Sent by Giorgio Recchia
Translated by SB
N.B.:

... Corte di Cassazione, Sezioni Unite [Supreme Court, Plenary Session], 22 December 2000, no. SU 1328

Parties: Claimant: Granitalia (Italy)
Defendant: Agenzia Marittima Sorrentini (Italy)

Published in: Unpublished

Articles: II(2)

Subject matters: - bill of lading
- incorporation by reference

Commentary Cases: ¶ 209; ¶ 211

Facts

Navigation Maritime Bulgare (NMB), a Bulgarian company, shipped four deliveries of grain by its vessel M/V ROUEN from a French harbour to Granitalia at the Italian harbour of Castellammare di Stabia, near Naples.

On 12 January 1999, Granitalia commenced proceedings against Agenzia Marittima Sorrentini (Sorrentini), NMB's Italian agent and representative, in the Court of First Instance of Torre Annunziata, Italy, alleging incomplete delivery and seeking ITL 101,181,411 in damages.

Sorrentini objected to the jurisdiction of the Italian court, relying on the arbitral clause in the charter party, which referred disputes to arbitrators in London. On 28 September 1999, Granitalia seized the Supreme Court with a preliminary question of jurisdiction.

The Supreme Court reiterated its jurisprudence that a general reference in the bill of lading to the charter party, as in the present case, does not validly incorporate the arbitral clause in the charter party into the bill of lading. Hence, the Court held that the arbitral clause in the charter party could not be relied on against Granitalia, the subsequent holder of the bill of lading.

Excerpt

[1] "[Granitalia] maintains that the Italian courts have jurisdiction on the following grounds: (1) the bills of lading refer to the charter party but do not specifically refer to the arbitral clause as is required under Art. II of the New York

Convention to express the intention to refer disputes to arbitration; (2) the general reference in the charter party does not bind Granitalia, the subsequent holder of the bills of lading, since jurisprudence consistently holds that 'in carriage by sea contracts, the requirement that a contract be signed - for the foreign arbitration clause therein to be valid and thus to derogate from the jurisdiction of the Italian courts - is not met by merely signing the bill of lading; such signature has the different purpose of transferring the rights under that bill to a third party'.

[2] "Granitalia's argument is founded. By signing (Art. II(2) of) the [New York Convention], the Contracting States undertook to recognize arbitral clauses for foreign arbitration only if they are in writing, this in order to make sure of the parties' intention to include them in their agreement. The Convention, which was enforced in Italy by Law 19 February 1968, no. 62, modified the provision then in force on arbitral clauses, Art. 808(1) CCP ("an arbitration clause must be in writing under pain of nullity"), so that clauses in agreements not signed by the parties but concluded through an exchange of letters or telegrams can derogate from the jurisdiction of the Italian courts.

[3] "According to the Convention, however, while the requirement of the written form is complied with between the original parties to the carriage contract both if the arbitral clause is included in the contract and if it appears from other documents (e.g., from mutual letters or telegrams), differently, where the carrier raises an objection of lack of jurisdiction in favour of foreign arbitrators against the buyer of the goods and subsequent holder of the bill of lading, the arbitral clause is valid only if the bill of lading specifically refers thereto (by words which show that the party agrees to derogate from the jurisdiction of the Italian courts). A general reference in the bill of lading to a different document containing an arbitral clause does not incorporate that clause into the bill of lading and, therefore, the clause may not be relied upon against a subsequent holder of the bill (see decisions no. 2392 of 1978, no. 6035 of 1981, no. 3285 of 1985 and no. 3362 of 1991)."[1]

[4] "In the present case, the general reference to the conditions, terms and exceptions of the charter party contained in the bills of lading, which were issued to the shipper by the carrier and then signed over to Granitalia, the consignor of the goods, does not

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[1] Supreme Court, 18 May 1978, no. 2392 (Atlas General Timbers SpA v. Agenzia Concordia Line SpA) Yearbook V (1980) pp. 267-268 (Italy no. 35); 14 November 1981, no. 6035 (SIAT - Società Industriale Agricola Treesse sas di Domenico ed Antonia Del Ferro v. Société de Navigation Transocéanique SA, Jauch & Hubener GmbH and Alfred C. Toepfer) Yearbook IX (1984) pp. 416-418 (Italy no. 56); 3 June 1985, no. 3285 (Zimmer USA Europa SA v. Giuliana Cremascoli) Yearbook XI (1986) p. 518 (Italy no. 87), and 28 March 1991, no. 3362 (Universal Peace Shipping Enterprises SA v. Montedipe SpA) Yearbook XVII (1992) pp. 562-563 (Italy no. 118).

derogate from the jurisdiction of the Italian courts. Derogation can only ensue from a specific reference to the foreign arbitration clause.

[5] "No different conclusion can be reached by applying Art. 833 CCP (Chapter V, 'International Arbitration'),[2] to which Sorrentini refers, since Art. 833 does not allow us to hold that a general reference to the charter party in the bill of lading is sufficient vis-à-vis a subsequent holder of the bill of lading.

[6] "Hence, the clause for foreign arbitration may not be relied on against Granitalia and the [Torre Annunziata] court has jurisdiction over the request for damages filed by Granitalia against Sorrentini, since Sorrentini has its seat in Naples and the claim concerns obligations to be performed in Italy (Art. 4(1)-(2) CCP)."[3]

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[2]Art. 833 of the Italian Code of Civil Procedure reads:

"*Form of the arbitration clause.* The arbitration clause contained in general conditions of contract or in standard forms is not subject to the specific approval provided for in Arts. 1341 and 1342 of the Civil Code.

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."

[3]Art. 4 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:

"*Jurisdiction over foreigners.* A foreigner may be summoned before the [Italian] courts:

(1) if he has his (chosen) seat or domicile, or a representative who may represent him in court according to Art. 77, in Italy, or if he has accepted the jurisdiction of the Italian courts, unless the claim concerns immovable goods situated abroad;

(2) if the claim concerns goods situated in Italy or