ITALIAN REPUBLIC

IN THE NAME OF THE ITALIAN PEOPLE

THE COURT OF APPEAL OF GENOA, FIRST CIVIL SECTION

composed of the Judges

Dr Maria Teresa Bonavia President

Dr Cinzia Casanova Judge

Dr Marcello Bruno Member

(rapporteur) delivered the following

JUDGMENT

In the proceedings challenging the decree recognising a foreign arbitral award, registered under No. 685/2017 R.G.

brought by

FERRUCCIO ROSSI, represented and assisted by Maurizio Traverso, Solicitor, and Emanuele Breggia, Solicitor, both of the Milan Bar, as well as by Francesca Dagnino, Solicitor of the Genoa Bar, with address for service at the offices of Ms Dagnino in Genoa, Salita di Santa Caterina 3/3, as per the power of attorney on file

PLAINTIFF

Against

FERRETTI S.P.A., represented and defended by Andrea Magliani, Elena Marinucci and Alessandra Fotticchia, of the Milan Bar, and by Lorenzo Ravenna, of the Genoa Bar, with address for service at the latter's chambers in Genoa, Via Bartolomeo Bosco No. 15/7 as per the power of attorney on file

DEFENDANT

SUBMISSIONS OF THE PARTIES:

On behalf of the claimant:

"For the reasons set out in this document or as otherwise deemed appropriate by the Honourable Court of Appeal, to refuse the recognition and enforcement in Italy of the arbitral award dated 30 January 2017, rendered in Geneva in ICC proceedings No. 20705/EMT/GR between Ferretti S.p.A. and Dr Ferruccio Rossi;

B. to set aside Order No. 106/2017 issued by the President of the Court of Appeal of Genoa on 31 March 2017 in case No. R.G. 95/2017;

C. order the opposing defendant to pay the costs of the proceedings".

On behalf of the defendant:

"May the Honourable Court of Appeal, having dismissed all other and contrary claims, defences and arguments:

a) declare the opposing party's opposition inadmissible and/or dismiss it on the grounds set out in the pleadings;

b) to confirm the decree recognising the foreign award issued by the Honourable President of the Court of Appeal of Genoa on 30-31 March 2017, No. 106, and therefore to declare the final award rendered by the Arbitral Tribunal on 30 January 2017 in the context of CCI arbitration No. 20705/EMT/GR, and to confirm its enforceability, which was already provisionally granted by order dated 24 January 2018;

c) to make any other orders connected with and/or dependent on the above claims.

In any event, with costs and fees awarded in favour of the successful party".

FACTUAL AND LEGAL GROUNDS FOR THE DECISION

By a request for arbitration dated 17 December 2014, Ferretti S.p.A. requested the International Court of Arbitration of the International Chamber of Commerce to appoint a panel of three arbitrators in accordance with Article 31 of Ferretti's Articles of Association, setting out the following submissions:

1. to ascertain and declare the liability of its director, Dr Ferruccio Rossi, on the grounds and for the reasons set out in the statement of claim;

2. order Dr Ferruccio Rossi to pay to Ferretti S.p.A. a sum equal to the amount that Ferretti S.p.A. would be required to pay, in the course of the arbitration proceedings, to Marco Zambelli and Pierluigi Galassetti in accordance with the so-called 'Parachute' agreements, described in the statement of facts and bearing the dates of 9 January 2013 and 4 March 2013 respectively, as well as to pay compensation for any further damage that Ferretti S.p.A. may suffer as a result of those agreements;

3. in any event, order Mr Ferruccio Rossi to pay to Ferretti S.p.A. an amount equal to the sum that Ferretti S.p.A. might be required to pay as a result of court orders or settlement agreements bringing legal proceedings to an end, to Marzo Zambelli and Pierluigi Galassetti in accordance with the so-called 'Parachute' agreements;

Ferruccio Rossi appeared in the proceedings, putting forward the following submissions:

As a preliminary matter:

1) having established the nullity or, in any event, the ineffectiveness of the arbitration clause contained in Article 31 of the Articles of Association of Ferretti S.p.A., to declare that it lacks jurisdiction to hear the dispute referred to it, in favour of the Italian court;

in the alternative, should the Arbitral Tribunal find that it has jurisdiction:

2) to dismiss all claims brought by Ferretti S.p.A. against Dr Ferruccio Rossi.

In the further alternative:

3) take into account the conduct of Ferretti S.p.A. pursuant to Article 1227 of the Civil Code".

In support of his submissions, Mr Rossi argued: the nullity of the arbitration clause contained in Article 31 of Ferretti's Articles of Association on the grounds of a breach of mandatory provisions pursuant to Article 1418(1) of the Italian Civil Code, with reference to Articles 34, 35 and 36 of Legislative Decree 5/2003; the inadmissibility of the claims put forward by Ferretti in its submissions nos. 2 and 3, in that they were purely prospective claims contingent upon the occurrence of future and uncertain events and lacking standing; and the lack of merit in any of the claims.

On 12 March 2015, the International Court of Arbitration appointed the arbitral tribunal.

On 4 May 2015, the Arbitral Tribunal issued Procedural Order No. 1, by which the Terms of Reference, the Rules of Procedure and the Timetable for the Proceedings were adopted.

The Terms of Terms of Reference, duly signed by the parties and by the
Arbitral , provided as follows: "for pursuant
Article 31.4 of the Arbitration arbitration clause, the seat
of arbitration shall be in Geneva, Switzerland; these arbitration proceedings shall be governed by Articles 176-194 (Chapter 12) of the Swiss Act on Private International Law ("LDIP"); subject to the mandatory provisions of the LDIP, the following shall also apply to these proceedings:

(a) the Rules [of 2012];

(b) this Terms of Reference ("ToR");

(c) the Rules of Procedure ("NPr") to be issued by the Arbitral Tribunal after consulting the Parties;

where the Rules (as well as the NPr and the AdM) are silent, the procedure shall be determined on a case-by-case basis by the procedural rules which the Arbitral Tribunal deems fit to issue in the exercise of its discretionary power through further procedural orders and directives, subject to any agreement to the contrary by the Parties;

by agreement of the Parties, the arbitration shall be conducted in Italian".

The Terms of Reference also reaffirmed, in line with the arbitration clause, the applicability of Italian law, in its entirety, for the resolution of the dispute.

On 8 September 2015, the Arbitral Tribunal issued an interim award on jurisdiction, finding that it had the power to decide the matter.

The proceedings continued with the evidentiary phase and were subsequently concluded with the final award rendered on 30 January 2017.

The final award did not revisit the issue of the arbitral tribunal's potestas iudicandi (which had already been addressed in the interim award) and, ruling on the merits, set out the following operative part:

"1. The Respondent, Dr Ferruccio Rossi, breached his duties as a director of the Claimant, Ferretti S.p.A.:

a) by signing, on behalf of Ferretti, the so-called 'Parachute' agreements with Messrs Marco Zambelli and Pierluigi Galassetti, formally dated 9 January 2013 and 4 March 2013.

b) by failing to set corporate performance targets (MBOs) for Messrs Marco Zambelli and Pierluigi Galassetti.

2. The Plaintiff's claims seeking an order requiring the Defendant to pay compensation in respect of the breaches referred to in point 1 are, for the time being, dismissed as inadmissible at this stage, unless rejected on the merits.

3. The costs of the arbitration amount to USD 278,958.00, as well as EUR 179,150.37, and shall be borne by the Claimant to the extent of one-third and by the Respondent to the extent of two-thirds. Taking into account the advance payments made and after making the appropriate set-offs, the Respondent is ordered to pay the Claimant USD 132,180.00 and EUR 3,326.32".

By application dated 9 March 2017, Ferretti requested the President of the Court of Appeal of Genoa to issue an order recognising the final award pursuant to Article 839 of the Code of Civil Procedure.

By order dated 30 March 2017, the President issued Order No. 106/2017 granting the application, thereby declaring the final award to be valid in Italy and ordering Dr Rossi to bear the costs of the proceedings.

Ferruccio Rossi lodged an objection against this order.

In his first ground of opposition, he alleged a breach of Article 840(3)(1) of the Code of Civil Procedure and Article V.1.A of the New York Convention, on the grounds that the arbitration agreement was not valid under the law to which the parties had subjected it or, in the absence of any indication in that regard, under the law of the state in which the award had been made.

It observed that Article 840(3)(1), which reproduces Article V.1.A of the New York Convention, provides that 'recognition or enforcement of the award shall be refused by the Court of Appeal if, in the opposition proceedings, the party against whom the award is invoked proves the existence of one of the following circumstances: (1) […] the arbitration agreement is invalid under the law to which the parties have subjected it or, in the absence of any indication to that effect, under the law of the state in which the award was made".

The law to which the parties had subjected the arbitration clause was Italian law, which, pursuant to Article 31 of Ferretti's Articles of Association, was applicable and had been applied by the Arbitral Tribunal.

According to the opponent, the arbitration clause in question was void on two grounds: (i) for breach of mandatory provisions, as it conflicted with the lex specialis governing arbitration clauses contained in the articles of association of companies having their registered office in Italy (Articles 34-36 of Legislative Decree 5/2003);

(ii) on the grounds of fraud against the law within the meaning of Articles 1343-1345 of the Civil Code.

On the first point, it observed that Italian law permitted the inclusion of an arbitration clause in the articles of association and the referral of corporate disputes to arbitration provided that, on pain of nullity which may be declared ex officio by the court:

(i) the content of the arbitration clause did not differ from that mandatorily provided for in Article 34 of Legislative Decree 5/2003 and, in particular, provided for the appointment of arbitrators by a party external to the company;

(ii) the arbitration clause ensures that the arbitration proceedings have the characteristics mandatorily provided for in Article 35 of Legislative Decree 5/2003 and, in particular, mandatorily permits the intervention of third parties and shareholders in the forms and within the time limits specified;

(iii) the arbitration clause ensured that the arbitrators' decision-making process, the award and any appeals against it did not differ from the requirements laid down without exception in Articles 35 and 36 of Legislative Decree No. 5 of 2003.

The provisions contained in Articles 34, 35 and 36 of Legislative Decree 5/2003 were mandatory, and any breach thereof would result in the nullity of the agreement in contravention of Article 1418(1) of the Civil Code.

Article 31 of Ferretti's articles of association provided that the seat of arbitration was to be in Switzerland, in the city of Geneva, and that the applicable law was to be Italian law.

However, according to the opposing party, the provision stipulating Switzerland as the seat of arbitration constituted a breach of the aforementioned Italian provisions and consequently rendered the arbitration clause invalid.

As the seat of arbitration was in Switzerland, any foreign award rendered would not have been appealable before the competent Italian Court of Appeal on the grounds set out in Article 829(1) of the Code of Civil Procedure, which are mandatory under Article 35(2) of Legislative Decree 5/2003.

Indeed, the arbitration clause provided that 'the award shall not be subject to appeal except in the cases mandatory provided for by law' (Article 32.5 of Ferretti's Articles of Association), whilst, in order to determine what grounds for appeal might exist, reference had to be made to the procedural law of the jurisdiction where the arbitration took place, which, in the present case, was Swiss law.

However, Article 192(1) of the LDIP, unlike Italian law (Article 829(1) of the Code of Civil Procedure), permitted a prior and complete waiver of the right to challenge the award: "where the parties do not have their domicile, habitual residence or a permanent establishment in Switzerland, they may, by means of an express declaration in the arbitration agreement or in a subsequent written agreement, completely exclude the possibility of challenging arbitral awards; they may also exclude only some of the grounds for challenge provided for in Article 190(2)".

And it was precisely the intention to preclude challenges to the award and possible interventions by third parties that was the obvious reason which had led the shareholders of Ferretti – an Italian company, with its registered office and centre of management in Italy and no connection with Switzerland – to designate Geneva as the seat of arbitration.

However, this was not permitted under the mandatory provisions governing statutory arbitration agreements applicable to Italian companies pursuant to Articles 35 and 36 of Legislative Decree 5/2003, nor could these provisions be circumvented by establishing the seat of arbitration abroad (on pain of the clause being void).

The Arbitral Tribunal, whilst correctly acknowledging that there were no issues regarding the recognition of the award in Italy, had distinguished between substantive rules and procedural rules: the former were to be observed (as the arbitrators were required to apply Italian law), whilst the latter would not apply, given that the proceedings were seated in Switzerland and Swiss law on arbitration therefore applied.

In particular, the Arbitral Tribunal had recognised Article 34 of Legislative Decree 5/2003 as a substantive provision insofar as it provides for the appointment of the arbitral tribunal by a third party, and Article 35 insofar as it provides for the obligation to file the request for arbitration with the Companies Register. The other provisions, and in particular Articles 35-36, were, by contrast, considered to be procedural in nature and, for that reason, had been deemed irrelevant by the arbitrators due to the Swiss seat of the arbitration.

However, contrary to the view taken by the Arbitral Tribunal, this body of legislation was not merely procedural in nature (and as such applicable only to 'Italian' arbitrations), but was of substantive importance because it governed the necessary content of the statutory arbitration clause of a company with its registered office in Italy; in the sense that such a clause had to be drafted by agreement in such a way as to ensure that all the requirements (including procedural ones) laid down by law were actually applied.

Articles 34-36 of Legislative Decree 5/2003, however, constituted lex specialis (company law: see Article 25 of Law 218/1995), which prevented Italian companies from resorting to foreign arbitration.

In conclusion, the nullity of the arbitration clause referred to in Article 31 of Ferretti's articles of association, in accordance with the law governing it, was evident and precluded the recognition of the final award in Italy pursuant to Article 840(3)(1) of the Code of Civil Procedure and the corresponding provision (Article V.1.A) of the New York Convention.

Even setting that aside, the arbitration clause would still have been null and void as it resulted from an evasion of the mandatory legislation applicable to Italian companies.

This constituted a case of illegality of the cause of action due to fraud against the law, which invalidated the instrument pursuant to Articles 1343 and 1344 of the Civil Code, containing general principles recognised in all legal systems, including Switzerland; thus, even under Swiss law (which is, however, inapplicable), the clause would have been null and void.

By the second ground of appeal, Ferruccio Rossi alleged a breach of Article 840(5)(2) of the Code of Civil Procedure and Article V.2.B of the New York Convention on the grounds of contravention of public policy.

Even if one were not to accept the argument that the statutory arbitration clause in question was void due to direct conflict with the mandatory provisions of the lex societatis (Articles 34-36 of Legislative Decree 5/2003, either directly or through Articles 1343-1344 of the Civil Code), that clause would in any event have amounted to a mechanism designed to circumvent a mandatory rule of the forum.

In order to circumvent these rules, the parties had resorted to the following arrangement: inserting a clause in the articles of association providing for foreign arbitration, with the seat of arbitration located in a jurisdiction where neither an appeal against the award nor, unless agreed by the parties and the arbitrators, third-party interventions were permitted.

That legal system was none other than Switzerland, where (i) pursuant to the aforementioned Article 192(1) of the LDIP, where both parties were foreign, a prior waiver of the right to challenge the award was permitted, and (ii) pursuant to Articles 353 LDIP and 376 of the Swiss Code of Civil Procedure, third-party interventions in arbitration were not permitted, unless there was an arbitration agreement between the parties to the proceedings and the third party, and the consent of the arbitral tribunal.

With particular reference to the appeal regime, it was no coincidence that Article 31 of the Statute provided that 'The award shall not be subject to appeal except in the cases mandatory provided for by law'. The drafters were well aware that, by designating Geneva as the seat of arbitration, the award would in fact be final and binding, so that the provision in Article 31 of the Articles of Association regarding appeals 'mandatorily provided for by law' appeared superfluous.

The evasive intent was even more glaringly obvious when one considered that neither Ferretti nor its shareholders had any connection with Switzerland; the Swiss legal system was therefore chosen solely to enable arbitration that was not permitted under the law governing Italian companies.

In conclusion, the ploy adopted by Ferretti's shareholders was contrary to public policy due to the deliberate circumvention of a mandatory provision of the applicable law.

The award that concluded the proceedings was neither recognisable nor enforceable in Italy: "The recognition and enforcement of an arbitral award may be refused, if the competent authority of the country in which they are sought finds that: (B) the recognition or enforcement of the award is contrary to public policy” (Article V.2.B of the New York Convention).

By the third ground of appeal, he argued, pursuant to Article 840(3)(1) or (3) of the Code of Civil Procedure and Articles V.1.A or V.1.C of the New York Convention, that the arbitration agreement was (subsequently) non-existent.

A further ground for the lack of arbitral jurisdiction and the non-recognition of the award was Ferretti’s waiver, during the proceedings, of the arbitration clause.

In its second statement of case dated 28 May 2015, authorised by the Arbitral Tribunal by procedural order
No. 2 of 4 May 2015, the respondent had produced document C-18, now on the record as doc. 7.

This was the ‘statement of defence’ filed by Ferretti with the Registry of the Court of Bergamo, Labour Division, on 15 May 2015 in the labour proceedings between Ferretti and Marco Zambelli (Case No. 109/2015).

By this document, Ferretti had requested that the third party, FERRUCCIO ROSSI, be joined as a party to the proceedings, arguing that: “In the factual section above, ample account has been given

of the active and fraudulent role played by the then Chief Executive Officer, Ferruccio Rossi, in the conception, drafting and signing of the stability agreement (see doc. 6) signed in favour of both Zambelli and Galassetti; consequently, although Rossi was well aware that he did not have the authority to do so, in accordance with the resolutions passed by the Board of Directors at its meeting on 1 August 2012 (Docs. 7 and 8) and at the subsequent meeting on 12 January 2013, at which the Board was instructed to

mandate to appoint Zambelli, agreeing on a gross annual salary of 160,000 plus MBO and benefits in accordance with policy, he nevertheless signed the aforementioned agreement. In view of the above, and given that the sole author of the agreement is Ferruccio Rossi, who signed it without having the authority to do so and without the prior or subsequent authorisation of the Board of Directors, Ferretti S.p.A. requests authorisation to bring legal proceedings against Ferruccio Rossi, [...], so that, in the unlikely event that the validity and enforceability of the stability agreement are established and, consequently, the opposing party's claim for payment to Zambelli of the sum of €968.449.65 as consideration for the stability agreement, Rossi may be ordered directly to pay Zambelli the aforementioned amount, or Ferruccio Rossi may be ordered to reimburse Ferretti S.p.A. for the aforementioned sum should the company be ordered to pay" (Appellant's Doc. 7).

On the basis of these allegations, Ferretti submitted the following conclusions: "[…] - In the further alternative, should the dismissal be found to be unlawful and the stability agreement to be lawful and valid, to reduce the sums claimed in respect of notice and supplementary compensation on the grounds set out in this statement of defence, taking into account the lower total gross remuneration indicated therein, and to order Mr Ferruccio Rossi to pay directly to Zambelli thethe amount claimed by him as a penalty under the stability agreement; or order Ferruccio Rossi to pay to Ferretti the sums that Ferretti might be ordered to pay to Zambelli as consideration under the stability agreement".

These were claims for compensation identical, in both title and relief sought, to those brought by Ferretti against Rossi in the arbitration proceedings (concerning the employee Zambelli) and in relation to which the defendant had raised an objection regarding the arbitrators' lack of jurisdiction.

In Rossi's view, such conduct was sufficient to bring about the termination of the effects of the arbitration agreement with regard to the dispute decided by the final award, since a party that brings proceedings before the ordinary courts to enforce rights arising from a contract, despite the existence of a foreign arbitration clause, implicitly waives the right to rely on that clause.

Ferretti's subsequent withdrawal of the claims brought in Italy, which took place at the first hearing in the Ferretti v Zambelli proceedings held before the Court of Bergamo on 26 May 2015, was of no effect.

It had to be considered that if a party chooses to bring a matter before a court to have the merits of a dispute decided – a dispute which would otherwise have fallen within the jurisdiction of arbitrators – it makes an irrevocable choice to definitively exclude arbitration.

Furthermore, in the pending employment proceedings between Ferretti and Dr Rossi before the Court of Bergamo (subsequently transferred to the Court of Bologna), Ferretti had not, in its statement of defence filed on 26 February 2015, raised the objection that the Italian court lacked jurisdiction by virtue of the arbitration clause contained in the articles of association.

Rossi Ferruccio therefore urged that the claims set out in the heading be upheld.

Ferretti S.p.A. appeared in the proceedings, opposing the opposing claims and seeking their dismissal.

The submissions were set out as transcribed in the heading and, once the time limits laid down in Articles 190 and 352 of the Code of Civil Procedure had expired, the case was decided in chambers.

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1. With regard to the first ground of opposition, the Court observes as follows.

The arbitration clause contained in Article 31 of the Articles of Association of Ferretti S.p.A. designates Geneva as the seat of arbitration (see doc. 2 Ferretti S.p.A.), thereby determining the nationality of the arbitration and identifying the lex arbitri, that is to say, the procedural law which, pursuant to Articles 816 and 810(3) of the Code of Civil Procedure, is Swiss law.

This is, moreover, confirmed by Swiss procedural law itself: Article 176(1) of the LDIP (see Doc. 7 Ferretti) provides that "The provisions of this chapter shall apply to arbitral tribunals seated in Switzerland provided that, at the time the arbitration agreement was concluded, at least one party was neither domiciled nor habitually resident in Switzerland" (this provision applies by virtue of the Terms of Reference accepted by the parties at the commencement of the arbitration proceedings - see Doc. 9, para. 27 and
28 produced by Ferretti S.p.A.).

The arbitration clause further provides, in Article 31.3, that the arbitrators must apply the "provisions of the Civil Code", thereby stipulating that the substantive law on the basis of which the arbitrators are required to decide the merits of the dispute is Italian law.

Consequently, the applicable procedural law is Swiss law and the applicable substantive law is Italian law.

Now, it is undisputed that the arbitration agreement constitutes a contract, with the consequence that its validity must be assessed in relation to substantive law, and not to procedural law.

To determine this substantive law, Article 178(2) of the LDIP (i.e. the lex arbitri) provides that: "the arbitration agreement is substantively valid if it complies with the law chosen by the parties, with the law applicable to the subject-matter of the dispute, in particular that applicable to the main contract, or to Swiss law". Therefore, the validity of the arbitration clause must be assessed on the basis of any one of the legal systems referred to in the aforementioned provision.

Now, the arbitration clause is, first and foremost, valid under Italian substantive law (the 'law applicable to the subject matter of the dispute'); Rossi, on the other hand, would seek to apply Italian procedural law to the arbitration agreement, thereby rendering it null and void.

Rossi, in fact, confuses the substantive Italian rules governing the validity of the arbitration clause in the articles of association (which are relevant for assessing the validity of the arbitration clause) with the Italian procedural rules governing domestic corporate arbitration proceedings (which are irrelevant, given that, as has been stated, the arbitration proceedings leading to the final award are governed by Swiss procedural law). Rossi, in fact, asserts that Articles 34 et seq. of Legislative Decree 5/2003 govern 'the only possible type of arbitration clause that may be included in the articles of association of an Italian company and the only corporate arbitration proceedings admissible under Italian law in such cases'.

In addition to what has already been noted regarding the Swiss nature of the arbitration—which requires the application of Swiss procedural rules on arbitration—it should be added that, in any event, Italian procedural rules have territorially limited effect

to the Italian legal system, as provided for in Article 12 of Law 31 May 1995, No. 218.

The plain text of the provisions also provides a clear indication (the heading of Article 34 is 'Subject-matter and effects of statutory arbitration clauses', whilst those of Articles 35 and 36 are, respectively, 'Mandatory rules governing arbitration proceedings' and 'Decision in accordance with the law').

The legislator provides for the nullity of the arbitration agreement only in the case of an arbitration clause that does not entrust the appointment of arbitrators to a party external to the company (see Article 34(2) of Legislative Decree 5/2003), whilst no grounds for nullity are provided for in Articles 35 and 36 of Legislative Decree 5/2003.

In any event, Article 35 of Legislative Decree 5/2003 does not prescribe the content of the arbitration clause, but sets out the 'mandatory rules governing corporate arbitration proceedings' in Italy: Article 35 therefore does not apply to these arbitration proceedings, which are governed by Swiss procedural law.

Similarly, Article 36 of Legislative Decree 5/2003, in so far as it governs challenges to arbitral awards, does not prescribe any mandatory content in relation to corporate arbitration agreements, but rather regulates challenges to internal awards issued following arbitration proceedings seated in Italy pursuant to Article 816 of the Code of Civil Procedure. In other words, Article 36 of Legislative Decree 5/2003 does not prescribe the content of the arbitration clause but rather governs appeals.

From the foregoing, it is clear that the arbitration clause is valid under Italian law, which is decisive.

1.2. That being said, without prejudice to the above comments regarding the procedural nature of Articles 35 and 36 of Legislative Decree 5/2003, and their consequent irrelevance for the purposes of assessing the validity of the arbitration clause, the opponent asserts that Articles 35 and 36 of Legislative Decree No. 5 of 2003 provide for procedural safeguards that would otherwise be absent in Swiss international arbitration; this absence, it is claimed, constitutes the reason for setting the seat of arbitration in Switzerland, as well as evidence of the evasive intent of Ferretti's shareholders.

This argument is unfounded.

In fact, the rules governing arbitration provide the parties with equivalent procedural safeguards in both Italy and Switzerland.

Thus, Rossi's reference to the rules governing intervention, set out in Article 35(2) of Legislative Decree 5/2003, is irrelevant.

In the present case, the Arbitral Tribunal ruled on a corporate liability claim: we are therefore outside the scope of proceedings that the legislator had in mind when regulating intervention in arbitration.

In fact, the structure of corporate arbitration was designed primarily to ensure the efficiency of proceedings in which there are typically multiple parties, namely challenges to shareholders' meeting resolutions (in which shareholders, in order to be entitled to bring an action, must hold, even cumulatively, a specified percentage of the share capital: see Article 2377 of the Civil Code).

It is not clear, however, what role a shareholder is expected to play in a corporate liability action, given that they remain uninvolved in the claim for damages, which is brought by the company for its own benefit and, consequently, for the benefit of all shareholders.

Turning then to the reference to the rules on challenging arbitral awards set out in Articles 35(3) and 36 of Legislative Decree 5/2003, Rossi Ferruccio contends that Ferretti's shareholders fixed the seat of arbitration in Switzerland, a State with which they have no connection, with the deliberate intention of circumventing Italian law and precluding any possibility of challenging the award.

Article 192 of the LDIP requires, for a waiver of the right to challenge the award to be valid, an 'express declaration' by the parties.

However, the arbitration clause contains no prior waiver, whether implicit or express, of the right to challenge the award; on the contrary, it provides, in Article 31.5, that the award shall be subject to appeal "in the cases mandatory provided for by law": the award rendered by the Arbitral Tribunal shall therefore be subject to review on the basis of all the grounds set out in Article 190 of the LDIP, thereby refuting Mr Rossi's complaints.

1.3. The findings set out above are also sufficient to refute the opponent's observation that locating the seat of arbitration in Switzerland would constitute a "flagrant circumvention, carefully planned 'behind closed doors' by Ferretti's shareholders, of the mandatory legislation applicable to Italian companies", which would amount to fraud against the law.

In the present case, there has been no attempt to circumvent a prohibition, given that, as explained above, no such prohibition can be identified in the present case.

Indeed, it has already been stated that foreign arbitration is not excluded from the provisions governing corporate arbitration, and that, in any event, the safeguards described by Rossi as mandatory (such as those relating to appeals) have not been disregarded, since the decisions of the Arbitral Tribunal are in any event subject to appeal in accordance with the remedies set out in Article 190 of the LDIP.

2. As regards the second ground of appeal, the Court observes that the public policy at issue is what is known as 'internal international public policy', that is to say, that of the State addressed on the basis of the provisions of the New York Convention, but also encompassing the fundamental supranational principles governing our legal system at a given historical moment; in other words, the concept of public policy is identified with the body of rules and values which the Italian legal system cannot allow to be disregarded, even in cross-border relationships.

When assessing whether such a breach has occurred, the wording of Article 840 of the Code of Civil Procedure must be taken into account, which provides that recognition shall be refused if 'the award contains provisions contrary to public policy". Case law has traditionally held that compliance with public policy must be assessed solely with regard to the operative part of the award (see Court of Cassation, 8 April 2004, No. 6974). Indeed, no assessment of the reasoning would be admissible, as this would entail the risk of a re-examination of the merits of the matter submitted to the arbitrators.

It follows from the above that the public policy referred to in the provision is substantive rather than procedural, as the indispensable procedural principles of the Italian legal system are already set out in the other grounds for opposing the recognition of foreign arbitral awards.

No breach of substantive public policy has been alleged in the present case.

The decisions of the Arbitral Tribunal are, in any event, not at odds with procedural public policy either, which comes into play in the event of a breach of the inviolable principles designed to safeguard the right to bring and defend legal proceedings (such as extremely serious breaches of the principle of the right to be heard and of the impartiality of arbitrators). The particularly restrictive nature with which the concept of procedural public policy must be understood has recently been reaffirmed by the Joint Divisions, according to which "the protection of the fundamental right to a fair trial, as repeatedly stated, has not been understood as an absolute prerogative – that is, an uncompromising search for any violation in relation to the procedural practices of each individual State – but as a means of preventing, through the enforcement of awards, only manifest and disproportionate infringements of the parties' right to adversarial proceedings and to a defence" (see Court of Cassation, Joint Divisions, No. 16601 of 7 February 2017).

Rossi's objection is therefore misplaced; he seeks to infer from the inapplicability of the (procedural) rules on Italian corporate arbitration to the present case a violation of public policy sufficient to prevent the recognition of the final award, given that, as seen above, the conduct of the arbitration proceedings leading to the award did not violate the guarantees that the Italian legal system considers to be of fundamental application (there are no objections regarding the right to be heard, which was fully respected; nor is the impartiality of the Arbitral Tribunal in any way in question).

The Arbitral Tribunal shares this view, stating in its interim award that: "the procedural provisions of Articles 35 and 36 of Legislative Decree No. 5/2003, although mandatory where the arbitration is seated in Italy, are not intended to safeguard principles of international public policy; therefore, arbitrations arising from a statutory arbitration clause, which is valid and substantively compliant within the meaning of Article 34 of Legislative Decree
No. 5/2003, as well as being valid under the lex arbitri, may be seated outside Italy and conducted in accordance with the procedural rules of a different State' (see Doc. 5, para. 127, Ferretti).

The procedural safeguards whose breach Rossi alleges have, in any event, been respected; consequently, the operative part of the final award contains no ruling which, if enforced, could conflict with public policy.

3. As regards the third ground of opposition, the Court finds that it is unfounded, as already stated in the order of 17 January 2019 granting provisional enforceability to the decree recognising the final award: "the alleged subsequent non-existence of the arbitration agreement due to an implied waiver thereof by Ferretti S.p.A., resulting from the latter's bringing before the ordinary courts the same claims as those raised in the arbitration proceedings, does not appear to be established", since "at the time

such claims were brought, the arbitration proceedings were already pending”.

Firstly, Ferretti did not bring any claim against Rossi before the Court of Bergamo, but merely sought authorisation to summon him to court (see Doc. 10 Ferretti and Doc. 7 Rossi). There was therefore never any claim by Ferretti against Rossi, as no writ of summons was served on the latter.

Secondly, even if it had been a genuine claim, no waiver of the arbitration clause could have been inferred from it. This is not only because Ferretti’s joinder of the proceedings would have established a direct adversarial relationship between Dr Zambelli and Dr Rossi, but also because, on 15 May 2015, these arbitration proceedings were already pending: the claim before the Court of Bergamo was therefore brought whilst the arbitration was pending.

However, case law recognises the invalidity of the arbitration agreement due to waiver in cases where ordinary proceedings were initiated before the request for arbitration was made, and not, as in the present case, the other way round.

This is evident from the Supreme Court’s judgment No. 22236/2009: the claim brought before the ordinary court, it states, implies a ‘waiver of the right to rely on the clause’. It is therefore clear that, according to the Joint Divisions, only a party who has not yet filed a request for arbitration may waive the right to rely on the clause.

According to case law, proceedings brought before a court prior to the request for arbitration may therefore constitute conclusive evidence from which to infer an implied waiver of the right to rely on the procedural effects of the arbitration agreement – that is, to lodge a request for arbitration in the future – but only whilst the arbitration is not yet pending.

Once the request for arbitration has been filed, however, there is no longer any scope for waiving the arbitration agreement. At most, the arbitration may be terminated by a waiver of proceedings made before the arbitrators, but this will involve the application of the relevant procedural rules rather than those of substantive law.

And Ferretti did not waive his right to the arbitration proceedings.

Furthermore, Ferretti chose not to call Rossi as a party at the hearing on 26 May 2015 (see Doc. 11 Ferretti).

In this regard, the argument that the waiver would have no effect because there is no scope for recognising a 'unilateral right of withdrawal' appears to be without merit.

First of all, withdrawal from the proceedings is always possible under Article 306 of the Code of Civil Procedure and, for the purposes of extinguishing the claim, is subject to the other party's acceptance only if that party has been duly served with the claim.

However, in the present case, Mr Rossi was not only not a party to the proceedings but was not even a party to the case, since the claim, not having yet been authorised, had not been served on him. Ferretti was therefore entitled to withdraw the application.

Ferruccio Rossi then attempts to infer some indication of a waiver of the arbitration clause from the fact that Ferretti, in the pending employment proceedings between Ferretti and Rossi before the Court of Bergamo (subsequently transferred to the Court of Bologna), did not raise, in the statement of defence filed on 26 February 2015 (see Doc. 12 Ferretti and Doc. 14 Rossi), that the Italian court lacked jurisdiction by virtue of the arbitration clause contained in the articles of association (see opposition, p. 31).

The complaint is without foundation.

Even setting aside the fact that the opposing party never raised this issue during the arbitration proceedings, there is nothing to prevent the same issue from being simultaneously pending before an arbitration tribunal to which the matter was previously referred and before an ordinary court.

Moreover, in the statement of defence and reply dated 9 October 2017, filed by Ferretti following the resumption of the proceedings in question before the Court of Bologna, the company raised the defence of arbitration (see Doc. 17 Ferretti). This demonstrates Ferretti's complete lack of any intention to waive arbitration.

Finally, Article 840(3)(1) of the Code of Civil Procedure identifies the 'invalidity' of the arbitration clause as a possible ground for refusing to recognise the award, whilst it is undisputed that an implied waiver of the arbitration clause merely renders it ineffective (Court of Cassation, 7 July 2014, No. 15452, which states that 'The non-binding nature, at the summary stage, of the submission of a claim for termination means that, when such a claim has been expressly made, the party has thereby manifested its intention not to avail itself of the arbitration clause, with the consequent ineffectiveness of the same').

Now, invalidity is a different defect from mere ineffectiveness, the former constituting a defect that renders the agreement as a whole void ab origine, whilst the latter constitutes a defect which, on the contrary, presupposes its validity.

Indeed, even in the context of arbitration agreements, invalidity and ineffectiveness are distinct defects: one need only look, for example, at Article 817(2), second sentence, of the Code of Civil Procedure, in which 'invalidity and ineffectiveness' are expressly mentioned as possible defects that are mutually exclusive.

Now, the invalidity referred to in Article 840(1) of the Code of Civil Procedure, which is relevant for the purposes of precluding recognition, according to legal doctrine, 'must be understood to refer exclusively to the grounds for so-called "substantive" invalidity of the arbitration agreement relating to the consent of the parties', that is to say, to the fact that the parties did not knowingly and validly opt to have the dispute resolved before arbitrators (rather than before a court of law); and there is no doubt that no defect relating to the parties' agreement exists in the present case.

It is therefore clear that, even if Ferretti's conduct were to be construed as an implicit waiver of the arbitration clause, the latter would at most have become ineffective rather than invalid, meaning that the final award could not be refused recognition.

The third ground of opposition is also to be regarded as unfounded. The opposition must therefore be dismissed.

4. The costs of these proceedings shall be borne by the unsuccessful party.

They are assessed in accordance with the provisions of Articles 4 et seq. of Ministerial Decree No. 55 of 10 March 2014 and the tables annexed to that decree, with the value bracket of 52,001 to €260,000.

Single instance:

stage of assessment		€	2,835.00
intro ducto ry	introductory	€	1,820.00
decis ion- makin g	decision-making	€	4,860.00
TOTAL		€	9,515.00

Although the appeal has been dismissed, the doubling of the standard court fee does not apply, pursuant to Article 13(*1-quater*) of Presidential Decree No. 115 of 2002, as the appeal against the decree issued by the President of the Court of Appeal, which recognises the enforceability of the foreign arbitral award under Italian law, does not constitute a procedural appeal, as this is a single-instance proceedings on the merits.

ORDERS

THE COURT OF APPEAL

In its final ruling, having dismissed all other claims, defences and arguments, dismisses the opposition brought by Rossi Ferruccio against Order No. 106/2017 issued by the President of the Court of Appeal of Genoa on 31 March 2017 in Case No. R.G. 95/2017;

orders the appellant to reimburse the respondent, Ferretti S.p.A., for the costs of the present appeal proceedings, which are set at €9,515.00 for fees, plus general expenses and statutory charges.

Genoa, 10 June 2020

The Chair

Dr Maria Teresa BONAVIA

The drafting Councillor,

Dr Marcello BRUNO