Sent by Giorgio Recchia
Translated by SB
N.B.: I could only find a later ICHSLTA Contract, no. 7, but it looks identical, so I used it

... Corte di Cassazione [Supreme Court], 16 November 2000, no. 14860

Parties: Claimant: Conceria Madera srl (Italy)
Defendant: Fortstar Leather Ltd (Hong Kong)

Published in: Unpublished

Articles: II(1)

Subject matters: – incorporation by general reference to standard conditions

Commentary Cases: ¶ 209

Facts

Conceria Madera srl (Madera) bought hides from Fortstar Leather Ltd (Fortstar) by three contracts concluded on 21 February 1989, 22 February 1990 and 26 February 1990. The contracts referred to the general conditions in International Standard Contract no. 2, issued in 1982 by the International Tanners Council and ICHSLTA (International Council of Hides, Skins & Leather Traders Associations). Clause 23(1) of International Standard Contract no. 2 provides that, failing amicable settlement negotiations, disputes shall be "referred to arbitration according to the international custom of the trade and subject to the rules for arbitration and appeal obtaining in the place specified for that purpose in Clause 1". The parties did not specify such place in their contracts.

On 5 February 1991, Madera commenced proceedings in the Court of First Instance in Pisa, Italy, seeking damages for breach of the three contracts by Fortstar. Fortstar objected to the jurisdiction of the Italian court. On 14-28 May 1993, the Pisa Court denied Fortstar's objection, holding that the arbitral clause was invalid as it did not indicate the seat of the arbitration as required by International Standard Contract no. 2.

On 7 September 1993, Fortstar appealed from this decision. On 4 February 1997, the Court of Appeal in Florence referred the parties to arbitration and held that the arbitral institution meant in International Standard Contract no. 2 was the Chamber of Arbitration at the Genoa Chamber of Commerce, which specializes in the leather trade and only administers *irrituale* arbitration.[1]

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[1][*Note Gen. Ed.*] In Italy, two principal types of arbitration exist, *arbitrato rituale* [formal arbitration] which is governed by the Italian Law on Arbitration set forth in the Code of Civil Procedure, and *arbitrato irrituale* [informal arbitration] which is entirely based on contract law and which is not governed by the provisions of the Law on

Madera appealed to the Supreme Court, which affirmed the lower court's decision. The Court held that an arbitral clause may be validly incorporated into a contract by a general reference to standard conditions.

Excerpt

[1] "By its sole ground for appeal, Madera alleges: (1) violation of Art. II of the [New York Convention] and of the [Italian] provisions on competence and jurisdiction, and lack of reasons on this issue [in the lower court's decision]; (2) nullity of the arbitral clause, because a general reference to International Standard Contract no. 2, which contains inter alia an arbitral clause, is insufficient, and lack of reasons on this issue; (3) nullity of the arbitral clause for failure to indicate the seat of the arbitration and erroneous reasoning in the attacked decision where it holds that the Genoa Chamber of Arbitration [has jurisdiction].

[2] "In order to put the issue in its exact context, we must note that while Fortstar argued in the Court of First Instance and in the Court of Appeal that the court lacked jurisdiction because of the arbitral clause [between the parties], the attacked decision granted the appeal on the ground that the arbitration agreement concerned *irrituale* arbitration....

[3] "Madera argues that there is no agreement in writing in the sense of Art. II New York Convention, since a general reference to general conditions in a separate contract does not suffice and the reference to the arbitral clause must be specific. Madera relies here on both Supreme Court decision no. 3285 of 1985[2] and on the words of the Italian Chamber of Arbitration for the Hides Trade in its preface to the 1982 edition of International Standard Contract no. 2. Madera argues that by granting the objection of lack of jurisdiction the lower court violated the [Italian] provisions on jurisdiction and competence and in particular Art. 20 CCP.[3] This last contention is irrelevant since this is a clause for *irrituale* arbitration.[4] The other aspects of this part of [Madera's] ground for appeal, however, must be examined.

Arbitration. The main difference between the two is that the decision rendered in *arbitrato irrituale* cannot be enforced as an arbitral award but only by means of a contract action.

[2]Decision of 3 June 1985, no. 3285 (Zimmer USA Europa SA v. Giuliana Cremascoli) Yearbook XI (1986) p. 518 (Italy no. 87).

[3]Art. 20 Italian CCP reads:

> "As regards disputes on obligations, also the court of the place in which the obligation comes into being or must be performed has jurisdiction."

[4][*Note Gen. Ed.*] The provisions of the Code of Civil Procedure do not apply to *irrituale* arbitration, which is based on the provisions of the Civil Code (see fn. 1), with some noticeable exceptions (see under [11]).

[4] "Fortstar maintained in the first proceedings that the Pisa Court of First Instance had no 'jurisdictional competence' because the parties had agreed to settle their disputes before the Chamber of Arbitration at the Genoa Chamber of Commerce. The objection thus concerned domestic rather than international arbitration, whereas the New York Convention ... concerns the possibility to derogate by agreement from the jurisdiction of the Italian courts in favour of foreign arbitration. Hence, the Convention does not apply to the dispute and the attacked decision should not take it into consideration, since in the first proceedings Madera did not dispute the domestic nature of the arbitration provided for in the clause, but argued that the clause was null and void because there was only a general reference thereto and because it failed to indicate the seat of the arbitration. This ground shall be examined [in the following paragraphs].

[5] "Madera alleges that the clause is null and void because the reference to International Standard Contract no. 2 is a general reference and, therefore, there is no *relatio perfecta*. Art. 833(2) CCP, introduced by Law no. 25 of 1994, provides: 'The arbitration clause contained in general conditions incorporated into a written agreement between the parties is valid, provided that the parties had knowledge of the clause or should have had such knowledge by using ordinary diligence'. This provision is directly applicable, according to Art. 27(5) of the same Law ('Art. 833 of the Code of Civil Procedure shall apply in any case, if the conditions of Art. 832 of the same Code are met'), and it reflects a tendency toward making formal requirements less stringent, in particular in international commerce (see, on competence, Supreme Court Plenary Session, 15 January 1997 no. 20 and Court of Justice of the European Communities, 16 March 1999 in case 159/97). Such tendency is not at odds with the treaties. Art. II(2) of the [New York Convention] states 'The term "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', thereby giving such a broad definition of an agreement in writing as to be perfectly compatible with the general reference at issue.

[6] "Hence, the reference '*per relationem imperfectam*' made by the parties in the contracts at issue engenders a valid arbitration clause, since the parties never argued that they were not aware of the contents of the Standard Contract (on the contrary, as stressed by Madera, ... both parties were experienced in the hide trade).

[7] "Nor can the earlier Supreme Court jurisprudence be relied on, which required that the parties manifest their intention to settle disputes by arbitration, be it by referring to a clause in a standard contract (Supreme Court, decision no. 5244 of 1982[5] and Supreme Court Plenary Session, decision no. 3285 of 1985). This jurisprudence is rooted in a different system, and a later decision of this Chamber (decision no. 1649 of 1996) held, on the basis of the new [post 1994 reform] system, that a *relatio imperfecta* does suffice.[6]

[8] "Madera also alleges that the clause is null and void because the parties did not indicate the seat of the arbitration and this gap cannot be filled at a later moment as held by the attacked decision.

[9] "This contention must be examined in the light of both the law and the agreement

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[5]Decision of 12 October 1982, no. 5244 (Air India v. Carlo Avanzo) Yearbook IX (1984) pp. 431-432 (Italy no. 63).

[6]Decision of 2 March 1996, no. 1649 (Molini Lo Presti SpA v. Continentale Italiana SpA) Yearbook XXII (1997) pp. 734-736 (Italy no. 145).

of the parties, bearing in mind that, if the arbitration proves to be *irrituale*, the interpretation of the [parties'] agreements pertains to the merits of the dispute and can be attacked before this Court only for violation of interpretation provisions or lack of reasons.

[10] "In the earlier system [before the 1994 reform], Arts. 824, 808 and 810 CCP, jointly considered, excluded that the indication of the place where the award is to be rendered was an essential requirement for the validity of the arbitral clause. The subsidiary criterion of Art. 810 CCP[7] could apply to the constitution of the arbitral tribunal, if needed, and the place of deliberation and signature (Art. 823(2) under 5 and 6 CCP)[8] had to be indicated,

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[7]Art. 810 Italian CCP reads:

"*Appointment of the arbitrators.* Where, in accordance with the provisions of the submission to arbitration or the arbitration clause, the arbitrators are to be appointed by the parties, each party, by means of a bailiff's notification, may inform the other party of its appointment of an arbitrator or arbitrators and request said other party to name its own arbitrators. The party so requested shall, within twenty days, serve notice of the personal data regarding the arbitrator or arbitrators appointed by it.

Failing this, the party which has made the request may petition the President of the Court (tribunale) in whose district the arbitration has its seat, to make the appointment. If the parties have not yet determined the seat of arbitration, the petition is presented to the President of the Court (tribunale) in the place where the submission to arbitration or the contract to which the arbitration clause refers has been executed or, if that place is abroad, to the President of the Court (tribunale) of Rome. The President, having heard the other party where necessary, shall issue his order against which there shall be no recourse.

The same provision is applied where the submission to arbitration or the arbitration clause has entrusted the appointment of one or more arbitrators to the judicial authority or where, if entrusted to a third party, that third party has failed to act."

[8]Art. 823 Italian CCP reads in relevant part:

"*Deliberation of and requirements for the award.* The award shall be deliberated by a majority vote of the arbitrators personally meeting together. It shall then be set down in writing.

It shall contain:

(....)

5) the indication of the seat of the arbitration and of the place or the manner in which it was deliberated;

6) the signatures of all of the arbitrators, with the indication of the day, month and year of their signature; the arbitrators may sign in a place other than the place of deliberation, as well as abroad. If there is more than one arbitrator, they may sign in different places without having to meet personally again."

under pain of nullity (Art. 829(1) under 5 CCP)[9] only at the moment of rendition [of the award]. According to most authors, this place could also be abroad (Art. 824 CCP [abrogated]).

[11] "In the present system, the failure to indicate the seat of the arbitration is no ground for the invalidity or inoperativity of a domestic arbitration clause. The seat can be indicated later by the arbitrators, to whose appointment the above-mentioned subsidiary criterion still applies (Arts. 810(2), 816(1),[10] 823(2) at no. 5, 829(1) at no. 5 CCP). Since the provision in Art. 810(2) CCP is deemed to apply also to *irrituale* arbitration (Supreme Court Plenary Session, decision no. 3189 of 1989 and decisions no. 8285 of 1992, no. 1021 of 1993 and no. 2425 of 1995), these conclusions also apply to the case at issue.

[12] "International Standard Contract no. 2 (which is in force as of 5 April 1982 and, according to the lower court's decision, was drafted by the International Tanners Council and by the International Council of Hides, Skins & Leather Traders Associations (ICHSLTA), which published it) is a standard contract to which the three contracts concluded by Madera and Fortstar on 21 February 1989, 22 February 1990 and 26 February 1990 refer. According to the arbitral clause in the Standard Contract, failing amicable settlement negotiations, disputes shall be 'referred to arbitration according to the international custom of the trade and subject to the rules for arbitration and appeal obtaining in the place specified for that purpose in Clause 1' (Clause 23(1)); the parties did not indicate this place ('place of arbitration and appeal'), just as they failed to fill in other 'Particulars' in Clause 1.

[13] "As the failure to indicate the seat of the arbitration does not lead to the invalidity of the arbitral clause, we must ascertain whether the arbitral clause may be null and void in conjunction with other clauses in the Standard Contract, which are also referred to. This must be excluded, since Madera merely submits its interpretation of the clauses in International Standard Contract no. 2 against the interpretation given in the attacked decision, and does not allege violation of the law or lack of reasons other than the different interpretation given in the decision with respect to the interpretation given by Madera.

[14] "The indication of the Genoa Chamber as the appropriate arbitral institution is not validly censured [before this Court] as Madera merely maintains that the lower decision's argumentation is rather contorted and that the parties could also choose the arbitral chambers in London or Paris, which are also well-known in the field. These considerations concern the merits of the case.

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[9] Art. 829 Italian CCP reads in relevant part:

> "*Grounds for setting aside.* Notwithstanding any waiver, a recourse for setting aside may be filed in the following cases:
> (....)
> 5) if the award does not comply with the requirements of Art. 823, paragraph 2, numbers 3), 4), 5) and 6) subject [in regard to number 6] to the provisions in the third paragraph of said Article; (....)"

[10] Art. 816 Italian CCP reads in relevant part:

> "The parties shall determine the seat of the arbitration within the territory of the Republic; failing this the arbitrators shall decide thereon at their first meeting. (....)"