



The European Legal Forum

Forum iuris communis Europae

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The European Legal Forum (E) 1-2002, 46 - 51

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The development of mutual recognition on a world-wide scale is not as advanced as that within the EU. Both due to the lack of institutional background and mutual trust in one another's judicial systems on the part of the Hague Conference Member States, more flexibility is needed in the adoption of instruments on mutual recognition; hence less ambitious projects are more likely to be successful until there is a broader acceptance of more ambitious projects. The abolition of *exequatur* orders is not seen as a necessity here. It is rather the standardisation of recognition proceedings that is of importance.

Perhaps it is too early to talk about a 'principle of international private law' in respect of mutual recognition, even though it does impinge on cross-border private law cases.¹⁵⁸ However, it is fully possible, that this principle will develop at the European Union level into a system similar to the US 'full faith and credit clause'.¹⁵⁹ The further use of this principle may prove to be helpful in solving, for example, problems associated with the substitution of notary deeds: formal require-

ments of that kind could become the object of recognition.¹⁶⁰ Especially in areas where the harmonisation of substantive laws is unattainable or undesirable due to cultural differences or the like, the harmonisation of procedural rules such as recognition is a welcome alternative. In order to work effectively though, the uniform jurisdiction and recognition provisions need to be accompanied in the long run by harmonised conflicts of law rules in order to avoid forum shopping and its negative consequences. Whether the complete relinquishment of *ordre public* review is desirable remains questionable. Surely, mutual trust in each other's judicial systems must be possible to achieve; however, this needs to grow in the minds of those applying the law. Since the different cultures within Europe will and should continue to exist, it would also be sensible to retain the option for public policy review.

¹⁵⁸ Cf. *Jayme/Kobler* (*supra* note 27), at 456 with references.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

Formal Invalidity of Arbitration Agreements at the Stage of Enforcement of the Arbitral Award Under the New York Convention: The Italian Judicial Approach

Leonardo Graffi*

1. The decision of the Court of Cassation of 21 January 2000¹

This article stems from a recent decision of the Italian Court of Cassation (Corte di Cassazione)² in which Italian judges were once again confronted with the issue of the formal invalidity of an arbitration agreement at the enforcement stage under the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or New York Convention (hereinafter, "NYC").³ In this case, a British company

(Interskins Ltd.) initiated an action in 1994 against an Italian company (Conceria De Maio) in the Naples Court of Appeals (Corte d'appello) for the recognition and enforcement of a foreign arbitral award made by the Skin, Hide & Leather Association in London. The award settled a dispute arising from a contract for the supply of leather to the Italian company. The Italian defendant refused to recognise the settlement, claiming the lack of a valid arbitration agreement. Two years later, the Naples Court of Appeals rejected the defendant's claims in a decision issued 13 November 1996. The appeals court ruled that the claims were inadmissible and that the invalidity of the arbitration agreement did not in any event constitute a ground for refusal of recognition of the award under Article V of the NYC. The Italian company turned to the Court of Cassation, claiming, *inter alia*, that the arbitration agreement was formally invalid under Articles 807 and 808 of the Italian Code of Civil Procedure and Article V of the

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¹ An extract from this decision appears at page 51 of this issue.

² See Cass. (I) 20 January 2000 – n. 671, Riv. dir. int. priv. proc. 2001, at 92 et seq.

³ The literature on the New York Convention is vast. For some specific references, see *Various authors*, The New York Convention of 1958, in: A Collection of Reports and Materials, Delivered at the ASA Conference, Zurich, 2 February 1996, ASA Special series no 9, Zurich (CH), 1996; *Bernini*, in: L'arbitrato (diritto interno convenzioni internazionali), Bologna (I), 1993; *Born*, in: International Commercial Arbitration in the United States, Deventer/Boston (NL/USA), 1994; *Briguglio*, in: L'arbitrato estero, Padua (I), 1999; *Reisman/Craig/Park/Paulsson* (eds), International Commercial Arbitration. Cases, materials and notes on the resolution of international business disputes, New York (USA), 1997; *Fouchard/Gaillard/Goldman* (eds), On International Commercial Arbitration, The Hague (NL), 1999; *Di Pietro/Platte*, Enforcement of International Arbitration Awards: The New York Convention of 1958, London (GB), 2001; *Remiro Brotons*, La reconnaissance et l'exécution des sentences arbitrales étrangères, in: Collected Courses of the Hague Academy of International Law 1984, at 173 et seq.; *Sanders*, A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 13 International Lawyer 1979, at 269 et seq.; *Van den Berg*, The New York Arbitration Convention, Deventer/Boston (NL/USA), 1981. With specific reference to

the relationship between the NYC and the Italian legal system, see *Briguglio*, L'accordo compromissorio e il lodo estero fra la Convenzione di New York e le recenti novità legislative italiane, Giust. civ., II 1997, at 467 et seq.; *Gaja*, Forma dell'accordo arbitrale e riconoscimento del lodo straniero secondo la Convenzione di New York, Riv. dir. internaz. 1991, at 321 et seq.; *Giardina*, Court Decisions in Italy Interpreting and Implementing the New York Convention, 7 Journal of Int'l Arb. 1990, at 77-86; *Luzzatto*, Accordi internazionali e diritto interno in materia di arbitrato: la convenzione di New York del 1958, Riv. dir. int. priv. proc. 1968, at 24 et seq. For the (unofficial) Italian translation of the New York Convention, see *Ferrari*, Le convenzioni di diritto del commercio internazionale, Milan (I), 2001, at 470, with introductory note by *Giovannucci Orlandi*, at 443-469.

NYC. The Court of Cassation denied the application, affirming the decision of the appeals court.

The decision of the Court of Cassation paid special attention to the issue of invalidity of the arbitration agreement as a ground for refusal of enforcement of the arbitral award. In this regard, it is common knowledge⁴ that, at an international level, only Italian courts have ruled⁵ that Article II of the NYC does not apply to the enforcement of arbitral awards, notwithstanding the express reference made thereto in Article V(1)(a) NYC.⁶ The Italian courts have decided that parties may invoke Article II only to contest the national jurisdiction of the courts. In some decisions, Italian courts have refused to take into account the formal validity of an arbitration agreement at all in enforcement actions; in other decisions, Italian judges have examined the formal validity of an arbitral clause, but without then considering the well known uniform standards set by Article II NYC. The peculiar interpretation in Italian case-law on this matter has provoked criticism for a number of reasons which will be discussed later. In the case under discussion, the decision of the Court of Cassation is to be welcomed insofar as it recognises that “the [Italian] interpretation has been criticised in the most highly regarded international legal literature,⁷ in which it has been pointed out that no judge within the contracting States has followed such an interpretation, above all stressing the fact that Article V(1)(a) also makes an express reference to Article II and to its formal requirements”.⁸

The Court of Cassation also noted⁹ that a major disagreement exists between Italian and foreign legal opinion on the interpretation of this provision. In this matter, the Court of Cassation proves itself familiar with the ongoing legal debate, and this becomes even more evident from its precedents where this particular issue enjoyed little or no attention at all. Italy’s highest court draws a clear distinction between the Italian and foreign judicial interpretation of this provision. It does not hesitate to define the Italian interpretation as a minority opinion, whilst recognising that the foreign interpretation has

been accepted in the legal opinion and case-law of virtually all contracting States. Although showing itself as capable of making such daring statements, the Court of Cassation eventually refused to support any of these interpretations openly, arguing that whichever view one decides to follow, the arguments put forward by the claimant should be rejected in any case. It is needless to say that this abrupt conclusion leaves a number of questions unanswered. Even though it is not possible to grasp the rationale underlying this decision, it must be pointed out that the fact that the Court of Cassation is aware of the international interpretations concerning this specific legal issue under the NYC may suggest a future shift more in line with the preferable and prevailing international view.

This might seem too premature however, especially in light of the corresponding legal precedents of Italy’s highest court. Presently, discussion of the Italian decisions must be confined to an analysis of the issue of the application of Article II NYC to the formal validity of the arbitration agreement at the enforcement stage. The goal of this article is to demonstrate the benefits of adopting the uniform criterion contained in Article II, and sheds light on the shortcomings of alternative criteria which have often been embraced in Italian case-law. First, however, the role of Article II within the system of the NYC must be addressed, as well as its interpretation in the literature and in judicial opinions, with particular attention given to the Italian situation.

2. Article II(2) of the New York Convention and Italian case-law

In the following section, the formal requirements under Article II(2) NYC will be analysed more closely. The text reads: “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.” It must be noted that Article II is clearly the provision which has caused the greatest interpretative problems within the framework of the NYC, and this is probably due to the fact that it was included in the treaty at the last moment.¹⁰ At the international level, the majority of legal opinion¹¹ has

⁴ For similar observations, more than one decade ago, see *Gaja* (*supra* note 3), at 321.

⁵ See the decisions of the Cass. (I) 15 April 1980 – n. 2448, *Foro it.* 1980, I, cc. 2164 et seq., also in: VI YCA 1981 at 233-236; Cass. (I) 13 July 1988 – n. 4592, *Giur. it.* 1989, c. 690, also in: XV YCA 1990 at 493-495.

⁶ Article V(1)(a) states that: “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: the 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 (...)”.

⁷ It seems reasonable to infer that the Court made reference to the opinion of *Van den Berg* (*supra* note 3), at 285, who stated that: “It is submitted that the view of the Italian Supreme Court that article II(2) is inapplicable at the stage of enforcement of the award is at odds with both the legislative history of the Convention and its internal consistency”.

⁸ Translated from Cass. (I) 20 January 2000 – n. 671, *Riv. dir. int. priv. proc.* 2001, at 98.

⁹ *Id.*, at 97.

¹⁰ The introduction of Article II to the text of the NYC was the result of the well known “Dutch proposal”, which was drafted by delegate Pieter Sanders during the New York conference of 1958. For some historical remarks concerning the “Dutch proposal”, see *Sanders*, *The history of the New York Convention*, in: *Various authors*, in: *Van den Berg* (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series no. 9, The Hague (NL), 1999, at 42.

¹¹ Amongst the better known supporters of this opinion, see *Sanders* (*supra* note 3), at 269 et seq., and especially at 286; *Van den Berg* (*supra* note 3), at 173; *Fouchard*, *L’arbitrage commercial international*, Paris (F), 1965, at 513 (although with some reservations); *Remiro Brotons* (*supra* note 3), at 228-229; *Boissésou*, *Le droit français de l’arbitrage interne et international*, Paris, 1990, at 478. In Italy, a similar view was held by *Giardina* (*supra* note 3), at 77-86; *Luzzatto* (*supra* note 3), at 32 et seq.; *Lopez de Gonzalo*, *Criteri di valutazione delle clausole compromissorie per arbitro estero nella Convenzione di New York del 1958*, *Dir. maritt.* 1982, at 657; *Bonelli*, *La forma della clausola compromissoria per arbitro estero*, *Rass. Arb.* 1983, at 143.

always endeavoured to construe this provision in a uniform fashion, regardless¹² of any possible interpretations based on the application of domestic norms, either of a substantive nature or of private international law nature¹³ Under this theory (the so-called theory of uniform interpretation), which has been adopted in many court decisions in the various contracting States,¹⁴ Article II(2) constitutes a uniform rule and must prevail as *lex specialis*¹⁵ over all domestic provisions which set stricter requirements for the arbitration agreement. However, it must be noted that lately, the uniform rule under Article II is being increasingly questioned in literature, and especially in national legislation of a more liberal nature.¹⁶ With regard to Italian case-law, although the NYC has been applied by courts¹⁷ several times since its entry into force in Italy,¹⁸ the Italian decisions have hardly ever contributed to the uniform interpretation of the Convention, which is often said to be of primary importance for a correct interpretation of the norms in all international uniform law conventions.¹⁹

¹² For a decision stating that no recourse to the rules under private international law is admissible, see App. Genova (I) 3 February 1990, *Dir. maritt.* 1990, at 707.

¹³ A further conclusion in support of the inapplicability of private international law criteria can be drawn from Article 1(2)(d) of the European Convention on the Law Applicable to Contractual Obligations (Rome, 1980) which expressly excludes arbitration agreements from its sphere of application.

¹⁴ For decisions which have clearly confirmed the autonomous character of Article II, see for example: in Austria, Oberster Gerichtshof 22 May 1991, XXI YCA 1996, at 521-523; in Germany, OLG Hamm 15 November 1994, XXII YCA 1997, at 707; in France, App. Paris 20 January 1987, XIII YCA 1988 at 466-470; in Switzerland, AG Basel 27 February 1989, XVII YCA 1992, Tribunal Fédéral 21 March 1995, XXII YCA 1997, at 800-806, OG Basel 5 July 1994, XXI YCA 1996, at 685-689; in the United States, US District Court, E.D.N.Y. 20 January 1989, XV YCA 1990, at 612, US Court of Appeals, 5th Circuit 12 August 1985, XII YCA 1987, at 539, US District Court S.D.N.Y., 11 October 1991, XVIII YCA 1993, at 496.

¹⁵ For a definition hereof, see *Rubino Sammartano*, *L'arbitrato internazionale*, Padua (I), 1989, at 188.

¹⁶ To this effect, see *Van den Berg*, *Consolidated Commentary*, XXI YCA 1996, at 420-421. For a critical approach to the written requirement set forth by Article II NYC, see *Kaplan*, *Is the need for Writing as Expressed in the New York Convention and the Model Law out of Step with Commercial Practice?*, 12 *Arb. Int'l.* 1996, at 27-45.

¹⁷ For recent decisions of the Court of Cassation pertaining to the NYC, see Cass. (I), sez. un., 26 June 2001 – n. 8744, unpublished; Cass. (I) 16 November 2000 – n. 14860, *Contratti* 2001, at 329, with note by *Delconte*; Cass. (I) 21 January 2000 – n. 671, *Riv. dir. int. priv. proc.* 2001, at 92 et seq.; Cass. (I) 18 February 2000 – n. 1808, *Corr. giur.* 2000, at 1497 et seq., with note by *Ruffini*; Cass. (I), sez. un., 10 March 2000 – n. 58, *Giust. civ.* 2000, at 3203; Cass. (I), sez. un., 22 December 2000 – n. 1328, *Mass. Foro it.* 2000.

¹⁸ Italy has ratified the NYC by means of Act n. 62 of 19 January 1968 (G.U. 21 February 1968) and the Convention has entered into force on 1 May 1969.

¹⁹ Generally, for the need of a uniform interpretation of the provisions of uniform law conventions, see *Bariatti*, *L'interpretazione delle convenzioni internazionali di diritto uniforme*, Padua (I), 1986. With specific reference to the uniform interpretation of the NYC and the need to take into consideration the interpretation of the different national courts, see *Van den Berg* (*supra* note 3), at 1, stating that: "The significance of the New York Convention for international commercial arbitration makes it even more important that the Convention is interpreted uniformly by the courts". In order to promote the uniform interpretation of the NYC, the International Council for Commercial Arbitration (ICCA), Professor Sanders and Professor Van den Berg, with the support of the T.M.C. Asser Institute for International Law of The Hague have since 1976 published the *Yearbook Commercial Arbitration*. This publication reports the decisions regarding the application of the NYC made throughout the world, both by national courts and arbitral tribunals.

This has become even more evident in recent years, in which Italian courts often found themselves criticised both by national and international legal scholars for manifestly disregarding the uniform requirements of the arbitration agreement under Article II NYC. With reference to the stricter provisions under domestic substantive law, Articles 1341 and 1342 of the Civil Code require a specific signature for an arbitration agreement to be valid. This gave rise to a well known dispute,²⁰ since the Italian courts had for a long time hesitated to recognise the supremacy of Article II(2) over the aforementioned articles of the Civil Code. However, this dispute has been resolved for some time now, as Italian judges have held in several decisions²¹ that Articles 1341 and 1342 are not applicable to arbitration agreements providing for arbitration abroad. Furthermore, since the entry into force of the new law on arbitration of 1994,²² those articles are not even applicable to arbitral clauses for international arbitral proceedings with seat in Italy, as expressly stated in Article 833 of the Italian Code of Civil Procedure. The rules of private international law have often been applied in Italian case-law for the purpose of determining the law applicable to the formal requirements of an arbitration agreement. In numerous cases,²³ the courts applied the rules on conflict of laws (Article 26 of the *disposizioni preliminari* to the Civil Code), thus refusing to recognise the special and uniform character of Article II(2). This practice also provoked a great deal of criticism amongst Italian²⁴ and international²⁵ legal scholars, who deemed the view of the Court of Cassation to be inconsistent with the uniform character of Article II(2) NYC. Presently, this issue has been settled and Italian case-law has almost²⁶ unanimously held the rules of private international law inapplicable to arbitration agreements falling within the scope of Article II(2).

²⁰ See *Van den Berg* (*supra* note 3), at 211 et seq.

²¹ For recent decisions stating that Article 1341 and 1342 do not apply to clauses falling under Article II NYC, See Cass. (I), sez. un., 22 May 1995 – n. 5601, XXI YCA 1996, at 610-611; App. Milano (I) 5 February 1999, *Riv. dir. int. priv. proc.* 1999, at 327.

²² The Italian arbitration reform was enacted on 5 January 1994 by Act No. 25. For a commentary on the Italian arbitration law, with a focus on international arbitration, see *Rubino Sammartano*, *New International Arbitration Legislation in Italy*, 11 *Journal of International Arbitration* 1994, at 77-86; *Bernini*, *Italy-Ad Informandum*, *Int'l. Handbook on Comm. Arb. Suppl.* 1994, at 17 et seq.; *Bernardini*, *L'arbitrage en Italie après la récente réforme*, *Rev. arb.* 1994, at 479 et seq.; *Gaja*, *L'arbitrato in materia internazionale tra la l. n. 25/1994 e la riforma del diritto internazionale privato*, *Riv. arb.* 1996, at 487 et seq.; *Luzzatto*, *L'arbitrato internazionale e i lodi stranieri nella nuova disciplina legislativa italiana*, *Riv. dir. int. priv. e proc.* 1994, at 257.

²³ See for example, the much criticized decisions of Cass. (I), sez. un., 25 May 1976 – n. 1877, III YCA 1978, at 278; Cass. (I) 7 October 1980 – n. 5378, VII YCA 1982, at 342-344; Cass. (I) 17 March 1982 – n. 1727, IX YCA 1984, at 426 et seq.

²⁴ For critical observations, see *Luzzatto*, *La Corte di Cassazione e la 'forma' della clausola compromissoria per arbitro estero: forza di una tradizione ed equivoci di una massima*, *Rass. arb.* 1976, at 157-166; *Bonelli* (*supra* note 11), at 140 et seq.

²⁵ See amongst the others, *Van den Berg* (*supra* note 3), at 211 et seq.

²⁶ It must be noted, however, that the Cass. (I), in its decision of 11 July 1992 – n. 8469, *Riv. dir. int. priv. proc.* 1995, at 108 once again applied Article 26 of the Preliminary Rules to the Civil Code.

3. Article II in the enforcement of an arbitral award: the Court of Cassation's (controversial) approach

The formal requirements of the arbitration agreement, as mentioned earlier, play a dual role in the application of the NYC: firstly, before the national judge at the recognition stage, since an agreement consistent with the formal requirements of Article II(2) can give rise to a waiver of jurisdiction²⁷ and to the formation of an arbitral tribunal. In this respect, Article II(3) imposes a specific obligation upon the national judges, stating that “[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall (...) refer the parties to arbitration(...).”

Secondly, the formal requirements become relevant in the course of recognising the arbitral award, given that the invalidity of the agreement within the meaning of Article II comprises one of the grounds for annulment of the award under Article V(1)(a). It has been maintained that the party seeking an annulment of the award most commonly invokes the formal invalidity of the arbitration agreement.²⁸ Now the focus will shift to the formal invalidity of the arbitration agreement at the enforcement stage in light of the Italian Court of Cassation's legal precedents. The Court of Cassation had confronted this issue several times in the past, but, as was just noted, it often ignored the special nature of Article II(2).

a) The Court of Cassation held Article II(2) to be inapplicable at the stage of enforcement of an arbitral award for the first time in 1977.²⁹ One year later, the principle was once again affirmed in the well known case of *Bobbie Brooks v Lanificio Walter Banci*.³⁰ In this decision, the Court of Cassation stated that Article II NYC only governs the waiver of jurisdiction, whereas Article V operates on a completely different level, and in the case before it regulates solely the enforcement of a foreign award. Hence, the formal validity of the arbitration agreement was determined under the law of the country in which the award was made, and not in accordance with the uniform criteria under Article II(2). The Court of Cassation thus found that the United States Federal Arbitration Act of 1925³¹ was applicable. It is needless to say that such an interpretation could only contribute to uncertainty amongst those relying on the uniform standards of Article II. Moreover, nothing in the text of the Convention suggests that Article II and Article V operate at different levels.

²⁷ On the waiver of Italian jurisdiction and international arbitration, see *Gaja* (*supra* note 22) at 487; *Briguglio* (*supra* note 3) at 467 et seq.; *La China*, L'arbitrato e la riforma del sistema italiano di diritto internazionale privato, Riv. arb. 1995, at 629.

²⁸ To this effect, see *Lattanzi*, L'impugnativa per nullità nell'arbitrato commerciale, Milan (I), 1989, at 155.

²⁹ See Cass. (I) 20 January 1977 – n. 272, Riv. dir. int. priv. proc. 1978, at 341 et seq., also in: IV YCA 1979, at 279 et seq.

³⁰ See Cass. (I) 15 April 1980 – n. 2448, Foro it. 1980, I, c. 2164, also in: VI YCA 1981, at 233-236.

³¹ The court deemed applicable Section 1 of the Uniform Arbitration Act of 1956 and Section 2 of the United States Arbitration Act of 1925.

b) This precedent was reversed a few months later in a decision which reaffirmed the applicability of Article II also to the enforcement of an arbitral award.³² Other rulings in subsequent years confirmed this view.³³

c) In 1988, the Italian court unfortunately once again changed its point of view in the case of *Meneghetti v August Töpfer & Co.*³⁴ However, in this matter the judges did not refer to the law of the country where the arbitral award was granted (as in *Bobbie Brooks*), but instead, they simply refused to examine the formal validity of the agreement. The Court of Cassation maintained that it was not its duty to examine the formal requirements for validity of the arbitration agreement, since this should have been done either by the national judge before referring the parties to arbitration, or by the arbitrators themselves.³⁵ The Court further held that a party cannot invoke Article V(1)(a) in the enforcement of an arbitral award, since the formal validity of the arbitration agreement already constitutes *res judicata*.³⁶ The Italian courts thus avoided dealing with this issue and patently ignored the judgments of other contracting States in which Article II was without a doubt held to be applicable to the enforcement of arbitral awards. This was clearly pointed out by a distinguished scholar³⁷ with regard to a 1990 decision³⁸ following the *Meneghetti* precedent.

d) In 1994, the Court of Cassation³⁹ once again examined the formal validity of the arbitration agreement in deciding the enforcement thereof in the light of the *Bobbie Brooks* case. The Court of Cassation applied the law of the country where the award was made, i.e. English law.⁴⁰ Article II was held to be applicable only when a court refers a matter to arbitration. A decision to this effect was rendered between the same parties a few months later.⁴¹

³² See Cass. (I) 18 April 1978 – n. 1842, Riv. dir. int. priv. proc. 1980, at 34 et seq., also in: IV YCA, 1979 at 282-283 where the Court of Cassation, however, did not explain why it held Article II for applicable.

³³ See Cass. (I) 26 May 1981 – n. 3456, Riv. dir. int. priv. proc. 1982, at 355 et seq., also in: VII YCA 1982, at 345-346; Cass. (I) 17 March 1982 – n. 1727, Riv. dir. int. priv. proc. 1983, at 615 et seq., also in: IX YCA 1984, at 426; Cass. (I) 19 January 1984 – n. 465, Riv. dir. int. priv. proc. 1984, at 583 et seq., also in: X YCA 1985, at 475-477; Cass. (I) 30 July 1984 – n. 453, Riv. dir. int. priv. proc. 1985, at 597 et seq.

³⁴ See Cass. (I) 13 June 1988 – n. 4592, Giur. it. 1989, cc. 690-694, with comment by *Franchi*, also in: XV YCA 1990, at 493-495.

³⁵ See Cass. (I) 13 June 1988 (*supra* note 33), c. 694. See also, App. Palermo 16 December 1989, in *Temi sic.*, 1990, at 22.

³⁶ See Cass. (I) 13 June 1988 (*supra* note 33), c. 694.

³⁷ For this view, see *Gaja* (*supra* note 3), at 323.

³⁸ See Cass. (I) 6 August 1990 – n. 7995, Riv. dir. int. priv. proc. 1991, at 1024 et seq., also in: XVII YCA 1992, at 545-550, where the Court of Cassation denied that Article II and Article V could be concurrently applied at the stage of enforcement.

³⁹ See Cass. (I) 15 July 1994 – n. 637, Riv. arb. 1995, at 449, with critical commentary by *Bandini*, Questioni in tema di riconoscimento ed esecuzione di lodi arbitrali stranieri, at 451 et seq.

⁴⁰ In doing so, the Court of Cassation expressly stated that Article II cannot be applied at the stage of enforcement.

⁴¹ See Cass. (I) 20 January 1995 – n. 637, Riv. dir. int. priv. proc. 1996, at 102, also in: XXI YCA 1996, at 602-606.

4. The preferred international approach to the application of Article II in the enforcement of an arbitral award

The overwhelming majority of Italian⁴² and international⁴³ legal scholars have repeatedly argued that Article II must also be applicable to an action for the enforcement of an arbitral award. In doing so, they have criticised the Court of Cassation's unusual⁴⁴ conduct. Sufficient indications exist in support of this view. Firstly, the wording of Article V(1)(a) clearly indicates that the alleged invalid agreement is the "agreement referred to in article II." Secondly, it must be noted that Article II is also referred to in Article IV(1)(b), which lists the documents (the arbitration agreement and the arbitration award) that the claimant must submit to the court deciding the recognition and enforcement of the award. Despite the fact that Article IV(1)(b) requires the claimant to supply the "agreement referred to in article II," it seems hard to believe that the NYC would prevent (as held by the Court of Cassation) a judge from examining the formal validity of an arbitration agreement pursuant to Article II. Thirdly, there are no words in the Convention to suggest that Article II and Article V should be applied in separate stages. Moreover, since the NYC is a single body of rules, its provisions should be applied concurrently and consistently.⁴⁵ All interpretations purporting to limit the application of Article II to the mere stage of a court referral to arbitration should consequently be deemed incorrect and contrary to the wording of the NYC. Finally, one should consider that the interpretation of the Court of Cassation may also cause uncertainty and unpredictability in international transactions. In fact, whenever the formal validity of an arbitration agreement is examined in accordance with the law of the country which had granted the award, the court risks an incorrect interpretation of the foreign law, which can be avoided by the uniform application of the rule under Article II. The view has been taken⁴⁶ that if the

law of the country granting the award were to be applied, a paradoxical situation arises: an arbitration agreement could be held to be valid at the stage of referral to arbitration under a given law, and subsequently be held invalid at the stage of enforcement under a different law! This undesirable result can occur if the country in which an order for referral to arbitration has been granted is not the same country in which the arbitral award was made. It thus appears much more preferable to apply the same requirements in both instances, or at least in respect of the formal requirements for validity of the arbitration agreement. From a judicial perspective, it seems that the Italian courts have deemed (albeit with some exceptions⁴⁷) as hardly relevant the necessity of promoting uniformity in the application of the NYC. It is a fact that Italian courts have paid little heed to decisions issued by courts of other contracting States,⁴⁸ which, in contrast, have not hesitated to hold Article II to be applicable also to an action for the enforcement of an arbitral award.

5. Conclusion

A few concluding observations are in order at this point. Reference must be made to the decision which gave rise to this article. It has already been noted that the Court of Cassation has in this case refrained from explicitly confirming that Article II is applicable to the enforcement of arbitral awards. One could say that this decision is merely coincidental. Nevertheless, if this were the case, the Court of Cassation could simply have rejected the claim as it has done in other cases, without taking the issue into consideration. Although this may be an overstatement, I would dare to suggest that the Court of Cassation has championed the point of view shared by the leading literature. It is not by chance that the Court of Cassation has stated that no judge in any contracting State has followed the approach of the Italian courts on this matter. It remains unclear as to how this decision must be interpreted. For this purpose, it might be useful to take a look at the so-called doctrine of prospective overruling,⁴⁹ which is often applied by the

⁴² In support of this view, see *Briguglio* (*supra* note 3), at 195; *Punzi*, *Disegno sistematico dell'arbitrato*, Padua (I), 2000, at 328; *Fumagalli*, in: *Tarzia/Luzzatto/Ricci*, *Legge 5 gennaio 1994, n. 25, nuove disposizioni in materia di arbitrato e disciplina dell'arbitrato internazionale*, Padua (I), 1995, at 280; *Bandini* (*supra* note 39), at 452; *Muroni*, in: *C.p.c. commentato*, Consolo/Luiso eds, Vicenza (I), 2000, sub. Article 839, at 3618; *Gaja*, (*supra* note 3), at 324 et seq. *Contra*, however, see *Bernini*, (*supra* note 3), at 507.

⁴³ See *Sanders* (*supra* note 3), at 269; *Patocchi*, *The New York Convention - The Swiss Practice*, in: *The New York Convention of 1958, A Collection of Reports and Materials* (*supra* note 3), at 169; Hill, *The writing Requirement of the New York Convention revisited: are there black holes in international arbitration?*, *Mealey's Int'l. Arb. Rep.* 1998, at 17 et seq.; *Van den Berg* (*supra* note 3), at 284.

⁴⁴ See *Van den Berg*, *Consolidated Commentary*, XXI YCA 1996, at 484, where the author states that: "Except for the Italian Supreme Court, no court has doubted that the words 'the agreement referred to in Article II' of Art. V(1) imply that the lack of the written form of the arbitration agreement as required by Art. II(2) constitutes a ground for refusal of enforcement of an arbitral award".

⁴⁵ Cf. *Cass. (I)* 27 April 1979 - n. 2429, *Foro. it.* 1980, I, cc. 190-194, at c. 193, where the Court of Cassation stated: "It is true that Article 2, n. 1 and l'art. 5, n. 2/a of the convention have a different scope and take into account the [writing] requirement in two different stages and under different perspectives (...). The interpreter, however, must co-ordinate the two provisions and must read the first one in the light of the second one. He must reach the conclusion that within the same legal system, the law applicable to each stage is the same" (unofficial translation).

⁴⁶ For these observations, see *Fumagalli* (*supra* note 42), at 280.

⁴⁷ It should be noted that a recent decision of the Milan Court of Appeals (*Corte d'appello*) has shown strong support for the uniform interpretation of the provisions contained in the international uniform law conventions, and, in particular, of Article II of the NYC. See *App. Milano (I)* 5 February 1999, *Riv. dir. int. priv. proc.* 1999, at 327.

⁴⁸ For decisions where the courts have expressly stated that Article II is applicable at the stage of enforcement, see *US District Court, District of Minnesota (USA)* 12 December 1997, XXIII YCA 1998 at 1103-1108; *US District Court, S.D.N.Y. (USA)* 8 December 1997, 12 *Mealey's Int'l. Arb. Rep.* 1997, at 1 et seq.; *App. Paris (F)* 20 January 1987, *Rev. arb.* 1987, at 482; also in: *Journal du droit international 1987*, at 934; *Cour de Cassation (F)* 11 October 1989, *Rev. arb.* 1990, at 134.

⁴⁹ For a detailed account of the origin and development of the idea of prospective overruling in American courts, see *Levy*, *Realist Jurisprudence and Prospective Overruling*, 109 *U. Pa. L. Rev.* 1965, at 17 et seq.; *Shapiro*, *Prospective or Retroactive Operation of Overruling Decision S.R.*, 10 *Am. L. Rev.* 1966, at 1371; *Note*, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 *Yale L.J.* 1962, at 907; *Currier*, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 *Vand. L. Rev.* 1965, at 201; *Traynor*, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 50 *Hastings L. J.* 1999, at 771; *Mattei*, *Stare Decisis. Il valore del precedente giudiziario negli Stati Uniti d'America*, *Milan (I)*, 1988, at 311.

American courts. Courts that employ the principle of prospective overruling hold that they will change their opinion on a given issue in future cases only, whereas they continue to apply their precedents to those cases that are still pending. This technique precludes placing an undue burden on a party that has relied on the court's precedents at the time of instituting an action,⁵⁰ while at the same time anticipating a future change in the court's position. Recently, a distinguished Italian legal scholar⁵¹ suggested that prospective overruling could even be introduced in continental Europe. Although there are not enough indications in the case under discussion to suggest that the Court of Cassation has in fact decided to experiment with prospective overruling, one could still conclude that the Court has intentionally underscored the parochial attitude of the Italian case-law, which no court in any contracting State has followed.

Since it is not inconceivable that the Court of Cassation has taken into account the need for a uniform interpretation of the provisions in international uniform law conventions – an issue which has been repeatedly raised,⁵² then the Court's statements concerning the Italian exception may be deemed intentional. This preliminary move may lead to a future change of view.

Leaving those considerations aside, it is still regrettable that the Court of Cassation has not seized the opportunity to clarify its position concerning the applicability of Article II NYC as to the enforcement of arbitral awards in Italy. The Court of Cassation still has to bring its decisions in line with the generally accepted international interpretation of this issue.

⁵⁰ According to *Traynor* (*supra* note 49), at 779, "the technique of prospective overruling enables courts to solve this dilemma by changing bad law without upsetting the reasonable expectations of those who relied on it".

⁵¹ In support of this view, see *Chiarloni*, *Un mito rivisitato: note comparative sull'autorità del precedente giudiziale*, Riv. dir. proc. 2001, at 614, especially at 622-623 as well as the authors cited therein in footnote 16.

⁵² See *supra* note 19.

Corte di Cassazione (I) 21 January 2000 n. 671

New York Convention¹ – Grounds for refusal of recognition of a foreign arbitral award – formal invalidity of an arbitration agreement at the stage of enforcement of the arbitral award

It is for the party against whom a foreign arbitral award is invoked, to put forward the grounds for refusal of recog-

¹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York), 10 June 1958.

niton thereof within the meaning of Article 5 of the New York Convention of 1958. Since the aforementioned Convention does not consider the pendency of legal proceedings as a ground for refusal, the pending litigation in Italy between the same parties and on the same subject-matter, does not prevent the recognition of a foreign arbitral award.

The possible renewal of the contractual relationship as regards foreign arbitration agreements and the resulting lack of competence of the arbitrator does not fall under the concept of invalidity of the arbitral regulation within the meaning of Article 5(1)(a) of the New York Convention.

Extract from the decision: "(...) 3.4. Per risolvere la questione sottoposta all'esame della Corte occorre sempre partire dalla premessa che la Convenzione di New York ha inteso favorire al massimo il riconoscimento dei lodi pronunziati in uno dei paesi firmatari, e che le condizioni stabilite per il riconoscimento sono soltanto quelle specificatamente previste. Per quanto concerne le condizioni ostantive elencate dal primo comma dell'art. V, si è già rilevato, inoltre, che l'onere della prova della loro esistenza è attribuito dalla stessa norma alla parte nei cui confronti è stato chiesto il riconoscimento. Nella specie la ricorrente ha dedotto, quale condizione ostantiva, ai sensi della lett. a, seconda ipotesi, del detto articolo, l'invalidità del compromesso sotto un duplice profilo: 1) il venir meno della competenza arbitrale a seguito di novazione dell'intero rapporto contrattuale; 2) la falsità della sottoscrizione.

Sulla interpretazione della citata norma della convenzione esiste una *summa divisio* nella dottrina italiana e straniera. Premesso che il concetto d'invalidità deve essere inteso in senso ampio (e cioè comprensivo delle ipotesi corrispondenti ai concetti giuridici di nullità, annullabilità ed inesistenza), secondo una prima opinione esso comprende anche i casi di difetto dei requisiti di forma previsti dalla stessa convenzione all'art. II (in particolare, al secondo comma); secondo una seconda opinione, l'invalidità come causa ostantiva al riconoscimento comprenderebbe soltanto ipotesi di vizi sostanziali, previsti dalla legge regolatrice della convenzione arbitrale o, in difetto di specifica scelta dei contraenti, dal diritto del paese in cui il lodo è stato pronunciato.

(...)

3.4.2. La Corte ritiene che, qualunque sia l'indirizzo che si intenda seguire, le eccezioni svolte dalla ricorrente non possono essere accolte e che, conseguentemente, la statuizione della Corte di merito sul punto sia immune da rilievi di legittimità, anche se è necessario apportare alla motivazione in diritto della sentenza impugnata alcune integrazioni, ai sensi dell'art. 384 cod. proc. civ.

L'art. V par. 1 lett. a, seconda ipotesi, prevede che venga rifiutato il riconoscimento quando il compromesso ("la convention visée à l'art. II") "n'est pas valable en vertu de la loi à laquelle les parties l'ont subordinée ou, à défaut d'une indication à cet égard, en vertu de la loi du pays où la sentence a été rendue".

3.4.3. Quanto al prospettato difetto della competenza arbitrale per novazione del rapporto contrattuale, potrebbe rilevarsi che tale situazione dovrebbe comportare, a maggior ragione, un impedimento a riconoscere. Ma la tesi, pur suggestiva, non può essere accolta. Occorre sempre, infatti, partire dalla regola del *numerus*