Corte di Cassazione, decision No. 24153, rendered on 25 October 2013

Luxury Goods International SA v. Swaili Diffusioni srl in liquidation

Headnote

jurisdictional nature of rituale award, existence, validity of arbitration clause is substantive, not jurisdictional issue, arbitration agreement "null and void" for indication of incorrect arbitration rules (no), applicable law to existence, validity of arbitration agreement

Summary

The Supreme Court reversed its earlier jurisprudence and held that the issue whether a dispute is to be heard in arbitration or in the Italian courts concerns jurisdiction rather than competence (division of tasks within the same jurisdictional system), because arbitral awards rendered in rituale (formal) arbitration have a jurisdictional nature; hence, it may be referred to the Supreme Court for a preliminary ruling on jurisdiction. This conclusion is supported by Art. II(3) of the 1958 New York Convention: an assessment of whether the arbitration agreement is null and void, inoperative or incapable of being performed concerns the merits but does not presuppose that the court has assumed jurisdiction but is rather a pre-judicial issue that becomes res judicata only if the court finds that there is no valid arbitration agreement and the court therefore has jurisdiction. If the court finds that there is a valid arbitration agreement and refers the dispute to foreign arbitration, its decision is not binding on the foreign arbitrators or courts. In the present case, the arbitration agreement was governed by Swiss law pursuant to the express choice of the parties in their contract. The agreement's alleged nullity because of an incorrect reference to arbitration rules was for the arbitrators to decide.

Swaili Diffusioni s.r.l. (Swaili) and Luxury Goods International SA (Luxury Goods) entered into a Contract. Art. 14 provided that the Contract was governed by Swiss law, and further read:

"All controversies that may arise out of the present contract and in relation to it shall be settled in a final manner by one or more arbitrators appointed according to the Lugano Arbitration Rules issued by the Chamber of Commerce and Industry of Canton Ticino. The seat of the arbitral tribunal shall be in…."

A dispute arose between the parties when Luxury Goods allegedly did not pay four invoices. Swaili, which was by then in liquidation, commenced an action through its receiver before the Court of First Instance in Florence, seeking payment of the four invoices. Luxury Goods raised the objection of lack of jurisdiction based on Art. 14 of the Contract, and sought a preliminary ruling on jurisdiction (*regolamento preventivo di giurisdizione*) from the Supreme Court. Swaili opposed the petition, arguing that the issue of whether a dispute should be heard by foreign arbitrators does not concern jurisdiction but rather competence; as a consequence, no preliminary ruling on jurisdiction is admissible. Swaili also argued that the arbitration clause was null and void because (i) it was not specifically approved in writing as required by the Italian Civil Code for restrictive clauses (*clausole vessatorie*), and (ii) the reference to the "Lugano Arbitration Rules" was incorrect.

The Italian Supreme Court held that a preliminary ruling on jurisdiction was admissible and denied Swaili's arguments.

The Supreme Court reversed its jurisprudence, initially expressed in a 2000 decision, that the issue whether a dispute should be heard by an Italian court or foreign arbitrators is an issue of *competence*, and reinstated its earlier opinion that it is an issue of *jurisdiction*; as a consequence, such issue may be referred to the Supreme Court for a preliminary ruling on jurisdiction.

The Court noted that before 2000, an agreement for foreign arbitration was deemed to deprive the Italian courts of jurisdiction, while an agreement for domestic arbitration involved an issue of competence, that is, the division of tasks within the same jurisdictional system. By its decision no. 527 of 2000, the Supreme Court reversed its earlier jurisprudence. It reasoned that arbitral awards are acts of private autonomy, rather than an expression of (alternative) jurisdiction. Hence, by concluding an arbitration agreement the parties wish topage "425" derogate from all court jurisdiction, be it Italian or foreign. As a consequence, the issue whether the dispute should be referred to arbitration concerns the validity of the arbitration agreement or clause, and thus the merits of the case.

The Supreme Court held that this opinion should be modified. It remarked that both Law no. 25 of 1994 and Legislative Decree 2 February 2006, no. 40, "contain sufficient systematic elements to hold that arbitral awards have a jurisdictional nature" when rendered in *rituale* arbitration, that is, arbitration regulated by the Code of Civil Procedure (as opposed to *irrituale*, or free, contractual arbitration). As a consequence, domestic *rituale*arbitration raises issues of competence, while agreements for foreign arbitration raise issues of jurisdiction, as held by the pre-2000 jurisprudence of the Court.

The Supreme Court added that no other conclusion can be reached under Art. II(3) of the 1958 New York Convention. Ascertaining whether the arbitration agreement is null and void, inoperative or incapable of being performed, while in itself a decision on the merits of the validity of the agreement, does not presuppose that the court has assumed jurisdiction. This decision concerns a pre-judicial issue and becomes res judicata only if the court finds that there is no valid arbitration agreement and thus finds that it has jurisdiction. If the court finds that there is a valid arbitration agreement and refers the dispute to foreign arbitration, its decision is not binding on the foreign arbitrators or courts.

The Court then turned to the arbitration clause in the Contract. It did not examine whether the clause should have been specifically approved in writing as required by the Italian Civil Code, finding that Swiss, rather than Italian, law was the law expressly chosen by the parties to govern their Contract. As to the allegedly incorrect reference to the Lugano Arbitration Rules, this was an issue for the arbitrators to decide.

Excerpt

I. Admissibility of a preliminary ruling on jurisdiction

[1] "The Plenary Session [of this Court] first revisits its earlier opinion and holds that a preliminary ruling on jurisdiction is admissible where there is an arbitration agreement (or arbitration clause) providing for the referral of disputes to arbitrators, including, as here, to foreign arbitrators."

1. Jurisprudence Before Supreme Court Decision No. 527 of 2000

[2] "Prior to Plenary Session decision no. 527 of 2000, the jurisprudence of this Court held that an agreement for foreign arbitration, which resulted in the dispute not being heard by the Italian courts, implied, unless otherwise provided in a legal provision or international treaty, that the Italian courts lacked *jurisdiction*, also in respect of a request for a preliminary ruling on this issue (Plenary Session, decisions no. 5049/1985; no. 6017/1979;[(1)] no. 9380/1992).[(2)] Thus, a preliminary ruling on *jurisdiction* [by the Supreme Court] was admissible (Plenary Session, decisions no. 5397/1995;[(3)] no. 58/2000).[(4)]

[3] "Differently, the objection based on an arbitration agreement in *rituale*[(5)] domestic arbitration was deemed to concern an issue of *competence*. The objection that the state courts could not hear the dispute because the dispute was referred to arbitration pursuant to an arbitration agreement or arbitration clause did not raise an issue of jurisdiction, but rather an issue of competence, because it concerned the division of tasks within the same jurisdictional system; hence, this issue could not be raised in a request for a preliminary ruling on jurisdiction (Plenary Session, decisions no. 2149/1984; no. 5568/1982; no. 1471/1976; no. 4360/1981; no. 242/1980; no. 1303/1987; no. 3767/1988).

[4] "It was also opined, in more detail, that the work of *rituali* arbitrators (whose award, once declared enforceable by the magistrate's court, and until annulled, was equivalent to an enforceable court decision) had a jurisdictional nature (and substituted for the function of ordinary courts) [in domestic arbitration]. It followed that while whether a dispute should be heard by the state court or the arbitrators was an issue of competence, whether a dispute fell under the jurisdiction of ordinary courts/*rituali* arbitrators or the jurisdiction of*administrative* courts was an issue of jurisdiction (Plenary Session, decision no. 4360/1981)."

2. Supreme Court Decision No. 527 of 2000

[5] "The Plenary Session of this Court modified this constant jurisprudence by its decision of 3 August 2000, no. 527, in which it held that an arbitral decision is an act of private autonomy, so that an arbitration agreement is a derogation from jurisdiction. Hence, whether a dispute cannot be referred to arbitrators because it falls by law under the (exclusive) jurisdiction of the administrative courts is not an issue of jurisdiction in the technical sense, but rather of the merits, as it concerns the validity of the arbitration agreement or arbitration clause.

[6] "According to this opinion, a preliminary ruling on jurisdiction is inadmissible where it is argued that the court seized (or any other Italian court) lacks jurisdiction because of the existence of an arbitration agreement or arbitration clause for foreign arbitration: there is no issue of jurisdiction (since the arbitrators do not perform a jurisdictional function and the arbitral decision is an act of private autonomy), but rather an issue of the merits concerning the validity of the agreement for foreign arbitration, which agreement derogates from all [court] jurisdiction, be it Italian or foreign. [This issue] must be ascertained by the judge having jurisdiction according to the normal criteria for its determination (Plenary Session, decisions of 5 January 2007, no. 35;[(6)] 28 January 2005, no. 1735; 18 April 2003, no. 6349;[(7)] 22 July 2002, no. 10723; no. 10896/2003; 21 October 2009, no. 22236)."

3. New Considerations

[7] "This Court believes that this opinion must now be revisited, also in light of the most recent legislative reforms.

[8] "The opinion that a *rituale* award is contractual – and that arbitration is a 'uniform [*unitario*]' phenomenon – was accepted by the jurisprudence of the Supreme Court (Plenary Session, decision of 3 August 2000, no. 527, which defined *ritual*e arbitration and was followed by many later decisions) as concerning a [proceeding] that is 'ontologically alternative to court jurisdiction' in that it is based on a 'waiver of court actions'. According to this jurisprudence, there is still a difference between the two types of arbitration: by *rituale* arbitration, the parties wish to obtain a contract that can become enforceable in the manner and with the effects provied for in Art. 825 CCP et seq., whereas in 'free' [*irrituale*] arbitration 'they wish to refer disputes to an arbitrator to be decided only by contractual means'.

[9] "The opinion that arbitral decisions were exclusively contractual (departing from the traditional dichotomy between *rituale* arbitration as a substitute for court proceedings and free arbitration as a contract) led to holding that a preliminary ruling on competence was not admissible. Before [decision no. 527/2000], our jurisprudence allowed [for such rulings], though only against a decision by which the state court found that it lacked jurisdiction in favor of arbitration; it also allowed for preliminary ruling on jurisdiction.

[10] "The Court remarks that this tendency to see arbitral decisions (in *rituale* arbitration) only as contractual arose from the concern that only this view would protect arbitration from the risk of unconstitutionality under Art. 102 Constitution.[(8)] The problem is thus whether the legislator, on certain conditions, can equate arbitral decisions rendered in proceedings meeting given requirements to decisions by state courts – 'jurisdictionalizing' [arbitral] decisions – without violating the Constitutional principles of protection of rights.

[11] "Based on the above premise, authoritative doctrine maintains – even after the legislator, by the 1994 reform, took the definitive step to recognize that arbitrators, within the powers granted to them by the parties, have (unequivocally) jurisdictional powers – that 'since arbitration is a fundamental value in the modern legal world, it must be seen as strictly contractual in order to protect it while the 1948 Constitution is in force'.

[12] "However, by its decision of 14 July 1977, no. 127, the Constitutional Court held that 'the basis for any arbitration lies in the free choice of the parties: because only the parties' choice (being one of the possible, even negative, manners by which they can make use of their right under Art. 24(1) Constitution) can derogate from the principle in Art. 102 Constitution'.

(….)

[13] "It can be concluded that in principle ordinary state courts perform the jurisdictional task in respect of rights, but that the parties, by a free and autonomous choice, may derogate from this rule and act to 'protect their rights' before private judges, who are recognized by the law provided that certain guarantees are safeguarded.

(….)

[14] "On this basis of constitutional compatibility, referral to arbitration is allowed when: (i) the derogation made by consent of the parties, in respect of rights of which the parties may freely dispose [*diritti disponibili*], concerns a dispute that the ordinary court could hear; (ii) arbitration is regulated by provisions of law safeguarding appropriate procedural guarantees, not only in respect of the impartiality of the adjudicating body but also in respect of adversarial proceedings [*contraddittorio*]; (iii) recourse before the ordinary state courts is possible (in respect of the grounds for nullity determined by procedural law).

[15] "With respect to *rituale* arbitration, the characteristics above meet the requirements (the body, though other than a state court, must be capable of performing a jurisdictional task, guaranteeing to the parties 'a jurisdictional solution of the dispute') required by the European Court of Human Rights in order to comply with Art. 6 of the Rome Convention of 4 November 1950.

[16] "The discipline introduced in part by Law no. 25 of 1994 and in part by Legislative Decree 2 February 2006, no. 40, appears to contain sufficient systematic elements to hold that arbitral awards have a jurisdictional nature, and to comply with the requirements mentioned above in respect of the limits within which the legal system can entrust the choice of a judge other than a state court to the parties' autonomy.

(….)

[17] "Since the nature of *rituale* arbitration is jurisdictional rather than contractual, it follows (as recognized earlier by this Court – see, among many, decisions no. 4475 of 1997; no. 7013 of 1995; no. 6556 of 1987; no. 7315 of 1986), that when the law … mandates *rituale* arbitration for the settlement of disputes arisen between the parties, or when there is an arbitration agreement or arbitration clause for domestic *rituale* arbitration, the issue whether an Italian arbitral tribunal or court must hear the dispute is an issue of competence (not jurisdiction)….

[18] "It follows from the jurisdictional nature of *rituale* arbitration – and the fact that [arbitrators] can perform, as a substitute, the function of ordinary courts – that while determining whether a dispute should be heard by an ordinary court or by arbitrators is an issue of competence …, differently, determining whether a dispute falls within the scope of the jurisdiction of an ordinary court – and thus, alternatively, of arbitrators – or within the scope of jurisdiction of an administrative … court is an issue of jurisdiction (Plenary Session, decisions of 4 July 1981, no. 4360; no. 3195 of 1969)."

4. Conclusion

[19] "Having provided the necessary framework above, we now turn to the specific issue raised in the present request, namely, whether the objection of lack of jurisdiction based on an arbitration clause for foreign arbitration raises an issue of the merits or an issue of jurisdiction; only in the latter case a preliminary ruling on jurisdiction would be admissible.

[20] "As mentioned, the current jurisprudence of the Supreme Court (Plenary Session, decision no. 6349/2003,[(9)] referring to the earlier decision of the Plenary Session no. 10723/2002) holds that, since an arbitral decision is an act of private autonomy, so that an award cannot be equated to a jurisdictional decision, even in the case of an agreement for foreign arbitration the objection of lack of jurisdiction raises an issue of the merits rather than an issue of jurisdiction: 'in this case, the parties waived any kind of jurisdiction, be it Italian or foreign'.

[21] "However, following the various consecutive reforms, and mainly Legislative Decree no. 40 of 2006, it is generally held that *rituale* arbitration has a jurisdictional nature. Hence, the same must be said in respect of foreign arbitration, whose jurisdictional nature is actually supported by even more elements. As a consequence, a preliminary ruling on jurisdiction is admissible.

[22] "First of all, it must be noted that the subject matter of a preliminary ruling on jurisdiction is not 'whether the dispute must be decided by the Italian judge or the foreign judge'. Rather, the issue is the limits of Italian jurisdiction.

[23] "Art. 4(2) together with Art. 11 of Law no. 218 of 1995 equate an agreement to derogate from Italian [court] jurisdiction in favor of foreign arbitration to an agreement to derogate in favor of a foreign court, since both are listed among the limits to Italian jurisdiction in Title II of the Law, that is, among the cases of lack of jurisdiction. Art. 4(2) of Law no. 218 of 1995 expressly provides that:

'Italian jurisdiction can be derogated from by agreement in favor of a foreign court or foreign arbitration if the derogation is proved in writing and the dispute concerns rights of which the parties may freely dispose [*diritti disponibili*].'

Similarly relevant is Art. 11 of the same Law, according to which:

'The lack of jurisdiction may be raised, at any time during the proceedings, only by the defendant who has put in a formal appearance [*costituito*] and has not expressly or tacitly accepted Italian jurisdiction.'

It follows from Arts. 4 and 11 of Law no. 218 of 1995, read together, that the lack of jurisdiction due to the existence of an arbitration clause for foreign arbitration can be raised at any time during the proceedings, provided defendant did not expressly or tacitly accept Italian jurisdiction – that is, only if the defendant invoked the lack of jurisdiction of the Italian court in its first statement of defense.

[24] "Authors have noted that if foreign arbitration were deemed to be contractual, this objection [of lack of jurisdiction] would be substantive rather than procedural; as a consequence, the decision of the court on the (in)validity or (lack of) efficacy of the arbitration agreement, being a decision on the merits, would be an insurmountable constraint that could potentially be exported to other legal systems and bind foreign arbitrators or courts.

[25] "Hence, it is intrinsically incorrect to say that, for the Italian courts, an objection based on an arbitration agreement for foreign arbitration is not an objection of lack of jurisdiction, because it cannot be deemed to be absolutely true that by that agreement the parties 'waived any kind of jurisdiction, be it Italian or foreign'. Ascertaining that there was such complete waiver would require analyzing each time the foreign legal system in which the arbitration will be rooted and the award will produce its original effects; thus, it would require presupposing that that foreign legal system also deems that arbitration and awards [on its territory] are 'other

than and radically alternative to jurisdiction, not only to the judicial organization of the state. Otherwise, it cannot be deemed that through their arbitration agreement for foreign arbitration the parties also waived Italian jurisdiction.'

[26] "It follows that the objection of foreign arbitration must remain fully among the list of procedural objections. Hence, pursuant to Art. 4(2) together with Art. 11 of Law no. 218 of 1995, and Art. 41 CCP, it 'can be referred to [the Supreme Court] by means of a preliminary ruling on jurisdiction' (since there can be an issue of competence only between Italian courts and arbitrators, not in respect of foreign arbitrators).

[27] "Nor can it be argued that this is an issue pertaining to the merits, rather than a procedural one, because Art. II(3) of [the 1958 New York Convention], ratified in Italy by Law no. 62 of 1968, provides that the national court shall examine whether the arbitration clause is valid, operative and applicable prior to ascertaining whether it has jurisdiction.

[28] "Some authors already correctly opine that this issue is procedural; but further, a logical-functional analogy between the preliminary enquiry made by the court pursuant to Art. II of the Convention and the [enquiry] provided for in Art. 7 of Law no. 218 of 1995 in respect of the so-called international litispendence shows that this question is settled, as far as foreign arbitration governed by the New York Convention is concerned, by the text of Art. II(3) of the Convention, which provides:

'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

Thus, a court seized of a dispute in a matter in respect of which the parties have concluded an arbitration agreement 'shall refer' the parties to arbitration, at the request of one of them, unless it determines that the agreement is invalid, inoperative or incapable of being referred to arbitration. The expression used in the Convention ('*renverra les parties à l'arbitrage*'; in the English text: 'shall … refer the parties to arbitration') is deemed to have a generic meaning, although it is frequently opined that where the arbitration clause is valid, operative and applicable, the court seized shall suspend the examination of the merits ('stay of court proceedings on the merits' [English original]).

[29] "It has been sometimes argued on this point that ascertaining whether the requirements for the jurisdiction of foreign arbitrators are met – precisely because in the Italian procedural system (Art. 819-ter CCP, last paragraph)[(10)] this issue concerns the merits (see, however, for the case of counter-objections, Supreme Court, decision no. 17019/2011) – must presuppose that the Italian court seized has jurisdiction. In other words, only the court having jurisdiction can decide whether the arbitration clause is valid, operative and applicable.

[30] "This opinion, however, is at odds with the mechanism of Art. II(3) of the New York Convention, which grants to any court seized – at the request of a party invoking the existence of an arbitration clause – the power/duty to ascertain preliminarily whether that clause is valid, operative and applicable and, only if it is, to refer the parties to arbitration; if it is not, then to decide on its own jurisdiction.

[31] "While it is true that in order to decide whether the arbitration clause is valid, operative and applicable the court seized frequently applies substantive norms, it is equally true that this is also the case when [the court] must decide on its own jurisdiction in the presence of an agreement to derogate [from Italian court jurisdiction] in favor of a foreign court (Art. 4(2), Law no. 218 of 1995). In principle, [such decision] is not res judicata, in the sense of Art. 2909 CC,[(11)] in respect of the pre-judicial substantive issue (validity of the agreement) [whose solution] is a precondition for the solution of the pre-judicial procedural issue, which in turn acts as a filter for accessing the sole, true decision on the merits (the one in respect of the *Hauptsache*). Only the latter shall be the final decision on the merits (based on the principle that the Italian courts may

decide on the existence of the constitutive elements of a contract, see Supreme Court, 14 December 1992, no. 13196, as well as EU Court of Justice, decision of 4 March 1982, no. 104365 in case no. 38 of 1981).

[32] "In other words, as already held by the Plenary Session (decision no. 412 of 12 January 2007)[(12)] this first decision of the Italian court on the validity of the arbitration clause, rendered in order to decide on the 'referral' of the dispute to foreign arbitration, does not, according to Art. II of the New York Convention, bind the arbitrators in respect of the substantive validity of the agreement or, in case invalidity is found, [it does not bind] the foreign court found to have jurisdiction; both are free to decide on this issue.

[33] "This solves the apparent incongruence created by the application of Art. II(3) of the Convention, according to which the national court decides on the validity of the arbitration clause before deciding on its own jurisdiction.

[34] "Hence, in the system of the New York Convention, ratified and implemented in Italy by Law 19 January 1968, no. 62, the court seized shall decide, in an absolutely preliminary manner and with no res judicata effect, at the request of the party relying on an arbitration clause, whether that clause is valid, operative and applicable; if this is the case, it shall refer the parties to arbitration. Only if the court seized finds that it has jurisdiction, its decision on the validity of the agreement – being rendered by a court that has found that it has jurisdiction – shall be res judicata. Although from a systematic-chronological point of view these two decisions are based on the same reasoning, from an ontological point of view (and thus as to their effects) they remain different.

[35] "The decision of the Court of Justice of the European Communities, no. 185 of 10 February 2009 in Case no. C-185/07, is of the same opinion. According to this decision, the competence system of Regulation no. 44/2001 does not prevent the national court from examining the preliminary issue of the validity or applicability of the arbitration agreement. If it were otherwise, parties could avoid proceedings simply by objecting that there is an agreement, and claimants maintaining that the agreement is invalid, inoperative or inapplicable would be prevented from seizing the court they seized under Regulation no. 44/2001; this would deprive them of a jurisdictional protection to which they are entitled."

II. The present case

[36] "The issue now is whether the arbitration clause at hand is invalid, as argued by Respondent, because Art. 14 of the Contract between the parties – which was drafted on the basis of a standard contract – provides for a derogation of jurisdiction in favor of arbitration in Switzerland but was not specifically approved in writing in accordance with Arts. 1341 and 1342 CC.[(13)]

[37] "Respondent argues that this [arbitration] clause is restrictive [*vessatoria*] under Art. 1341 CC; as a consequence, it is null because it was not specifically approved in accordance with the above provisions of the Italian Civil Code.

[38] "The Court notes preliminarily that in order to ascertain whether an arbitration clause in favor of foreign arbitrators is valid and effective, it must first be determined what norms the court shall apply to this examination where, as here, the contract was concluded between an Italian legal entity and a Swiss legal entity.

[39] "Pursuant to Art. 57 of Law 31 May 1995, no. 218 – according to which contractual obligations are regulated in any case by the Rome Convention of 19 June 1980 (without prejudice to any other international convention, insofar as applicable) – together with Art. III(1) of the New York Convention, 'the contract is governed by the law chosen by the parties, who can determine the law applicable to the entire contract or only to a part thereof' (Supreme Court, decision no. 8360 of 21 April 2005).

[40] "In the present case, Art. 14 provides that the Contract shall be

'governed by and interpreted according to Swiss law, independent of the principles of conflict norms. All controversies that may arise out of the present contract and in relation to it shall be settled in a final manner by one or more arbitrators appointed according to the Lugano Arbitration Rules issued by the Chamber of Commerce and Industry of Canton Ticino. The seat of the arbitral tribunal shall be in….'

[41] "It follows that in the present case, since Italian law does not apply, the alleged nullity of the arbitration clause because of a violation of Arts. 1341 and 1342 CC is irrelevant.

[42] "The objection that the clause is inoperative because it refers to the Lugano Arbitration Rules rather than to the 'Swiss Rules of International Arbitration, Lugano' is also unfounded. Once the jurisdiction of the Italian courts has been excluded, because of the derogation in favor of foreign arbitration, the procedure for the appointment of the arbitrators and the rules that the arbitrators shall apply for reaching a decision fall outside the ambit of the jurisdiction issue, which we have now decided by holding that the Italian courts lack jurisdiction; rather, they fall exclusively under the jurisdiction of the foreign arbitrators."

III. Conclusion

[43] "In sum, we must state that the Italian courts lack jurisdiction.

[44] "Taking into account that constant jurisprudence has been modified, it is appropriate to compensate the costs of this proceeding.

[45] "For these reasons, [the Court] finds that the Italian courts lack jurisdiction and the Court orders compensation of the costs of this proceeding."

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[1] Reported in Yearbook VI (1981) pp. 232-233 (Italy no. 39).
[2] Reported in Yearbook XIX (1994) pp. 680-684 (Italy no. 124).
[3] Reported in Yearbook XXIII (1998) pp. 719-722 (Italy no. 147).
[4] Reported in Yearbook XXVI (2001) pp. 816-822 (Italy no. 157).
[5] *Note General Editor*. The distinction between *arbitrato rituale* (formal arbitration) and *arbitrato irrituale*(contractual arbitration) is explained by Prof. Piero Bernardini in the "National Report Italy" in ICCA's*International Handbook on Commercial Arbitration* as follows:

"In addition to arbitration regulated by the Code of Civil Procedure (known as the ritual Code: hence the name of *arbitrato rituale* for this form of arbitration), a second type of arbitration, based on the parties' contractual autonomy recognized by Art. 1322 of the Civil Code, has developed since the turn of the [twentieth] century (*arbitrato irrituale* or *libero*) by which the parties entrust the arbitrator with the power to determine their own will. Unlike *arbitrato rituale*, the proceedings under the latter type of arbitration are not subject to the formal requirements set by the Code of Civil Procedure (although the courts tend now to apply various of its provisions also to *arbitrato irrituale*, including the requirement of due process) and give rise to a determination which is only contractual as to its effects for the parties and is not susceptible to acquire executory force. Such a determination may be attacked only on the same grounds for which the invalidity of a contract may be invoked before a national court."

[6] Reported in Yearbook XXXIII (2008) pp. 596-599 (Italy no. 174).
[7] Reported in Yearbook XXIX (2004) pp. 792-797 (Italy no. 165).
[8] Art. 102 of the Italian Constitution reads:

"Judicial proceedings are exercised by ordinary magistrates empowered and regulated by the provisions concerning the Judiciary.

Extraordinary or special judges may not be established. Only specialized sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary.

The law regulates the cases and forms of the direct participation of the people in the administration of justice."

Text available from the site of the Italian Senate at <www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.

[9] Reported in Yearbook XXIX (2004) pp. 792-797 (Italy no. 165).
[10] Art. 819-ter of the Italian Code of Civil Procedure, last paragraph, reads:

"Pending the arbitral proceedings, no requests may be submitted to the judicial authorities regarding the invalidity or lack of efficacy of the arbitration agreement."

[11] Art. 2909 of the Italian Civil Code (CC) reads:

"A determination contained in a decision which has become final (res judicata) is binding on the parties…."

[12] Reported in Yearbook XXXIII (2008) pp. 600-606 (Italy no. 175).
[13] Art. 1341 Italian CC reads:

"General conditions of contract

Standard conditions prepared by one of the parties are effective as to the other, if at the time of formation of the contract the latter knew of them or should have known of them by using ordinary diligence.

In any case conditions are ineffective unless specifically approved in writing, which establish, in favour of him who has prepared them in advance, … arbitration clauses or derogations from the competence of courts."

Art. 1342 Italian CC reads:

"Contract concluded on (standard) forms

In contracts concluded by signing (standard) forms, which aim at providing a uniform rule for certain contractual relationships, clauses added to the (standard) form prevail upon those of the (standard) form when they are incompatible with them, also when the latter have not been canceled.

The provision of the second paragraph of the preceding Article also applies."