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ITALIAN REPUBLIC
IN THE NAME OF THE ITALIAN PEOPLE THE SUPREME COURT OF CASSATION
FIRST CIVIL SECTION

Composed of the Honourable Judges

Dr Mauro Di Marzio	President
Dr Marco Marulli	Counsellor
Dr Alessandra Dal Moro	Counsellor
Dr Eduardo Campese	Councillor – rapporteur
Dr Paolo Catallozzi	Counsellor

Subject

OPPOSITION TO THE RECOGNITION OF AN ARBITRAL AWARD FOREIGN AWARD.

Hearing 14 March 2025 PU
Case No.
R.G.N. 30467/2020

has delivered the following

JUDGMENT

on appeal no. 30467/2020 r.g. brought by:

ROSSI FERRUCCIO, represented and defended, pursuant to the special power of attorney attached to the appeal, by Professor Claudio Consolo, Solicitor, and by Solicitors Maurizio Traverso and Alfredo Irti, as well as, pursuant to the special power of attorney attached to *the 'Statement of Appointment of a New Defence Counsel in Addition to the Originally Appointed Defence* Counsel', by Mr Emanuele Breggia, with whom he has elected domicile in Rome, at Via Andrea Vesalio No. 22, at the offices of Mr Alfredo Irti.

- Appellant -

against

FERRETTI S.P.A., with its registered office in Cattolica (RN), at Via Irma Bandiera No. 62, represented by its managing director and legal representative, Mr Alberto Galassi, a solicitor, represented and defended, pursuant to special special attached to the counter-appeal, by Mr Andrea Magliani, Solicitor, and Prof. Elena 1

Marinucci, through whom he elects domicile in Rome, at Piazza Adriana No. 5, at the offices of Ms Elena Vaccari.

- counter-appellant -

against the judgment, case no. 649/2020, of the COURT OF APPEAL OF GENOA, published on 9 July 2020;

having heard the report on the case presented at the public hearing on 14 March 2025 by Judge Dr Eduardo Campese;

having heard the Public Prosecutor, represented by the Deputy Attorney General, Dr Andrea Postiglione, who concluded by requesting that the appeal be upheld;

having heard, on behalf of the appellant, Solicitors Emanuele Breggia and Alfredo Irti, as well as Solicitor Prof. Claudio Consolo, who requested that their appeal be upheld; having heard, on behalf of the respondent, Mr Andrea Magliani and Prof. Elena Marinucci, who requested that the opposing appeal be dismissed;

having examined the written submissions filed by the parties *pursuant to* Article 378 of the Code of Civil Procedure.

FACTS OF THE CASE

1. By a request for arbitration dated 17 December 2014, Ferretti S.p.A. applied to the International Court of Arbitration at the International Chamber of Commerce for the appointment of a panel of arbitrators in accordance with Article 31 of its Articles of Association and set out the following claims: *"As a principal claim: 1. To establish and declare the liability of the respondent, 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 have been required to pay, in the course of these arbitration proceedings, to Messrs Marco Zambelli and Pierluigi Galassetti in performance of the agreements, known as 'Parachute' agreements, described in the statement of claim and formally dated 9 January 2013 and 4 March 2013 respectively, as well as to compensate Ferretti S.p.A. for any further damages, costs and expenses that Ferretti S.p.A. may suffer or incur as a result of those agreements, as further quantified in the course of the proceedings; 3. in any event, order Dr Ferruccio Rossi to pay to Ferretti S.p.A. an amount equal to the sum that Ferretti S.p.A. may*

pay as a result of any court order(s) or settlement agreement(s) bringing legal proceedings to an end, to Messrs Marco Zambelli and Pierluigi Galassetti in performance of the so-called "Parachute", agreements described in the statement of facts and formally bearing the dates of 9 January 2013 and 4 March 2013 respectively; 4. In any event, with costs and fees to be borne by the losing party, including those relating to the establishment and operation of the Arbitral Tribunal to be constituted".

1.1. Ferruccio Rossi appeared in the aforementioned arbitration proceedings, concluding as follows: *"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) to take into account the conduct of Ferretti S.p.A. pursuant to Article 1227*
of the Civil Code in order to exclude or, where appropriate, significantly reduce any compensation that might be awarded to Ferretti S.p.A.".

1.2. The appointed arbitral tribunal adopted *the Terms of Reference*, pursuant to which, in accordance with the arbitration clause in the Articles of Association, it would apply Italian law in its entirety to decide the dispute.

1.3. By , an award , not , final , dated 8 September 2015, , the aforementioned
The court declared that it had jurisdiction to rule on Ferretti's claims
s.p.a. and subsequently, in a final award dated 30 January 2017, without expressly referring to the previous *ruling* on its own *jurisdiction*, issued the following operative part: *"1. The Defendant, 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 assign corporate performance targets (MBOs) to Messrs Marco Zambelli and Pierluigi Galassetti. 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. The costs of the arbitration amount to USD 278,958.00, as well as EUR 179,150.37, and are to 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".

2. By Decree No. 106 of 30 March 2017, the President of the Genoa Court of Appeal, upon application by Ferretti S.p.A. *pursuant* to Article 839 of the Code of Civil Procedure, declared the final award to be enforceable in Italy and ordered Ferruccio Rossi to bear the costs of the proceedings.

3. The appeal lodged by the latter, *pursuant* to Article 840 of the Code of Civil Procedure, against the aforementioned decree was dismissed by the Court of Appeal of that same city by judgment No. 649 of 10 June/9 July 2020, delivered after hearing both sides in the proceedings with Ferretti S.p.A.

3.1. In particular, that court held as follows:

'As regards 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. stipulates that the seat of arbitration shall be in Geneva [...], 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 [...] 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 ...).

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

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

It is now undisputed that the arbitration agreement constitutes a contract, with the consequence that its validity must be assessed in accordance with substantive law, and not procedural law.

To determine that 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, the law applicable to the subject-matter of the dispute, in particular that applicable to the main contract, or Swiss law". Consequently, 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 concluding that it is null and void.

Rossi, in fact, confuses the Italian substantive rules governing the validity of the statutory arbitration clause (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 nationality 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 territorial effect limited to the Italian legal system, as provided for in Article 12 of Law No. 218 of 31 May 1995.

The literal wording 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 that an arbitration agreement is void only where the arbitration clause does not entrust the appointment of arbitrators to a party external to the company (see Article 34(2) of Legislative Decree 5/2003), whilst Articles 35 and 36 of Legislative Decree 5/2003 do not provide for any grounds for nullity.

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 does not, therefore, 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 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.

That being said, without prejudice to the above remarks 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 contends that Articles 35 and 36 of Legislative Decree 5/2003 provide for procedural safeguards that are otherwise absent in Swiss international arbitration, an absence which is said to constitute the reason for fixing 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 on intervention, contained 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 claims that the legislature had in mind when it regulated intervention in arbitration.

In fact, the structure of corporate arbitration has been 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, either individually or collectively, a specified percentage of the share capital: see Article 2377 of the Civil Code).

It is not clear, however, what role the shareholder is required to play in the corporate liability action, given that he remains uninvolved in the claim for damages brought by the company for its own benefit and, by extension, for the benefit of all shareholders. Turning, then, to the reference to the rules on appeals 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 country with which they have no connection, with the deliberate intention of circumventing Italian law and to preclude 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 does not contain any prior waiver, whether implied 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 challenge 'in the cases mandatory provided for by law': the award rendered by the Arbitral Tribunal will therefore be open to challenge on all the grounds set out in Article 190 of the LDIP, thereby refuting Rossi's complaints.

The points made so far are also sufficient to refute the opponent's observation that setting the place 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.

It has, in fact, 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.

As regards the second ground, 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 requested State on the basis of the provisions of the New York Convention, but also concerning 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.

In assessing whether such a breach has occurred, consideration must be given to the wording of Article 840 of the Code of Civil Procedure, which provides that recognition shall be refused where '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 permissible, as this would risk 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, since the mandatory procedural principles of the Italian legal system are already covered by the other grounds for opposing the recognition of foreign 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 guaranteeing the right to bring and defend legal proceedings (such as very serious breaches of the principle of the right to be heard and the impartiality of arbitrators). The concept of public policy must be interpreted in a particularly restrictive manner

The principle of public access to court proceedings has recently been reaffirmed by Sezioni Unite, 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 to say, an uncompromising investigation of any infringement in relation to the procedural practices of each individual State, but as a means of preventing, through the enforcement of judgments, 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 breach of public policy sufficient to prevent the recognition of the final award, given that, as has been seen above, the conduct of the arbitration proceedings leading to the award did not breach 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 question).

The Arbitral Tribunal shares this view and, in its interim award, states that: "the procedural provisions of Articles 35 and 36 of Legislative Decree No. 5/2003, whilst mandatory where the arbitration is seated in Italy, are not intended to safeguard principles of international public policy; therefore, arbitration proceedings 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 valid under the lex arbitri – may be seated outside Italy and conducted in accordance with the procedural rules of a different State' [...].

The procedural safeguards which Rossi alleges have been breached have in any event been respected, so that the operative part of the final award contains no ruling which, once enforced, could conflict with public policy" [...]'.

4. Ferruccio Rossi lodged an appeal against this judgment, relying on two grounds, which were also set out in a statement of grounds *pursuant to* Article *380-bis*.1 of the Code of Civil Procedure. Ferretti S.p.A. filed a counter-appeal, accompanied by a corresponding statement of grounds.

4.1. By interlocutory order No. 16124 of 6–11 June 2024, this Court, having considered that *'The question (as to whether or not an arbitration clause providing for foreign arbitration contained in the articles of association of an Italian company is valid) raised by the arguments set out in the grounds of appeal – given its particular complexity and significance (see Court of Cassation, Joint Divisions, No. 14437 of 2018), its clear normative significance, the conflicting views in legal scholarship on the matter and the absence of specific precedents in the Court of Cassation – makes it appropriate to refer the case to a public* hearing', ordered accordingly, and consequently referred the case to the new docket.

4.2. Subsequently, today's public hearing was scheduled, in the run-up to which written submissions were filed *pursuant to* Article 378 of the Code of Civil Procedure.

GROUNDS FOR THE DECISION

1. – *The grounds of appeal.* The grounds of appeal set out, in summary, as follows:

I) *'Infringement or misapplication of Articles 34 and 35 of Legislative Decree No 5 of 17 January 2003, in relation to Article 840 of the Code of Civil Procedure, constituting a ground for appeal under Article 360(1)(3) of the Code of Civil* Procedure', in that the Court of Appeal held to be valid the arbitration clause contained in the articles of association of an Italian limited company with its registered office in Italy, which, in stark contrast to the mandatory rules governing statutory corporate arbitration, entrusts the resolution of corporate disputes to foreign arbitrators, whose award – being final in the foreign state of origin – is not even subject to appeal in Italy, the resolution of corporate disputes;

II) *'Breach and/or misapplication of Article V.1(a) of the New York Convention, Article 840(3)(1) of the Code of Civil Procedure, in relation to Articles 34, 35 and 36 of Legislative Decree No 5/2003, Article 1418 of the Civil Code, and Articles 4 and 25 of Law No. 218/1995, relevant pursuant to Article 360(1)(3)* of the *Code of Civil* Procedure', on the grounds that the Court of Appeal did not refuse to recognise in Italy an award issued on the basis of an arbitration clause contained in the articles of association of a public limited company (S.p.A.) with its registered office in Italy, an arbitration clause which is invalid in that it refers the settlement of disputes between the company, its shareholders and its directors to foreign arbitration seated in Switzerland.

2. – *The submissions and arguments of the Attorney General*. Given the particular significance and normative value of the legal issue before this Court today, as well as the conflicting views in legal scholarship on the subject and the absence of specific precedents from the Court of Cassation on this matter, the Court considers it appropriate to set out, albeit briefly, the arguments on which the representative of the Office of the Attorney General before this Court has based his request for the appeal to be upheld.

These can be summarised as follows: (*i*) where recognition of a foreign award is sought in Italy, international (and national) law provides for an assessment of the validity of the arbitration agreement, to be carried out in accordance with the law to which the parties have subjected it (in the present case, undisputedly, Italian law); (*ii*) the provisions laid down in Article 35 of Legislative Decree No 5/2003 – which has been repealed, as have Articles 34 and 36 of the same decree, but all of which remain applicable here *ratione temporis* – (and, today, in Article *838-quater* of the Code of Civil Procedure), is not merely procedural in nature, but takes on a substantive character insofar as it defines the scope of contractual freedom and excludes the possibility of subjecting the award, in the corporate context (that is to say, one rendered following arbitration proceedings provided for by an arbitration clause in the articles of association), to any form of challenge; *iii*) the nullity of the arbitration agreement, regulated as a ground precluding recognition *under* Article 840(3)(1) of the Code of Civil Procedure, cannot therefore be limited solely to the fact that the person vested with the power to appoint arbitrators is not a member of the company, as required by Article 34, paragraph 2, of Legislative Decree No 5/2003, but encompasses all other cases of breach of public policy rules, such as those governed by Article 35 of the aforementioned Legislative Decree and by Article 829(1) of the Code of Civil Procedure; (*iv*) the clause at issue in the present proceedings, by indirectly establishing (through the choice of venue) the procedural rules governing the arbitration proceedings in accordance with Swiss law, effectively entails, in addition to other derogations from the special regime, an absolute lack of appealability of the arbitral award, in that, in the case of companies not established in Switzerland, the parties are permitted (as, in fact, was done in the

in the present case) to preclude any appeal before the Swiss court ad ro; v) a
The clause at issue in the present proceedings is therefore null and void, as it imposes on the shareholders (and directors) procedural rules which effectively deprive them of any means of appeal, in breach of the special regime provided for by Italian law.

3. – *The relevant national and international legislation.* It should be noted at the outset, in order to avoid any possible misunderstanding, that this judgement does not concern the validity of the foreign award or the procedural rules governing its rendering, but relates exclusively to the enforceability of that foreign award to be recognised by the national national intoby virtue of recognition and, therefore, through the special procedure provided for in Articles 839 et

ff. of the Code of Civil Procedure, which refers to the New York Convention of 10 June 1958. The decision in the present dispute must therefore be made in accordance with the aforementioned (and comprehensive) legislative framework, both national and international, which it is appropriate to mention here.

3.1. Firstly, Articles 34, 35 and 36 of Legislative Decree No. 5 of 2003, in their respective versions applicable *ratione temporis* prior to their repeal by Legislative Decree No. 149 of 2022 (*the* so-called *Cartabia Reform*). These provide as follows:

Article 34 (*Subject-matter and effects of arbitration clauses in articles of association).*

1. The articles of association of companies, with the exception of those that raise capital on the risk capital market pursuant to Article 2325-bis *of the Civil Code, may, by means of arbitration clauses, provide for the referral to arbitrators of some or all disputes arising between shareholders or between shareholders and the company concerning enforceable rights relating to the shareholder relationship.*

2. The clause must specify the number of arbitrators and the procedure for their appointment, and must in any event – on pain of nullity – confer the power to appoint all arbitrators on a person outside the company. Should the designated person fail to do so, the appointment shall be requested from the president of the court in the place where the company has its registered office.

3. The clause is binding on the company and on all shareholders, including those whose status as shareholders is the subject of the dispute.

4. The articles of association may provide that the arbitration clause applies to disputes brought by, or against, directors, liquidators and statutory auditors; in such cases, the clause is binding on them upon acceptance of their appointment.

5. Disputes in which the law provides for the mandatory intervention of the public prosecutor may not be subject to an arbitration clause.

6. Amendments to the articles of association introducing or removing arbitration clauses must be approved by shareholders representing at least two-thirds of the share capital. Absent or dissenting shareholders may, within the following ninety days, exercise their right of withdrawal.

Art. 35 (*Mandatory rules governing arbitration proceedings).*

1. A request for arbitration brought by the company or against it shall be filed with the Companies Register and shall be accessible to the shareholders.

2. In arbitration proceedings initiated pursuant to the arbitration clause referred to in Article 34, third-party intervention in accordance with Article 105 of the Code of Civil Procedure, as well as the intervention of other shareholders in accordance with Articles 106 and 107 of the same Code, is permitted up to the first hearing. Article 820, second paragraph, of the Code of Civil Procedure applies.

3. In arbitration proceedings, Article 819, first paragraph, of the Code of Civil Procedure shall not apply; however, the award may always be challenged, notwithstanding the provisions on international arbitration set out in Article 838 of the Code of Civil Procedure, in accordance with Articles 829, first paragraph, and 831 of the same Code.

4. The findings of the award are binding on the company.

5. The referral of a dispute to arbitration, even if not in accordance with formal procedures, does not preclude recourse to interim relief under Article 669-quinquies *of the Code of Civil Procedure; however, if the arbitration clause permits the referral to arbitration of disputes concerning the validity of shareholders' meeting resolutions, the arbitrators shall always have the power to order, by means of an order against which no appeal may be lodged, the suspension of the resolution's effect.*

5-bis. *The provisions of the suspension order and the award che decide relating to the appeal must be entered by the directors in the Companies Register.*

Art. 36 (*Decision in accordance with the law).*

1. Even if the arbitration clause authorises the arbitrators to decide on the basis of equity or to issue a non-appealable award, the arbitrators must decide in accordance with the law, with an award that is appealable also pursuant to Article 829, second paragraph, of the Code of Civil Procedure, where, in reaching their decision, they have considered matters not subject to arbitration or where the subject-matter of the proceedings concerns the validity of shareholders' meeting resolutions.

2. This provision also applies to awards made in international arbitration.

3.2. It should also be noted that Article 840 of the Code of Civil Procedure – contained in Chapter VII (*Foreign Awards*) of Title VIII of Book IV of the Code of Civil Procedure – governs proceedings to challenge the order by which, *pursuant* to Article 839 of the same Code, the President of the Court of Appeal declares a foreign award to be enforceable in Italy.

The text applicable here *ratione temporis*, prior to the amendments made by Legislative Decree No 149 of 2022, provides as follows:

Article 840 (*Opposition*).

I. An opposition may be lodged against the decree granting or refusing the enforceability of a foreign award by serving a writ of summons before the Court of Appeal within thirty days of service, in the case of a decree refusing enforceability, or within thirty days of notification, in the case of a decree granting enforceability.

II. Following the opposition, the proceedings shall be conducted in accordance with Articles 645 et seq., insofar as they are applicable. The Court of Appeal shall deliver a judgment which may be appealed to the Court of Cassation.

III. The Court of Appeal shall refuse to recognise or enforce the foreign award if, in the opposition proceedings, the party against whom the award is invoked proves the existence of one of the following circumstances:

1) the parties to the arbitration agreement lacked legal capacity under the law applicable to them, or the arbitration agreement was invalid under the *law to which the parties have subjected it or, in the absence of any such indication, under the law of the State in which the award was made;*

2) the party against whom the award is invoked was not informed of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to put forward its defence in those proceedings;

3) the award has ruled on a dispute not covered by the arbitration agreement or the arbitration clause, or beyond the scope of the arbitration agreement or the arbitration clause; however, if the provisions of the award relating to matters submitted to arbitration can be separated from those relating to matters not submitted to arbitration, the former may be recognised and declared enforceable;

4) the constitution of the arbitral tribunal or the arbitral proceedings did not comply with the agreement of the parties or, in the absence of such an agreement, with the law of the place where the arbitration took place;

5) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the State in which, or under the law of which, it was made.

IV. Where an application has been made to the competent authority referred to in paragraph 5 of the third subparagraph for the annulment or suspension of the effect of the foreign award, the Court of Appeal may stay the proceedings for the recognition or enforcement of the award; at the request of the party concerned, it may, in the event of such a stay, order the other party to provide appropriate security.

V. Recognition or enforcement of the foreign award shall also be refused where the Court of Appeal finds that:

1) the dispute could not be the subject of an arbitration agreement under Italian law;

2) the award contains provisions contrary to public policy.

VI. In any event, the provisions laid down in international conventions shall apply.

3.3. Finally, mention should be made of Article 5(1*)(a)* of the New York Convention of 10 June 1958 – concerning the *recognition and enforcement of foreign arbitral awards* (transposed into Italian law by

Law No. 62 of 19 January 1968) – which provides that *"The recognition and enforcement of the judgment shall be refused, at the request of the party against whom the judgment is invoked, only if that party provides the competent authority of the country in which recognition and enforcement are sought with evidence that: (a) the parties to the agreement referred to in Article II were, under the law applicable to them, legally incapable, or that the said agreement is invalid under the law to which the parties have subjected it or, in the absence of any indication in this regard, under the law of the country where the judgment was given* (a principle clearly incorporated into the aforementioned Article 840(3)(1) of the Code of Civil Procedure, in the text introduced by Law No. 25 of 5 January 1994).

3.4. Finally, it should be noted at this stage that, insofar as they are materially relevant to today's decision, the contents of certain provisions of Law No. 218 of 31 May 1995 (*Reform of the Italian system of private international law*) and of the Swiss Private International Law Act (LDIP) will be set out below.

4. *Statutory corporate arbitration with a seat abroad.* The order challenged today and the grounds of appeal put forward against it bring to this Court's attention, for the first time, the complex issue of statutory corporate arbitration with a seat abroad.

The absence of specific case law precedents that have already addressed this issue should certainly not obscure its practical significance, which is undoubtedly very significant. Indeed, as has been rightly emphasised by authoritative legal scholarship, it is by no means uncommon, in an increasingly globalised and interconnected market, for there to be practical reasons for adopting statutory arbitration clauses that designate the seat of arbitration in a third country, distinct from the company's registered office.

The reasons suggesting the advisability of such a choice may be varied, just as, indeed, the needs that economic operators may have in domestic or international corporate transactions are also manifold. One need only consider, by way of a mere example and without claiming to be exhaustive, the following scenarios: (*i*) a company in which a significant proportion of the shareholding is held by foreign shareholders: in this case, such shareholders may wish to adopt, in order to ensure greater guarantees of the impartiality and neutrality of the arbitral tribunal in relation to any disputes between the shareholders or between the shareholders and the company, an arbitration clause in the articles of association that designates a third, neutral State as the seat of arbitration; (*ii*) a special-purpose vehicle, specifically created to implement an investment agreement and/or a *joint venture* between two or more parties of different nationalities. Where such an investment agreement contains an arbitration clause designating a seat of arbitration in a State other than that in which the special-purpose vehicle is incorporated, the parties may legitimately wish to align the content of the arbitration clause in the articles of association of the vehicle company to be incorporated as closely as possible with the content of the (contractual) clause included in the investment agreement, in order to avoid the risk that disputes which are largely overlapping and/or interrelated might be decided by two different tribunals.

Nor can one deny the significance, moreover, of legitimate grounds of procedural expediency – namely, *'forum shopping*' – which lead to corporate disputes involving a particular company being subject to the procedural law of a country other than that in which the company was incorporated.

It is therefore, in light of all these considerations, particularly appropriate to set out here the various views expressed in legal scholarship regarding the aforementioned issue.

4.1. Now, in the wake of Legislative Decree No. 5/2003, only one article had specifically addressed the issue of the territorial scope of corporate arbitration. Starting from the observation that *"There are essentially two alternatives: a) to hold that the new arbitration rules apply to all companies incorporated in Italy and governed by the Civil Code in its current form following the entry into force of Legislative Decree No. 6, also of 17 January 2003; b) to hold that the new arbitration rules apply to all corporate arbitration proceedings taking place in Italy, regardless of whether the company is governed by Italian or foreign* law', this doctrine held that *'The choice between the two alternatives or*

The suggestion of an intermediate solution should not be based solely on fundamental theoretical considerations regarding the substantive or procedural nature of the new legislation, which obviously lead, in the former case, to option (a) and, in the latter, to option (b). Instead, the choice must also, or above all, be made empirically, by identifying factors for assessment within the mechanisms inherent in the legislation itself that are capable of revealing aspects useful for resolving the issue'. Therefore, it scrutinised and assessed various elements, dividing them into two groups: *i*) those concerning the subjection of companies to Italian law (see Article 34(1) of Legislative Decree No 5/2003, which provides that the articles of association of companies may provide for the referral to arbitrators of certain or all corporate disputes having specific characteristics. As is well known, companies that raise capital on the risk capital market pursuant to Article *2325-bis* of the Civil Code are excluded. The reference to the Civil Code contained in the exclusion demonstrates that, in *the legislature's intent,* the provisions apply to the articles of association of companies governed by the Italian Civil Code; Article 34(2), which stipulates, with regard to the arbitration clause, that it must specify the number and method of appointment of the arbitrators, conferring – on pain of nullity – the power to appoint all arbitrators upon a party external to the company itself. Where the designated person fails to do so, the appointment is to be requested from the President of the Court of the place where the company has its registered office. This necessarily implies that the legislation is intended to apply to companies with their registered office in Italy and not to companies with their registered office abroad; Article 34(6), according to which amendments of the of incorporation introducing or abolishing of arbitration clauses must be approved by shareholders representing two-thirds of the share capital. This necessarily implies that the legislation refers to the articles of association of companies subject to Italian law, which governs their organisation and their operation , and not to articles of association subject to foreign laws; Article 35(1) of the same Legislative Decree, which provides that a request for arbitration brought by the company or against it must be filed with the Companies Register and must be accessible to the shareholders. The Companies Register lists, in fact, companies with their registered office in

Italy. With regard to companies with their registered office abroad and

administrative office or branch in Italy, the filing of the application with the Italian Companies Register cannot serve to replace the essential filing of the application to be made at the registered office abroad); *ii*) those concerning the arbitration proceedings (see the aforementioned Article 34(2) of Legislative Decree No. 5 of 2003, which confers the power to appoint arbitrators—where the designated party fails to do so—on the President of the Court of the place where the company has its registered office, to argue that the legislation is directed at Italian companies; the aforementioned paragraphs 1 and 5 of the same Article 34, where, respectively, they limit arbitration to disputes concerning *'disposable rights relating to the corporate* relationship' or exclude arbitration in matters where

'the mandatory involvement of the public prosecutor'. It is clear that the definition of available rights and that of matters in which the involvement of the public prosecutor is mandatory may and must be determined in the light of Italian substantive and procedural law; paragraphs 2 and 3 of Article 35 of the aforementioned Legislative Decree, concerning, respectively, the possibility of third-party intervention in arbitration proceedings – to be carried out in accordance with Articles 105 et seq. of the Code of Civil Procedure and within the time limits laid down in Article 820 of the Code of Civil Procedure – and the inapplicability of Article 819 of the Code of Civil Procedure to corporate arbitration, so that the arbitrators have the power to hear, on an incidental basis, even matters not subject to arbitration and are not required, as Article 819 mandates, to suspend the proceedings pending the civil court's decision on the incidental issue. Almost as a counterbalance to this power conferred on arbitrators in corporate matters, paragraph 3 further provides that the award may always be challenged on grounds of nullity for the reasons set out in Article 829(1) of the Code of Civil Procedure, and by way of third-party proceedings and revocation pursuant to Article 831 of the Code of Civil Procedure; paragraph 5 of Article 35, which provides that the referral of a dispute to arbitration, even if not formal, does not preclude recourse to interim relief, and the subsequent Article 36, which obliges arbitrators to decide in accordance with the law, with the award being subject to challenge in accordance with Article 829(2) of the Code of Civil Procedure, even where the arbitration clause authorises them to decide

on the basis of equity or by means of a non-appealable award, provided that in order to decide and ab b

in cases where the matters at issue are not subject to compromise, namely where they have ruled on the validity of shareholders' meeting resolutions. This provision, as expressly laid down in Article 36(2), also applies in the case of international arbitration). The general conclusion he drew, having considered the implications arising from the two groups of indicative factors described, was that *"the new rules on arbitration set out in Articles 34 et seq. of Legislative Decree No. 5 of 17 January 2003 apply when two conditions are simultaneously met: the company has its registered office in Italy and the arbitration is seated in Italy. If either of these conditions is not met, the new rules do not automatically apply'*. He added, moreover, that this *'appears to be in line with the solutions under private international law relating to companies. Article 25 of Law No. 218 of 31 May 1995 provides, in fact, that the companies, in particular for the matters specifically indicated therein, which include matters that may be the subject of corporate arbitration pursuant to Articles 34 et seq. of Legislative Decree No. 5 of 17 January 2003, , are governed by the law of the country in which the company was incorporated. Companies incorporated in Italy, and therefore having their registered office in Italy, are therefore subject to Italian law, and the provisions of the Legislative Decree concerning arbitration in company matters apply to them.*"

4.2. More recently, two further views on this subject have emerged in legal scholarship which, despite their differing nuances, appear to be united, so to speak, by a commendable internationalist spirit and by the concern that arbitration should not remain confined, particularly in company law matters, to the domestic sphere alone.

In one view, it has been argued that the parties, in the articles of association or in a subsequent instrument, may designate the seat of arbitration as being abroad, since Legislative Decree No. 5/2003 contains no prohibition in this regard and that, on the contrary, the possibility of derogating from Italian jurisdiction in favour of foreign arbitration is guaranteed, as a general rule, and therefore also for ' ' corporate arbitration, under Article 4 of the Law No. 218/1995, which, is entitled

Accept*ance and waiver of jurisdiction*: paragraph 2 provides that *“Italian jurisdiction may be waived by agreement in favour of a foreign court or foreign arbitration if the waiver is evidenced in writing and the case concerns enforceable rights*”. In this regard, just as is the case under the rules governing ordinary arbitration (see, for example, Article 829 of the Code of Civil Procedure, as a mandatory provision of domestic law), Articles 35 and 36 of Legislative Decree No. 5/2003, although defined as mandatory, nevertheless apply only to domestic arbitration and are intended to give way where the seat of arbitration is located abroad and the proceedings are therefore governed by *the lex arbitri* of a different legal system. In other words, therefore, in statutory corporate arbitration – just as in ordinary arbitration – the rules are mandatory when the arbitration is seated in Italy but are uncontroversially disapplied where a foreign seat is chosen: simply put, the legislator would have laid down a framework interspersed with mandatory provisions solely for domestic arbitration, without making any provision regarding foreign arbitration and without prohibiting the parties from locating the seat of arbitration outside Italy. There would be a single limitation on the exercise of the option in question, namely the necessary compliance, even in the case of foreign arbitration, with Article 34(2) of Legislative Decree No 5/2003 as the rule governing the validity of the arbitration agreement, that is to say, a substantive act (a legal transaction) subject to national law.

The other view, however, proves to be more ‘moderate’, as it seeks to reconcile the necessary compliance with the various rules (and not merely Article 34(2) of Legislative Decree No. 5/2003) that characterise the statutory arbitration model with the general right – granted to the parties by Article 4 of Law No. 218/1995 and Article II of the aforementioned 1958 New York Convention – to choose foreign arbitration and, in so doing, to determine the applicability of a foreign *lex arbitri*. The need to ensure consistency between these various elements, given the mandatory nature of the rules governing Italian corporate arbitration, stems from the concern that any foreign arbitration proceedings might effectively lead to an award that is enforceable in the State where the parties have an interest in the award having

enforcement: *first and foremost*, from the perspective under consideration here, in Italy as the State of incorporation of the company, without running the risk that the *award* will be refused recognition (e.g. due to a lack of the conditions for arbitrability or the invalidity of the arbitration agreement). In this regard, it has been argued that a balance between the above requirements appears possible, first and foremost, where the foreign procedural provisions intended to apply to the proceedings are compatible with the provisions of Articles 34 et seq. of Legislative Decree
No. 5/2003, so that these may in any event be deemed to have been complied with. Such a compatibility assessment would require the acceptance of these two conditions: (*a*) that one should reason not in terms of coincidence or exact overlap, but rather in terms of equivalence between the rules of different legal systems (and so, by way of example, it is stated that the rule on third-party intervention may be deemed to have been complied with where the *lex arbitri* also permits the entry of third parties or partners into the proceedings, albeit under terms and in forms different from those that would apply if the arbitration were to take place in Italy; furthermore, the provisions of Articles 35(3) and 36 of Legislative Decree No 5/2003, concerning appeals, may be deemed to have been complied with if the legal system of the foreign State provides for remedies that are equivalent *'in nature and basis, even if they do not exactly correspond in terms of procedure to those provided for by our Code of* Civil Procedure'); (*b*) that it is accepted that the mandatory nature of the provisions set out in Legislative Decree No 5/2003 does not extend to the jurisdiction of the Italian courts, nor does it imply the mandatory application of Italian procedural rules. In other words, the jurisdiction of the Italian state court as the court hearing appeals against the award would not be mandatory: what would essentially matter is that the appeal remedies provided for by the Italian Code of Civil Procedure and Legislative Decree No. 5/2003 have their counterpart in the procedural legislation of the State in which the seat of arbitration is established. The same reasoning, with the necessary modifications, should apply to the provisions providing for the assistance of the judicial authorities to ensure the effective functioning of the arbitration process: what would be mandatory, under Article 34(2) of Legislative Decree No 5/2003, would be the appointment mechanism, not the involvement of the president of the

court of the place where the company has its registered office, should the appointing authority specified in the clause of the articles of association fail to act.

4.3. That said, the more stringent view holds that the provisions (all provisions, without exception) set out in Articles 34 et seq. of Legislative Decree No. 5/2003 are intended to apply exclusively where both conditions—namely, the presence in Italy of both the company's registered office and the seat of arbitration—are met simultaneously; the other two opinions cited above have not been without their critics.

With regard to the first point, some have observed that, whilst it is true that an arbitration agreement is an act of contractual autonomy and may therefore be classified as a private legal transaction, its classification as a contract cannot, however, be applied uncritically. Indeed, it must not be overlooked that the arbitration agreement is not a transaction designed to self-regulate the parties' interests, but rather, fundamentally, the agreement by which they choose to refer the dispute to arbitrators, that is to say, they identify arbitration as an alternative form of dispute resolution (albeit not radically different from) state jurisdiction. It can therefore be better defined as a contract with procedural effects or as a substantive legal arrangement having both positive and negative procedural implications, in the dual sense that the arbitration agreement, on the one hand, expresses a choice in favour of a judgement and a decision not by state judges but by arbitrators (whom the parties, on the basis of the rules of the relevant arbitration model, directly or indirectly help to appoint), a judgement and decision reached at the conclusion of proceedings whose rules the parties themselves (or the arbitrators) may determine, as the case may be, to a greater or lesser extent; and, on the other hand, prevents civil proceedings from taking place for as long as *the procedure* in favour of which the option has been exercised remains available. Precisely because of this nature and its specific character as an act of choice – and as the founding moment – of a procedural instrument for the settlement of disputes, – it was further argued – the arbitration agreement cannot be said to be governed in its entirety by the civil law provisions on contracts, nor solely by provisions that can be classified or identified unequivocally as a matter of substantive law, inasmuch as procedural rules – or, in any event, rules in relation to which the rigid distinction *between* substantive *and* procedural law becomes blurred – also deal with the content (which is as necessary as it is supplementary), the validity and the effects of the arbitration agreement. It has also been observed, moreover, that, in the field of arbitration, the legislator sometimes chooses to intervene with statutory provisions which – even when they do not concern the objective scope of arbitrability, the form or the requirements of the arbitration agreement, but rather the appointment of arbitrators, the conduct of the proceedings, the criteria for adjudication or the regime governing the award – condition the validity, effectiveness and 'robustness' of the parties' intention to submit to arbitration, if not the very arbitrability of the dispute. This is what occurs – as has been noted – in so-called *'statutory'* arbitrations, that is, those models of arbitration relating to specific matters or types of disputes (one might think, for example, of the legislative tradition of arbitration, both formal and informal, in labour matters, which has been characterised by a two-tier system of regulation, namely the presence of 'framework' provisions – such as Article 808(2) of the Code of Civil Procedure, as amended by Article 4 of Law No. 533/1973, and now Article 806(2) of the Code of Civil Procedure, as well as Article 5(1) of Law No. 533/1973 – aimed at establishing the conditions for the arbitrability of labour disputes, namely the so-called trade union coverage of arbitration or the authorisation contained in a statutory provision; and 'second-tier' provisions, contained in collective agreements or contracts or in other statutory provisions, which, in conjunction with the former, set out a more detailed framework; this framework, in addition to specifying the two aforementioned conditions for arbitrability, may concern the procedures for expressing the intention to submit to arbitration, the additional terms of the arbitration agreement, the appointment of arbitrators, the proceedings, the rendering of the award, and appeals) left to the free choice and will of the parties *in principle* – in the sense that they are optional in nature – but binding and mandatory in *practice*, as they are characterised by specific features distinct from the rules governing 'ordinary' arbitration and are subject to mandatory provisions that limit the parties' regulatory autonomy. In these so-called *'statutory'* arbitrations, the parties' intention to submit to arbitration can only be expressed in favour of the arbitration model as provided for by the legislature, with the parties to the agreement being precluded from removing it, either directly or indirectly, from the relevant rules, whether explicit or, in some cases, implicit. In this regard, therefore, it has been observed that, in the context of Legislative Decree No. 5/2003, the statutory agreement entails that the corporate arbitration arising therefrom is subject to the entire specific legislation, of mandatory nature, set out in Articles 34–36: *a lex specialis* which may be supplemented, in respect of matters not regulated therein, by the general provisions insofar as they are compatible, and in accordance with which it is inherent that the arbitration must take place in Italy.

The second of the most recent views cited above (namely, the one defined as 'moderate'), on the one hand, has been interpreted as suggesting that reasoning not in terms of coincidence or exact overlap, but rather in terms of equivalence between rules of different legal systems, not only results in rather uncertain boundaries of application, but also implies both a certain degree of flexibility and the need to allow for a series of adaptations between the rules of different legal systems (elements which are both deemed to be precluded by the mandatory nature of the legislation referred to in Legislative Decree No. 5/2003); on the other hand, as regards the notion that the mandatory nature of the provisions set out in the aforementioned Legislative Decree does not also extend to the jurisdiction of the Italian courts, nor does it imply the necessary application of Italian procedural rules, it has been countered that the reservation in favour of the jurisdictional competence of the Italian state court, particularly in matters of appeals against the award, and the application of Italian procedural rules would inevitably follow from the appeal procedure for formal arbitral awards provided for by the legislature in Articles 35 and 36, from which it follows that an arbitral *award* is subject to appeal by means of those remedies, which may be brought before a specific court, on specific grounds, in accordance with specific rules and formalities, all of which are provided for in the Code of Civil Procedure.

It should be noted, however, that according to the 'moderate' view, where there appears to be, *prima facie*, an incompatibility between the two sets of rules (*lex arbitri* and Legislative Decree No. 5/2003), the valid establishment of the seat of arbitration abroad could still be achieved in two ways. The first, more radical but also more difficult (given that even those who have proposed this

The ruling did not fail to point out that it stands in contrast to the now well-established rejection, by the Supreme Court's case-law, of the so-called 'dual-track' theory; that is to say, the position which excludes the possibility that corporate arbitration based on a clause in the articles of association may be governed, at the parties' request, as 'ordinary' arbitration within the meaning of Articles 806 et seq. of the Code of Civil Procedure, and with the non-application and total irrelevance of Articles 34 et seq. of Legislative Decree No. 5/2003), would consist in holding that the *rationale* underlying the mandatory provisions of Articles 34 et seq. of Legislative Decree No. 5/2003 do not apply to all corporate disputes, but only to those concerning the life, management or organisation of the company, whilst they do not apply where disputes relate to inter-individual relationships; thus, in this second scenario, the need to refer to the internal rules could be ruled out from the outset. The second approach, on the other hand, would consist of deriving the rules governing corporate arbitration with a seat abroad through a combination or *patchwork* of the provisions of *the lex arbitri* and those of Legislative Decree No. 5/2003, based on the interpretation, or rather the presumption, that the intention expressed in the clause in the articles of association is that the parties intended to derogate from all non-mandatory provisions of *the lex arbitri* that conflict with Articles 34 et seq. of Legislative Decree No. 5/2003. It is clear, however, that this interpretative approach, in its final form, essentially serves to reaffirm the necessary, strict compliance with the rules laid down for the special corporate model by the clause in the articles of association and, therefore, to prevent the circumvention of the mandatory provisions that locating the seat of arbitration abroad would entail.

5. – *The approach favoured by this Court.* The respective positions of the parties to the present proceedings essentially reflect the doctrinal views described above. In a nutshell, in fact: *i*) Rossi challenges the contested decision for having rejected the objection to the recognition of the award even though, in his view, it was rendered on the basis of an invalid arbitration agreement because, by establishing the seat of arbitration abroad, it would have precluded the full applicability of the Italian rules on corporate arbitration laid down in Articles 34–36 of Legislative Decree No. 5/2003; full applicability, according to the appellant, is, on the contrary, 'necessary'

because it would constitute a condition for the validity of the clause to be assessed in accordance with Italian law, whilst also taking into account that the application of the procedural law of the Swiss does not permit the compliance of the special Italian legislation on 'statutory' corporate arbitration, resulting in the nullity of the arbitration clause and the refusal to recognise the award; *ii*) Ferretti S.p.A., on the other hand, contends that the contested judgment classified the arbitration clause as a legal transaction and ruled on its validity not on the basis of Italian procedural rules – the applicability of which is excluded by the itself clause but rather on the basis of those of substantive law to the same applicable, thus proceeding precisely from the characterisation of the arbitration agreement as a legal transaction with procedural effects, as set out in the 'historic' judgment of the Court of Cassation, Plenary Session, No. 24153 of 2013. This is in full conformity with and continuity of that ruling, in which the arbitration agreement is equated with an agreement by which the parties derogate from Italian jurisdiction by conferring the power to decide a dispute on a foreign court. The counter-respondent company further contends that the non-application of Italian procedural rules and the use of those of another procedural system are not relevant for assessing the validity of the legal act, but rather for governing the proceedings that will take place before the court or the foreign arbitrator . The claimant, contrary to , would like to interpret Articles 34 et seq. of Legislative Decree No. 5/2003 as a single package of provisions that are always and in all circumstances applicable, regardless of whether they are substantive or procedural rules, which would even render the rules on the recognition of foreign awards and the aforementioned New York Convention inapplicable, because foreign corporate arbitration would not be recognised under Italian law; all this, without any express provision to that effect within a legal space at the global level, which today recognises the circulation of rulings in all matters.

5.1. It is appropriate, at this point, to set out the specific wording of the arbitration clause in question, which is to be found in Article 31 of the Articles of Association of Ferretti S.p.A., the exact wording of which was transcribed as follows in Rossi's appeal (see pp. 3–4, footnote 1): *"31.1 All disputes relating to*

corporate relations, including those relating to the validity of shareholders' meeting resolutions, brought by or against shareholders, by or against the company, by or against directors, by or against statutory auditors, or by or against liquidators, shall be resolved by arbitration in accordance with the Rules of the International Chamber of Commerce in Paris. 31.2 The arbitral tribunal shall consist of 3 (three) arbitrators appointed by the International Chamber of Commerce in Paris. 31.3 The arbitrators shall proceed in accordance with the rules of formal arbitration and in compliance with the provisions of the Civil Code. 31.4 The seat of arbitration shall be Geneva, Switzerland. 31.5 The award shall not be subject to appeal except in the cases mandatory provided for by law.
31.6 The costs of the arbitration shall be borne by the parties in accordance with the decision of the arbitral tribunal."

5.2. Notwithstanding the foregoing, the Panel, whilst fully aware that all the views expressed in legal scholarship appear, on the one hand, to be entirely reasonable but, at the same time, not entirely free from possible criticism, considers that it must, in this instance, give preference to a solution which, not only (as is obvious), proves to be compatible with the body of legislation referred to above, but which, at the same time, does not unduly hinder recourse to the instrument of statutory corporate arbitration. This conviction is based both on the various reasons already described (see *the opening* of the preceding paragraph 4 of this reasoning), which may make it appropriate to opt for this instrument, and on the equally diverse needs that economic operators may have in domestic or international corporate transactions. This, moreover, is set against a global legal context which today appears clearly geared towards facilitating the circulation of judicial decisions across all areas of law; nor can one *simply* dismiss the significance of legitimate grounds of procedural expediency – that is, *'forum shopping*' – which lead to corporate disputes involving a particular company being subject to the procedural law of a country other than that of incorporation.

From this perspective, therefore, one must proceed from the methodological premise that, in cases characterised by elements of foreignness with respect to the forum, the interpreter must ask whether domestic law does, or does not, application: in particular, therefore, as regards the specific issue at hand

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the interpreter must ascertain whether the rules governing this or that aspect of international corporate arbitration fall within the scope of (Italian) company law or, rather, arbitration law, procedural law or contract law, since, were such laws to belong to foreign states (the State of the seat of arbitration, the State whose law governs the proceedings, or the State whose law governs the arbitration agreement), the application of Legislative Decree No. 5/2003 would, in principle, be excluded.

Proceeding on this basis, therefore, in response to the question as to whether the unified model imposed by Italian law applies solely to domestic corporate arbitration or also to foreign corporate arbitration provided for in articles of association, it is possible to give an affirmative answer in the latter sense (bearing in mind, moreover, the Court of Cassation, in Case No. 4335 of 2022, has already held that an arbitration clause contained in a company's articles of association, which, in compliance with the provisions of Article 34 of Legislative Decree of 17 January 2003,

No. 5, which provides that arbitrators must be appointed by a person external to the company, is valid even in the case of non-statutory arbitration, given that *'the sole limitation on the use of an arbitration clause in corporate disputes lies not in the nature of the arbitration, but rather in the nature of the dispute itself, which must not concern matters that cannot be settled by agreement, such as the accuracy and regularity of financial statements [Cass. 20674/2016; 13031/2014; 18600/2011], or the reduction of share capital due to losses [Cass. No. 14665/2019], or in cases where the mandatory intervention of the Public Prosecutor is required* under *Article 34(5) of Legislative Decree No. 5/2003; so much so that, in such cases, the arbitration clause has been held to be null and void both in the case of ad hoc arbitration and* formal arbitration'), that is to say, by affirming that an arbitration clause included in the articles of association of an Italian company may refer corporate disputes to arbitration (in this instance, formal arbitration) seated in a different State without encountering any prohibitions whatsoever.

5.3. This conclusion follows, first and foremost, from the statutory provisions: indeed, none of the provisions set out in Articles 34–36 of Legislative Decree No. 5 of 2003 (repealed by Legislative Decree No. 149 of 2022, but applicable here, as already mentioned, *ratione temporis*) contains provisions concerning the seat on arbitration (the same, in fact, applies to Articles 838-*bis*, *Articles 838-ter* and *838-quater* of the Code of Civil Procedure, introduced by the aforementioned Legislative Decree No. 149 of 2022 and substantially similar in content to the aforementioned repealed articles of Legislative Decree No. 5 of 2003), nor can any rule requiring the seat of arbitration to be in Italy be inferred from the silence of the law (It is worth noting, moreover, that the rules governing arbitration proceedings set out in the Code of Civil Procedure – see Article *816-bis* of the Code of Civil Procedure, introduced by Legislative Decree No. 40 of 2006 – by providing that the parties may set out in the arbitration agreement, or in a separate written instrument prior to the commencement of the arbitration proceedings, the rules that the arbitrators must observe during the proceedings and that, in the absence of such a determination, the arbitrators shall conduct the proceedings as they deem appropriate – allows one to infer, quite readily, that the parties may choose any arbitration rules, including those with a seat abroad, thereby confirming that they are free to determine the rules and the seat of the arbitration). In this matter too, therefore, the relevant provision is to be found in Article 4(2) of Law No 218 of 1995, which expressly provides that Italian jurisdiction may be waived by agreement in favour of a foreign arbitral tribunal if the waiver is evidenced in writing and the case concerns enforceable rights.

Nor is there any reason to believe that the provision just referred to is subject to any derogation in the context of company law. It is undeniable that the heading of Article 35 of Legislative Decree No. 5/2003 describes the procedural rules governing corporate arbitration as *'mandatory rules governing arbitration* proceedings', but these provisions, which undoubtedly refer to domestic corporate arbitration, say nothing regarding cases where the seat of arbitration is located abroad, and the arbitration is therefore subject to a different legal system.

Therefore, the view of those who have argued that, in this case, a situation arises that is *'entirely analogous to that which occurs in relation to arbitration under ordinary law, where rules that are undisputedly mandatory when the arbitration is seated in Italy are set aside by the choice of a foreign seat for the arbitration, thereby linking the proceedings to an other legal system, without that there are in* *"in this regard, restrictions that are different from and in addition to those that would prevent the recognition of the award if the aim were to ensure its enforceability*". To illustrate, Article 829 of the Code of Civil Procedure, like Article 35 of Legislative Decree No. 5/2003, is a mandatory provision of domestic law with which every *ad hoc* domestic award must comply; yet, when the seat of arbitration is situated abroad, no one doubts that this provision gives way to the appeal system of the legal order to which the parties or the arbitrators have linked the arbitration by establishing its seat elsewhere. The truth is therefore – as the same legal doctrine has continued, once again quite rightly – that *'Article 35 of Legislative Decree No. 5/2003, just like Article 829 of the Code of Civil Procedure, lays down mandatory rules for formal arbitration proceedings subject to* the *domestic* lex arbitri*, that is to say, proceedings where the seat is established within the territory of the State; however, neither provision in any way precludes the mandatory rules set out therein from giving way to other rules when the arbitration is seated abroad and is therefore governed by the* lex arbitri *of the chosen legal system*".

It should also be borne in mind that the Italian legislature's stated aim in enacting specific legislation on corporate arbitration was to promote a culture of arbitration, including by encouraging an increase in the number of international arbitration cases seated in Italy. It was precisely with this aim in mind that a regulatory framework was created which was innovative compared to the ordinary law and which, at the time of its enactment, in certain respects anticipated solutions that subsequently became rules of ordinary law following the 2006 reform. However, encouraging an increase in arbitration proceedings seated in Italy through the introduction of domestic rules deemed more suited to the corporate context does not imply that the legislature intended to restrict arbitration initiated by or against Italian companies to within national borders. An exception to this effect in Article 4 of our general law on private international law – which would be detrimental to the very culture of corporate arbitration that the law explicitly sought to promote – would, in fact, have required a specific provision and justification.

Nor can it be overlooked, moreover – and insofar as this may o v a l e r e , given the inapplicability, *ratione temporis*, of the relevant legislation to the case in question – that a purpose substantially analogous to that

The point just highlighted is also reflected in the reform of the arbitration framework introduced by Enabling Act No. 206/2021 (see Article 1, paragraph 15, subparagraph *f)*, as implemented by Legislative Decree No. 149 of 2022. Indeed, in the Explanatory Memorandum accompanying the proposals put forward in this regard by the so-called Luiso Commission – all of which were subsequently incorporated in substance into the enabling act – it is stated that the objective pursued is that of a *'general enhancement* of the institution' of arbitration and a *'strengthening of its specific* prerogatives', not least with a view to *'reaffirming the* confidence' of its *'potential* users', to *"align Italian legislation … with the provisions of European legal* systems" and to make recourse to arbitration *"more attractive … including for foreign parties and investors*". Although these latter observations were intended to justify the innovations regarding the conferral of interim relief powers on the arbitral tribunal, they nevertheless appear to reflect the general *rationale* behind the reform. In the same vein, moreover, the subsequent Technical Report by the Legislative Office of the Ministry of Justice also took this line when it stated that the reform pursues the *"aim of systematically framing and enhancing the institution of* arbitration", particularly for the benefit of businesses and in *the "commercial and international spheres*".

All this indicates, therefore, that for some time now the legislature has sought to 'improve', in general terms, the Italian legal framework governing arbitration, drawing on the experience of foreign legal systems (regarded as more advanced), on the assumption that this would facilitate the inflow of foreign capital and contribute to the modernisation of our country's economy.

Ultimately, the aim has been to facilitate domestic arbitration through the introduction of domestic legislation (first Articles 34–36 of Legislative Decree No. 5 of 2003, applicable here *ratione temporis*, and, following their repeal by Legislative Decree No. 149 of 2022, Articles *838-bis*, *838-ter* and *838-quater* of the Code of Civil Procedure, introduced by the latter and substantially similar in content to the aforementioned repealed articles of Legislative Decree No. 5 of 2003)

The view that certain provisions are more appropriate to the corporate context cannot be interpreted as reflecting the legislature's original (and now ongoing) intention on the part of the legislator to restrict arbitration initiated by or against Italian companies to within national borders. As has already been noted, indeed, a derogation in these terms from Article 4 of our general law on private international law – which would be detrimental precisely to that culture of corporate arbitration that was explicitly intended (and has been) to be promoted – would have required specific indication and justification. Otherwise, it would be difficult to understand why, in this specific case, the principle of the general fungibility of jurisdictions that underpins modern legal systems should give way to the – admittedly somewhat retrograde – preference for acting solely within domestic borders. On the contrary, it is precisely the aim of promoting arbitration in corporate matters that underlies the aforementioned provisions of Legislative Decree No. 5/2003 (and, following their repeal, those of substantially similar content set out in Articles *838-bis*, *838-ter* and *838-quater* of the Code of Civil Procedure), it should be noted in this regard that incorporating the few provisions of the Companies Decree that remain in force into the Code of Civil Procedure will help to flesh out the provisions on corporate arbitration where they are silent. In other words, by virtue of a unified systematic framework, the gaps in Articles 34 et seq. of Legislative Decree No. 5/2003 may be filled by the general provisions governing arbitration, subject to compatibility with the special rules), which has created a new model of special arbitration, leading to the recognition that, even in this area, there is no restriction on the normal freedom of national operators to link arbitration to a different legal system and to opt for foreign arbitration.

There is therefore nothing to prevent a corporate arbitration arising from an arbitration clause in the articles of association from being seated abroad, just as there is nothing to prevent parties domiciled in Italy from choosing, for the resolution of their disputes, an arbitration seated in a foreign jurisdiction. The applicable rule in this regard is, in both cases, that laid down in Article 4(2) of Law No. 218/1995, which is not derogated from in the context of corporate arbitration and therefore permits, in this context too, the choice of foreign arbitration.

5.4. The possibility is therefore permitted that the seat of arbitration D sa ota cp iu eb tb alic ra iz oione04/04/2025

If it does not fall within national borders, we must further consider whether this can take place without any restrictions whatsoever, or whether Legislative Decree No. 5/2003 (insofar as it is of specific relevance here, given its applicability, *ratione temporis*, in the case in question under under consideration) contains provisions of a mandatory nature. In other words, and with greater reference to the specific case at hand, it must be determined whether the aforementioned arbitration clause provided for in Article 31 of the Articles of Association of Ferretti S.p.A., which designates Geneva as the seat of the arbitration it provides for, is valid or not. Consequently, this requires, as a matter of priority, a determination of the law under which such an assessment must be carried out.

It is worth recalling, then, that the Joint Divisions of this Court, in Order No. 24153 of 2013 (subsequently confirmed, *in this respect*, by the more recent Order of the Court of Cassation, Joint Divisions, No. 36374 of 2021), held that, *'for the purposes of determining the validity and effectiveness of an arbitration clause that derogates from jurisdiction in favour of foreign arbitrators, it is first necessary to establish which rules the court must apply for such* an examination'; in other words, it is necessary to establish whether validity is to be assessed in accordance with Italian law or the law of another State.

In the case under consideration today, therefore, it should be noted that the aforementioned clause of the Articles of Association of Ferretti S.p.A. provides, amongst other things, that (see Article 31.3) *'31.3 The arbitrators shall proceed in accordance with the rules of procedure and in compliance with the provisions of the Civil Code*'. This means that the validity of the aforementioned arbitration clause in the Articles of Association must be assessed in the light of Italian law (on this point, moreover, both parties to the dispute are in agreement). Moreover – as has been aptly observed by authoritative legal scholarship – the conclusion that the applicable law for resolving intra-corporate disputes within an Italian company can only be Italian law would have been a reasonable conclusion even in the absence of an express provision stipulating its applicability.

Indeed, as is well known, our law on private international law (, No. 218/1998) identifies the law applicable to matters within the company corporate matters, primarily, under *the "law of the State in whose territory* Data pubblicazione 04/04/2025

"*the incorporation procedure has been* completed" (the so-called 'incorporation criterion') and, in addition, under *"Italian law if the administrative headquarters are situated in Italy, or if the principal object of such entities is located in* Italy" (the so-called 'actual headquarters' criterion of the entity).

Unlike the law governing contracts – in relation to which the contracting parties are free to choose the applicability of a national law even if it has no connection whatsoever with the nationality of the parties or with the subject-matter of the contract itself – the shareholders of an Italian company are not permitted to derogate by agreement from *the lex societatis* identified in accordance with the applicable principles of private international law. This is the case despite the contractual nature of companies.

Indeed, unlike 'ordinary' contracts—which are the result of the parties' contractual autonomy and, therefore, of the meeting of their minds (recognised and guaranteed in Italy by Article 1322 of the Civil Code)—companies are 'creations' of a specific legal system and, as such, exist only in so far as the public authority of a specific state confers legal personality upon them. Furthermore, by allowing companies to operate within its legal system, the State that incorporates them also provides for a series of mandatory rules designed to protect the various *stakeholders* with whom companies come into daily contact. It would therefore be paradoxical – as the legal doctrine in question concluded – *"to allow shareholders to subject the creation of a legal system… to the law of a different legal system*".

5.5. The need to examine the validity of the arbitration clause *in question*, as set out in the articles of association, in the light of Italian law gives rise to a further question as to whether, for this purpose, the applicable provisions (namely Articles 34–36 of Legislative Decree No 5 of 2003) must necessarily be considered as a whole or whether they may be considered in part. *In other words*, whether, for the aforementioned purpose, all the provisions contained in the aforementioned articles should be taken into account, or perhaps only some of them.

Rossi's defence argues, on this point (see p. 29 et seq. of th r s o) , c h e
'the distinction between substantive rules (Article 34, allegedly complied with) and procedural rules (Articles 35 and 36, which are, in theory, inapplicable) proposed by Ferretti'

s.p.a. and uncritically adopted by the Genoa judgement is erroneous and amounts to a fallacy. We are not, in fact, talking about applying rules of Italian procedural law (which are certainly not applicable in other jurisdictions). We are discussing what form a clause must take. And, precisely because it is incorporated into the articles of association, the arbitration clause must – and, under current legislation, cannot – be anything other than the special clause established by law, providing for arbitration necessarily to be seated in Italy and conducted in accordance with the law (appeals, third-party interventions, publicity requirements, etc.). In short, the clause must be drafted in such a way as to comply with all the provisions of Articles 34–35–36, and not merely with Article 34 as a provision that is allegedly 'substantive' rather than 'procedural'. Alternatively, the only recourse available today is to the state courts'. In his view, therefore, all the provisions contained in Articles 34–36 of Legislative Decree No. 5/2003 are of substantive importance because they govern the necessary content of the arbitration clause in the articles of association of a company with its registered office in Italy; in the sense that such a clause should be drafted by agreement in such a way as to ensure that, in practice, all the requirements (including procedural ones) laid down by law are met. Consequently, any non-compliance of the arbitration proceedings conducted abroad with any provision of Articles 34–36 of Legislative Decree No. 5/2003 should, in his view, result in the nullity of the arbitration clause in the articles of association.

Ferretti S.p.A., on the other hand, referring to certain statements contained in the judgment of the Court of Cassation, Joint Divisions, No. 24153 of 2013, argues (see page 8 of the counter-response) that: '*(i) the validity of an arbitration agreement is assessed in the light of substantive law: "in order to rule on the validity, effectiveness and enforceability of the arbitration clause, the court seised often applies rules of substantive law, but it is equally true that this also occurs when it must rule on its own jurisdiction in the face of a contractual derogation in favour of foreign courts (Law No. 218 of 1995,* pursuant *to Article 4(3)'); ii) the relevance of Italian procedural law is* *excluded in the face of an agreement providing for foreign arbitration: "Once the jurisdiction of the Italian court has been excluded, by virtue of the derogation in favour of foreign arbitration, the procedure for appointing arbitrators and the rules that such arbitrators must adopt in their decision fall outside the scope of the jurisdictional issue—which has now been concluded with a declaration that the Italian court lacks jurisdiction—and fall, instead, exclusively within the jurisdiction of the foreign courts*."

The judgment under appeal today did not go into detail in identifying which of the provisions contained in Articles 34–36 of Legislative Decree No. 5/2003 were substantive in nature and which were procedural in nature; instead, it confined itself to identifying Article 34(2) of the aforementioned Legislative Decree as the sole substantive provision to be assessed for the purpose of examining the validity of the arbitration clause in the articles of association.

This is, however, a particularly significant distinction in general terms, since substantive rules, falling within *the lex causae* (that is, as we have seen, the *lex societatis*), will 'follow' the fate of the latter and will therefore also apply in the context of foreign arbitration, whilst procedural rules will have no bearing in such a scenario, since Article 12 of Law No 218/1998 clearly stipulates that Italian procedural rules are limited in their territorial scope to Italian territory.

Now, amongst the provisions contained in the aforementioned Articles 34–36, the Court considers that those governing the adoption, amendment and objective and subjective binding effect of the statutory arbitration clause may be classified as provisions of substantive law, by virtue of the undisputed contractual nature of this type of clause. This core set of provisions thus includes: (*i*) Article 34(1), in so far as it excludes companies that have recourse to the venture capital market, pursuant to Article *2325-bis* of the Civil Code, from the possibility of including statutory arbitration clauses in their articles of association. This means that an Italian company falling within this category cannot adopt a statutory arbitration clause providing for foreign arbitration, because that provision (which expressly prohibits it) would application also in foreign arbitration; *ii*) Article 34(2), namely the provision examined in the present case by the judgment under appeal, concerning the number and method of appointment of arbitrators (with the exception, however, of the mechanism for the appointment of a supplementary arbitrator in the event of inaction on the part of the appointed arbitrator, as the latter provision is clearly of a procedural nature); *iii*) Article 34(3), concerning the binding nature of the clause on the company and its members; *iv*) Article 34(4), concerning the binding nature of the clause on directors, liquidators and statutory auditors; *v*) Article 34(6), concerning the procedures for introducing and removing the clause from the memorandum of association and the right of withdrawal of absent and dissenting shareholders; *vi*) Article 35(1) and (*5-bis*), which provide for the obligation to file certain arbitration documents and decisions with the Companies Register.

As is widely accepted in legal scholarship, indeed, all the aforementioned statutory provisions are united by the legislator's aim to safeguard the substantive position of those involved in the internal workings of companies. The *rationale* behind the ex officio appointment of the arbitral tribunal, for example, is to guarantee the protection of the rights of all parties who might be involved in corporate arbitration proceedings, rights which might otherwise be compromised by a potential binary clause, in accordance with that fundamental principle of arbitration, namely its consensual nature. Paragraphs 3 and 4 of Article 34 impose an obligation on the company, its shareholders, directors, liquidators and statutory auditors to comply with the award arising from an arbitration clause validly included in the company's articles of association. Article 34(6), by requiring a qualified majority of two-thirds of the share capital for the adoption or repeal of the statutory arbitration clause, establishes a special criterion in a matter that is undisputedly of a substantive nature, namely that of *the quorums* for resolutions at shareholders' meetings. Similar considerations led the legislator to exclude from the possibility of resorting to arbitration those companies that raise capital on the risk capital market pursuant to Article *2325-bis* of the Civil Code. The reason for this exclusion has, in fact, been identified by the majority of legal scholars as the protection of widely held share ownership, given the tendency for such shareholders to be detached from the company's day-to-day management, a characteristic common to such parties. The shareholders of such companies are generally unaware of the content of their articles of association and, therefore, the legislator did not wish to bind them to such a onerous consequence as waiving ordinary jurisdiction in favour of arbitration, not least for reasons relating to the expression of consent with regard to the aforementioned clause. Finally, the obligation to file the arbitration claim and the award deciding on an appeal against a resolution serves an informative function to protect the company's various *stakeholders*.

The following, however, are classified as procedural: *i*) Article 34, paragraphs 1 and 5, which together establish the criteria for the arbitrability of corporate disputes; (*ii*) Article 34(2), insofar as it governs the mechanism for the appointment of a replacement in the event of inactivity on the part of the designated person; (*iii*) Article 35(2)–(5), containing various procedural provisions derogating from the ordinary rules governing commercial arbitration.

These provisions, in fact, govern in a specific manner certain aspects typical of arbitration, the 'ordinary' rules for which are set out in Book IV, Title VIII of the Code of Civil Procedure. As regards paragraphs 2–5 of Article 35, the procedural nature of the provisions set out therein is indicated not only by the heading of the article itself (*'Mandatory rules governing arbitral* proceedings'), but also by the various references to procedural rules contained in that article, ranging from interventions *under* Articles 105–107 of the Code of Civil Procedure (paragraph 2), to the admissibility of incidental issues that cannot be compromised in arbitration (paragraph 3), and to the interim relief provided for in Article *669-quinquies* of the Code of Civil Procedure (paragraph 5). Similarly, the provisions contained in Article 36 of Legislative Decree No. 5/2003 are of a procedural nature. The criteria for arbitrators' decisions (decisions *ex equo et bono* or in accordance with the law) and the grounds for challenging the award are also typical aspects of the rules governing arbitration proceedings, which – for ordinary arbitration – are laid down in Articles 822 and 827 et seq. of the Code of Civil Procedure. The provisions concerning arbitrability, set out in paragraphs 1 and 5 of Article 34, are also procedural in nature. Arbitrability, in fact, refers to the possibility that a particular dispute may be the subject of an arbitration agreement: the choice of matters subject to arbitration (or, *more precisely*, the criteria for identifying them) lies with each legislator national law which, reflecting the social and economic values of its own State, reserves certain matters for the exclusive jurisdiction of the State courts. The provisions concerning the arbitrability (or subjection to arbitration) of corporate disputes are rules of jurisdiction and, as such, are procedural in nature. Finally, the second sentence of Article 34(2) must be classified as a rule of procedural law. Whilst the first sentence – concerning the obligation, on pain of nullity, to provide for the appointment of arbitrators by a person external to the company – falls within the sphere of the protection of shareholders' substantive rights, thereby qualifying it as a substantive rule, the second establishes a purely procedural mechanism, namely the intervention of the state courts in the event of inaction on the part of the external party designated for this purpose in the arbitration clause. In this case too, a similar (procedural) provision can be found for ordinary arbitration proceedings: Article 810(2) of the Code of Civil Procedure provides, in fact, that where arbitrators are appointed by the parties, the party that has already appointed its own arbitrator may request the president of the court within whose jurisdiction the seat of arbitration is situated to make up for any failure by the other party to make the appointment that should have been made.

Having set out the matter in this way, therefore, the Court considers that it can endorse the view – on which the judgment under appeal is also essentially based – that *"the essential core of the legislation in question nevertheless remains in the provision of Article 34 of Legislative Decree No. 5/2003, in so far as it stipulates that the clause in the articles of association must confer 'in all cases, on pain of nullity, the power to appoint all arbitrators to a person external to the* company'."

Indeed, whilst it is undeniable that the arbitration agreement is an act of contractual autonomy and may therefore be classified as a private legal transaction, its classification as a contract cannot, however, be made uncritically. It must not be forgotten, in fact, that the arbitration agreement is not a transaction for the self-regulation of the parties' interests, but rather, fundamentally, the agreement by which they choose to refer the dispute to arbitrators; that is to say, they choose arbitration as a form of alternative dispute resolution (albeit not radically different from) state jurisdiction. It should therefore be better defined as contratto con procedural effects or as a matter of substantive law with both positive and negative procedural implications, in the dual sense that the arbitration agreement, on the one hand, expresses a choice in favour of a judgement and a decision not by state courts but by arbitrators, reached at the conclusion of proceedings the outcome of which the parties themselves (or the arbitrators) may determine, depending on the circumstances, with greater or lesser scope; and, on the other hand, prevents civil proceedings from taking place for as long as *the procedure* in favour of which the option has been exercised remains available. In other words, therefore, such an agreement proves to be a legal transaction with procedural effects which, whilst preserving the parties' right to bring proceedings before a state court, is of a substantive nature and is therefore governed by the provisions set out above regarding the content of the statutory in the under under consideration, of the national . This conclusion is entirely consistent with the aforementioned ruling of the Joint Divisions No. 24153 of 2013, in which the arbitration agreement is treated as equivalent to an agreement whereby the parties derogate from Italian jurisdiction by conferring the power to decide a dispute on a foreign court. That ruling, in fact, whilst taking a position on the procedural validity of the arbitration agreement, did not therefore exclude the relevance of substantive law provisions but defined the scope of their application in relation to procedural rules, stating that the validity of an arbitration agreement is assessed in the light of substantive law provisions.

That being said, national legislation lays down, in this case, through Article 34 of the aforementioned Legislative Decree No. 5/2003 (see paragraph 2), a rule governing the validity of the arbitration agreement, requiring (on pain of nullity) the appointment of a third party external to the company to appoint the entire arbitral tribunal; this rule is mandatory and cannot be derogated from even where the seat of arbitration is situated abroad.

By contrast, Articles 35 and 36 of the same Legislative Decree, far from prescribing rules on the validity of the arbitration clause contained in the articles of association, lay down procedural rules whose mandatory nature is beyond doubt for corporate arbitration taking place in Italy.

Precisely for this reason, and given their nature, these are rules governing domestic arbitration alone and, therefore, cannot apply where the seat of arbitration is abroad, with the proceedings subject to a different *lex arbitri*.

Nor can it be said that the procedural rules laid down in Articles 35 and 36 of Legislative Decree No. 5/2003 are based on a matter of procedural public policy, and are therefore mandatory or capable of precluding the subsequent recognition of the award in this country. In fact, the parties' autonomy in drafting the arbitration agreement and/or in including a corresponding clause within company articles of association is subject to insurmountable limits of procedural public policy, such as the principle of adversarial proceedings, the rules requiring equality of the parties and the impartiality and independence of the adjudicating body, as well as, more generally, the principles governing the standards of due process; however, none of these principles ceases to apply merely because a *lex arbitri* other than Italian law is chosen, unless, of course, the arbitration is anchored to a legal system whose procedural rules unduly restrict precisely those fundamental principles. The provisions set out in Articles 35 and 36 of the Companies Decree, whilst highly innovative, particularly at the time of their entry into force, do not, in the Board's view, contain public policy provisions, not even with regard to challenges, given that the national system itself, following the 2006 reform, shifted significantly towards the rule restricting challenges to cases of breach of legal provisions, thereby promoting the stability of the award.

The conclusion is, therefore, that whilst the provision of Article 34 of Legislative Decree No. 5/2003 is mandatory and governs the only possible form of corporate arbitration, in that it stipulates – on pain of the arbitration agreement being void – that the entire arbitral tribunal must be appointed by a third party external to the company, provided that the necessary formal requirements of the arbitration agreement are met; the procedural provisions contained in the other provisions of the Companies Decree, on the other hand, may be derogated from by choosing a different *lex arbitri*, provided that it complies with those fundamental principles, incorporated, in particular, by

New York Convention of 10 June 1958 (incorporated into Italian law by a legge n. 62 of 1968), which, at supranational level, govern the recognition of arbitral awards.

5.6. It remains to be said that, as also observed in the counter-respondent's statement of defence *pursuant* to Article 378 of the Code of Civil Procedure, Mr Rossi's differing argument and the contrary conclusions put forward by the Public Prosecutor cannot be accepted, given the circumstances precluding the recognition of foreign awards, which go beyond that *set out in* Article 840(3)(1) of the Code of Civil Procedure (and under Article V.1*(a)* of the New York Convention). These additional impediments (in particular those *under* Article 840(3)(2), (3) and (4) of the Code of Civil Procedure and *under* Article V.1 (*b*), *(c)* and (*d)* of the New York Convention) are, in fact, designed to prevent the recognition of foreign awards rendered following proceedings governed by a *lex arbitri* other than Italian law which do not comply with the procedural principles of 'fair arbitration proceedings': violation of the right of defence or the principle of adversarial proceedings, an award that is exorbitant in relation to the arbitration agreement, and irregularities in the constitution of the arbitral tribunal and the conduct of the arbitral proceedings. Therefore – contrary to the views expressed by the appellant and the Public Prosecutor – the Italian legislature and the New York Convention protect the parties from breaches of procedural rights that may be authorised by a *lex arbitri* or by a system for challenging the award different from those of Italy, with the circumstances precluding recognition of the award set out *in* paragraphs 2, 3 and 4 of Article 840 of the Code of Civil Procedure, and by not declaring null and void any arbitration agreement that renders applicable a *lex arbitri* other than the Italian one.

Rossi's arguments and the Public Prosecutor's conclusions, which seek to elevate the rules governing Italian corporate arbitration proceedings to the status of an *ex ante* validity requirement for the arbitration clause in the articles of association, overlook the aforementioned circumstances (*pursuant* to Article 840(3), nos. 2, 3 and 4 of the Code of Civil Procedure) and appear to implicitly regard the latter *as, a priori,* incapable of preventing the 'importation' into Italy of awards rendered in breach of procedural rules deemed indispensable by the Italian legal system and by all legal systems that have acceded to the New York Convention.

It is, however, plain to see that, as is still recognised ib il m e n te

As observed by the respondent in its aforementioned statement of defence, *'If taken to their logical conclusion, these objections and the Public Prosecutor's submissions risk fundamentally undermining the regime for the recognition of foreign arbitral awards enshrined in the New York Convention, which is based on the implicit assumption that each legal system is free to regulate arbitral proceedings as it sees fit, provided that the circulation of the relevant awards may take place regardless of the aforementioned diversity, provided that the procedural rights set out in Article V of the New York Convention and Article 840 of the Code of Civil Procedure are guaranteed in individual territorial proceedings. In the view of the Appellant and the Public Prosecutor, however, the procedural regime governing arbitration proceedings in each legal system would itself become a requirement for the validity of the arbitration agreement, with the consequence that, except where the proceedings are identical, no award could be recognised in legal systems other than that in which the award was made*'.

5.7. Finally, it should be noted that the District Court (see pages 19–21 of the contested judgment) found that the award did not conflict with public policy (rejecting, on this point, Dr Rossi's objection) and the appellant has not specifically challenged that ground of appeal in the present proceedings. It follows that, as this Court has already held, once a final domestic judgment has been delivered, the matter cannot be raised of the court's own motion (see Court of Cassation judgment No 9979 of 2023).

6. - *Decision on the specific case and point of law*. All the arguments set out thus far allow for a joint examination of both grounds of appeal, given their clear connection. Moreover, these grounds are unfounded, given that the district court's decision is entirely consistent with the arguments in question and, as such, immune to the criticisms levelled against it in Mr Rossi's present complaints. Mr Rossi, in fact, whilst complaining (without foundation, as has already been explained) that the court deemed the provisions of Legislative Decree No 5 of 2003 to be compatible with the case of foreign statutory arbitration, fails to take into account that a prerequisite for opposing the decree of

recognition of a foreign award (as well as a judgement r a) è c h e
(*i*) there has been an actual breach of the applicable procedural law and (*ii*) this has resulted in a concrete and actual infringement of the opponent’s rights. However, during the arbitration proceedings leading to the award, the question of applying the provisions set out in Articles 34–36 of Legislative Decree
No. 5/2003, for which there are no corresponding provisions in Swiss law.

Mr Rossi, moreover, essentially complains (not of a breach but) of the abstract inapplicability of those provisions (regarding them as prescribing requirements for the validity of the arbitration clause). It should be noted, however, that in the present case: no third party has sought to intervene in the proceedings, nor was the subject-matter of the dispute specifically the challenge to a shareholders’ meeting resolution (so that the provision of Article 36, according to which an award is open to challenge under Italian law for breach of the rules of law applied to the substance of the dispute, is irrelevant).

Nor does the *present* case involve a situation of exclusive Italian jurisdiction. With regard to a liability claim brought by a company with its registered office in Italy against a director, a clause extending jurisdiction in favour of a foreign ordinary court would certainly be admissible: the exclusive jurisdiction of the State in which the company has its registered office does, in fact, exist *pursuant to* Article 24 of EU Regulation No 1215/2012 (formerly Article 22 of Regulation 44/01, and analogous to Article 22(1)(2) of the Lugano Convention of 20 October 2007), solely in the case of disputes concerning the validity of the company’s incorporation, its nullity or dissolution, or the validity of the decisions of its governing bodies (see, essentially, in this regard, Court of Cassation, Joint Divisions, No. 26984 of 2020 and CJEU, 2 October 2008, C-372/07, *Hassett and Doherty*). It would therefore be paradoxical to allow the extension of jurisdiction in favour of a foreign judicial authority but not, conversely, in favour of foreign arbitration, the latter being the preferred means for resolving disputes involving international elements.

6.1. The appellant, therefore, although he has not alleged that he has suffered any breaches or infringements of procedural guarantees, in order to overcome this

As an essential requirement for an objection, he attempts to elevate (without foundation, as has been extensively explained above) the (procedural) provisions set out in Articles 34–36 of Legislative Decree No. 5/2003 to the status of requirements for the validity of statutory arbitration clauses. In doing so, however, he reverses the perspective and opposes the recognition of the award by asserting that, if the clause were to render applicable the procedural provisions of another legal system rather than those laid down in Articles 34–36 of Legislative Decree No. 5/2003, it would be null and void in itself, regardless of whether the latter provisions were actually disapplied.

In other words, Rossi attempts to call for an *ex ante* and abstract assessment of procedural rules; this is, however, an inadmissible approach, both in the opposition proceedings referred to in Article 840 of the Code of Civil Procedure and in the appeal to the Court of Cassation in which alleged *errors in iudicando de iure procedendo* are raised (it is well known, indeed, that such an appeal would not be admissible where *the error* has not actually 'occurred' and, even if it had occurred, the appellant has not in any event demonstrated a concrete and actual prejudice to his procedural rights).

In other words, he calls for the formulation of a general and abstract principle entirely divorced from the function of the opposition, given that, had a breach of his procedural guarantees actually occurred, he would have had at his disposal the further grounds for opposing the recognition of the award set out in Article 840 of the Code of Civil Procedure; a provision (the wording of which, it is worth recalling, reproduces Article V of the New York Convention) which he overlooked in his appeal, but which is, in fact, more than 'sufficient' to protect our legal system from the importation of awards rendered in (alleged) breach of the founding principles of fair arbitration proceedings, and which does not justify the attempt to transform corporate arbitration into 'necessarily' domestic arbitration.

6.2. In conclusion, therefore, Ferruccio Rossi's appeal must be dismissed, whilst the following principle of law is hereby established:

'In the context of corporate arbitration, a foreign arbitral award rendered in accordance with the rules of procedure, issued pursuant to an arbitration clause included

in the articles of association of a company incorporated under Italian law, which publishes its annual report abroad

of the arbitration proceedings themselves where, in accordance with Article 34(2) of Legislative Decree No 5 of 2003, applicable ratione temporis*, the entire arbitral tribunal is appointed by a third party unrelated to the company. Once this requirement is met, the procedural provisions contained in Articles 35 and 36 of the same Legislative Decree may be derogated from by choosing a different* lex arbitri*, provided that it complies with the fundamental principles laid down in the New York Convention of 10 June 1958 (transposed into Italian law by Law No 62 of 1968), which, at the supranational level, govern the recognition of arbitral awards*'.

7. – *The rules on costs.* The costs of these appeal proceedings may be shared equally between the parties, given the novelty and complexity of the legal issues involved.

7.1. It must be acknowledged, however – in the absence of any discretion in this regard (see Court of Cassation judgment no. 5955 of 2014; Court of Cassation, Joint Divisions, judgment no. 24245 of 2015; Court of Cassation, Joint Divisions, No. 15279 of 2017) and in accordance with the clarification provided by the Court of Cassation, Joint Divisions, No. 4315 of 2020 – that, given the wording of the ruling adopted, the procedural requirements are met, pursuant to Article 13, paragraph *1-quater*, of Presidential Decree No. 115 of 2002, the procedural requirements are met for the appellant to pay an additional sum by way of a unified court fee, equal to that provided for the appeal, in accordance with paragraph *1-bis* of the same Article 13, if due, whilst *'it shall be for the judicial administration to verify whether the fee is actually due, in the absence of any original or subsequent grounds for exemption from its payment*'.

FOR THESE REASONS

The Court dismisses the appeal brought by Ferruccio Rossi and orders the costs of these proceedings before the Court of Cassation to be shared equally between the parties.

Pursuant to Article 13(*1-quater*) of Presidential Decree No. 115 of 2002, inserted by Article 1(17) of Law No. 228 of 2012, it is hereby acknowledged that the procedural requirements are met for the payment, by the appellant, of an additional sum by way of a standard court fee, equal to that provided for the appeal, in accordance with paragraph *1-bis* of the same Article 13, if due.

So decided in Rome, in the chambers of the First Civil Section of the Supreme Court of Cassation, on 14 March 2025.

The Reporting Judge
Eduardo Campese

The President,
Mauro Di Marzio