Final Award, CAM case No. 7211, rendered on 24 September 2013

Supplier (Italy) v. Dealer (Greece)

Summary

The lex arbitri applies to the issue of the validity of the arbitration agreement. Under the applicable Italian law (and the New York Convention, which the arbitrator took into account in light of the international character of the dispute), the parties concluded a valid arbitration agreement by signing Business Terms that referred to claimant's General Conditions (Distribution Agreement) containing an arbitration clause. The reference was both in general and to the arbitration clause specifically; this was thus a case of incorporation per relationem perfectam. The specific approval in writing requirement in Arts. 1341 and 1342 page "263" of the Italian Civil Code was not subject to any objection by respondent in the specific case but is anyhow not required in case of a valid incorporation of the arbitration agreement per relationem perfectam and further does not apply in international cases. Art. II of the New York Convention provides for a uniform discipline of the formal requirements for arbitration agreements, which prevails as lex specialis. The arbitrator then dismissed the objection that the person who entered into the arbitration clause on respondent's behalf had no authority to do so, finding that he was a "substitute organ" of the company under the applicable Greek law and could bind the company both to contracts and to arbitrations. Greek law applied on the basis of the conflict of law rules of Italy, the seat of the arbitration, which refer in respect of a company's representation to the state of the company's incorporation (as do the Greek conflict of law rules). However, Italian conflict rules also include a CCP provision according to which the authority to enter into the underlying contract includes typically ("in re ipsa") the authority to agree to the arbitration clause, so that under Greek law only capacity to enter into the contract underlying the arbitration agreement, rather than the power to agree to arbitration, needed to be ascertained here. In the specific case, however, the arbitrator held that not only the power to enter into the underlying contract, but also the power to agree to arbitration had to be affirmed on the basis of Greek law. The arbitrator examined and affirmed the authority of the person who agreed to arbitration on respondent's behalf both on the basis of the mentioned CCP provision as a specific conflict of law rule and Greek law on company representation. On the merits, as claimant's claims were substantiated and uncontested, they were deemed to be well-founded under the principle of non-contestation, recognized by Italian jurisprudence and the CCP. Respondent was directed to bear the costs of the arbitration and all legal costs.

(1)

The Italian Supplier distributed its products in Greece through the Greek Dealer since the 1990s; there was no formal dealership arrangement. In March 2005, Supplier requested Dealer to enter into a formal Distribution Agreement by signing the General Conditions of Distribution drafted by Supplier (the General Conditions). Supplier signed these Conditions on 14 March 2005. The General Conditions were also signed on behalf of Dealer on 17 March 2005, but during the arbitration Dealer contested the authenticity and validity of the signature on its behalf, and thus to have ever entered the Distribution Agreement. The Distribution Agreement was complemented by Business Terms concluded in respect of each individual delivery (indicating goods, price, modality of payment, etc.); over the years Dealer issued purchase orders and Supplier issued invoices for each delivery.

Also through 2009 and early 2010, Supplier delivered goods to Dealer in accordance with the Distribution Agreement and consecutive Business Terms. Relevantly to the present dispute, Mr. X, Dealer's sales director and Board member, signed Business Terms on behalf of Dealer on 26 June 2007 and 19 February 2009. All Business Terms referred in general to the General

Conditions page "264" (Distribution Agreement); they also contained a specific reference to Art. 21 of the same.

Art. 21.5 of the General Conditions (Distribution Agreement) read:

"21.5 (If [Supplier] is the supplier and the Dealer is not Italian)

Any controversy, claim or difference which may arise between the Parties hereto in relation to or in connection with this Agreement, including those concerning its validity, interpretation, performance and termination, if not amicably settled between the Parties through the abovementioned procedure (Art. 21.4), shall be referred to an arbitral tribunal … according to the International Arbitration Rules of the Chamber of National and International Arbitration of Milan [CAM], which the Parties declare to know and accept in their entirety. The arbitral tribunal shall decide according to the Italian laws in force. The language of the arbitration shall be Italian."

A dispute arose between the parties when Dealer failed to pay certain invoices, either entirely or in part. On 11 July 2011, Supplier commenced CAM arbitration. The parties agreed to appoint a sole arbitrator, a German national practicing in Italy.

By the present award, the sole arbitrator rejected Dealer's objection of lack of jurisdiction, found in favour of Supplier on the merits, and directed Dealer to bear the costs of the arbitration and reimburse Supplier's legal costs.

The arbitrator first denied Dealer's argument that the arbitral tribunal lacked jurisdiction because – lacking any evidence of a valid signature on Dealer's behalf on the Distribution Agreement – no valid arbitration clause existed between the parties. The arbitrator noted at the outset that Dealer's objection did not prevent her from deciding on her own jurisdiction, pursuant to the principle of Kompetenz-Kompetenz, which is widely recognized internationally and also adopted in the Italian Code of Civil Procedure in respect of international arbitrations with seat in Italy such as the present one.

The tribunal held that Italian law applied to the issue of the validity of the arbitration clause, in accordance with the prevailing opinion that in lack of a choice by the parties the law of the state of the seat of the arbitration applies. This opinion – noted the tribunal – is in conformity with Art. V(1)(a) of the 1958 New York Convention, which provides that the validity of the arbitration agreement is determined under the law of the country where the award is made. The arbitrator further noted that because of the broad wording of Art. 21.5 of the General Conditions – which provided for Italian law to apply to "any page "265" controversy, claim or difference … in relation to or in connection with this Agreement, including those concerning validity" – the choice for Italian law should be interpreted to refer not only to the substantive discipline of the transaction but also to the determination of the (in)validity of the arbitration clause. The Arbitrator therefore held that the validity of the clause at issue should be determined applying Italian law but, in light of the international character of the dispute, the arbitrator also took into account international treaties, in particular the New York Convention.

The sole arbitrator then found, under both Italian law and the New York Convention, that the parties had concluded a valid arbitration agreement in writing. Dealer admitted that it signed Business Terms in June 2007 and February 2009; these Terms were expressly made dependent on the acceptance of the General Conditions. Thus, Dealer accepted the General Conditions, and the arbitration clause therein, expressly and in writing. The tribunal noted that Italian law does not require that general conditions be necessarily approved of in writing (except where so provided for by law for certain conditions, e.g. the so-called clausole vessatorie – restrictive clauses); it merely provides that the party drafting the conditions has the burden to make the adhering party aware of the clauses. It appeared from the evidence that this was the case here.

Further, the arbitration clause in the General Conditions was validly incorporated by reference in the Business Terms, which referred to the Conditions in their entirety and also specifically to the arbitration clause; the reference was therefore by relatio perfecta. Arts. 1341 and 1342 of the Italian Civil Code, which provide that an arbitration clause and other so-called clausole vessatorie be specifically approved in writing, did not apply. The Italian Supreme Court held in a recent decision that the lack of specific approval can be invoked only by the adhering party – here, Dealer, which did not raise this objection. The arbitrator added that even if one deems that there is an absolute, rather than relative, nullity, the New York Convention prevails as lex specialis: Art. II of the Convention provides for a uniform discipline of the formal requirements for the arbitration agreements in international contracts, thus preventing a Contracting State from imposing further or more restrictive formal requirements.

Dealer also argued that the arbitration clause was invalid because Mr. X lacked the power of a legal representative necessary to agree to arbitration on Dealer's behalf. The arbitral tribunal disagreed.

The arbitrator first distinguished between capacity – the juridical condition for validly entering into any contract – and the power to agree to arbitration. The latter presupposes the former.

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The issue of capacity is not governed by the law applicable to the arbitration agreement; rather, it falls under the scope of the personal law determined by the conflict-of-laws norms applied by the arbitrator. This conclusion is supported by the New York Convention, which refers to the capacity of parties under “the law applicable to them”. The Convention does not define that law, but doctrine and jurisprudence almost unanimously deem that it is the law regulating capacity as determined by the relevant conflict of laws norms of the forum.

As to the issue of the power to agree to arbitration, the Convention is silent, and doctrine and jurisprudence divided. The minority view is that the power to agree to an arbitration agreement is regulated by the law applicable to the agreement itself. Following this opinion, Italian law would apply, being both the law chosen by the parties and the lex arbitri. The prevailing opinion, however, points to the conflict norms of the forum. Since arbitrators have no forum in the strict meaning of this term, they are not necessarily bound by a forum's conflict of laws norms and may apply any autonomous conflict system that they deem appropriate. In the present case, the sole arbitrator deemed that the appropriate set of conflict of law rules provisions was Italian private international law, being the law of the seat of the arbitration.

This set of rules includes Art. 808(2) of the Italian CCP, which is authoritatively deemed, in respect of international arbitration, to be a material norm of private international law. According to this article, the authority to enter into the underlying contract includes the authority to agree to the arbitration clause. There is therefore no need to ascertain whether there is power to agree to arbitration, but only the need to establish the party's capacity to enter into the contract underlying the arbitration agreement. The arbitral tribunal added that the application of Art. 808 CCP, as a special conflict norm, to international arbitration is also supported by the principle of favor arbitrati, and is not at odds with the New York Convention, whose literal text only refers to “capacity”, not to the “power to agree to arbitration”.

Under Italian conflict law (as well as under Greek conflict law), representation of companies is regulated by the law of the State where the establishment of the company has been completed: here, Greek law. The sole arbitrator concluded that on the facts of the case and under Greek law Mr. X had the implied power to represent Dealer as a “substitute organ” of the company and could therefore bind Dealer to the General Conditions and to the arbitration clause therein.

The arbitrator then noted – though no objection had been raised in this respect – that the dispute fell within the scope of the arbitration clause. Also, the request for arbitration was admissible because the parties made an attempt at conciliation as provided for in the General Conditions.

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As to the merits, Dealer did not contest Supplier's claim. Under the principle of non-contestation, long recognized by Italian jurisprudence and presently also embodied in the Code of Civil Procedure, uncontested claims are deemed to be founded. Also, Supplier fully proved that its claim was well founded, by submitting all the relevant documentation.

No interest was awarded as Supplier did not request any on the sum owed.

The sole arbitrator finally directed Dealer to bear the costs of the arbitration and compensate Supplier for its legal costs.

Excerpt

I. Lack of Jurisdiction

[1] "From its first appearance in the arbitration, Dealer [Respondent] objected that the arbitration clause was null and void and therefore the Arbitral Tribunal lacked jurisdiction. This objection, however, does not prevent the Arbitrator from deciding on her own jurisdiction, pursuant to the well-known principle of Kompetenz-Kompetenz, also adopted in Art. 817 CCP(2) which applies to international arbitrations with seat in Italy.

[2] "The objections raised by Respondent are without merit and must be dismissed [on the following grounds]."

1. Applicable Law to Validity of Arbitration Clause

[3] "Before deciding on the objection that the arbitration clause at issue is null and void (because, as argued by Respondent, it is both non-existent and invalid), page "268" the law applicable to the arbitration agreement must be determined, so that [the agreement's] validity can be ascertained: this issue is not explicitly provided for in the Rules governing the present arbitration.

[4] "Although this issue is widely discussed in both doctrine and jurisprudence, it is generally held – an opinion shared by the Arbitrator – that lacking a choice by the parties the law of the state of the seat of the arbitration (lex arbitri) applies. This approach is in conformity with the provision in Art. V(1)(a), second part, of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention), ratified by both states of the parties' nationality. According to this provision, failing a choice by the parties, the validity of the arbitration agreement is determined under the law of the country where the award was made – here, Italian law (including its conflict of law provisions), since the seat of the arbitration is Milan, Italy.

[5] "This said, we should stress at any event that the application of Italian law to the arbitration clause in the present case also appears to be a direct consequence of Art. 21.5 of the General Conditions of Distribution [the General Conditions] of Supplier [Claimant], which contains the arbitration clause. This article reads:

'Any controversy, claim or difference which may arise between the Parties hereto in relation to or in connection with this Agreement, including those concerning its validity, interpretation, performance and termination, ... shall be referred to an arbitral tribunal ... according to the International

Arbitration Rules of the Chamber of National and International Arbitration of Milan…. The arbitral tribunal shall decide according to the Italian laws in force….'

[6] "In light of the text of Art. 21.5 reproduced above – the Arbitrator being well aware of the well-known and well-established principle of the autonomy of the arbitration agreement with respect to the main contract – it is appropriate to conclude that in the present case the choice for Italian law in Art. 21.5 does not refer solely to the substantive discipline of the transaction but also extends to the determination of the (lack of) validity of the arbitration clause. The text refers to 'any controversy, claim or difference … in relation or in connection with this Agreement, including those concerning its validity': therefore, also in respect of the validity of the arbitral clause contained in that article and thus in the Distribution Agreement (drafted as general conditions), which also explicitly provides at Art. 21.2 that it is governed by Italian law.

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[7] "This 'choice' must be taken into account also when the validity of the arbitration agreement is disputed by one of the parties to the arbitration, as is the case here.

[8] "This thesis is supported by Art. 10(1) of EC Regulation 593/2008 ('Rome I') of 17 June 2008 on the law applicable to contractual obligations (which replaced the 1980 Rome Convention), which contains mandatory rules of private international law according to which:

'The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.'

In application of this provision, the law applicable to the contract or any term thereof, if valid pursuant to the Rome I Regulation, would be, in accordance with Art. 3(1) Regulation, 'the law chosen by the parties'.(3)

[9] "Although this provision obviously does not directly apply to arbitration clauses, still in the Arbitrator's opinion it states a broader principle. Further, it must be noted that lacking a choice [by the parties], relevant arbitral practice also applies the law applicable to the contract to which the arbitration clause refers:(4) here, the Distribution Agreement. In turn, this law is determined on the basis of the criterion in Arts. 10 and 3 Rome I Regulation and thus, in the specific case, Italian law as the law'chosen' by the parties (see Arts. 21.2, 21.3 and 21.5 of the General Conditions).

[10] "It is therefore reasonable to conclude that the Arbitrator must examine the question of the validity of the arbitration clause under Italian law, also taking into account, in light of the international nature of this proceeding, the impact of international treaties, in particular the New York Convention (see also below [at [50]-[60]]).

[11] "Particularly because of the objections raised in the arbitration by Respondent, we must remark already at this stage that it is disputed whether the scope of the law governing the arbitration clause also extends to the parties' power to conclude an arbitration clause. This issue, which was raised specifically by Respondent, was therefore examined, as will be seen, on the basis of different premises and norms (see below [at [63]-[87]])."

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2. Existence of Valid Arbitration Clause

[12] "The valid conclusion of an arbitration clause requires first of all the parties' agreement. Both international treaty and Italian law on arbitration require the written form to ensure that the contracting parties are aware of the decision to refer a dispute to arbitration.

[13] "Art. II(1)-(2) of the New York Convention provides:

'

(1) Each Contracting State shall recognize an agreement in writing.…
(2) The term "agreement in writing" shall include an arbitral clause in a contract … signed by the parties or contained in an exchange of letters or telegrams.'

[14] "Similarly, Art. 808 CCP provides that the choice to refer possible future controversies to arbitration must appear from a written agreement:

'The parties may establish, in their contract or in a separate document, that disputes arising out of the contract be decided by arbitrators, provided such disputes may be made subject to an arbitration agreement. The arbitration clause must be contained in a document meeting the form required for a submission agreement by Art. 807.'

And, according to Art. 807 CCP:

'The submission to arbitration must, under sanction of nullity, be made in writing and must indicate the subject matter of the dispute.

The written form requirement is considered complied with also when the will of the parties is expressed by telegram, telex, telecopier or telematic message in accordance with the legal rules, which may also be issued by regulation, regarding the transmission and receipt of documents which are teletransmitted.'

[15] "According to the prevailing opinion, this is still required ad substantiam actus [as a substantive requirement] even if the current text of Art. 808 CCP [see above] no longer states, in respect of the formal requirement, 'under sanction of nullity', as the text in force before the reform of Law no. 25 of 1994 did.

[16] "Since the arbitration clause at issue is contained in Claimant's General Conditions of 14 March 2005, Respondent's objection that, contrary to Claimant's opinion, these General Conditions never governed the dealership page "271" relation between the parties – both because they were never accepted by Respondent and because the signature made (on 17 March 2005) on [Respondent's] behalf is not referable to a person belonging to the company and/or at any event having the power to bind it – is of paramount importance.

[17] "Faced with [Respondent's] disavowal, Claimant did not ask for a verification of the disputed signature, nor for any other evidence aiming at contradicting Respondent's argument on this point. Hence, it follows on the one hand that it is undisputed that the General Conditions was not signed by Respondent on 17 March 2005 and, on the other hand, that the Arbitrator correctly did not grant Respondent's request to appoint a handwriting expert.

[18] "However, Claimant argued that this is irrelevant because Respondent admitted that it signed the Business Terms on 19 February 2009 through its sales director and Board member Mr. X. Acceptance of these Terms necessarily implied acceptance of the arbitration clause, since [the Terms] specifically referred to Art. 21 of the General Conditions, which contains the arbitration clause at issue.

[19] "Respondent in turn replied, inter alia, that the Business Terms were simply a document containing purely commercial terms. Further, the reference therein to Art. 21 [of the General Conditions] was vague, ambiguous and therefore insufficient to prove that Respondent meant to express the intention to arbitrate; because of these characteristics, [this reference] escaped the attention of the signatory [Mr X], who at any event lacked the power to validly sign the arbitration clause.

[20] "In light of the above considerations, it appears necessary, in order to decide on this objection, to examine (1) whether the reference in the Business Terms to Art. 21 of Claimant's General Conditions may support the finding that the arbitration clause at issue was validly concluded; and (2) if so, whether Mr. X had the power to bind Respondent to the arbitration agreement at issue."

a. Consent to and form of the arbitration clause

i. General conditions of contract

[21] "Logically, we must first [deal with and] reject Respondent's argument that Claimant's General Conditions dated 14 March 2005 do not apply to the dealership relation between the parties, because that relation was exclusively based, since the 1990s, on non-written agreements, the so-called gentlemen's agreements (as well as on Business Terms that were signed [for each individual transaction]: page "272"

'The only terms that were signed were – [for each individual transaction] – the business terms, the various price lists and, last, a contract dated 30 October 2008 modifying the relationship between Claimant, us [Respondent] and [Greek Company A] in Greece.' [Respondent's statement….]

[22] "It appears actually from the evidence that Respondent in fact (expressly) accepted the said general conditions of contract, whose last version – in the asbsence of contestation or contrary evidence – must be deemed to be the version of March 2005, as argued by Claimant.

[23] "As mentioned above, it is undisputed that Respondent deems that the Business Terms – both the version of 11/26 June 2007 and the most recent version of 11/19 February 2009 (signed on behalf of Respondent by Mr. X and stamped with the company seal) – apply to the relationship at hand. Now, it appears from the introduction to these texts that the efficacy of the Business Terms was expressly made dependent on the acceptance of Claimant's General Conditions in force at the time, which were expressly referred to in their entirety and deemed to be an integral part of the agreement signed by both parties:

'This agreement contains Special Terms applicable to the dealership of Claimant's products and possibly to other dealings between other companies in the Claimant Group. It is subject to acceptance of Claimant's General Terms and Conditions currently in force, which shall be deemed to be accepted as they are cited herein and form an integral part of this Agreement. The terms and conditions set out hereafter are granted to the dealer, unless otherwise agreed in writing….' [English original.]

[24] "There is therefore no doubt that in the present case Respondent accepted expressly and in writing Claimant's General Conditions.

[25] "Also, there is a further, well-evidenced sentence in the Business Terms, at the end of the page immediately above the signatures of the contracting parties, by which the signatories state that they accept specifically Art. 21 of Claimant's General Conditions, that is, the Article which contains the arbitration clause at issue (Art. 21.5):

'Clause 21 (Miscellaneous) of Claimant's Distribution Agreement is expressly accepted.' [English original.]

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[26] "In further support of the above conclusion, we stress that Claimant's General Conditions were accepted in writing by Respondent already in 2008, when entering into the Distributors Co-existence Regulation, which, Respondent itself allows, regulated the 'coexistence' of Respondent and Company A, another distributor that Claimant had decided to use in Greece in the meantime. Art. 11 of the Regulation reads:

'A breach of any term or condition of the present regulation will constitute a breach of the Distribution Agreement…. For all other sales of Claimant's products between Claimant and each dealer, the Distribution Agreement and the General Terms and Conditions in force (see enclosure) will apply.' [English original.]

[27] "For the sake of completeness, we add that Art. 1341 of the Italian Civil Code provides that:

'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.'

Thus, Italian law does not require that general conditions be necessarily approved of in writing; it provides that the party drafting the conditions has the burden to make the adhering party aware of the clauses, that is, to make the clauses normally knowable to it.

[28] "It is a hard fact here that Respondent was on the one hand perfectly aware that Claimant usually used general conditions of contract to regulate relations with its dealers in Italy and abroad in a uniform manner and, on the other hand, that it was aware of the text, as far as relevant here, of the General Conditions of 14 March 2005. It suffices to note that Respondent itself submitted the letter of Claimant's General Manager of 14 March 2005 by which the latter informed Respondent that the relationship should be deemed regulated by the said general conditions as well as by individual agreements relating to possible discounts, credit lines and payment terms:

'Kindly let me have your attention on the general conditions that you can find at the end of every price list: they regulate the sales relationships, the warranty and the related services, and the software license of use. In the same way, the Distribution Agreement here attached (attachment 2) fix[es] the basic conditions of our relationship. The conditions of sale and page "274"recommendation (discounts compensations, payment terms) were studied on the base of both the agreements in force and the credit approved….' [English original.]

[29] "Respondent itself allows that it received Claimant's General Conditions, not only the version of March 2005, but also the version of March 2004: it has submitted this [latter] document, signed by Claimant on 14 March 2004, in the arbitration. There is therefore no doubt that Respondent was aware of Claimant's General Conditions and that [the Conditions'] applicability to the business relationship at hand was specifically examined and discussed.

[30] "This conclusion is further reinforced by Claimant's submission of the complete text of the General Conditions of 14 March 2005, which contains at the end not only Respondent's Mr. X's signature to acknowledge receipt, but also the sentence, which he wrote, ' just for checking and reading'. Even if it is true that it cannot be deemed, on the basis of the evidence, that Respondent accepted the General Conditions in writing on 17 March 2005, it is also true – and relevant here – that after receiving and examining them Respondent never told Claimant that it did not wish to accept them, while subsequently performing under the Distribution Agreement by, among others, issuing purchase orders. We must note in this respect that Art. 15.1 of the said General Conditions expressly provides that:

'In any case, by submitting and accepting the first supply order, the Parties are deemed to fully accept, to all effects, the present Agreement, which shall therefore be deemed valid and binding at the date of acceptance of the order.' [English original.]

[31] "Indeed, Respondent itself allows that the business relationship between the Parties began to change and became more formal already in 2002, when the son of Claimant's founder came to work for Claimant (see also [certain documents] of Respondent which show that, at least from that time, the parties used written agreements to regulate their relations). For this reason, the conclusions reached above from a legal point of view appear to be correct from a factual point of view as well."

ii. Incorporation of arbitration clause by reference (per relationem)

[32] "Considering that Claimant's General Conditions of March 2005 must be deemed to have been validly agreed on by the parties, it remains to be ascertained whether the same can be said for the arbitration clause therein. We page "275" must therefore ascertain in this respect whether the double reference in the 2007 and 2009 Business Terms (first to Claimant's General Conditions 'in their entirety' and then 'specifically' to Art. 21) complies with the formal requirements for the validity of the arbitration agreement.

[33] "We must stress first that in both Italian(5) and international jurisprudence,(6) the written form requirement does not mandatorily mean that the contractual intention must be expressed in one document signed by both parties. It is therefore undisputedly allowed, and relevant here, that the intention to refer to arbitration may also be expressed by means of a relatio to a separate document in which the arbitration clause is contained (the so-called 'per relationem' arbitration clause).

[34] "We further stress in this respect that the UNCITRAL Model Law, as amended in 2006, also expressly allows for a per relationem conclusion, by providing in its Art. 7(6) (and in the original version, Art. 7(2)):

'The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.'

[35] "According to a stricter approach, relatio is admissible as long as it is specific, that is, it is not limited to a generic reference to the document containing the arbitration clause but refers to it expressly, so that it appears unequivocally that the parties intended to refer to arbitration. Only an express reference would guarantee that the parties fully understand that they are derogating from [state court] jurisdiction. For instance, the Italian Supreme page "276" Court, referring particularly to foreign arbitration has stressed (see Supreme Court, Plenary Session, 19 May 2009, no. 11529):(7)

'This Plenary Session notes that the practice of the so-called per relationem arbitration clauses – that is, [clauses] contained in a separate act or document to which the contract refers – which is especially frequent in international commerce, has created considerable difficulties also in respect of the compliance with the written form requirement. Italian jurisprudence (foreign jurisprudence oscillates) generally distinguishes two cases, depending on whether the contract makes an express and specific reference to the arbitration clause (the so-called per relationem perfectamreference) or a general reference: that is, it merely refers to the document or [standard] form containing the arbitration clause (the so-called per relationem imperfectam reference). In the first case the arbitration clause is deemed to have been validly stipulated (Corte di Cassazione, no. 7497 of 1983(8) and no. 6925 of 1983).(9) In the second case, on the contrary, the formal requirements under the New York Convention are not met (Corte di Cassazione, Plenary Session, 1 March 2002, no. 3029;(10) 7 August 2002, no. 11891;(11) no. 1649 of 1996;(12) no. 3285 of 1985).(13) This opinion is to be shared, because only [with] an express reference also to the arbitration clause contained in a document containing several terms can one be sure that the parties consciously intended to derogate from state court jurisdiction.'

[36] “Along this approach, there is a less strict approach according to which ‘per relationem imperfectam’ agreements are valid. This approach is followed by authoritative doctrine(14) and confirmed by international jurisprudence. For page "277" instance, a clause is deemed valid where there is a general reference,(15) or it is required, further to the reference, that the other party was or could have been aware of the general conditions containing the arbitration clause.(16) However, the approach that is not favourable to the so-calledrelatio imperfecta(17) appears still to be prevailing in Italy, although there were authoritative statements in favour of [the less strict approach] when Art. 833 CCP, now abrogated, was in force.(18)

[37] “In light of the above considerations, it must be deemed that in the present case there was a clear case of conclusion of the arbitration agreement per relationem through a so-called relatio perfecta.

[38] “Contrary to Respondent's opinion, by signing the Business Terms the parties not only regulated some strictly ‘commercial’ terms of the dealership relation (such as payment terms, discounts, credit lines, etc.) but clearly also formalized that relationship in writing by referring in respect of all aspects not directly regulated by the Business Terms to the Claimant's General Conditions in force; the parties stated to have accepted this provision and absorbed it as an integral part [of their agreement]. It is in fact rather usual that when regulating a (national or international) dealership relation the parties negotiate and agree specifically on ‘business’ conditions and terms and refer in respect of other aspects to general conditions drafted by one of them (generally, as in the present case, the seller/supplier).

[39] “Among the general conditions thus integrated [into their agreement], the signatories particularly distinguished the clause of Claimant's General Conditions (Art. 21) that contained (at 21.5) the arbitration agreement at issue, to such an extent that they specifically referred to it and accepted it expressly and separately. More than any other consideration, this ‘double’ reference in the text (first, in the introduction, ‘en bloc’ to the general conditions as a whole, and then ‘specifically’ to Art. 21, containing the arbitration clause) makes it clear that the signatories were duly made aware of the existence of the arbitration agreement.

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[40] “If the ‘en bloc’ reference in the introduction to the Business Terms to Claimant's General Conditions may be deemed insufficient to prove the existence of a valid intention to arbitrate, this cannot be said in respect of the express, specific and separate acceptance, at the end of the same text, of the clause (21) containing the arbitration agreement (21.5).

[41] “The special prominence given in the agreement to the acceptance of this clause (21) over all others contained in the General Conditions not only excludes that this clause was not duly examined but rather ensures, beyond any reasonable doubt, that the parties were fully aware of its entire content and thus gave their full and informed adhesion to the derogation from state court jurisdiction.

[42] “The fact that clause 21 concerns and regulates various contractual aspects does not make it ‘ambiguous’ or ‘vague’ and at any event such that its content escaped the attention of the signatory, as Respondent – in a generic manner – seems to argue. We must consider, on the one hand, that the text of the clause (written in both Italian and English, the latter language being well known to Respondent) is absolutely clear and completely comprehensible and, on the other hand, that [the clause's] specific approval, separately from all other clauses, has led the signatories to pay the greatest attention to it, thereby ruling out any ‘surprise’ effect.

[43] “Nor can we forget to mention that an examination of clause 21 shows that in fact the subject matter of dispute resolution – subdivided in several points depending on the seat of the distributor, either in Italy or abroad, and/or the role played by Claimant or other companies of the group as supplier (see Art. 21.4 to 21.7) – is the main subject matter of the clause, at least in terms of size, and

certainly, also for this reason, could not be overlooked. Further, Art. 21.5, which interests us here, cannot have failed to draw the immediate attention of Respondent's representative: not only was its heading emphasized (in bold characters) in contrast to the other provisions in Art. 21; it also specifically concerned the relations between Claimant and non-Italian dealers, such as Respondent ('Where [Claimant] is the Supplier and Dealer is not Italian').(19)

[44] "Finally, we cannot avoid noting in the present case that Respondent is a commercial entity and that it acted within the ambit of its entrepreneurial activity and through a highly qualified person (sales manager and member of the company's Board) who was fully accustomed to negotiating international page "279"contracts and who evidently was not unaware of the contractual elements and dynamics usually arising in respect of such relations. Nor should we forget that Mr. X not only was almost exclusively responsible for all contacts with Claimant since 2004/2005 but also, as is proved by the evidence, was well aware of the text of Claimant's General Conditions."

iii. Arts. 1341 and 1342 Civil Code (specific approval of arbitration clause)

[45] "Having determined that the parties concluded an arbitration agreement per relationem, at any event as of 26 June 2007 (the date of approval by Respondent of the Business Terms 2007), we still must resolve a further question relating to the fact that the arbitration clause at issue is contained not generically in a document, but in Claimant's General Conditions of Distribution.

[46] "Pursuant to Art. 1341 and Art. 1342 CC,(20) the so-called clausole vessatorie [restrictive clauses] (which include arbitration clauses) contained in general conditions of contract require a specific approval in writing (through an additional signature of the list of the vessatorie clauses generally to be found at the end of the document), because the legislator deems that they disadvantage the adhering party.

[47] "In the present case, however, [these provisions] do not apply for the following several reasons.

[48] "A very recent decision of the Italian Supreme Court of Cassation(21) held that the nullity of a restrictive clause, because it has not been specifically approved in writing, is a 'relative' [nullity] that only the adhering party may invoke. In the case at hand, an examination of the lack of specific approval would therefore be precluded because Respondent did not raise any objection in this respect.

[49] "According to a different, prevailing jurisprudential and doctrinal interpretation, non-compliance with this formal requirement leads to 'absolute' page "280" nullity, which can be invoked by any interested party and also ex officio.(22) However, even if we followed this opinion the result would not change in this case.

[50] "In consideration of the speciality principle in Art. 2 of the Italian Statute on Private International Law (Law no. 218 of 1995),(23) it is in fact deemed that the [1958] New York Convention, in particular its Art. II, provides for a uniform – that is, special – substantive discipline of the formal requirements for the arbitration agreements in international contracts, thus preventing the Contracting States from imposing further or more restrictive formal requirements on arbitration agreements.

[51] "The prevalence of uniform law has been broadly discussed in Italy, in particular with respect to the application of Arts. 1341 and 1342 CC in light of the provision of Art. II of the New York Convention; following this discussion, jurisprudence held on several occasions that Arts. 1341 and 1342 CC do not apply to agreements for foreign arbitration.(24)

[52] "We must note on this issue the pertinent clarification made by the Italian legislator, specifically in respect of international arbitration (with seat in Italy), through Art. 833(1) CCP, which was introduced by the 1994 arbitration reform: 'The arbitration clause contained in general conditions of

contract … is not page "281"subject to the specific approval provided for in Articles 1341 and 1342 of the Civil Code.' This provision was subsequently abrogated following the 2006 arbitration reform.

[53] "Although Art. 833 CCP has been abrogated, it must be deemed with the prevailing doctrinal opinion, which is to be shared,(25) that there are no valid reasons for holding that the opinion expressed by jurisprudence before the 1994 reform (see fn. 24) must be relinquished. Art. 833 CCP (now abrogated) merely absorbed a principle that jurisprudence had already developed and affirmed. Further, a contrary opinion would be in unavoidable contrast with the spirit and the text of Art. II of the New York Convention. We must also take into account that the stated aim of the 2006 reform, which the Legge delega [law delegating the Cabinet to pass a legislative decree] expressly sought to pursue,(26) was to bring the new arbitration discipline broadly in line with the discipline (already) provided for international arbitration in the earlier 1994 reform.

[54] "It is irrelevant that the (pre-1994 reform) jurisprudence mentioned above concerned disputes relating to agreements for foreign arbitration. There are multiple and concordant considerations, supported by authoritative and prevailing doctrine, for deeming that the provisions of the New York Convention, particularly the said Art. II, must be deemed applicable also to agreements for international arbitration, such as the one at issue, with seat in Italy and contained, obviously, in international contracts (containing elements extraneous to the Italian legal system); this leads, in conformity with the jurisprudence mentioned above, to the inapplicability of Arts. 1341 and 1342 CC.

[55] "As to the scope of application of Art. II of the New York Convention, it was pointed out that while Art. I on the recognition and enforcement of awards applies only to foreign awards, in both senses mentioned there (see fn. 27), the Convention is silent in respect of Art. II, which concerns arbitration agreements, not awards. Thus, it is acknowledged that Art. II is a self-sufficient part of the page "282" Convention, not a mere auxiliary norm aimed at the application of the Convention's norms on the recognition and enforcement of the award. The majority doctrinal opinion, which the Arbitrator follows, deems therefore that Art. II of the Convention clearly applies, as to formal requirements, also to agreements for international (and not only foreign) arbitration.(27)

[56] "We should further note that Art. 4(2) of Law no. 218 of 31 May 1995 provides in respect of foreign arbitration simply that:

'Italian jurisdiction may be derogated from by agreement in favour of a foreign court or foreignarbitration if there is written proof of the derogation and the dispute concerns rights of which the parties may freely dispose [diritti disponibili].' [Emphasis added.]

[57] "It is further relevant that Art. 23 of EC Regulation 44/2001 on jurisdiction (though not arbitral jurisdiction) provides that the clause derogating [from the jurisdiction of national courts] in favour of a court of a Contracting State (clause conferring jurisdiction) shall be concluded either:

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(a) in writing or orally with confirmation in writing;
(b) in a form which accords with practices which the parties have established between themselves; or
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or page "283" commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned' [emphasis added].(28)

[58] "Based on the considerations above and taking into account the interests of the parties involved in an international arbitration, there are no reasonable grounds, in this Arbitral Tribunal's opinion, to hold that the formal requirements for an arbitration clause for international arbitration (with seat in

Italy) must be deemed to be more restrictive than those provided for the arbitration clauses for foreign arbitration (concerning an Italian party and contracts governed by Italian law) or for the clauses derogating from Italian jurisdiction in favour of the court of another State. Also, arguing that the provisions of the New York Convention and in particular its Art. II do not apply to agreements for international arbitration, as described above, would mean being at odds with the historical interpretation of the Convention, which regulates international arbitration independent of the arbitration's seat. In sum, it can be concluded even today that an arbitration clause for international arbitration (with seat in Italy) is valid also without the specific approval ex Arts. 1341 CC et seq.; this is the case here.

[59] "The same conclusion can be reached by a different route, if we wish to apply Italian law. According to constant jurisprudence and authoritative doctrine, there is no need for a specific approval in writing of restrictive clauses when the contract is concluded as described above 'per relationem perfectam', that is, where the reference to the rules drafted by one of the contracting parties results from an agreed-upon choice for a [regulatory] system to which the parties refer with a formulation that, though summarily, evidences their effective knowledge and acceptance of all clauses therein contained:

'The reference made by the parties to the provisions in a separate document – provided that [the parties] are fully aware of this document and that [this reference] aims to supplement the contractual relation insofar as not otherwise provided – makes those provisions, through a relatio perfecta, equal to agreed-upon clauses and thus unaffected by the requirement for a specific approval in writing pursuant to Art. 1341 CC. It is irrelevant whether the said document is drafted unilaterally [by one page "284" party], since [this circumstance] is superseded by the fact that both parties agreed to absorb its contents [into their agreement].'(29)

[60] "Thus, according to the opinion just mentioned, this formal requirement is also met in the absence of a specific approval in writing where there is an express reference to the clause containing the arbitration agreement; this is the case here."

b. Power to represent

[61] "Respondent … also argues that Mr. X lacked the power of a legal representative in order to validly bind Respondent to arbitration. [It argues that] according to Greek law, which it deems applicable, only a legal representative, or a person duly authorized by a specific power of attorney (which is lacking here), has this power. Respondent maintains that during the relevant period Mr. Y (President) and Mr. Z (Vice President) were [Respondent's] legal representatives, as clearly shown by the Companies Bulletin of the Greek Official Gazette.

[62] "Respondent's objection is unfounded and must be rejected."

i. Applicable law

[63] "We must first of all distinguish between capacity, which concerns the subjective status of the parties entering into an arbitration agreement, and the power to agree to arbitration. The former puts into play the assessment of the existence of the juridical condition for validly entering into such agreement; it is not discussed here. The latter – the power to agree to arbitration – concerns the exercise of the power to bind, and presupposes that there is capacity. The issue in the present case is the identification of the person having the power to validly bind a legal entity such as Respondent to an arbitration agreement (including compliance with internal procedures for conferring such power to this person).

[64] "The issue of the 'capacity' to enter into an arbitration agreement in the strict sense, which concerns [a party's] subjective status, undoubtedly falls outside the scope of application of the law

applicable to the arbitration agreement; it is regulated first by the provisions governing the capacity of the contracting party in accordance with the conflict-of-laws norms applied by the page "285" arbitrator. In this respect, national laws limit the parties' autonomy in arbitration.

[65] "This conclusion is supported by international treaty law, which gives some useful indication on the determination of the law applicable to capacity. The New York Convention, often mentioned above, provides in Art. V(1)(a) that recognition and enforcement of an award shall be denied if the party/parties 'to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'. Hence, an examination of these provisions evidences that, other than the issue of the validity of the arbitration agreement, the issue of capacity (at least in a strict sense) is not regulated by the law chosen by the parties.(30)

[66] "However, Art. V(1)(a) of the New York Convention does not expressly provide what law applies to the issue of capacity, and uses an ambiguous, almost tautological expression: 'the law applicable to them'. In sum, the authors of the Convention, having chosen for a private international law approach – thus refraining from laying down a uniform substantive discipline – did not express a clear intention to prefer one conflict rule over another. However, doctrine(31) and jurisprudence(32) almost unanimously deem that [the Convention] refers to the page "286" law regulating capacity as determined by the relevant conflict of laws norms of the forum (usually, those of the forum where a court is asked to decide on an issue of lack of jurisdiction because of an arbitration agreement, or on a request for recognition and/or enforcement of an award). Others suggest that the formulation of the Convention must be considered a 'conflict norm' indicating directly the national law of the party, that is, the law of domicile or incorporation.(33)

[67] "Further, [the Convention] does not deal specifically with the issue of representation of persons, including (as here) legal persons, that is, with the issue whether the above-mentioned article on 'capacity' also extends to the power of representation. International doctrine and arbitral and court jurisprudence differ on this point. Some even deem that the representative's power to agree to arbitration concerns the 'validity of the arbitration clause' (rather than 'capacity') and thus falls under the law regulating the arbitration agreement.(34)

[68] "Differently, the Italian Supreme Court of Cassation, in a not-too-recent decision (decision 18 October 1997, no. 10229,(35) rendered in proceedings for the recognition of a foreign arbitral award in which the objection of incapacity under Art. V(1)(a) of the New York Convention was raised) held that under the New York Convention the existence of the power to agree to arbitration must be assessed pursuant to the law applicable to the parties' capacity, expressly excluding the application of the law regulating the arbitration agreement:

'In the … provision at issue, capacity means not only the capacity of a physical person to perform an act, but any capacity, both a legal capacity to perform an act – with an eye to the so-called special legal incapacities – and the capacity of physical and legal persons; in the latter case, special attention is given to representation by the organs [of an entity] and their representation powers, including legitimation [legittimazione].'

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The Court apparently read the reference in the New York Convention to 'the national law of the person' to be a 'direct reference':

'The scope of the applicable norm is thus defined. Since the New York Convention … provides for a complete and self-sufficient system of both substantial and procedural requirements for the enforcement of a foreign award … [there is a direct reference to Italian law for] the issue whether Dalmine was "under some incapacity" to enter into the arbitration clause.'

[69] "Thus, while in principle there is a widespread consensus as to the applicability of the 'personal law' to capacity in the strict sense, there are diverging opinions as to the determination of this law, particularly in respect of the 'power of representation'.

[70] "Obviously, Italian law (and thus Art. 808(2) second part CCP)[36] must be applied here if we follow the opinion that the power to agree to arbitration is regulated by the law applicable to the agreement itself, which is Italian law in the case at hand (both by choice and because it is the lex arbitri).

[71] "If, on the contrary, we follow the different, apparently prevailing opinion that this issue falls outside the scope of application of the law regulating the clause, then we must note that for the purpose of determining the applicable law (in the present case, to the power of representation) arbitrators, in contrast to state courts, have no forum in the strict meaning of this term and are not necessarily bound by [the forum's] conflict of laws norms. Hence, [arbitrators] may devise an autonomous conflict system – which they deem appropriate – in order better to safeguard the specific needs of international commerce and, obviously, of the case at hand. According to authoritative international doctrine, it is even admissible to leave a private international law approach completely aside, for instance by applying substantive norms directly applicable in an international context.[37]

[72] "It follows that in order to determine what is the 'applicable law' for the determination of whether Mr. X had the necessary power to enter into the page "288" arbitration agreement at issue, the Arbitral Tribunal can apply the conflict norm that it deems appropriate in the circumstances of the case and in light of the indications given by treaty law.

[73] "On the one hand, an appropriate conflict law could be Greek private international law (being the law that a Greek court asked to enforce the award most likely would take into account). On the other hand, and preferably, [that law could be] Italian private international law, being the law of the seat of the arbitration – lex arbitri. In a resolution of 1957, the Institute of International Law already recommended the application of the conflict norms of the seat of the arbitration (lex arbitri) in respect of the determination of the law applicable to capacity (Institute of International Law, Resolutions on Arbitration in Private International Law 1959, Neuchatel, Annuaire de l'Institut de Droit International, Vol. II, Art. 4, p. 396 (1959).

[74] "Following this recommendation and thus taking into account Italian conflict norms first, the Arbitrator cannot however ignore the provision of Art. 808(2) CCP, which is contained in [the Title] regulating arbitration. Authoritative doctrine equals this provision, in respect of international arbitration, to a material norm of private international law, that is, a special conflict norm according to which – in derogation from the Italian private international law norms in Law no. 218/95 – the power to agree to arbitration can be affirmed in all arbitrations with seat in Italy, independent of the national law (personal law) of the party disputing that power, that is, the law governing capacity.[38]

[75] "Thus, it should only be ascertained whether the signatory had the capacity and power to conclude the contract containing or referring to an arbitration clause under the 'law applicable' to [that signatory] (determined in turn according to the conflict provisions in Law no. 218/95). There would be no need to examine the specific 'power to agree to arbitration'; [this power] is assumed where it is ascertained that there is power to conclude the contract.

[76] "We remark in this respect that the Supreme Court (see Supreme Court, Civil Section, 19 May 2009, no. 11529) clarified, though with respect to a domestic arbitration, that Art. 808(2) second part CCP derogates inter alia from page "289" the (formal) requirements[39] for the power of attorney to conclude an arbitration agreement, so that the validity of that power of attorney 'should be ascertained not necessarily in respect of that [arbitration] clause, but in respect of the related contract only' [footnote omitted]. The same Court remarked:

‘The second paragraph of [Art. 808] apparently eliminated the necessary bifurcation [biunivocitá] of the “power to conclude the arbitration clause” and the power of representation in respect of the conclusion of that clause, rather linking also the former exclusively to the “power to conclude the contract”. If there is the latter, then there is also the power to conclude the arbitration clause.’ [Emphasis added.]

[77] “The application of Art. 808 CCP, as a special conflict norm, to international arbitration is supported as well by the principle of favor arbitrati, and is not at odds with the New York Convention, which literally only refers to ‘capacity’, not to the ‘power to agree to arbitration’ and which, at least according to the prevailing opinion, does not give specific indications as to the issue of what law is the ‘law applicable to the person’ and as to how to determine it. After all, the application of Art. 808(2) CC to the ‘power to agree to arbitration’ does not take away the need to ascertain always, under the ‘personal law’, both ‘capacity’ in the strict sense (according to the provision of the New York Convention) and the power of the contracting party to conclude the contract (containing the arbitration clause), since the conflict norms on representation also refer to the ‘personal law’ (thus safeguarding in this regard also the requirements stressed by those supporting the application of the lex societatis).

[78] “Further, the extensive interpretation of the term ‘capacity’ given by the Supreme Court decision no. 10229/97 mentioned above did not meet with universal consensus,(40) because it appears to broaden the grounds for refusal exhaustively listed in the Convention, against the principle of favor arbitrati embodied in the New York Convention itself. Also, for the sake of completeness, we remark that the said decision no. 10229/97 concerned a case in which Art. 808 CCP did not apply ratione temporis; however, the Court recognized [in thepage "290" same decision] the ‘innovative’ character of [Art. 808] with respect to the earlier relevant discipline.

[79] “Art. 808(2) second part CCP and other similar provisions in other legal systems(41) have long been considered a material conflict norm in jurisprudence involving a State(42) (reinforced in this respect by the Geneva Convention, which provides at Art. II[(1)]:

‘Right of legal persons of public law to resort to arbitration.

1. In the cases referred to in Article I, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as “legal persons of public law” have the right to conclude valid arbitration agreements.’

Greek jurisprudence has also held, in respect of international arbitrations involving States or state entities, that limitations and formal requirements under domestic law may not be relied on in order to contest the conclusion of arbitration agreements.(43)

[80] “In light of the above considerations, the Arbitral Tribunal therefore follows the interpretation that Art. 808(2) CCP is (also) a special conflict norm and deems that it applies in order to ascertain whether Mr. X had the power to agree to arbitration in the case at issue. (We anticipate here that the conclusions reached under Art. 808 CCP would not be different if the lex societatis were page "291" here applied on the basis of the references in the Italian and Greek conflict provisions, see [at [88]-[93]]).

[81] “As mentioned above, the application of Art. 808(2) second part CCP to the examination of the power to agree to arbitration obviously does not take away the need to ascertain in a preliminary manner that there is the power to conclude the contract to which the arbitration clause refers under the traditional conflict norms – in the present case the Italian norms: that is, those of the lex arbitri (these norms are exclusively relevant if the interpretation is followed that determines the ‘power to agree to arbitration’ only under the ‘lex societatis’).

[82] "The Italian conflict norm on representation of companies is Art. 25 of Law no. 218/95, which reads as follows:

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1. Companies … and all other public or private entities, also if not of an associative nature, shall be regulated by the law of the State on whose territory the setting-up process [procedimento di costituzione] has been completed. However, Italian law shall apply if the seat of the administration is located in Italy, or if the main objective of these entities is in Italy.
2. In particular, the law regulating the entity shall govern:
   (a) juridical nature; …
   (e) constitution, powers and manner of functioning of organs;
   (f) the entity's representation.'

Hence, pursuant to the Italian conflict provision the issue of the existence of the power of representation of Mr. X must clearly be examined under Greek law, since the company was established in Greece.

[83] "The same conclusion is also reached under Greek private international law, as illustrated by the expert in his report:

'Generally, the capacity of legal persons is governed by the national law of the subject (Art. 7 Greek CC). In particular, Article 10 provides in respect of legal persons that the law applicable to their capacity is the law of their legal seat (lex societatis). This conflict rule has been interpreted to include the scope of both the capacity of a legal person per se and the powers granted to its organs.'

[84] "Further, pursuant to Art. 60 of the Italian conflict law, voluntary representation would also be ascertained according to Greek law: page "292"

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1. Voluntary representation is regulated by the law of the State in which the representative has its business seat, provided he acts in his professional capacity and that the third party is or can be aware of this seat. Lacking these conditions, the law of the State in which the representative principally exercises his power in the concrete case shall apply.
2. The act conferring the power of representation is formally valid when it is deemed so by the law regulating its substance (Note of the Arbitrator: that is, the law regulating representation pursuant to the first paragraph) or by the law of the State in which it comes into existence (Note of the Arbitrator: that is, the law of the State in which the power of attorney is granted).'

[85] "Finally, Greek law would also be applied if one deemed that the reference to the 'law applicable to the person' in the New York Convention is a 'direct reference', that is, a special conflict norm (without the intervention of national conflict norms).

[86] "Based on the above, the Arbitrator has examined this issue under Greek law in respect of both the power of Mr. X to conclude the main contract (as this would suffice if Art. 808(2) CCP were applied here) and the power to enter into arbitration clauses (as required by the private international law approach that ascertains this power only under the lex societatis).

[87] "This examination leads us, under both the approaches mentioned above, to hold that Mr. X had the power of legal representation, including the power to agree to the arbitration clause."

ii. Power of representation under Greek law

[88] "It follows from the above considerations that this issue must be examined under Greek law. Obviously, the reasoning and conclusions of the legal expert's report submitted in this proceeding must be taken into account; there is no reason to depart from them, since the Parties agreed with the expert's assessments and conclusions in their entirety, although they interpreted them in a diametrically opposing manner in order to support their diverging arguments."

[89] The sole arbitrator noted in essence that according to the expert report that was submitted on relevant Greek law provisions and case law, the power to represent a company such as Respondent (SA – société anonyme) lies, under Greek law, with the company's Board collectively; the Board can delegate this power (entirely or in part) to physical or legal persons, both members or non-members, and thus to: page "293"

(i) substitute organs of the company. Delegation to substitutes of the company's organ (physical or legal persons, both members or non-members) requires that the Board as company organ is validly constituted; that the by-laws explicitly provide for such substitution (possibility of delegation); and that the Board decides, explicitly or implicitly, to delegate. No power of attorney is required for a substitute organ to act on behalf of the company. The substitute directly expresses the original will of the company;
(ii) representatives with power of attorney. The power of attorney must indicate the specific matters in respect of which the representative may bind the company; no specific provision in the by-laws is needed. The power may be implicitly granted or accepted unless a specific form is required – this is the case for (international) arbitration clauses, for which Greek law requires the written form where the clause is concluded by a representative with power of attorney (not, however, by a substitute organ of the company).

[90] The sole arbitrator then reasoned: "We must therefore ascertain, in order to reach a decision, whether Mr. X was appointed as the legal representative of Respondent, in accordance with Greek law, if not by an explicit decision of the Board (which is excluded – there is no evidence in this respect), by an implicit decision of the Board, provided that the by-laws authorized [the Board of] Respondent to grant the power of representation to a substitute. If this were the case, the substitute organ would be allowed to conclude arbitration clauses without requesting the prior consent of the Board."

[91] The sole arbitrator, having ascertained the substitution requirements and possibility in the by-laws, found that on the facts of the case, and in consideration of Greek case law cited by the expert, Mr. X had been implicitly appointed as substitute representative of Respondent, a family enterprise: at the relevant time, Mr. X, a member of the family running the company, was Respondent's sales director and a member of its Board; for a long time in the parties' relationship, Mr. X dealt with Claimant autonomously, managing (substantial) financial aspects of the relationship, negotiating and signing orders and the Business Terms, also using the company stamp (particularly relevant under Greek law), and thus credit lines, payment modalities, etc., as well as the 2008 Distributors Coexistence Regulation. Further, Respondent itself admitted that Mr. X could sign the purchase orders, and accepted as valid all acts signed by Mr. X (except the Distribution Agreement). The arbitrator therefore held that, on the basis of an implicit decision of the Board, Mr. X was the substitute organ of Respondent with power of representation in relation to the relevant agreements (rather than a representative with power of attorney).

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[92] The arbitrator concluded: "In sum, Mr. X had the power to conclude the arbitration clause at issue, both under Art. 808(2) CCP – according to the thesis the Arbitrator prefers – and under the lex societatis (as the law referred to by both Greek and Italian conflict laws). Indeed, according to Art. 808 CCP, in the light of the above findings, the ascertained power of Mr. X to conclude the [Distribution]

agreement implied the authority to enter into the arbitration clause.(44) Equally, once established that Mr. X acted as a substitute organ of Respondent, with an implied power of representation (in application of the lex societatis), he is deemed to have had the power to conclude the arbitration clause at issue without being specifically authorized thereto by the Board.

[93] "The expert has stressed that the power of representation of a substitute organ has the same limits as the power of the Board where that power is granted in its entirety to the substitute organ. Where this power is granted only in part, it has the limits established by the by-laws and the relevant decision of the Board. The expert stressed that 'the power of substitute organs to sign an arbitration agreement does not require an official statement from above granting the power to act; rather, it can be simply derived from the text of the delegation and its interpretation …' (and the delegation can also be implicit, see above). Further, the expert explained that a company (this is also the case in respect of its Board) cannot invoke possible violations of the limits of the representation against third parties, unless it is proved that those parties were or could have been aware of this violation – a circumstance that is excluded by evidence and also not alleged by Respondent in the present case.

[94] "Since Mr. X had the implied power to represent [Respondent], the Tribunal did not need to examine the formal requirements of Greek law for granting these powers to [representative with power of attorney] to agree to arbitration [footnote omitted]. As described above, these requirements do not apply in respect of the so-called 'substitute organs'.

[95] "Nor is it necessary to examine the applicability to the present case of the so-called internationally recognized principles, such as estoppel, lex mercatoria, 'validation principles' and in general the principle of good faith, which are invoked (at least as a corrective) by those who prefer the application of material norms or internationally recognized principles (rather than the purely private international law approach) to the issue of capacity in its broad sense."(45)

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c. Scope of arbitration clause

[96] "Having concluded that the arbitration clause is valid, we note that no objection was raised in the course of the proceedings in respect of its 'scope'.

[97] "Respondent argued that the arbitration clause was tout court null because of its non-existence (as it was included in general conditions of contract allegedly inapplicable to the relationship at issue) and invalidity (as a person lacking the power of representation bound Respondent). Respondent never argued, not even subsidiarily, that if the arbitration clause were held to be valid (as it was) the subject matter of the dispute did not fall within its scope of application.

[98] "Pursuant to Art. 817 CCP, if no objection is raised by a party, any substantive evaluation of the scope of the arbitration clause (provided the clause is found to be valid) is precluded, since such issue cannot be raised ex officio.

[99] "This said, we should remark that in any case no doubts may arise, in light of what has appeared in the proceedings, as to whether Claimant's request falls within the scope of application of the arbitration clause at hand.

[100] "Claimant argues in this proceeding that the price of certain deliveries of goods under the Distribution Agreement between the parties (concluded through general conditions of sale) was not paid (or not completely paid); as a consequence, it has requested that Respondent be directed to pay the sums Claimant deems owed.

[101] "It is undisputed that the parties' relationship can be qualified as an international [dealership contract –contratto di concessione di vendita]. This is undisputed, to the extent that the sales were made within the framework and in execution of a broader 'frame' contract (which, as mentioned, was concluded in writing, at least through the signing of the Business Terms). As is well known, under Italian law (which applies here pursuant to Art. 21.2 of Claimant's General Conditions) a dealership contract is characterized, inter alia, by the fact that its primary object is to market the supplier's products in a given territory and that the dealer acts as a buyer/re-seller, becoming part of the supplier's sale network. All these characteristics are present here.

[102] "It suffices to refer on this point to Art. 2 of Claimant's General Conditions – 'Terms of distribution: Customized products – Occasional page "296" intermediary' [English original] – and in particular to Art. 2.1, which reads: 'The Supplier hereby grants to the Distributor and the Distributor accepts, the nonexclusive right to distribute, market and sell … the Products….' Further, 'The Distributor undertakes to market and sell in the Territory, in its own name and for its own account, the Products purchased from Supplier' (see Art. 3.5 of Claimant's General Conditions). Nor should we forget the nomen juris used in the introduction to the General Conditions: 'This Distribution Agreement….'

[103] "The issue of the juridical nature of dealership contracts is broadly discussed. To put it very briefly, the prevailing thesis is that it is an atypical contract. According to prevailing jurisprudence, this contract is structurally a frame or normative [normativo] contract, from which emerges the obligation to promote the re-sale of the products purchased through the stipulation of individual purchase contracts on the terms and conditions established in the original contract (see, among many, Supreme Court, Civil Section, 3 October 2007, no. 20775). This is exactly the case here. The dealer had the obligation to purchase the supplier's products and to promote their sale in the territory (see Arts. 3.1. and 3.5 of Claimant's General Conditions), and the parties agreed that the products would be purchased on the basis of further agreements (order/acceptance), whose terms and conditions were already determined in the 'frame' agreement (Claimant's General Conditions) and its supplemental agreements: 'The present Distribution Agreement shall be performed through orders that shall be deemed as valid and binding between the Parties only upon written acceptance by the Supplier' (see Art. 2.2 of the said General Conditions).

[104] "Some argue that the dealership contract is a fusion between or a mixture of individual elements of several typical contracts (e.g., sale, mandate, supply [somministrazione]) that interlink to achieve a sole practical and economic purpose. This contract could thus be described as a mixed contract and should be seen as one transaction with separate performances all within a global relationship having a sole purpose [causa].

[105] "Alternatively, this contract could be considered to be one of the so-called functionally linked contracts, in which there are several transactions having several direct purposes [cause], though these transactions are functionally linked.

[106] "On the basis of the above remarks we can conclude, in application of the interpretation criteria of Art. 1362 CC et seq. – first of all, the principle of the common intention of the parties – that the subject matter of this dispute does not fall outside the scope of application of the arbitration clause.

[107] "Clearly, there is no problem if the mixed-contract theory is followed, since this contract is to be deemed a sole transaction, though with mixed purposes.

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[108] "No different conclusion would be reached if the functionally linked contracts alternative were followed. This is supported by the text of the clause, which shows that the parties wished to extend it to: 'Any controversy, claim or difference which may arise between the Parties in relation to or in

connection with this Agreement', including those concerning 'its performance', and thus first of all the individual sale and purchase contracts that the parties themselves, as seen above, expressly meant to be 'in performance' of the Distribution Agreement: 'The present Distribution Agreement shall be performed through orders …' (Art. 2.2 of Claimant's General Conditions). Further, Art. 15.1 of the said General Conditions provides that 'in any case, by submitting and accepting the first supply order, the Parties are deemed to fully accept, to all effects, the present Agreement which shall therefore be deemed valid and binding at the date of acceptance of the order'. Also, the Business Terms, which supplement the Distribution Agreement, contain a Term – whose acceptance is a precondition for the Business Terms' efficacy – providing for the extension of the Terms, and thus also of the general conditions of contract referred to therein, to all 'dealership of Claimant's products' [English original].

[109] "Further, the sale and purchase contracts and the Distribution Agreement are obviously complementary here: the former are not only the logical and necessary development of the latter for the realization of the business envisaged by the parties, but they are also based on the contractual conditions set out in the latter. It is understandable then why a specific provision in the clause extended the clause to issues both 'related' and 'connected' to the Distribution Agreement and at any event concerning its 'performance'. This provision leaves no doubt as to the parties' intention and the existence of one relationship only. This leads to the conclusion (apart from the remarks above [at [97]-[98]]) that the arbitration clause does apply to the issues raised in this proceeding.

[110] "Definitive support for this conclusion is to be found in the new provision, introduced by the 2006 arbitration reform, of Art. 808 quater CCP (which applies to the present case ratione temporis); [this provision] introduced, along with the parameter in Art. 1362 CC et seq., a new parameter for the interpretation of the arbitration clause, according to which:

'In case of doubt, the arbitration agreement shall be interpreted in the sense that the arbitral jurisdiction extends to all disputes arising from the contract or from the relationship to which the agreement refers.'

This criterion points to an extensive interpretation of the arbitration agreement that includes all disputes deriving not only from the contract but also from the page "298" relationship to which [the clause] refers. It follows that any doubt as to the interpretation of the arbitration clause must be solved in the sense that all connected contracts are included within its objective scope of application where there is an economic-juridical transaction that gives origin to a sole contractual relationship between the parties.

[111] "It is true that the arbitration clause at issue is contained in general conditions of contract and that therefore, pursuant to Art. 1370 CC, 'in doubt, the clauses contained in general conditions of contract … drafted by one of the contracting parties shall be interpreted in the other party's favour'; however, it should be noted that the provision in Art. 808 quater CCP, as it specifically concerns the arbitration clause, is a special provision and therefore prevails over the general discipline laid down in Art. 1370 CC. At any event, in light of the text of the clause at issue and the considerations above, there is no doubt as to the interpretation of the scope of the arbitration clause."

II. Admissibility: Conciliation Attempt

[112] "Having said this, and before dealing with the merits of the dispute, it remains to be said that under Italian law – being, as mentioned, both the law chosen by the parties and the lex arbitri – the request for this arbitration is admissible. It appears from the file that the conciliation attempt provided for at Art. 21.4 of Claimant's General Conditions was made, unsuccessfully. It is proved by documents and at any event undisputed that the parties met several times and exchanged correspondence in an attempt to find an amicable solution to the issue of the alleged failure [by

Respondent] to pay for some deliveries of goods made by Claimant to Respondent, as per the invoices on which Claimant relies here.

[113] "We remark for the sake of completeness that at any event because the conciliation cause (Art. 21.4) is a contractual clause, if the conciliation attempt had not been made (which is not the case here) the Arbitrator could not have raised this point ex officio, in the absence of an objection raised by a party."

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III. Merits

[114] "Also pursuant to Art. 3.2 [Milan Chamber] Rules,(46) Italian substantive and procedural law applies to the merits of Claimant's claim, because of the parties' choice in Arts. 21.2 and 21.5 of Claimant's General Conditions (which exclude the 1980 Vienna Convention on Contracts for the International Sale of Goods, see Art. 21.3 General Conditions).

[115] "Claimant's claim is founded. We remark first that Respondent did not contest the merits of the claim from any point of view, only objecting to the Arbitral Tribunal's jurisdiction and reserving its right to discuss the merits later in the proceedings – which it did not do.

[116] "From the lack of contestation of the facts on which Claimant's claim is based it can be derived that they are founded. The principle of non-contestation is a general principle long recognized by Italian jurisprudence (see, among many, Supreme Court, Civil Section, 24 May 2004, no. 10031). Following the recent reform of the Italian Code of Civil Procedure by Law no. 69 of 18 June 2009, [this principle] has been finally embodied in Art. 115 CCP, according to which the court shall base its decision on, among other things, 'the facts not specifically disputed by defendant'. Thus, this principle must be taken into account also for the decision in this arbitration, as it applies ratione temporis pursuant to Art. 58 of Law no. 69/2009 (this proceedings was commenced after 4 July 2009).

[117] "Further, Claimant fully proved that its claim is well founded:

(i) it proved [the existence of] the contractual bases for its credit (i.e., the Distribution Agreement; the Commercial and Business Terms; and the purchase orders, which are specifically referred to and indicated by number, date, description of the goods and individual price in the invoices submitted in the proceeding, which were not contested by Respondent). Respondent actually admitted that it signed 'orders', when it stated: '[Claimant] offers six witnesses in support of arguments that we do not contest, such as, in particular, the signing of the sale orders and price lists by Mr. X';

(ii) it proved that it delivered the goods ordered (a fact that is not disputed by Respondent), as shown by the transport documents and CMR [Convention des Marchandises par Route] international consignment notes in the file. According to page "300" Art. 1510 CC, 'save contrary agreement or usage, the seller discharges its obligation to deliver by handing over the good to the carrier or shipper'.

    It suffices to stress in this respect that all CMR international consignment notes submitted in the proceeding, which are not contested by Respondent, are signed at the bottom by the road carrier; this proves that the goods were handed over to the [road carrier]. Also, the handing over is specifically described both in the transport documents and in the individual invoices issued by Claimant, attached to the consignment notes in all cases;

(iii) it proved that the agreed time limits for payment have expired. It clearly appears from the file that the parties agreed on payment by instalments of the total price agreed for each delivery and indicated in each invoice. In most cases payment was to be made directly at fixed due dates, for

instance 30/60/90/120/150/180 days;

(iv) it proved that the price indicated on each invoice corresponded with the agreements and that the sum sought here was owed. Respondent never raised objections to the several notices sent by Claimant, last, by its counsel's letter of 7 March 2011, to which a detailed list of the sums owed – which are sought here – was attached. Nor did Respondent do so during the attempt at amicable settlement of the dispute discussed [above]. Respondent also never disputed, either here or outside this proceeding, that Claimant issued these invoices or that the invoices were delivered [to Respondent]. This proves that Respondent accepted them in all their aspects, including price. Further, although invoices are a fiscal documentation issued by the party which relies on them in the proceedings in support of its claims, a lack of timely contestation of the sums requested [therein] must be deemed to be an implied conduct [comportamento concludente]. It is unlikely that an entrepreneur will receive invoices together with several deliveries of goods and will not raise any objection (not for years, as is the case here) if the price indicated therein is incorrect or not owed. At any event Respondent should have contested these facts here, the more so because of the final legislative recognition of the principle of non-contestation (Art. 115 CCP, see [above at [116]]).

[118] "It must be added that where performance of a contractual obligation is sought, as here, the prevailing opinion in Italian jurisprudence (for all, Supreme Court, Civil Section, Plenary Session, 30 October 2001, no. 13533) holds that the creditor shall only prove the existence of the (contractual or legal) basis for its right and the expiry of the time limit for performance, not also the lack of performance by the [debtor], which it can merely allege. The [defendant debtor] page "301" has the burden to prove that there is a circumstance modifying, preventing or extinguishing the [claimant's] claim. Respondent did not meet this burden.

[119] "Specifically, Claimant is owed the amounts claimed, which are either the total amount of or the unpaid individual instalments under the following invoices: ….

[120] "No interest can be granted on the principal sum determined above in the absence of a request in this respect by Claimant: these sums are not owed as damages and therefore no [interest can be granted] ex officio. Supreme Court jurisprudence on this point is unanimous:

'Except in the case of interest on a sum owed for damages, which must be granted also ex officio, in all other cases interest can be granted only if the party seeks it. In the former case interest aims at avoiding the damage to the creditor because of the late payment of the monetary equivalent of its damage; hence, it is a component of the damage itself, deriving simultaneously and inseparably from the same fact that led to the reimbursement obligation. In all other cases [legal interest] has an autonomous basis with respect to the monetary obligation and can be granted only by express request indicating its basis and amount.'

(See Supreme Court, Civil Section, 22 November 2010, no. 23603; accord, Supreme Court, Civil Section, Plenary Session, 18 March 2010, no. 6538)."

IV. Costs

[121] "The losing party bears the costs … of the arbitration – which were paid in their entirety by Claimant – and the legal costs; hence, Respondent shall bear these costs in the amounts indicated in the award.

[122] "Pursuant to Art. 36 of the Rules [of the Milan Chamber] the costs of the arbitration have been quantified by the Arbitral Council of the Chamber of Arbitration by order no. 1752/20 of 16 May 2013, which was communicated to the parties and the Arbitrator on 27 May 2013.

[123] "As to the legal costs, the Arbitrator applied for her determination the parameters set down in Ministerial Decree 140/2012 on the determination of parameters for the quantification by a judicial body of the fees of professionals regularly monitored by the Ministry of Justice.

[124] "The compensation for the so-called 'general expenses' was predetermined by law as a lump sum and deemed to be owed even if the party does not request page "302" it (see Supreme Court, 2 August 2013, no. 18518). Art. 14 of the Professional Schedule of Fees regulated by Ministerial Decree 127/2004 fixed it at 12,5 percent. This provision was subsequently abrogated by Art. 1(2) of Ministerial Decree 140/12 which, in implementation of the provision of Art. 9 of Law 27/2012, stated that compensations to be quantified by the court did not 'include expenses to be reimbursed in any manner, including by lump sum'.

[125] "By the recent forensic reform law, however, the legislator has reintroduced the obligation to quantify general expenses as a lump sum, providing that: 'Along with a fee for their professional activity, counsel are owed … a reimbursement of the expenses effectively incurred … and a sum for the reimbursement of lump sum expenses; these sums are quantified by the court.' However, this provision is conditional upon the issuance of an implementing decree by the Ministry of Justice, which shall fix a quantification 'maximum'. No such decree has been issued yet.

[126] "This leads to concluding that we cannot proceed to the quantification of this sum, as such quantification would be made on the basis of arbitrary parameters, not based on any objective foundation."

V. Award

[127] "In light of all the above, the Sole Arbitrator has rendered the following award:

The Sole Arbitrator, by final decision, rejecting all other claims and objections:

(1) rejects the objection of lack of jurisdiction and nullity of the arbitration clause at issue raised by Respondent and holds that she has jurisdiction to decide on the present dispute;

(2) directs Respondent to pay the following amounts to Claimant:

(a) € …, being the unpaid balance of the sale price of the goods at issue;

(b) the costs of the arbitration as quantified by the Arbitral Council of the Milan Chamber of Arbitration pursuant to Art. 36 of the Rules …, being:

(i) Chamber of Arbitration's fees: € … and VAT 21 percent;

(ii) arbitral tribunal's fees: € …, 4 percent lawyers' security fund contribution, and 21 percent VAT;

(iii) fees of the expert appointed by the tribunal: € … and 21 percent VAT; page "303"

(iv) translation costs paid by the Chamber of Arbitration: € … and 21 percent VAT; stamp duties on the orders issued by the tribunal, the minutes of the hearings and the parties' statements (as per Decree of the President of the Republic no. 642/72), totaling € …;

(c) € …, 4 percent lawyers' security fund contribution and 21 percent VAT for Claimant's counsel's fees, and € … for expenses."

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[1] Original award in Italian; translation approved by the sole arbitrator.

[2] Art. 817 of the Italian Code of Civil Procedure (CCP) reads:

“Should the validity, content or scope of the arbitration agreement or the regularity of the arbitrators' appointment be challenged in the course of the arbitration, the arbitrators shall decide on their own jurisdiction.

This provision shall apply also in case the arbitrators' powers are challenged in any venue for whatever reason which has supervened in the course of the proceedings. The party that does not object in the first statement of defense subsequent to the arbitrators' acceptance that they lack jurisdiction by reason of the non-existence, invalidity or ineffectiveness of the arbitration agreement, may not challenge the award on this ground, except in case of a non-arbitrable dispute.

The party which, during the arbitration proceedings, fails to raise the objection that the other parties' pleadings exceed the limits of the arbitration agreement may not, on this ground, challenge the award.”

[3] “See also ICC Interim Award, 10 February 2005, in XXXII (2007) Yearbook Commercial Arbitration, p. 93 at p. 99 et seq.”
[4] “See ICC Interim Award, 10 February 2005, n. 1.”
[5] “Supreme Court [Corte di Cassazione], 19 May 2009, no. 11529 (Dreyfus) and references therein [reported in Yearbook XXXIV (2009) pp. 649-652 (Italy no. 179)]; see Supreme Court, 16 June 2011, no. 13231 [reported in Yearbook XXXVII (2012) pp. 255-256 (Italy no. 185)]; see also Supreme Court, 21 April 1999, no. 3929.”
[6] “These same principles have been long recognized by French, Swiss and German jurisprudence, see references in Benedettelli, Consolo and Radicati di Brozolo, ‘Commentario breve al diritto dell'arbitrato’,Arbitrato internazionale, Sect. 2, Title II, p. 605 (CEDAM 2010). See for instance, in French jurisprudence, Supreme Court [Cour de Cassation], First Civil Chamber, 9 November 1993 (Bomar Oil NV v. ETAP), Revue de l'arbitrage 1994, p. 108 [reported in Yearbook XX (1995) pp. 660-662 (France no. 22)]; Court of Appeal [Cour d'appel], Paris, 17 May 1995, Revue de l'arbitrage 1997, p. 90; Supreme Court, First Civil Chamber, 3 June 1997, Revue de l'arbitrage 1998, p. 537. See also P. Bernardini, L'arbitrato nel commercio e negli investimenti internazionali, p. 106 (Giuffré 2008).”
[7] Reported in Yearbook XXXIV (2009) pp. 649-652 (Italy no. 179).
[8] Reported in Yearbook X (1985) pp. 473-475 (Italy no. 77).
[9] Reported in Yearbook X (1985) pp. 478-480 (Italy no. 79).
[10] Reported in Yearbook XXX (2005) pp. 599-604 (Italy no. 166).
[11] Reported in Yearbook XIX (1994) pp. 685-686 (Italy no. 125).
[12] Reported in Yearbook XXII (1997) pp. 734-736 (Italy no. 145).
[13] Reported in Yearbook XI (1986) p. 518 (Italy no. 87).
[14] “Holzmann and Neuhaus, A Guide to the Uncitral Model Law on International Commercial Arbitration: Legislative History and Commentary. The French position is also very liberal: it excludes that international arbitration agreements must comply with the formal requirements set for domestic arbitration; see, among many, Court of Appeal, Paris, First Civil Chamber, 10 June 2004, in Revue de l'arbitrage , 2004, no. 3, p. 733 et seq.; see further references, Benedettelli, Consolo and Radicati di Brozolo, ‘Commentario breve’, p. 605.”
[15] “See Court of Appeal [Oberlandesgericht], Celle, 14 December 2006, Sch 14/05, in XXXII 2007 Yearbook Commercial Arbitration, p. 372 et seq. [Germany no. 106]; Court of Appeal [Efeteio], Athens, no. 7195 of 2007, in XXXIV 2009 Yearbook Commercial Arbitration, p. 545 et seq. [Greece no. 20]; United States Court of Appeals, Third Circuit, 15 October 2009, no. 08-2924, in XXXV 2010 Yearbook Commercial Arbitration, p. 485 et seq. [US no. 683].”
[16] “See United States District Court, Western District of Washington, 19 May 2000, no. 99-5642 (FDB), in XXVI 2001 Yearbook Commercial Arbitration, p. 939 et seq. [US no. 342].”
[17] “See Supreme Court, Civil Section, 19 May 2009, no. 11529 [reported in Yearbook XXXIV (2009) pp. 649-652 (Italy no. 179)].”
[18] “See Supreme Court, Civil Section, 16 June 2011, no. 13231.”
[19] “The headings of Arts. 21.6 and 21.7 are also in bold; however, they could not give rise to confusion since their headings made immediately and very clearly evident that they concerned relations with

another company of the group, 'Claimant SA' (Art. 21.6) and with Italian dealers (Art. 21.7), respectively."

[20] "[Art. 1341(2) CC reads:] 'In any case conditions are ineffective unless specifically approved in writing, which establish … arbitration clauses or derogations from the competence[/jurisdiction] of courts.'"

[21] "Chamber VI, in decision no. 14570 of 20 August 2012 – under reference to an earlier decision of Chamber II of the Supreme Court, no. 11213 of 23 October 1991, which expressed the same opinion – held that: 'the specific approval in writing of restrictive [vessatorie] clauses (including clauses referring the dispute to arbitrators) pursuant to Art. 1341(2) CC is a condition for invoking these clauses against the adhering party, who is the sole party who can rely on the lack [of that approval]; the nullity of a restrictive clause lacking the specific approval in writing by the adhering party cannot be invoked by the party supplying it (Supreme Court, Second Chamber, 23 October 1991, no. 11213)'."

[22] "See, e.g., Supreme Court, Civil Section, 18 January 2002, no. 547; Supreme Court, Civil Section, Plenary Session, 12 June 1997, no. 5292, in Riv. arb. 1997, p. 759; Arbitral Tribunal, Milan, 2 September 2009, in Riv. arb. 2010, 2, p. 375 et seq."

[23] "'Art. 2: (1) The provisions of this Law do not affect the application of international conventions in force in respect of Italy. (2) When interpreting these conventions their international character and the need for their uniform application shall be taken into account.' See also Art. 117(1) Constitution, which reads: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.' [Translation available on the site of the Italian Senate at <www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.]"

[24] "'The [1958 New York Convention] establish[es] a uniform discipline; hence, in order to ascertain the validity and efficacy of a foreign arbitration clause in a contract to which an Italian citizen or legal entity is a party, Art. II Convention must be exclusively applied. [Art. II] deems it sufficient, as to the form of this clause, that the clause is contained in an agreement signed by the parties or in an exchange of letters or telegrams; it is irrelevant that the law of the place where the contract is concluded (in the present case, Italy) has stricter formal requirements (Art. 1341 CC, which requires that this clause be specifically approved in writing). ([Supreme Court] decisions no. 1765 of 1986 [reported in Yearbook XII (1987) pp. 497-498 (Italy no. 93)]; no. 1235 of 1984; no. 563 of 1982 [reported in Yearbook IX (1984) pp. 423-426 (Italy no. 59)]; and no. 4746 of 1979 [reported in Yearbook VI (1981) pp. 230-232 (Italy no. 38)])." See, among many, Supreme Court, Civil Section, First Chamber, 19 November 1987, no. 8499 [reported in Yearbook XIV (1989) pp. 675-677 (Italy no. 97)]; Supreme Court, Civil Section, Plenary Session, 22 May 1995, no. 5601 [reported in Yearbook XXI (1996) pp. 610-611 (Italy no. 141)])."

[25] "See F. Bortolotti, Il Contratto internazionale – Manuale Teorico Pratico, p. 133 (CEDAM, 2012); Benedettelli, Consolo and Radicati di Brozolo, 'Commentario breve', p. 602, quoting P. Bernardini, 'Ancora una riforma dell'arbitrato in Italia', in D. com. int. 2006, p. 230, and F. Portento, 'La clausola compromissoria nelle condizioni di contratto internazionale dopo la riforma dell'arbitrato', in Commercio Internazionale, 2007, p. 50. [All authors] opine in favour of the non-applicability of Arts. 1341 and 1342 CC."

[26] "See Art. I(3)(b) of Law no. 80/2005, which indicates as its directing principle: 'The suppression of the Chapter dedicated to international arbitration, with the extension in principle of its discipline to domestic arbitration, save the necessary adaptations, with exclusion of the provision of Art. 828 CCP'. Thus, by abolishing the title on international arbitration, the legislator meant in principle to internationalize domestic arbitration."

[27] "Art. I(1) of the New York Convention contains two definitions of 'foreign' award: award(s) (1) made in the territory of a state other than the state where the recognition is sought or (2) made in the state where enforcement is sought but not considered as domestic awards under the law of that state. Authoritative doctrine deems on this point that the 'non-domestic' concept must include also all arbitrations (and thus arbitration agreements) concerning international disputes, independent of the law applicable to the arbitration proceeding. We refer in this respect to the decision of a US court which recognized under the New York Convention an award issued in New York, reasoning that the dispute concerned interests of an international character (both parties to the arbitration resided in countries other than the [United States] where the action was heard). According to this reasonable

interpretation, 'non-domestic' award is not (only) an award rendered abroad but also an award concerning disputes of an 'international' character (see US Court of Appeals for the Second Circuit in Bergesen v. Muller, 710 F.2d 928 2d Cir. 1983 – in IX 1984 Yearbook Commercial Arbitration, p. 487 [US no. 54], quoted in Gaillard and Di Pietro, Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice, Cameron 2008)."

[28] "The Italian Supreme Court (Supreme Court, Civil Section, 28 February 2007, no. 4634) has held, although with respect to a derogation of jurisdiction in favour of a foreign court, that the written form is complied with also when the contract has been concluded by tacit acceptance and its performance ex Art. 1327 CC, if the relationship was preceded by business operations in which the same clause was regularly accepted in writing and there are no elements that can justify a contrary intention to this uninterrupted practice."

[29] "See Supreme Court, Civil Section, 22 April 1997, no. 3479; accord, Supreme Court, Civil Section, 22 October 2003, no. 15783; Supreme Court, Civil Section, 23 May 2006, no. 12153; Supreme Court, Civil Section, 21 April 1999, no. 3929; and also arbitration, Rome, 31 May 2006, in Arch-giur. Oo. pp. 2006, I 091."

[30] "See in this respect also the decision of the Swiss Federal Court of 22 December 1992, no. 161, in Riv. arb. 1995, p. 773 et seq., with note F. Pietrangeli : 'The law regulating the capacity to invoke and conclude an arbitration clause shall not be determined in accordance with the provision of the new Swiss act on private international law concerning the validity of the arbitration agreement (Art. 178(2) PILA), but rather in accordance with the conflict of laws norms concerning the capacity of physical and legal persons and their representation power (Arts. 35, 126, 154, 155 and 158 PILA).' See also Federal Court, 31 March 2009 (Vivendi SA v. Deutsche Telekom) in Int.L Lis, 2010,128; in Repertorio: 2011, Diritto Comparato (2250), no. 524 [reported in Yearbook XXXIV (2009) pp. 286-292]."

[31] "See, particularly, Luzzatto, 'Accordi internazionali e diritto interno in materia di arbitrato: la Convenzione di New York del 10 giugno 1958', in Riv. dir. int. priv. proc., 1968, pp. 44 and 47; Van den Berg, The New York Arbitration Convention of 1958, Deventer, 1981, p. 276 et seq.; Redfern and Hunter (eds.), Law and Practice of International Commercial Arbitration, 3-25 (4th ed. 2004); see further references, also to international doctrine, in Benedettelli, Consolo and Radicati di Brozolo, 'Commentario breve', Section 2, Title II, XII, p. 596 et seq."

[32] "See for foreign jurisprudence, Swiss Federal Court, decision of 31 March 2009 (4A_428/2008) [reported in Yearbook XXXIV (2009) pp. 286-292] and decision of 22 December 1992, no. 161, in Riv. arb. 1995, p. 773 et seq.; numerous references to arbitral awards in Born, International Commercial Arbitration, Vol. I, op. cit., p. 555 et seq.; ICC Award in Case no. 2694, 105 J.D.I. (Clunet) 985, 986 (1978); ICC Partial Award in Case no. 6474 of 1992, XXV 2000 Yearbook Commercial Arbitration, p. 279; German Federal Supreme Court, decision of 23 April 1998, XXIVa 1999 Yearbook Commercial Arbitration, p. 928 at p. 930 [(Germany no. E14)]. See also German law: Art. 1059(2) ZPO, referring to personal statute, that is, lex societatis, and related doctrine: W. Voigt, in Musielak, ZPO-Kommentar, 2013 (beck-online), Art. 1059, n. 6."

[33] "See W. Craig, W. Park and J. Paulsson, International Chamber of Commercial Arbitration, para. 5.02, no.3 (3rd ed.2000); ICC Award no. 4381/1986, in S. Jarvin and Y. Derains (eds.), Collection of ICC Arbitral Awards, 1986-1990, p. 263; see in this regard also G. Born, op. cit., p. 553."

[34] "See Award of 8 November 2005, German Maritime Arbitration Association, XXXI 2006 Yearbook Commercial Arbitration, p. 66; see also Supreme Court of Korea, decision of 10 April 1990, XVII 1992 Yearbook Commercial Arbitration, p. 568 [(Korea no. 2)]; see also Born, International Commercial Arbitration, pp. 555 and 560."

[35] Reported in Yearbook XXIV (1999) pp. 709-713 (Italy no. 152).

[36] Art. 808(2) Italian CCP reads:

"The validity of the arbitration clause must be evaluated independently of the underlying contract: nevertheless, the authority to enter into the contract includes the authority to agree to the arbitration clause."

[37] "See Fouchard/Gaillard/Goldman, On International Commercial Arbitration, 468-0, E. Gaillard and J. Savage (eds.) (The Hague 1999)."

[38] "See also A. Giardina, 'La legge no. 25 del 1994 e l'arbitrato internazionale', in Riv. arb., 1994, p. 257 et seq. (260); Poudret/Besson, Comparative Law of Intemational Arbitration, para. 270, Sweet & Maxwell (2007); Benedettelli, Consolo and Radicati di Brozolo, 'Commentario breve', p. 597; F. Pietrangeli, note to the decision of the Swiss Federal Supreme Court of 22 December 1992, Riv. arb. 1995, p. 776 et seq."

[39] "This is an exception to the principle in Art. 1392 CC, which states: 'The power of attorney has no effect if it is not granted in the same form as is requested for the contract that the representative shall conclude.'"

[40] "See A. Berlinguer, note to the decision of the Supreme Court, Civil Section, 18 October 1997, no. 10229 (Foro italiano)."

[41] "See Art. 177(2) Swiss PILA: 'A state, or an enterprise held by, or an organization controlled by a state, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.' Further, Art. 158 PILA provides: 'A company may not invoke restrictions of the power of representation of an organ or a representative which are not known in the law of the state where the other party has its seat or habitual residence, unless that party was or should have been aware of these restrictions.'"

[42] "See A. Giardina, 'L'Arbitrato internazionale', in Riv. arb., 1992, p. 21, at p. 29: 'As to the capacity to agree to arbitration, the opinion must be noted that was first authoritatively recognized in Art. 2 of the Geneva Convention of 1961; according to [this opinion], "legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements" [English original]. A material law provision is thus introduced – obviously only for arbitration as governed by the Geneva Convention – that grants foreign legal persons of public law the power to conclude valid arbitration agreements, in derogation from the general system of private international law embodied, for instance, by Art. 17 of the Preliminary Dispositions to the Civil Code in Italy, with a reference to the national law of the legal person at issue. '"

[43] "Athens Court of Appeal, decision no. 3894 of 1976, XIV 1989 Yearbook Commercial Arbitration, p. 634 [Greece no.7]."

[44] "We note in this respect that under Art. 808(2) CCP, Mr. X would have the power to conclude the arbitration clause even if he were an implied agent of Respondent."

[45] "See, for instance, ICC Partial Award no. 5065 of 1986, 114 JDI (Clunet) 1039 (1987); Paris Arbitration Chamber Award of 8 March 1996, no. 9246, XXII 1997 Yearbook Commercial Arbitration, p. 28, 29-30, and ICC Award in case no. 5730 of 1988 (Elf/Orri) in JDI 1990, p. 1029 et seq., in which the represented's behaviour, rather than Greek law, is taken into consideration for the examination of the power of representation. Further, it is worth mentioning the ICC Partial Award on jurisdiction/admissibility no. 6474 of 1992, XXV 2000 Yearbook Commercial Arbitration, p. 279, which corrects the effect of a rigid application of domestic law on capacity and power to agree to arbitration. See also the UNIDROIT Principles, which provide for the so-called 'apparent authority' (Art. 2.2.5.(2)), and G. Born, International Commercial Arbitration, p. 557 et seq."

[46] Art. 3.2 of the Arbitration Rules of the Milan Chamber of National and International Arbitration reads:

"The Arbitral Tribunal shall decide in accordance with the rules chosen by the parties."