Sent by Giorgio Recchia
Translated by SB
N.B.: the name sounds familiar? We published an unrelated 1995 De Maio decision as Italy no. 139

ITALY

Accession: 31 January 1969
No Reservations

... Corte di Cassazione [Supreme Court], 21 January 2000, no. 671[1]

Parties: Appellant: De Maio Giuseppe e Fratelli snc (Italy)
Appellee: Interskins Ltd (UK)

Published in: Unpublished

Articles: V(1)(*a*); V(1)(*b*)

Subject matters:
- grounds for refusal of enforcement are exhaustive
- violation of due process is impossibility rather than difficulty to present one's case
- concurrent court proceedings (litispendence)
- renewal of contract (*novatio*)
- invalidity of arbitral clause includes lack of formal requirements in Art. II ?
- signature of contract allegedly counterfeited

Commentary Cases: [1]-[2] + [5]-[9] = ¶ 510; [3] + [7] + [10]-[12] = ¶ 501; [4] + [12]-[21] = ¶ 504; [7] + [12] + [20] = ¶ 503

Facts

De Maio Giuseppe e Fratelli snc (De Maio) bought hides from Interskins Ltd (Interskins). The sales contract contained a clause for arbitration of disputes at the Skin Hide Leather Traders Association in London.

On 29 April 1993, following a dispute between the parties, an arbitral tribunal of

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[1] *Note General Editor.* In conformity with the Italian practice of publishing court decisions, the date of the decision is that on which the decision is filed with the *Cancelleria* of the court, and not on which the decision was actually made.

the Skin Hide Leather Traders Association rendered an award directing De Maio to pay UK£ 86,350 to Interskins.

Interskins sought enforcement of the London award before the Court of Appeal in Naples. De Maio resisted enforcement arguing that a court action on the same dispute was pending before the Court of First Instance in Avellino, Italy, that there had been violation of due process in the arbitration as De Maio had not been properly notified of the commencement of the arbitration and that there was no valid arbitration agreement between the parties because the agreement in the original contract had been superseded by renewal (*novatio*) as the parties had regulated their business relation by a second contract which contained no arbitration clause. De Maio also alleged that its signature in the original contract was counterfeited.

On 13-25 November 1996, the Naples Court of Appeal granted enforcement to the London award. It held that court proceedings pending between the same parties on the same subject matter are irrelevant as this is not a ground for refusal of enforcement under Art. V of the New York Convention. It also held that there was no violation of due process as Interskins informed De Maio that it had appointed an arbitrator and requested De Maio to do the same within 14 days. The Court of Appeal dismissed De Maio's further objections as they should have been raised before the arbitrators.

The Supreme Court affirmed the lower court's decision on all points. When dealing with the alleged invalidity of the arbitral clause, the Court noted that both its jurisprudence and the authors disagree on whether Art. V(1)(*a*) includes the formal requirements under Art. II or only concerns material defects of the arbitration agreement according to the law applicable to it. The Court did not settle the issue, however, since it held that the allegation that the arbitral clause was invalid because the contract had been renewed "does not raise an issue of invalidity, as invalidity assumes a defect of the agreement making it void, voidable or inoperative" and is therefore not included in the exhaustive list of grounds for refusal of enforcement in Art. V.

Excerpt

I. GROUNDS FOR APPEAL

[1] "By its first ground for appeal, De Maio alleges a lack of reasons or insufficient reasons on a fundamental issue of the dispute (Art. 360(5) CCP),[2] that is, it alleges that the Court of Appeal gives insufficient reasons for its decision on De Maio's objection of violation of due process. De Maio remarks that a page is missing in the original decision

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[2]Art. 360 of the Italian Code of Civil procedure reads in relevant part:

> "A decision rendered in appeal or in sole instance may be attacked, by filing a petition with the Supreme Court:
> (1) on issues of jurisdiction;
> (2) in case of violation of the provisions on competence....;
> (3) in case of violation or erroneous application of the law;
> (4) in case of nullity of the decision or the proceedings;
> (5) where no reasons or insufficient or contradictory reasons are given on a fundamental issue of the dispute, raised by the parties or ex officio. (....)"

as well as in the copy which was notified to it, so that the Court's reasoning on this issue is incomplete and its *ratio decidendi* cannot be traced in its entirety.

[2] "By its second ground, De Maio alleges violation of Art. V(1)(*b*) of the [New York Convention] and of Art. 24 Constitution ([with respect to] Art. 360 (3) and (5) CCP).[3] It maintains that Interskins' communication that it had appointed an arbitrator did not safeguard De Maio's right to present its case in the arbitration. Art. V(1)(*b*) provides that enforcement of the award may be refused 'when the party against whom the award is invoked proves that it was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'. Interskins' letter arrived at pre-vacation time and gave a very short period (fourteen days) in which to appoint counsel in England, examine the case and prepare a line of defence. It must also be taken into account that De Maio was to appear before an arbitral tribunal abroad. In De Maio's opinion, the formalities followed in this case do not guarantee due process as provided by Art. 24 Constitution. In any case, the Court of Appeal does not give sufficient reasons as to why these formalities must be deemed adequate.

[3] "By its third ground, De Maio alleges violation of Art. 797(6) and (5) CCP,[4] violation and incorrect application of Art. 39 CCP [on *litispendenza*, concurrent court proceedings], violation of Art. III [Convention] and lack of reasons and contradictory reasons [in the decision of the Court of Appeal]. It brings a twofold attack on the [lower court's] decision, in so far as it denies the impact of the proceedings on the same subject matter pending between the same parties before the Court of First Instance in Avellino. [De Maio argues that], first, there is an interruption in the reasons given [by the Court of Appeal] on this issue, as one or more pages are missing so that there is no logical connection between the end of the fourth page [of the decision] and the beginning of the fifth. Second, the [Court of Appeal's] opinion that arbitration governed by international law prevails over the [Italian] code [of civil procedure] is not in agreement with the principles of procedural law. If we hold *litispendenza* to be irrelevant we could end up enforcing a foreign award where there is an Italian decision between the same parties on the same subject matter. *Litispendenza* is a preliminary issue and must be raised ex officio.

[4] "By its fourth ground for appeal, De Maio alleges violation of Arts. 807 and 808 CCP [on the form of the arbitral clause] and Art. V Convention, invalidity of the award – because [De Maio] disowns its signature on the contract containing the arbitral clause – and lack of reasons. De Maio maintains that, although the violation of Arts. 807 and 808

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[3] Art. 24 of the Italian Constitution guarantees, inter alia, the parties' right to present their case in [court] proceedings.

[4] Art. 797 Italian CCP, which was abrogated by Law no. 218 of 31 May 1995, providing for the reform of the Italian private international law system, read in relevant part:

> "The Court of Appeal renders a judgment enforcing the foreign decision in the [Italian] Republic where it ascertains:
> (....)
> (5) that [the decision] it is not at odds with a decision rendered by an Italian court;
> (6) that no action on the same subject matter and between the same parties is pending before an Italian court, which was commenced before the foreign decision became res judicata;
> (....)"

CCP (lack of a [valid] arbitral clause) was raised in the enforcement proceedings [before the Court of Appeal], the lower decision does not deal with this issue adequately. The lower decision also lacks reasons on the alleged renewal contract and consequent termination of the arbitration clause."

II. DECISION

[5] "The first two grounds for appeal, which must be examined together since they concern the same issues, are unfounded. Art. V(1)(*b*) of the New York Convention provides that the failure to communicate either the arbitrator's appointment or the arbitral proceedings, which makes it impossible to present one's case, is a ground for refusing enforcement of the award. De Maio maintains that it was unable to present its case because of it was given only fourteen days to appoint an arbitrator.

[6] "This Court deems that there was no violation of due process as alleged by De Maio, and that one or more missing pages on this issue in the Court of Appeal's decision do not make this decision invalid. Since this is a procedural defect, we can settle the issue directly, independent of whether the lower decision failed to give reasons on this issue, the more so as we deal here exclusively with the interpretation and the application of a procedural provision.

[7] "Art. V(1) provides that the party against whom the award is invoked has the burden to prove the ground for refusal of enforcement under letter (*b*), as well as the other grounds in that paragraph. Further, we must consider that, according to the spirit of the Convention, the recognition of arbitral awards depends on specific requirements which must be interpreted narrowly.

[8] "Since in the present case it is undisputed that Interskins informed De Maio that it had appointed an arbitrator, the reasons given in the lower decision, which deems that this information and the time limit [given to De Maio] guaranteed due process, suffice, independent of a failure to give reasons on the objections raised by De Maio.

[9] "Second, we must consider that the ground for refusal under letter (*b*) concerns the impossibility rather than the difficulty to present one's case. De Maio does not argue and certainly does not prove that it could not present its case when the arbitration was commenced or while it was held.

[10] "As to the third ground for appeal, the issue is whether an action on the same subject matter pending before a State court between the same parties is a ground for refusing recognition of the foreign award. This Court can and must render a decision on this issue if the reasons in the lower decision are incomplete, by exercising its power to amend under Art. 384(2) CCP.[5] This ground for appeal is unfounded.

[11] "This Court already held (decision of 15 January 1992, no. 405, to which Interskins

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[5]Art. 384 CCP, on the powers of the Supreme Court, reads in relevant part:

> "(....) Decisions which give erroneous reasons may not be reversed where their dispositive part [dictum] is in accordance with the law; in this case, the Supreme Court only amends the reasons."

correctly refers)[6] that an action on the same subject matter pending between the same parties does not hinder the recognition of a foreign award since *litispendenza* is not expressly provided for as a ground for refusal in the Convention. We already said that the Convention aims at favouring recognition and that its provisions containing positive or negative conditions must be interpreted narrowly. As to the possibility of an Italian [court] decision [between the parties], this is merely a theoretical hypothesis as De Maio does not prove that the decision [in the Italian court proceedings] is final.

[12] "The fourth and last ground is also unfounded. In order to settle the issue before us, we must as always start from the premise that the New York Convention meant to favour the recognition of awards rendered in the signatory States and that the conditions for recognition are only those specifically provided for. As to the grounds for refusal in Art. V(1), we have also said that the party against whom recognition is sought has the burden to prove their existence according to that same Article.

[13] "In the present case De Maio relies on the ground for refusal under Art. V(1)(*a*) second hypothesis, [that is], on the invalidity of the arbitration agreement because: (1) there was no arbitral jurisdiction as the contractual relation had been renewed and (2) its signature was counterfeited.

[14] "Italian and foreign authors disagree on the interpretation of the above provision of the Convention. On the premise that it must be understood in the broad sense (and thus to include nullity, voidability and non-existence), invalidity includes, according to a first group of authors, the lack of the formal requirements provided for in Art. II Convention (in particular in its second paragraph). According to a second group of authors, invalidity as a ground for refusal of recognition only includes material defects of the arbitration agreement according to the law applicable to it or, if the parties have not chosen such law, according to the law of the country where the award is rendered.

[15] "This Court has given diverging answers to this issue. The first interpretation is followed by the Plenary Session (*Sezioni Unite*) decision of 27 April 1979, no. 2429,[7] which considers [Art. V(1) and Art. II] together and concludes that the law applicable at both stages (recognition of the arbitration agreement and recognition/enforcement of the award) must be the same since it could otherwise happen that within the same legal system a court denies its jurisdiction over a dispute which it deems to be arbitrable and successively denies enforcement of the arbitral award.

[16] "According to the second opinion (see decision of 15 April 1980, no. 2448,[8] adopted without analytical comment by the decision of 13 July 1988, no. 4392), Art. II(2) and Art. V(1)(*a*) second hypothesis operate on two different levels. Art. II(2) applies only where a national court deals with an objection of lack of jurisdiction and must ask itself whether it has jurisdiction; Art. V(1)(*a*) only concerns decisions on the recognition and enforcement

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[6](Privilegiata Fabbrica Maraschino Excelsior Girolamo Luxardo SpA v. Agrarcommerz AG Yearbook XVIII (1993) pp. 427-432 (Italy no. 122).

[7](Compagnia Generale Costruzioni COGECO SpA v. Piersanti) Yearbook VI (1981) pp. 229-230 (Italy no. 37).

[8](Official Receiver in the Bankruptcy of Lanificio Walter Banci sas v. Bobbie Brooks Inc.) Yearbook VI (1981) pp. 233-236 (Italy no. 40).

of awards. Hence, in the second case, the court deciding on the recognition of an award may not deal with issues concerning the form of the arbitration agreement (as regulated in Art. II) but can only ascertain, at the specific request of a party, whether the agreement is null and void according to the law chosen by the parties or, in the absence of such law, according to the law of the place where the award was rendered. The examination of the formal requirements provided for in the Convention is thus reserved to the arbitrators.

[17] "This second interpretation has encountered the decided criticism of the most authoritative international authors, who remark that no court of the signatory States adheres to it and remark the explicit reference in Art. V(1)(*a*) to Art. II ('the [agreement referred to in article II] is not valid') and therefore to the formal requirements therein.

[18] "The Court deems that, whichever interpretation is to be followed, De Maio's objections cannot be granted and that consequently the Court of Appeal's decision is correct on this issue, although the reasons given therein must be supplemented as provided for in Art. 384 CCP.

[19] "Art. V(1)(*a*) second hypothesis provides that recognition is refused when the arbitration agreement ('the agreement referred to in article II') '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'. It could indeed be argued ... that renewal (*novatio*) of a contractual relation could lead to refusing recognition. Though interesting, this argument cannot be granted. We must always start from the premise of the 'numerus clausus' of the grounds for refusal of recognition and from the ensuing exclusive jurisdiction of the arbitrators over any other issue. A new contract which does not provide for arbitration does not raise an issue of invalidity, as invalidity assumes a defect of the agreement making it void, voidable or inoperative. Hence, only the arbitrators may ascertain whether an arbitration agreement or clause is still in force or whether it has been terminated by a new contract between the parties.

[20] "Further, since De Maio's objection is based on Art. V(1)(*a*) (and thus on a ground for invalidity of the agreement other than the lack of the formal requirement according to Art. II), the burden of proof to be borne by the party opposing recognition, laid down in the first part of that Article, is made even more rigorous by the need to prove the defect of the agreement, and the consequences thereof, under a specific legal system (that is, the law chosen by the parties or, in the absence thereof, the law of the country in which the award was rendered). Hence, the party which opposes recognition on the ground of the invalidity of the arbitration agreement may not simply allege a generic defect but must qualify it under a given legal system.

[21] "[Last], the alleged counterfeiting of De Maio's signature equals the failure to meet the formal requirement under Art. II. If we follow the interpretation in decisions no. 2448 of 1980 and no. 4392 of 1988, this issue cannot be dealt with in the proceedings for the recognition of the award. If, however, we follow the first interpretation (which, as mentioned above, is shared by doctrine and jurisprudence in almost all signatory States), the Convention does not require that both parties sign the clause, as it suffices that it can be proven that the clause reflects the parties' intention (decisions no. 1269 of 1975, no. 1877 of 1976,[9] no. 6055 of 1982). The second paragraph of Art. II provides that: 'The term

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[9]Decisions of 8 April 1975, no. 1269 (Agenzia Marittima Constantino Tomasos Ltd. v. Sorveglianza SIPA) Yearbook II (1977) pp. 247-248 (Italy no. 13) and 25 May 1976, no. 1877 (Begro BV v. Ditta Voccia and Ditta Antonio Lamberti) Yearbook III (1978) pp. 278-279 (Italy no. 17).

"agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'.

[22] "The appeal is denied."