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**RUCELLAI & RAFFAELLI
STUDIO LEGALE**

**Directors and Officers Liability
in Italy**

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Directors and Officers liability in Italy

1. Structure of Italy's Corporate Entities

Corporate entities may be incorporated, under Italian law, either as “*società di capitali*” or as “*società di persone*”. This distinction entails certain differences, as regards, in particular: i) the internal organisation of the company and ii) the liability of the company's partners for the company's obligations. We will briefly deal hereunder with each of the two above points, with reference to “*società di capitali*” and to “*società di persone*” respectively.

1.1. **Società di capitali** include *Società per azioni* (S.p.A.), regulated by articles 2325-2461 of the Italian Civil Code (c.c.); *Società in accomandita per azioni* (S.a.p.a.), regulated by articles 2462-2471 c.c.; *Società a responsabilità limitata* (S.r.l.), regulated by articles 2472-2497bis c.c.

- (a) the internal organisation of *società di capitali* shows the following common characteristics: i) same corporate bodies, namely: the share/quotaholders' meeting; the board of directors/sole director; the committee of statutory auditors. The Directors and the statutory auditors are elected by the share/quotaholders meeting. The committee of statutory auditors is mandatory for the S.r.l. only if certain conditions are met, regarding capitalisation, turnover and number of employees (see art. 2488 c.c.); ii) the single share/quotaholder does not have the power to direct the company, subject however to what is stated under (b) hereunder with reference to *soci accomandatari*. The single share/quotaholder votes at the ordinary and extraordinary share/quotaholders' meeting; iii) the vote of the single share/quotaholder is proportionate to the amount of corporate capital subscribed by the single share/quotaholder, except for shares without or with limited voting rights but privileged in the distribution of dividends; however the issue of such shares is subject to the specific limitations and requirements provided by the law. Normally, the participation of the share/quotaholder is freely transferable.
- (b) In the *società di capitali* only the company (with its assets) is liable for the company's obligations, with the exception however of the S.a.p.a., where shareholders whose liability is limited to the

amount of the corporate capital subscribed (so called *soci accomandanti*) coexist with shareholders whose liability for the company's obligations is unlimited (so-called *soci accomandatari*), who are by law entitled to the direction of the company).

- (c) Pursuant to law no. 366 of 3 October 2001 ("Legge Delega") the Parliament delegated the Government to enact legislative decrees for reforming the corporate structure of both *Società per azioni* and *Società a responsabilità limitata*. In particular, *Società per azioni* shall adopt, alternatively, one of the following systems of internal control: i) the committee of statutory auditors, mentioned under paragraph (a), which shall be vested with a broader function of control over the action of the board of directors; ii) a supervisory board also elected by the shareholders' meeting, which shall have a function of supervision over the board of directors, close to the system presently in force under German law; iii) a special committee of outside directors appointed within the board of directors with the specific task of controlling and monitoring the activity of the inside directors. As regards **Società a responsabilità limitata**, their corporate structure will become more flexible and will be based, to a larger extent, on the agreements between the parties as incorporated in the articles of association.

1.2. **Società di persone** include *Società semplice* (S.s.), regulated by articles 2251-2290 of the Italian Civil Code; *Società in nome collettivo* (S.n.c.), regulated by articles 2291-2312 of the Italian Civil Code; *Società in accomandita semplice* (S.a.s.), regulated by articles 2313-2324 of the Italian Civil Code.

- (a) The internal organisation of *società di persone* is not based on a number of different bodies, as provided for *società di capitali*. Except for the *soci accomandanti* in the S.a.s., all partners would normally have managerial and controlling powers, except for possible specific limitations specifically agreed between the partners themselves. Normally, the participation of the partner in the company is transferable only with the consent of the other partners.
- (b) In the *società di persone* the company's assets and the single partners are personally and unlimitedly liable for the company's obligations, except for the *soci accomandanti* in the S.a.s. However, as regards the partners' liability for the obligations of S.n.c. and S.s., the personal goods privately

owned by the partners may only be attached after the assets of the company have been unsuccessfully attached. In the S.a.s. two kinds of partners coexists: the *soci accomandanti*, whose liability is limited to their participation in the corporate capital, and the *soci accomandatari*, whose liability is unlimited. In the S.a.s. only the *soci accomandatari* are entitled to the direction of the company.

2. Company's Directors and Officers liability

The Italian Civil Code provides, with exclusive reference to *società di capitali*, different kinds of directors' and officers' liability: a) towards the company (articles 2392-2393 c.c.); b) towards the company's creditors (art. 2394 c.c.); c) towards shareholders and third parties individually (art. 2395 c.c.). The statute of limitation is five years for all these actions.

We shall deal separately hereunder with each of the above kinds of liabilities, with distinct reference to: i) directors; ii) statutory auditors; iii) general managers; iv) liquidators.

2.1. Director's liability towards the company

Pursuant to article 2392 c.c., the directors must fulfil the obligations imposed on them by the law or by the articles of association with the diligence of an agent (*mandatario*). The failure to fulfil such obligations entails the joint liability of the members of the board of directors towards the company, unless the liability is related to those functions which have been specifically entrusted by the board to an executive committee or to one or more directors (managing directors and presidents). In the latter event only these executive directors are specifically liable for mismanagement in the exercise of the specific powers delegated to them. In any event, all directors, including non-executive directors, are jointly liable towards the company if they failed to supervise the general conduct of the company's business (so-called *culpa in vigilando*).

If the directors violate their obligations, the company can bring a liability action against directors, such an action to be approved by a resolution of the shareholders' meeting (see articles 2393 c.c.). The company can either waive the liability action against the directors or compromise by express resolution of the shareholders' meeting, provided that such vote is not opposed by shareholders representing 20 % of the corporate capital.

As regards S.p.A. quoted on the stock exchange, article 129 of legislative decree no. 58 of 24 February 1998 (hereinafter "Unified Financial

Statute”) provides that the liability action against the directors can be brought by shareholders representing 5 % of the corporate capital or a lower percentage if such lower percentage is provided by the articles of association. Likewise the S.p.a. quoted on the stock exchange can either waive the liability action or compromise by express resolution of the shareholders’ meeting, provided that such resolution is not opposed by shareholders representing 5 % of the corporate capital. The provisions of article 129 of the Unified Financial Statute are aimed at facilitating the exercise of control by minority shareholders over the management of companies quoted on the stock exchange.

Similar provisions for the protection of minority shareholders shall be enacted in due course, in pursuance of the Legge Delega, also for those Società per azioni which are not quoted on the stock exchange. However, the percentage required for resolving the liability actions against the directors of Società per azioni not quoted on the stock exchange shall be higher than 5% in order not to unduly encourage litigation among shareholders, as stated by same Legge Delega.

Pursuant to art. 146 of the law on the bankruptcy of undertakings (law no. 267/1942 as amended) the liability action against the directors can be brought by the bankruptcy receiver. If the company is subject to compulsory winding up, pursuant to articles 194-215 of law no. 267/1942, the same liability action can be brought by the commissioner that manages the winding up (see article 206).

The liability of the directors towards the company is contractual in nature. Therefore the company bringing such action does not have the burden of proving the directors’ guilt, but exclusively: i) the misconduct of directors who violated the specific obligations imposed on them by the law or by the articles of association ; ii) the existence of damages suffered by the company; iii) the link (*nesso di causalità*) between the directors’ misconduct and the damages suffered by the company.

In practice, cases of liability actions brought by solvent companies against their directors have been quite infrequent so far, if for no other reason because the directors have been elected by and have the confidence of the same majority shareholders who should approve the liability action. Consequently, the liability action against directors has been brought until now mainly by bankruptcy receivers or by commissioners in proceedings of compulsory winding up. This situation is however subject to change for S.p.a. quoted on the stock exchange by virtue of the enactment of the Unified Financial Statute and for unquoted companies by virtue of the implementation of the Legge Delega

because, as a result of such legislative changes, these actions may now be brought also by minorities of shareholders.

2.2 Directors' liability towards the company's creditors

Pursuant to article 2394 c.c., the directors are liable towards the company's creditors if they did not fulfil their obligations concerning the preservation of the company's assets.

This action can be brought by the company's creditors when the company's assets prove insufficient for the satisfaction of their claims. A waiver by the company to the liability action against the directors does not prevent the company's creditors from exercising the liability action.

In case of bankruptcy or compulsory winding up, this action can be brought by the bankruptcy receiver (see article 146 of law 267/1942) or by the commissioner who manages the winding up (see article 206 of law 267/1942). In other words, in case of bankruptcy or compulsory winding up the liability action to be brought by the company and the liability action to be brought by the creditors are merged into a sole action.

Although there is uncertainty as to the nature of the liability of the directors towards the company's creditors, this liability should probably be regarded as "extracontractual" (tortious) in nature, with the consequence that creditors who bring this action must prove not only mismanagement and damage resulting therefrom but also the directors' guilt.

2.3. Directors' liability towards shareholders and third parties individually

Article 2395 c.c. provides that article 2393 and 2394 c.c. do not prejudice the right of the single shareholder or of a third party to bring an action against single directors to obtain refunds for damages directly suffered by them as a result of directors' misconduct.

This action is extracontractual in nature, with the consequence that the plaintiff bears the burden of proof not only with respect to mismanagement and damage but also with reference to directors' guilt.

This action is rarely brought and even more rarely successful.

2.4. Statutory auditors' liability towards the company and towards the company's creditors

Pursuant to article 2407 c.c. the statutory auditors, similarly to the directors, must fulfil their obligations with the diligence of an agent (*mandatario*); moreover the auditors are responsible for the truth of their statement and must keep secret the facts and documents of which they have knowledge by reason of their office. The auditors are also jointly liable with the directors for the directors' acts and omissions, whenever the damage would have been prevented if the auditors had duly supervised the company's conduct.

The liability action against the auditors is similar in nature to the liability actions against the directors. It may therefore be brought by the company, by the company's creditors and by the single shareholders or by third parties.

The liability action against the company's statutory auditors can also be brought by the bankruptcy receiver. In practical terms, this action is in fact usually brought by the bankruptcy receiver, once the insolvency of the company has been ascertained.

The responsibilities of the statutory auditors have been made broader, by virtue of the Unified Financial Statute , with respect to S.p.a. quoted on the stock exchange. Also the percentages for bringing complaints or actions with or against the statutory auditors have been made lower by the Unified Financial Statute, always with the aim of enhancing the protection of minorities (see in particular articles 128 and 129 of the Unified Financial Statute).. Shareholders representing 2 % of the corporate capital, or a lower percentage if so provided by the articles of association, , may file complaints with the statutory auditors whenever they are aware of irregularities in the company's business conduct. Companies' actions against the statutory auditors may be brought by shareholders' meeting's resolution approved by so many shareholders as represent 5 % of the corporate capital (as for the directors). Similar protections will be extended also to minorities in unquoted companies pursuant to the implementation of the Legge Delega, as mentioned above with reference to directors.

The statutory auditors have the power to file complaints with the competent tribunal if they have reason to believe that the directors do not comply with their corporate obligations.

The regulatory authority, called "national commission for the control of companies quoted on the stock exchange" (CONSOB), has the power to file complaints with the competent tribunal, if it has reason to believe that the auditors do not comply with their corporate obligations (art. 152 Unified Financial Statute).

2.5. General managers' liability towards the company, towards the company's creditors and towards the shareholders and/or third parties individually

A general manager (*direttore generale*) is normally, although not necessarily, appointed pursuant to the articles of association or by resolution of the shareholders meeting, particularly in companies of major size. The general manager is the highest-ranking executive employee. The general manager has the task of carrying out the resolutions of the board of directors, therefore he is usually vested with the power to represent the company towards third parties.

The provisions regarding the director's liability, including those of the Unified Financial Statute and those to be enacted pursuant to the Legge Delega , would normally also apply to general managers.

2.6. Liquidators' liability

Liquidators are subject to the same kind of liability as the company's directors. Therefore the company's liquidators are liable towards the company, the company's creditors, the company's shareholders and third parties individually.

The liquidation of the company also entails the prohibition for directors and liquidators to undertake new business transactions. The directors or liquidators who violate the prohibition to undertake new business transaction are unlimitedly and jointly liable for the obligations arising from the transactions so undertaken.

2.7. Administrative responsibility of companies for criminal acts of chief executive officers and of employees

Pursuant to the OECD convention of 17 December 1997 on combating bribery in international business transactions, Italy enacted Legislative Decree no. 231 of 8 June 2001 on administrative liability of companies for criminal acts of chief executives and employees. The Legislative Decree covers also criminal acts of *de facto* chief executives, that is, of those personalities which may be in command of the company's activity without being appointed to any corporate office. The administrative liability of the company may be avoided under certain circumstances, provided that: (i) an adequate model of conduct has been instituted within the company and (ii) a specific compliance body has been instituted to monitor compliance with the model of conduct. It is held that, if the company incurs in this kind of administrative liability due to lack or to inadequacy of the aforesaid model of conduct or of the compliance body, the directors may be deemed liable towards the company and towards the company's creditors pursuant to paragraph 2.1. and 2.2. hereof. Therefore, while the

criminal acts which trigger the administrative liability of the company are those committed by chief executive officers (appointed or de facto) and by employees of the company, the responsibility for not duly adopting the models of conducts and compliance bodies could be imputed by the company and by the company's creditors to the directors as such. The administrative sanctions which the company may incur include substantial monetary penalties the amount of which depends on the dimensions of the company. In the event of crimes damaging the public administration (such as corruption and similar) the administrative sanctions may include the temporary closing of branches or even of the whole of the business concern.

The criminal acts which trigger this administrative liability of the company include bribery, corruption, fraudulent acts damaging the public administration (for instance in bids and tenders) and also falsehoods in the corporate balance-sheet, insider trading as well as other corporate misrepresentations and abuses as itemized by the Legislative Decree no 61 of 11 April 2002 enacted in pursuance of the Legge Delega.

2.8 Additional Directors' liabilities pursuant to the Legge Delega: conflicts of interests.

The Legge Delega provides for the enactment of detailed provisions in order to prevent directors' conflicts of interest. These provisions will not alter the structure of the directors' liability towards the company, the company's creditors, shareholders and third parties individually as discussed under paragraph 2.1., 2.2., 2.3; however, the potential liability of directors will in all likelihood increase as a result of these provisions.

2.9 Enforceability in Italy of a foreign judgement on directors', general managers' and statutory auditors' liability under Italian law

The enforcement in Italy of a foreign judgement on directors and other officers' liability is governed by the rules of the Conventions of Brussels and Lugano, as well as by the EC Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

It should at any rate be kept in mind that actual cases of this kind appear rather improbable to materialise in practice. Actions of Italian companies against foreign directors and officers domiciled in Italy would be brought before an Italian jurisdiction in compliance with article 2 of the Brussels and Lugano Conventions. In the event that the foreign directors or officers in question are domiciled outside Italy alternative Italian jurisdiction would in all likelihood apply pursuant to article 5 of the Brussels and Lugano Conventions. Article 5 provides that in matters relating to tort, delict or quasi-delict, alternative jurisdiction pertains to the judge of the place where the harmful event occurred. Such harmful event would be deemed

in all likelihood to have occurred at the headquarters of the company or in any event within the Italian territory. Nevertheless it is possible, although unlikely, that an Italian company brings an action against a director or other officer domiciled in another contracting State before the judge of the place where such director or other officer is domiciled. If such an unlikely event were to occur, the enforcement in Italy of the foreign judgement would be swiftly obtained pursuant to the Brussels and Lugano Conventions. Article 31 of the Brussels and Lugano Conventions provide that a judgement given in a contracting State and enforceable in that State shall be enforced in another contracting State when, on application of any interested party, it has been declared enforceable there.

It is also possible that a foreign judgement be issued against a director, domiciled in Italy, of a company domiciled outside Italy. Also in such event enforcement would be swiftly obtained pursuant to the Brussels and Lugano Conventions.

Actions brought by the bankruptcy receiver of an Italian company against former directors, general managers and statutory auditors would be in any event brought before the judge of the place where the bankruptcy was declared and therefore necessarily in Italy.

2.10 Can the Directors and Officers be liable for punitive damages under Italian law?

There is no legal disposition nor case law on punitive damages under Italian law.

3. Whether the company can indemnify its Directors and Officers

As pointed out above, under paragraph 2.1, the company can waive its right to bring a liability action against the directors. Such waiver amounts to an indemnification of the company in favour of the directors, because the economic burden deriving from the directors' misconduct would remain to the charge of the company. However, as confirmed by recent cases, this waiver may not be general but must refer to specific business transactions and to well specified facts.

It is doubtful if the company may indemnify the directors and officers from their obligations deriving from the liability actions brought by creditors, single shareholders or third parties. The negative solution is usually applied by the Courts.

Legislative Decree no. 472 of 18 December 1997 has introduced the principle of the personal liability of the directors, officers, employees and advisors of the company for the violation of tax-law provisions committed by them in the carrying out of their office. Pursuant to article 11 of said

law, the company is jointly liable with its directors, officers and employees for the payment of the administrative penalties imposed by tax authorities upon same directors, officers and employees. The same law also provides that the company can validly resolve at board and shareholders level to hold its directors, officers and employees harmless, provided that the violation of the tax-law provision in question is committed without fraud or gross negligence.

4. Directors and Officers insurance

The liability of Directors and Officers is insurable, subject to the following qualifications.

- 4.1. It is disputed by legal authors if the premium for an insurance policy covering damages caused to the company by its directors, may be paid by the company itself. The leading opinions deem that the relevant premium must be paid by the directors concerned and is not refundable by the company.

Any direct or indirect refund by the company is deemed inconsistent with the right of the company to be kept indemnify and harmless by the directors from any damage caused to the company.

The aforesaid considerations apply also to the liability of directors towards the company, deriving from the administrative liability of the company for criminal acts of the officers and employees made possible by the lack or inadequacy of the model of conduct adopted, pursuant to Legislative Decree 8 June 2001, no. 231 as discussed under paragraph 2.7.

The substantial impact of the administrative sanctions which may be inflicted on the company and which may consequently trigger the liability of directors towards same company (and possibly its creditors) fully warrants an adequate insurance coverage, also for this kind of directors' risk. However, also the premium for this kind of insurance policy should be paid by the directors insured and may hardly be deemed refundable by the company, due substantially to the same reasons set forth under paragraph 3.

- 4.2. The directors' and officers' liability towards the company's creditors and towards the single shareholders and third parties may be insured and the relevant premium may be paid or refunded by the company, differently from what we have seen under paragraph 4.1 for the liability towards the company itself. Such an insurance would in fact be an insurance for extracontractual liability admitted by art. 1917 c.c., with the exclusion,

however, of tortious facts committed with fraud. The resolution to stipulate an insurance policy in favour of the company's directors should be taken by the shareholders' meeting, in order to avoid conflicts of interest (prohibited by art. 2391 c.c.).

- 4.3. As regards the personal liability of company's directors and officers deriving from the violation of tax-law provisions (provided by law 472/1997), it is debated whether such a liability may be insured or not. A negative solution to this issue has been given by the supervisory authority of private insurance companies (ISVAP), with reference to the liability for monetary administrative fines. ISVAP in fact maintains that these sanctions are punitive in nature and therefore that the relevant economic burden should remain on the person who committed the violation.

It is argued however that the company, which is jointly liable with the directors/officers/employees and advisors, should be allowed to insure its own relevant risk. Indeed, the joint liability of the company with its directors/officers/employees/advisors is not punitive in nature but simply guarantees the actual payment of the sanction applied. We therefore believe that such a liability of the company should actually be deemed to be insurable by the company itself. We have seen under paragraph 3 that the company is allowed to keep its directors/officers/employees/advisors indemnified and harmless from this kind of liability. This confirms that the company is allowed to insure this kind of risk.

- 4.4. It should be mentioned, before closing, that the system of corporate crimes imputable to directors, general managers (“*direttori generali*”) and liquidators has been radically changed by the aforesaid Legislative Decree no.61 of April 11, 2002 , enacted in pursuance of the Legge Delega. At any rate, no mention has been made throughout this article of any possibility for directors and officers to be insured against damages caused to the company or to third parties by corporate crimes committed by them (such as falsehood in balance-sheet causing damage to shareholders or creditors, insider trading, other corporate abuses and falsehoods etc., as itemized by Legislative Decree no.61 of April 11, 2002). Indeed, any insurance coverage for damages arising from crimes or fraudulent acts of the insured is prohibited by the law. In any case, this prohibition does not prejudice the right of the company to be insured against damages caused by the infidelity of its own directors or officers, even if such infidelities amount to corporate crimes.

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