Germany, the corporation's interest is an interest which goes beyond of the sum of the shareholders interests and corresponds to the interest that the corporation is efficient and well organized.

minority: on basis of his/her qualification of fiduciary, the powers of the director are limited and he/she always must act in good faith[12].

Clarified the different position and role of the directors in the two legal systems, we may analyze which the business judgment rule consists in the U.S. system and see whether the Italian Courts have restricted themselves to apply the same principle or, going beyond, have fitted it on the Italian system.

2. The business judgment rule in the U.S.

The business judgment rule is one of the most important safe harbor for the directors against liabilities and is the answer given by the American system (and in particular by Delaware system) to a practical question: whether the directors are always liable for wrong economic decisions or sometime and in presence of particular behavior such liability can be excluded[13].

In fact, the directors must manage the corporations and consequently they must take, every day, a lot of decisions which can influence the corporation business and may cause damages.

Sometime the decision, which appears as the best solution for the corporation business, turned out to be wrong at the end.

If the directors are always found liable in case of wrong economic decisions, it should be very difficult to find persons who are available to serve as director or it should be likely that the directors reduce the number of acceptable risks to be taken on behalf of the corporation (with evidence prejudice for the corporation itself because sometime the risky solutions bring huge positive effects).

In order to avoid that the directors' behavior is influenced by fear with prejudice for the corporation, American Courts created the judicial presumption named "business judgment rule".

But what is the business judgment rule?

[12]F. TROY, *Basic Principles*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007, 15; W.G. KNEPPER and D.A. BALEY, *Liability of Corporate officers and directors*, 8th ed., Vol. I, 2010, 26 e ss.

[13] The business judgement rule is applicable in all the states of the U.S., but the rule has been theorized by the Delaware courts, which have described it in details.

First of all, it is important to stress out that the business judgment rule is a concept derived from case law[14] and in particular from Delaware case law[15].

However, although the rule is created by case law, it is possible to find some codification of such rule, for example the codification made by the American Law Institute in their Principles of the Corporate Governance: Analysis and Recommendations, Section 4.01 c, which summarizes the principle elaborated by case law: "*A director or officer who makes a good faith business judgment fulfills the duty (of care) if the director or officer: (a) is not interested in the subject of the business judgment; (b) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under circumstances; and (c) rationally believes that the business judgment is in the best interest of the corporation.*"

So, under the business judgment rule the Court does not find liable the directors for the damages caused to the corporation by their business resolution if such business resolution has been taken in good faith and the directors have acted on a sufficiently informed basis and "*in the honest belief that the decision was in the corporation's best interests*"[16].

Consequently it is not enough that the directors fulfilled their statute duties in order that the Court applies the business judgment rule, but it is necessary that there are the three further requirements identified by Delaware case law[17]:

- not to be interested in the decision and to act in good faith;
- to act on informed basis;
- to believe that the decision is in the best interests of the corporation.

[14]W.J. FEIS, R.E. BENEFIELD, *Duty of Care and Business Judgment Rule*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007, 88. The authors clarified that although one of the California case law had pretended that California Corporate Code § 309 (a) codifies such rule, it is not true. In fact the mentioned article sets forth only the duties that a director must comply with, but the fulfillment of such duties is not enough to invoke the shield of the business judgment rule.

[15]See: *In re Abbott Labs. Shareholders Derivative Litig.* (7th Cir 2003) 325 F3d 795; *In re Walt Disney Co. Derivative Litig.* (Del Ch 2003) 825 A2d 275; *In re Walt Disney Co. Derivative Litig.* (Del Ch 2005) 907 A2d 693, 751, *aff'd Brehm v Eisner (In re Walt Disney Co. Derivative Litig.)* (Del 2006) 906 A2d 27; *Aronson v Lewis* (Del 1984) 473 A2d 805, 812; *Brehm v Eisner* (Del 2000) 746 A2d 244, 254; *Moran v Household Int'l, Inc.* (Del Ch 1985) 490 A2d 1059, aff'd (Del 1985) 500 A2d 1346; *Rosenblatt v Getty Oil Co.* (Del 1985) 493 A2d 929, 943; *Smith v Van Gorkom* (Del 1985) 488 A2d 858; *Polk v Good* (Del 1986) 507 A2d 531, 537; *Gimbel v Signal Cos.* (Del Ch 1974) 316 A2d 599, aff'd (Del 1974) 316 A2d 619.

[16] W.J. FEIS, R.E. BENEFIELD, *Duty of Care and Business Judgment Rule*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007, 87.

[17] As specified above in the U.S. system the business judgement rule is not codified. However, for example in California, there were some efforts to amend the Corporate Code in order to introduce some sections pertaining to the business judgment rule.

Please consider that in some case law a further element has been required: the decision must be rational[18].

Given the above requirements, to invoke the safe harbor of the business judgment rule, first of all the directors must act.

Usually Courts do not apply the business judgment rule in case in which the directors delegate their powers or refrain from acting[19].

In one of the most famous case law relating to the business judgment rule[20] the shareholders plaintiff argued that the directors could not invoke the shield of the business judgment rule because the board did not take any business decisions and did not comply with their duty of care in connection with the hiring and termination of Michael Ovitz as Disney's President.

In particular the shareholders pointed out that the board did not discuss neither analyze the terms and conditions of the employment agreement, which granted Mr Ovitz stock options and no-fault termination provisions (on basis of these clauses Mr. Ovitz was entitled to obtain from the corporation more than $ 38 million after one year service).

The Delaware Court of Chancery granted the observations of the plaintiffs and did not apply the business judgment rule.

However, in *In re Walt Disney Co. Derivative Litig. (Del Ch 2005) 907 A2d 693, 760, aff'd Brehm v Eisner (In re Walt Disney Co. Derivative Litig.) (Del 2006) 906 A2d 27* the Court reached another solution pertaining to the same case and decided to apply the business judgment rule[21].

Moreover, the directors do not have an interest connected to the decision, but they must act in good faith in order to protect and fulfill the interests and rights of the corporation.

So, a director who has an interest cannot invoke the business judgment rule unless he obtains the approval of the majority of the directors without an interest in the decision[22].

[18] *Gimbel v Signal Cos.* (Del Ch 1974) 316 A2d 599, aff'd (Del 1974) 316 A2d 619

[19] *Rosenblatt v Getty Oil Co.* (Del 1985) 493 A2d 929, 943; *Aronson v Lewis* (*Del* 1984) 473 A2d 805, 813. However in *Brehm v Eisner* (Del 2000) 746 A2d 244, 254 the Court pointed out that the conscious decision not to act could be a good exercise of the business judgment rule.

[20] *In re Walt Disney Co. Derivative Litig.* (Del. Ch 2003) 825 A2d 275.

[21] To read the analysis of two cases see W.J. FEIS, R.E. BENEFIELD, *Duty of Care and Business Judgment Rule*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007, 93.

[22] See *Polk v Goud* (Del 1986) 507 A2nd 531, 537.

The shield of the business judgment rule is not applied also when the director authorizes decisions not in compliance with the statute of the corporation.

The directors must also act on an informed basis: they have to investigate in details and collect all the necessary opinions from experts especially in case they have some doubts or suspects about the decision[23].

Case law is very strict in connection with this aspect because it is required that the directors collect the information with due care[24].

Relating to such requirement the ABA Committee on Corporate Laws gives some suggestions in the Corporate Director's Guidebook (5th ed. 2007).

Actually to comply with this requirement the director must at least[25]:

– read and review all the documents connected to the decision before the meeting;
– entrust experts to obtain outside fairness opinions;
– discuss in details all the issues connected to the decision during the meeting and take a minute of the meeting itself and attach to it all the documents used to reach the decision[26].

After such investigations, the directors must believe that the resolution taken is in the best interest of the corporation and is rational.

In a famous leading case the Court decided not to apply the business judgment rule because the decision was irrational[27] because the directors decided to sell a corporate subsidiary for $280 million instead of $760 million book value.

Finally it is important to clarify the difference between the business judgment rule and the business judgment doctrine[28].

[23]Please consider that in the California system, each director has a right of information and communication: he/she can inspect all the corporation books or records and ask all the documents which he/she deems necessary to perform carefully his/her duties. Moreover, the director is entitled to speak directly (and not though the board) to the corporation key employees as well as to the officers and the internal consultants of the corporation. This huge right of information lets the director ask a legal or technical expertise to an external legal counsel or technical consultant, at the corporation's expense. See F. TROY, *Basic Principles*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007, 14.

[24]See *Smith v Van Gorkom* (Del 1985) 488 A2d 858.

[25]Given the strictness of such requirement some States, for example Delaware and California, modified their statutes to cross out the personal financial liability of the directors because of breaches of the duty of care.

[26]W.J. FEIS, R.E. BENEFIELD, *Duty of Care and Business Judgment Rule*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007, 92.

[27] *Gimbel v Signal Cos.* (Del Ch 1974) 316 A2d 599, aff'd (Del 1974) 316 A2d 619. W.J. FEIS, R.E. BENEFIELD, *Duty of Care and Business Judgment Rule*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007, 93.

[28]See: *Revlon, Inc. v MacAndrews & Forbes Holding, Inc.* (Del 1986) 506 A2d 173, 180 n. 10; Hinsey, *Business Judgment and the American law Institute's Corporate Governance Project: Duty of Care*, 52 Geo Wash L Rev 609 (1984); Block, Barton & Radin, *The*

The first one is the shield which protects the directors in case in which their business decisions should turn out wrong.

The second one is a judicial presumption based on the acknowledge that the judges are "*ill-equipped and infrequently called on to evaluate what are and must be essentially business judgments.*" [29]

Usually the business judgment doctrine is used by courts to grant the decision of a board committee, independent and without an interest in the decision, which declares that the derivative action brought against directors by the shareholders has not to be carried on because it is not in the best interest of the corporation.

3. The business judgment rule in Italy.

Also in Italy the business judgment rule is not codified and Courts[30] use to apply it to avoid that the fear of being found liable prevents directors from taking risky business decisions.

How does the business judgment rule work in Italy?

First of all, to invoke such shield the directors do not have any interest in the business decision[31].

"*In fact, under art. 2391 c.c. in order that directors are liable because of taking a decision relating to a business in conflict with the corporation's interests it is enough that the business is useful for the counterpart in which the directors have interests, so you do not take into account the reasons and the management choices on basis of that the directors acted.*"[32]

Afterward, the directors must give evidence that their high risky business decisions (that might also turn out wrong) have been taken after analyzing thoroughly the situation, collecting all the necessary information and discussing very carefully all the possible solutions.

Business Judgment Rule: Fiduciary Duties of Corporate Directors, 4d 1993, 424; W.J. FEIS, R.E. BENEFIELD, *Duty of Care and Business Judgment Rule*, J. F. TROY and W. D. GOULD, *Advising and defending corporate directors and officers*, Oakland, 2007, 87.

[29]See: *Auerbach v Bennett* (1979) 419 NYS2D 920, 926, 393 NE2d 994, 1000.

[30]See: Cass. Civ., January 16 1982, n. 280, *Giur. Comm.*, 1983, I, 603; Cass. Civ., July 27 1978, n. 3768, *Giur. Comm.*, 1980, II, 904; Cass. Civ., April 28 1997, n. 3652, *Società*, 1997, 1389; Cass. Civ. August 12 2009, n. 18231, *Società*, 2009, 10, 1247; Court of Milan, May 30 1977, *RD Comm.*, 1978, II, 320; Court of Milan, March 28 1985, *Foro It.*, 1986, I, 256; Court of Milan, June 26 1989, *G Comm*, 1990, II, 122; Court of Milan, September 3 2003, *Giur. It.*, 2004, 350; Cass. Civ., March 23 2004, 5718, *Guida al Diritto*, 2004, 18, 66; Court of Milan, April 14 2004, *Giur. It.*, 2004, 1897.

[31]F. BONELLI, *Gli amministratori di S.p.A., dopo la riforma delle società*, Milano, 2004, 183.

[32]Cass. Civ. April 4 1998, n. 3483, *Società*, 1999, 1, 62: "*Infatti, dal dettato e dalla ratio dell'art. 2391 Cod. civ. emerge in modo univoco che ai fini della sussistenza della responsabilità degli amministratori per la loro partecipazione ad una delibera riguardante un'operazione in conflitto di interessi con la società è sufficiente che l'operazione presenti un'utilità per la controparte nella quale costoro abbiano interesse, sicché risultano del tutto irrilevanti le ragioni e le scelte gestionali che abbiano indotto gli stessi amministratori a compierle.*".

In one of the leading case, the Court of Milan declared[33]: "*If we accept the meta-juridical principle (the " plain principle" of " to know as rule of acting") of "before lit up and then act", it is clear that the acknowledge, the critical analysis of all the economic, financial and juridical aspects involved in the business should have given the first and essential support of the decision.*"

Actually the directors are requested to comply with the duty of care during the decision making process.

But what is the level of diligence requested to Italian directors to comply with the duty of care?

Before the 2003 reform art. 2392 Italian Civil Code established that the diligence required for the director was the same one required for the "*mandatario*".

So, under the provisions[34] governing the "*mandato*" agreement the diligence which the director should use was the diligence which a *good family father* ("*buon padre di famiglia*") should use under similar circumstances.

However the majority of the scholars[35] and case law pointed out that, given the nature of the relationship between the corporation and the directors and the necessary skills they must have to serve as directors, the diligence the director had to use was the same diligence a professional man had to use to perform his tasks.

Consequently the standard of diligence required to the director was higher than the diligence required to the "*mandatario*".

The 2003 reform codified the above mentioned theory and now art. 2392 Italian Civil Code does not refer to the "*mandatario*" diligence, but to the "*professional man*" diligence.

Such amendment is due also to the evolution of the director from a "*mandatario*" on behalf of the controlling shareholders to professional man whose powers are provided by laws.

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[33]Court of Milan, June 26 1989, *Giur. Comm.*, 1990, II, 122: "*Se è accettato il principio metagiuridico (quasi il "concetto puro" del "conoscere come formula dell'agire") del "prima fare luce e poi fare il passo" è chiaro che la conoscenza, l'apprezzamento critico di tutti i termini economici, finanziari e giuridici che definivano l'operazione avrebbero dovuto fornire il primo ed essenziale supporto della decisione negoziale assunta.*".

[34] Art. 1710 Italian Civil Code: "*Il mandatario è tenuto a eseguire il mandato con la diligenza del buon padre di famiglia* (The "*mandatario*" binds himself to fullfill his "*mandato*" with the care of the good family father) omissis.".

[35]M. GIORGIANNI, *L'inadempimento*, Milano, 1970, 337; G. COTTINO, *Diritto commerciale*, Padova, Vol. I, 547; S. RODOTA', *Diligenza* (*dir. Civ.*), in Enc. Dir., XII, Milano, 1964, 545; R. WEIGMANN, *Responsabilità e potere legittimo degli amministratori*, Torino, 1974, 143; Court of Appeal of Milano, January 21 1994, in *Società*, 1994, 923; Court of Reggio Emilia, June 12 1996, in *Dir. Fall.*, 1996, II, 718; Court of Milan, September 14 1992, in *Società*, 1993, 511.

It seems important to clarify that, although the standard of the diligence provided under art. 2392 is linked to the professional man standard, however the director cannot invoke the safe harbor provided for the professional man.

Under art. 2236 Italian Civil Code the professional man who must overcome high level problems is found liable only for gross negligence or fraud.

This safe harbor is a special limitation and given that art. 2392 does not refer it expressly, it is impossible to apply it to director by analogy[36].

Under art. 2392 Italian Civil Code the standard of diligence is flexible and depends on the director's tasks[37].

It is clear that after the 2003 reform the standard of the diligence required to the Chairman is higher than the plain director because under 2381 Italian Civil Code the Chairman has special duties (for example to guarantee the information flow in the board, etc.).

A similar observation can be done also for the managing director who has more duties than a plain director and so he/she has a higher standard of diligence.

But it is important to stress that the standard of the diligence depends not only on the task which the director must carry on in the corporation, but also on the personal skills of the director himself.

Under 2392 Italian Civil Code when a director takes a resolution or/and acts, he/she must use his/her special skills, if they are linked to the resolution or/and the action.

Consequently, a director with fiscal skills will be judged more strictly than the other directors without such skills, if the board takes a resolution with negative fiscal effects, which a fiscal expert should recognize and avoid at the first sight[38].

[36] A. DE NICOLA, *Commento all'art. 2392 c.c.*, in AA.VV., *Amministratori*, a cura di F. GHEZZI, in AA.VV., *Commentario alla riforma delle società*, diretto da P. MARCHETTI, L.A. BIANCHI, F. GHEZZI, M. NOTARI, Milano, 2005, 556.

[37] Although the director must be a professional man, it is not necessary that he/she is expert in any fields. But he/she is not expert in the field connected to the resolution to be taken in order to be in compliance with the minimum standard of diligence and to act on informed basis, the director must ask an expertise.

[38] A. DE NICOLA, *Commento all'art. 2392 c.c.*, in AA.VV., *Amministratori*, a cura di F. GHEZZI, in AA.VV., *Commentario alla riforma delle società*, diretto da P. MARCHETTI, L.A. BIANCHI, F. GHEZZI, M. NOTARI, Milano, 2005, 557; L. NAZZICONE, S. PROVIDENTI, *Commento all'art. 2392 c.c.*, in AA. VV., *La riforma del diritto societario*, a cura di G. LO CASCIO, Milano, 2003, 182.

To verify whether the above mentioned level of diligence has been reached or not during the decision making process[39], Italian Courts use to analyze the situation which the directors had to face when they took the decision[40].

The review and the analysis of the situation in which the directors took the decision must be made *ex ante* and not *ex post* because Courts must "*take into account all the circumstances, objective and subjective, being when the actions that cause prejudice to the corporation had been made*"[41].

As explained in the above mentioned leading case, the reason of such *ex ante* review is that otherwise, by applying an *ex post* review of the situation, the directors should be always found liable.

It seems opportune to stress out that Italian Courts use to emphasize one of the requirements that sometime U.S. Courts require to apply the business judgment rule: the rationality of the decision taken[42].

In fact, also by a very careful and diligent decision making process it is possible that the directors might choose among different business decisions. In this situation, in order that they may invoke the business judgment rule, the directors must choose the most rational decision among the different solutions they have.

An author[43] justifies this position of Italian Courts by observing that, without such further requirement, the directors might avoid any liability by adopting a careful and diligent decision making process (at the corporation's expenses) without paying any attention to the final decision taken.

Nevertheless, this theory does not convince.

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[39] Please consider that the decision making process includes all the steps necessary to take the decision, consequently: collecting all the information, asking for outside opinions, analyzing carefully the situation, etc.

[40] A. DE NICOLA, *Commento all'art. 2392 c.c.*, in AA.VV., *Amministratori*, a cura di F. GHEZZI, in AA.VV., *Commentario alla riforma delle società*, diretto da P. MARCHETTI, L.A. BIANCHI, F. GHEZZI, M. NOTARI, Milano, 2005, 558; F. BONELLI, *Gli Amministratori di S.p.A. dopo la riforma delle società*, Milano 2004, 183 e ss; A ROSSI, *Commento all'art. 2392*, in AA.VV., *Il nuovo diritto delle società*, a cura di A. MAFFEI ALBERTI, Padova, 2005, 800; M. SPIOTTA, *Commento all'art. 2392*, in AA.VV., *Il nuovo diritto societario*, Bologna, 2004, 782.

[41] Court of Palermo, February 20 2009, Banca dati Platinum: "*Occorre, altresì, tenere presente che nella valutazione della diligenza usata va effettuato un giudizio da riferirsi ex ante e non ex post, dovendosi, cioè, prendere in considerazione le circostanze, oggettive e soggettive, esistenti al momento in cui furono posti in essere gli atti per i quali ebbe a prodursi un pregiudizio per la società.*".

[42] See: Court of Milan, May 30 1977, in *RD Comm.*, 1978, II, 320; Court of Milan, March 28 1985, *Foro Italiano*, 1986, I, 256; Court of Milan, June 26 1989, *Giur. Comm.*, 1990, II, 122; Cass. Civ., August 12 2009, n. 18231, *Società*, 2009, 10, 1247.

[43] A ROSSI, *Commento all'art. 2392*, in AA.VV., *Il nuovo diritto delle società*, a cura di A. MAFFEI ALBERTI, Padova, 2005, 800.

As some authors[44] correctly observe, no provision governing the duties and the obligations of the directors provide that the directors are not allowed to make mistakes.

Moreover, should the above mentioned theory be applied, it is likely that no directors would accept to take very risky decisions, being afraid that such decisions might be deemed as not rational, with a gross prejudice for the corporation and so the shield of the business judgment rule could come out useless.

This does not mean that directors can take any irrational or absurd decisions: if the decision is affected by a highly relevant mistakes or is greatly inopportune or by such decision the corporation takes a huge and out of proportion risk, the directors cannot invoke the business judgment rule.

In all the above mentioned situations[45], in fact, the decision making process is affected by a gross negligence and lack of the necessary diligence requested to the directors or the directors have an interest in the decision and so they chose an irrational solution.

Finally, we might affirm that Italian corporate law accept the second theory.

In fact, although there is not a real codification of the business judgment rule, Italian corporate law suggest the unquestionableness of the business resolutions of the board.

Some authors[46] observe that the new specific duties of the members of the board provided by the Italian Civil Code after the 2003 reform confirm the fundamentals of the business judgment rule because they require, to avoid any liability, that the board take their resolutions after a careful analysis and on basis of a fixed and strict procedure[47].

And in the report concerning the 2003 reform it can be read: "*the diligence requested by the task nature* (omissis) *does not mean that the director must necessarily be accountant, financial expert and expert in any field connected to the management of a*

[44] F. BONELLI, *Gli Amministratori di S.p.A. dopo la riforma delle società*, Milano 2004, 183 e ss.

[45] Court of Milan, March 28 1985, *Foro Italiano*, 1986, I, 256; Court of Milan, June 26 1989, *Giur. Comm.*, 1990, II, 122; Cass. Civ., August 12 2009, n. 18231, *Società*, 2009, 10, 1247.

[46] A. DE NICOLA, *Commento all'art. 2392 c.c.*, in AA.VV., *Amministratori*, a cura di F. GHEZZI, in AA.VV., *Commentario alla riforma delle società*, diretto da P. MARCHETTI, L.A. BIANCHI, F. GHEZZI, M. NOTARI, Milano, 2005, 558.

[47] Please consider that after the 2003 reform it is up to directors to plan the strategic, industrial and financial programs of the corporation and verify that they are carried out. Moreover the directors must verify that by applying the compliance program they draft together with the outside experts the corporation is in compliance with Italian laws. Consequently the control which Courts must do over the directors should be ahead of this stage of the directors behavior.

corporation, but means that their choices must be informed and carefully analyzed, based on their knowledge and calculated risk and not based on irresponsible or negligent improvisation.".

4. Conclusion.

After analyzing the requirements established by case law to apply the business judgment rule under the two systems it seems clear that such rule is nothing but a special application of the duty of care and the duty of loyalty.

In fact, to apply such rule it is necessary that the directors fulfill their duty of care by making all the necessary investigations and analysis (investigation and analysis which must comply with the standard of the duty of care) and by taking a decision which they believe, on basis of such collected information, that it is in the best interest of the corporation; by acting in good faith and without an interest (the duty of loyalty).

Actually, by applying the business judgment rule, American and Italian Courts require that the directors comply with the duty of care during the decision making process.

However, if the theory of the minority of the Italian scholars pertaining to the further requirement of rationality becomes generally accepted, that might cause a separation of the two systems[48] and determine unpredictable outcomes of the application of the business judgment rule.

In fact, differently from other professions (see the profession of a doctor, etc), in connection with that it is possible to identify some rational and correct procedures to overcome the problems, given the unpredictability and the rapid changes of economic situation, it is very difficult to establish *a priori* the most correct and rational business decision and it is likely that the most irrational business decision will turn out as the most correct one to protect the interests of the corporation.

So, should the above mentioned theory be accepted, it will be necessary, to avoid that the business judgment rule comes out useless, that the Courts should become very specialized, highly skillful and able to create a behavior code of the ideal director (but, given the rapid evolution of the economy, the Courts should always update and improve such code, which, actually, should be inadequate).

[48] As explained above, American Courts apply the further requirement of rationality only when the business decision is totally absurd or irrational or when the director has an interest in the decision (as suggested by F. Bonelli).

Then, it is hoped for that Italian Courts will follow the guidelines of U.S. Courts also in connection with the requirement of rationality, especially after the suggestions included in the report concerning the 2003 reform about the concept of a rational business decision.

IFTIN EBE HASSAN ADEN, *The Business judgment rule*, 4 Businessjus 31 (2013)