

GENERAL DETAILS ABOUT EXTRASTATUTORY CONVENTIONS

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Abstract

Statutory and extra-statutory conventions are contracts, plurilateral (thus, typically, voting unions), or corresponding services (typically blockades): a common feature is that they remain foreign both to society and to associations and third parties who are not part of it. The rules laid down in the Italian Civil Code to Articles 2341-bis and 2341-ter only deal with conventions aimed at stabilizing the joint stock company which is the subject of such agreements: these provisions provide for lasting limits (when stipulated for a specified period, can not exceed three years, whereas for an indefinite period, each party may give up an ad with a notice of one hundred and eighty days) and, by limiting ourselves to the so-called open societies, advertising obligations (communication to the company and declaration at the opening of the assembly). There is no restriction, however, on the form that the parties may adopt for the purpose of that stipulation.

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1. Introduction

This article attempts to bring together, as the title says, general data on statutory and, implicitly, extrastatutory agreements of commercial law. As this part of the law can already be considered autonomous, after the unification of commercial and civil law, I considered it useful and even welcome on the specialized market.

Unlike other articles published in this field, the explanations of the terms covered by this paper cover the future stage of Romanian legal evolution.

In the elaboration of the present paper I have taken into account some tendencies and conceptions regarding the current doctrine and legislation in Romania and, of course, other European countries.

The legal research will aim at gathering the principles, stages, methods, techniques and tools of investigation and scientific knowledge of legal phenomena, playing an important role in the final outcome of the project.

The actual research will consist of documenting, debating and proposing solutions to problems and gaps in both doctrine and legislation and jurisdictions.

When we talk about commercial law, about everything that surrounds it, we think that in a way we are limited, that the commercial law in our country could be more open, with more possibilities and more "loopholes" for both for associates and for companies themselves.

As a result, the study of extraordinary conventions aims to be novelty in the commercial field, to be "fresh air" for the principles of commercial law of wide applicability, especially on some practical aspects, resulting from disputes generated in connection with this matter.

A balance must be found between creativity and consistency, between transmitting the complete message without going into the profound theoretical details and discussions, limiting ourselves to finding and explaining new methods, facilitating and improving our commercial law system and beyond.

Finally, the theme chosen is of broad interest, related to one of the most important areas of law, and will provide both practitioners and professionals with the information they need to understand, use and enforce statutory and extra-statutory conventions.

2. General data

Statutory and extra-statutory conventions are contracts that represent an instrument through

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which shareholders have rights deriving from the principal contract, and govern interests and conduct in internal relationships or relationships with the company, with corporate origins or with third parties.

Statutory and extra-statutory conventions are atypical contracts with inter partes effectiveness on the rules of conduct to be followed in the exercise of competences, faculties and obligations recognized by shareholders by the articles of association, capable of conditioning the performance of the company. In other words, through these conventions, shareholders agree to pursue joint business choices by exercising social rights in a predetermined manner, while the organization of the company remains foreign to the contract itself. Specifically, they are plurilateral, binding, binding effects, with a common purpose which is binding only to the contracting parties and implies a consequence of possible failure, sole responsibility.

Types of closed-ended conventions are appropriate to stabilize the ownership structure or governance of the company, being expressly identified in Article 2341-bis² of the Italian Civil Code, in agreements on the exercise of voting rights or in joint stock companies or companies [letter a)], agreements setting limits on the transfer of shares or participants in the companies they control [letter b)] and agreements having as their object or effect the joint exercise of a dominant influence over those companies [letter c)].

The reference standard for public limited liability companies is listed companies, on the other hand it consists of Article 122 (5) of Legislative Decree 58/98 (TUF)³ which includes, in addition to the voting rights agreements, and those which establish prior consultation obligations for the exercise of voting rights in listed companies and in the companies they control [letter a)], which limits the transfer of shares or related financial instruments entitling them to buy or subscribe [letter b)], which provide for the purchase of shares or financial instruments referred to in letters b) and c), the object of which is the joint exercise of a dominant influence over such companies [letter d)].

In practice, therefore, it is customary to distinguish between voting unions (shareholder conventions with which the participants undertake to vote at the meeting as indicated by the union); blocking syndicates (shareholder conventions with which the participants undertake, in the case of the individual sale of shares, to obtain the approval of the other shareholders or to allow their pre-emption); consultation arrangements (to guarantee the exchange of information before voting); purchase agreements (to require the purchase of shares or financial instruments that can be attributed to the right to buy and subscribe shares) and dominant influence agreements (to exert a dominant influence on listed companies or the companies they control).

3. Requirements

Generally, with regard to content, all shareholder agreements characterized by the anti-social objective pursued and breach of imperative rules are considered inadmissible.

As to the form, there are no specific requirements, neither *ad substantiam* nor *ad probationem*, with the exception of the shareholders' conventions involving a solemn contract or shareholder conventions subject to certain legal and advertising requirements.

² Articolo 2341 bis Codice civile: Patti parasociali. I patti, in qualunque forma stipulati, che al fine di stabilizzare gli assetti proprietari o il governo della società: a) hanno per oggetto l'esercizio del diritto di voto nelle società per azioni o nelle società che le controllano; b) pongono limiti al trasferimento delle relative azioni o delle partecipazioni in società che le controllano; c) hanno per oggetto o per effetto l'esercizio anche congiunto di un'influenza dominante su tali società, non possono avere durata superiore a cinque anni e si intendono stipulati per questa durata anche se le parti hanno previsto un termine maggiore; i patti sono rinnovabili alla scadenza. (R.D. 16 marzo 1942, n. 262).

³ Decreto Legislativo 24 febbraio 1998, n. 58, art. 122, 5: „Il presente articolo si applica anche ai patti, in qualunque forma stipulati: a) che istituiscono obblighi di preventiva consultazione per l'esercizio del diritto di voto nelle società con azioni quotate e nelle società che le controllano; b) che pongono limiti al trasferimento delle relative azioni o di strumenti finanziari che attribuiscono diritti di acquisto o di sottoscrizione delle stesse; c) che prevedono l'acquisto delle azioni o degli strumenti finanziari previsti dalla lettera b); d) aventi per oggetto o per effetto l'esercizio anche congiunto di un'influenza dominante su tali società”. Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52, pubblicato nella *Gazzetta Ufficiale* n. 71 del 26 marzo 1998 - Supplemento Ordinario n. 52.

In particular, for open non-listed companies, art. 2341 ter⁴ of the Italian Civil Code provides, under the sanction of the suspension of voting rights, that the shareholders' agreements are counted against the company and declared at the meeting, with the obligation to transcribe the statement in the minutes and the subsequent filing of the declaration in the trade register.

On the other hand, listed companies are subject to a more complex advertising regime because, once the agreement has been signed, it is necessary to notify within 5 days to Consob⁵, under the sanction of its nullity and the suspension of voting rights an extract is published in the daily press within ten days and deposited in the trade register within 15 days.

As regards the duration, the shareholders' conventions may not exceed 5 years (which may be renewed at maturity) in closed companies, 3 years (redeemable at maturity) in open-ended companies; in both cases, the duration exceeding the legal deadline leads to an automatic reduction, while the indefinite duration gives each contractor the right to withdrawal, which can be exercised with a six-month notice (for listed companies, however, no notification is required for shareholders wishing to participate in a public purchase or exchange offer).

4. Legal nature

The legal nature of the conventions is that of plurilateral agreements with a common purpose.

The common goal is to stabilize the ownership structure of a joint stock company or to control it.

An essential fact that needs to be emphasized is that these statutory or extra-statutory conventions have a purely binding and not real effectiveness.

This means that this convention only works between subscribers and not third parties: an eventual breach of the convention may only be valid as a contractual fault between subscribers but can not be relied on against third parties.

Often, in order to make these conventions more effective, a penalty clause, which implies the payment of an amount (often considerable) for the mere fact that it has violated the Convention, regardless of the actual damage suffered, which would constitute the premise of a compensatory action.

Considering the contractual nature of the shareholders' conventions, the applicable basis for the discipline is the general one of the contracts. However, there are also two particular aspects, but the legislator also wants to establish special rules: duration and advertising of the agreement. It is precisely in the discipline of these two aspects that one can see the diversification of the three real types of joint stock companies.

5. Closed society

Although the articles in the Italian Civil Code referring to statutory and extra-statutory conventions are 2341 bis (duration) and 2341 ter (advertising), only the premium can be applied to societies for so-called societies "closed", because the second concerns only the joint stock company - recourse to the venture capital market. It follows that, from the two aspects, the duration and advertising of agreements, is regulated in the closed-end joint-stock company refers only to the duration.

These are blocking syndicates and voting unions. They may not last for more than 5 years, and if a period of more than five years has been imposed, the time limit is imposed by law.

⁴ Articolo 2341-ter Codice civile: Publicita de Patti Parasociali: „Nelle società che fanno ricorso al mercato del capitale di rischio i patti parasociali devono essere comunicati alla società e dichiarati in apertura di ogni assemblea. La dichiarazione deve essere trascritta nel verbale e questo deve essere depositato presso l'ufficio del registro delle imprese. In caso di mancanza della dichiarazione prevista dal comma precedente i possessori delle azioni cui si riferisce il patto parasociale non possono esercitare il diritto di voto e le deliberazioni assembleari adottate con il loro voto determinante sono impugnabili a norma dell'articolo 2377.”

⁵ Commissione nazionale per le società e la Borsa – Comisia Națională pentru Societăți și Bursa de Valori; <http://www.consob.it>, consulted on 1.05.2019.

Conventions are, however, renewable. There is also the possibility to conclude agreements of indefinite duration, subject to the right of withdrawal, with six months' notice. So-called "joint ventures"⁶ are excluded from the application of regulation 2341 bis.

6. Societies with actions not attached to the stock

Companies that make use of the venture capital market but which are not quoted apply both the discipline referred to in Article 2341 bis above, as regards the duration of the agreement (since it is a common discipline for all joint stock companies) and the 2341 ter for advertising. The law provides that in the case of joint stock companies, double advertising applies:

- communication for the company;
- statement at the beginning of each meeting (with transcript in the minutes and filed in the trade register).

The issue that comes up is about any sanctions against the behavior that runs counter to this rule.

The only thing that can happen in case of failure to declare at the opening of the meeting and involves a ban on the right to vote for the parties to the convention and the possibility to challenge the resolution adopted with the vote of those who signed the convention.

7. Societies with actions attached to the stock

As I have already pointed out, the applicable regulation is Articles 122 and 123 of the Legislative Decree of 24 February 1998 and Article 122 on advertising:

"The conventions, in any form stipulated, concerning the exercise of voting rights in listed companies and in the companies they control are:

- communicated to CONSOB within five days from the date of stipulation;
- published in the daily press statement within ten days of the stipulation;
- registered in the register of companies in which the company has its registered office within fifteen days from the date of its stipulation."

The sanction for non-compliance is quite rigorous: the nullity of the convention (members of the agreement may interrupt the agreement without suffering consequences) and the prohibition of the right to vote in the assembly.

As regards Article 123 of the Legislative Decree of 24 February 1998, it regulates the duration of the Convention in a manner similar to that described for the joint stock company, but with the difference that the maximum limit is three years instead of 5.

8. Conclusions

This work aims to analyze, on the basis of concrete definitions, the forms and modalities of the statutory and extraordinary conventions. In a simple form, while emphasizing the complexity of these notions. Although the definition of statutory and extrastatutory conventions far outweighs the "part" I have chosen to deal with in the present paper, I also consider it to bring a series of clarifications to what extra-conventions are.

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⁶ A *joint venture* is a contract whereby two or more companies agree to collaborate to achieve a particular purpose or to achieve a project. The Joint Undertaking is a simple contract and does not constitute a new legal entity distinct from the companies that entered it. https://it.wikipedia.org/wiki/Joint_venture, consulted on 1.05.2019.

2. Company Law no. 31/1990 republished in the Official Gazette no.1066 of November 2004 with subsequent modifications.
3. Law no. 134/2010 on the new Civil Procedure Code, republished in the Official Gazette, Part I no. 247 of April 10, 2015, as amended.
4. Law no. 297/2004 regarding the capital market, published in the Official Gazette, Part I no. 571 of June 29, 2004, as amended.
5. Law no. 11/1991 on combating unfair competition, published in the Official Gazette, Part I no. 24 of January 30, 1991, as amended.
6. Italian Civil Code.