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International Commercial Arbitration Issue

Articles

Domestic and International Arbitration in Italy after the Legislative Reform

Giorgio Bernini†

I. Dual Nature of Arbitration in Italy

In Italy arbitration must be viewed from a dual angle, corresponding to a deep rooted distinction between *arbitrato rituale* (procedural arbitration),¹ and *arbitrato irrituale* (free, or contractual, arbitration).² Even after the enactment of Law no. 28 of February 9, 1983, which amended the legal discipline of arbitration,³ this distinction remains although its theoretical and practical impact may be deemed greatly reduced.⁴

The essential features of *arbitraggio* (determination of the

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1. See CODICE DI PROCEDURA CIVILE of 1942 [C.P.C.] tit. VIII, arts. 806-831 (Italy).

2. See CODICE CIVILE OF 1942 [C.C.] art. 1332 *et seq.* (Italy).

3. See 8 Y.B. COM. ARB. 327 (1983). For an English translation of the pertinent articles of the C.P.C., see 9 Y.B. COM. ARB. 309 (1984).

4. See *infra* Section VI.

contractual object by a third person) and *perizia contrattuale* (technical expertise) should also be sketched, because sometimes the borderline between these two figures and *arbitrato irrituale* remains uncertain.⁵

II. *Arbitrato Rituale* and *Arbitrato Irrituale*

One is faced with *arbitrato rituale* (procedural arbitration) whenever the parties intend to request a jurisdictional type of activity from the arbitrator(s) that leads to an award (*lodo*), which may acquire the status of a judgment (*res judicata*) by means of a leave of enforcement (*exequatur*) granted by the local Magistrate Court (*Pretura*).

One is faced with *arbitrato irrituale* (contractual arbitration) whenever the parties intend to settle a dispute by means of a decision in the (private law) form of a contract. *Arbitrato irrituale* draws its strength from the contractual autonomy of the parties recognized by article 1322 of the Civil Code, whereby they "can freely determine the content of the contract within the limits imposed by the law. The parties can also make contracts that are not of the types that are particularly regulated, provided that they are aimed at the realization of interests worthy of protection according to the legal order."⁶

The arbitral award stemming from an *arbitrato irrituale* is binding upon the parties but has no executory force. Lacking voluntary performance, the party concerned must inevitably turn to the courts in order to secure enforcement. Recourse to the courts may take the form of ordinary proceedings or, under certain circumstances, a request for summary judgment (*Decreto Ingiuntivo*). In either case, however, only the final judgment rendered by the court will have the force of *res judicata*, thus allowing the winning party to carry it into effect by means of execution proceedings.

Differences have arisen among legal writers and court decisions concerning the legal nature of an *arbitrato irrituale*. These differences range from the most radical theories purporting that *arbitrato irrituale* is only to be found when the *animus tran-*

5.. See *infra* Section IV.

6. C.c. art. 1322.

sigendi (the intent to settle the dispute amicably) of the parties can be clearly identified (thus equating it with a friendly compromise), to the more hazy theory that through *arbitrato irrituale* the parties are merely deemed to give rise to a so called *negozio di accertamento*. This latter definition requires a clarification. The *accertamento* (ascertainment) is the process aimed at converting a situation of uncertainty into a situation of certainty. As a consequence, the *negozio di accertamento* is a contract by which the parties aim to solve a dispute without recourse to judicial proceedings. It differs from a compromise (or friendly settlement) in the strict sense because in the *negozio di accertamento* no *animus transigendi* is to be found, since the parties do not negotiate and settle conflicting claims, but merely set the terms and conditions under which the definition of the difference by a third party (arbitrator) is to be viewed as a binding clarification of the real intent of such parties.

Under the former theory (friendly settlement) in *arbitrato irrituale* the arbitrators should adjudge only *ex aequo et bono* (as *amiable compositeurs*),⁷ whereas the supporters of the latter

7. The expression "*amichevoli compositori*" (*amiables compositeurs*) was adopted by art. 20 of the former Civil Procedure Code of 1865. The Civil Procedure Code of 1942, presently in force, uses the expressions "*in equita*" (in equity) and "*valutazione equitativa* (equitable evaluation) in a number of articles, as does the Civil Code. The expression "*ex bono et aequo*," coming from the Roman law tradition, can be fully equated with the expression "*in equità*." The Roman law doctrine of *aequitas* mainly signified the adaptation of the rules of *jus strictum* to the needs of each individual case. This doctrine, of paramount importance throughout the development of the Roman law, probably found its earliest support in certain procedural *formulae* (typical of the Roman judicial system), called *in bonum et aequum conceptae*, which required the judge to set the amount of the condemnation *ex bono et aequo*, or in *quantum aequius melius iudici visum fuerit*, which meant taking into account all features of each individual case.

The expression "*amichevoli compositori*" is still frequently used in many arbitration agreements. Under the overwhelming weight of opinion, the phrase should be interpreted in the sense that the arbitrators are authorized to adjudge "*in equità*." See the numerous judicial precedents cited by VECCHIONE, *L'ARBITRATO NEL SISTEMA DEL PROCESSO CIVILE* 565 n.178 (1951). More recent authorities (doctrinal as well as judicial) have widely debated the notion of "*equità*." At the risk of oversimplification, one may be permitted to state that the old Roman definition, as sketched above, still holds. One conclusion, however, emerges clearly from the majority opinion. When adjudging in equity, arbitrators (as well as judges) should, in the first place, never depart from the logical canons presiding over legal reasoning. Concepts and basic value judgments should be borrowed from the domain of law. Equity, because of its greater breadth, may be viewed as a system encompassing the whole body of the legal norms. But it can never depart from the basic philosophy inspiring these norms by replacing the quintessence of legal principles with

theory (*negozio di accertamento*) maintain that even an award rendered according to legal rules can fall within the scope of an *arbitrato irrituale*.

Be that as it may, one should realistically stress that the impact of these divergent views on the legal nature of *arbitrato irrituale* is mainly confined to the dogmatic features of the definition, without entailing any substantial consequences upon the ambit in which the parties are permitted to make use of this type of arbitration. Today, there is no reasonable doubt that even in the framework of *arbitrato irrituale*, the parties may validly confer upon the arbitrators the power to decide under the law and not merely as *amiable compositeurs*.⁸

III. How to Distinguish Between *Arbitrato Rituale* and *Irrituale*

Both legal writers and court decisions consistently hold that, when faced with an arbitration clause or agreement, reference should be made to the will of the parties in order to ascertain whether they intended to give rise to an *arbitrato rituale* as opposed to an *arbitrato irrituale*. In the words of the Supreme Court of Cassation:

The distinction between *arbitrato rituale* and *irrituale* must be traced back to the intent of the parties. In the first case, such intent is aimed at attributing to the arbitrators a jurisdictional function in order to secure from them a decision susceptible to acquiring efficacy similar to that of a judicial decision. In the second case, the parties attribute to the arbitrator the function of giving birth to a *negozio di accertamento*, which must be referred exclusively to the intent of the parties.⁹

arbitrary and casual rules of conduct drawn from the arbitrator's individual notion of fairness and justice. Furthermore, while deciding in equity the arbitrators must always comply with principles of public policy (*ordine pubblico*).

8. Recent case law has admitted that even in *arbitrato irrituale*, the award may be rendered according to the rules of law, provided, however, that this is expressly requested by the parties. See Judgment of Mar. 9, 1982, Court of Cassation, No. 1519; Judgment of Dec. 3, 1981, Court of Cassation, No. 6414; Judgment of Nov. 17, 1981, Court of Cassation, No. 6099; Judgment of July 4, 1981, Court of Cassation, No. 4360. For a doctrinal opinion, see, e.g., Punzi, *La Riforma sull'arbitrato*, in *RIVISTA DI DIRITTO PROCESSUALE* 80 (1983).

9. Judgment of Oct. 1, 1969, Court of Cassation, No. 3150. See also Judgment of Jan. 8, 1980, Court of Cassation, No. 975; Judgment of June 14, 1979, Court of Cassation,

In most circumstances, however, tracing the parties' intent is more easily said than done. In construing such intent, paramount consideration has to be given to the wording of the arbitration agreement or clause. The scale will weigh in favour of *arbitrato rituale* whenever the parties make reference to an award having the efficacy of a judgment, or ask for the application of the rules on arbitration provided for by the Civil Procedure Code. On the other hand, recourse to *arbitrato irrituale* will be envisaged whenever one is faced with provisions whereby the parties undertake to abide by the award as an expression of their own contractual intent, or otherwise make it clear that they are not entrusting the arbitrator(s) with a jurisdictional (or jurisdiction-like) function, but rather are seeking a decision without "formalities." Reference to "amiable composition," or to an award to be decided in equity (*ex aequo et bono*), does not indicate as such a recourse to *arbitrato irrituale*, in view of the principle already mentioned that in *arbitrato irrituale* the arbitrators may also decide under the legal rules. Conversely, even in *arbitrato rituale* the arbitrator(s) may decide in equity if the parties so provide. This is why a "caveat" is put forward against past holdings giving too much weight to the finding that arbitrators were asked to decide as amiable compositeurs, thereby tipping the scale in favor of *arbitrato irrituale*.

Given the uncertainty of the matter, it is strongly suggested that when drafting the arbitration agreement or clause, the parties insert the sacramental word *rituale*, or *irrituale*, in order to identify beyond doubt the type of arbitration they have in mind.

IV. *Arbitraggio* and *Perizia Contrattuale*

In a case of *arbitraggio*, the appointed third party is called upon to make a determination by completing or filling in certain elements of a contract already executed by the parties. The main regulation of *arbitraggio* is set forth under Article 1349 of the Civil Code, drawing a distinction between a determination rendered as *bonus vir* as opposed to a determination rendered according to the *arbitrium merum* of the third appointed person.

In the first case, the power entrusted to the third appointed person must be exercised within the limits of equity, justice and reasonableness. In the second case, no limits are set on the discretionary judgment of the third appointed person. The difference has obvious repercussions upon the scope of the claims that the dissatisfied party may eventually bring before the courts. In a case of *arbitrium boni viri*, decisions may be challenged by alleging that they are "manifestly inequitable" or "erroneous," thus inevitably re-opening the merits of the case to judicial review. This possibility does not exist in *arbitrato*, be it *rituale* or *irrituale*.

In the case of *arbitrium merum*, claims can be based only on allegations of bad faith or fraud on the part of the third appointed person. Article 1349 of the Civil Code provides further that unless the parties specify their intent to the contrary, there is a rebuttable presumption that they intend the third appointed person to act as *bonus vir*.

The determination of a contractual element by a third person falls within the scope of the contract of *mandatum* (mandate). Consequently, the determination by the third appointed person, which in *arbitraggio* is called *arbitratore*, as opposed to *arbitro* (the person appointed in arbitration proceedings *stricto sensu*), has a purely contractual nature, and can never acquire the force of *res judicata* by means of a leave of enforcement.¹⁰

In practice, it is sometimes difficult to differentiate between *arbitrato irrituale* and *arbitraggio*, although in principle the two categories are different in their structural elements as well in their respective functions.

Another borderline category is that of the *perizia contrattuale*, which prevailing case law recognizes as an autonomous and distinct category as opposed to *arbitrato irrituale*. As in the case of the distinction between *arbitrato irrituale* and *arbitraggio*, the borderline between *perizia contrattuale* and *arbitrato irrituale* remains very uncertain, as demonstrated by the fact that the *perizia contrattuale* is often differently defined as *perizia tecnica*, *perizia arbitrale*, *perizia stragiudiziale*, *arbitraggio*

10. On the difference between *arbitrato irrituale* and *arbitraggio*, see Judgment of Mar. 20, 1972, Court of Cassation, No. 854; Judgment of Apr. 20, 1968, Court of Cassation, No. 1223.

tecnico, and *arbitrato tecnico*.¹¹

At the risk of oversimplification, it can be stated that the *perizia contrattuale* is a "species" within the "genus" of *arbitraggio*, in the sense that it consists of a determination by a third person and is characterized by its eminently technical content. In other words, there exists a *perizia contrattuale* whenever the parties entrust to one or more persons a technical assessment, finding, or project, relying only upon their specific competence, and therefore excluding any discretionary judgment or prudent appreciation on the part of the third appointed person(s). In particular, it has been held that the task of the third appointed person(s) may consist of, among other things, an inspection of accounts, works or sites, or an appraisal of the quality of goods delivered in order to ascertain whether they are in conformity with the quality contracted for.

In the latter case, consisting in reality of a valuation, it again becomes hard to differentiate between *perizia contrattuale* (or *tecnica*) and quality (or commodity) arbitration carried out by means of an *arbitrato irrituale*. However, since quality arbitration is generally carried out by means of *arbitrato irrituale*, the identification of *perizia contrattuale* as an independent *tertium genus* does not entail much practical consequence.

In order to shed light on a trilogy (*arbitrato irrituale*, *arbitraggio*, and *perizia contrattuale*) which may be likely to raise some perplexities in terms of separate classification, it may be helpful to compare notions prevailing in other systems, such as the Dutch *bindend advies*, the German *Schiedgutachten* and the English "valuation", which appear to be akin to the Italian *perizia contrattuale*. It is unquestionable that *bindend advies*, *Schiedgutachten*, and "valuation", as well as *perizia contrattuale*, rest upon a contractual basis, although they are aimed at solving factual rather than legal issues. As a consequence, if not complied with, they can be taken before the ordinary courts for enforcement and a marginal control on the merits of the decision can be exercised by the court itself.¹²

11. Judgment of June 14, 1979, Court of Cassation, No. 3348.

12. See Sanders, *National Reports, The Netherlands*, 6 Y.B. COM. ARB. 61 (1981); Glossner, *National Reports, Federal Republic of Germany*, 4 Y.B. COM. ARB. 62 (1979); Gill, *National Reports, United Kingdom*, 2 Y.B. COM. ARB. 93 (1977).

This is not true for *arbitrato irrituale*, where the merits of the decision are not re-opened by the court before which enforcement is sought. This is why, under Italian doctrine and case law, as among the above cited trilogy, only *arbitrato irrituale* is deemed to amount to arbitration in the proper sense.

V. The Legislative Reform

The reform was carried out through the enactment of Law No. 28 of February 9, 1983. The rules contained in the Law are few in number, but are of paramount importance to the goal of harmonizing Italian domestic legislation with the provisions of the multilateral conventions on arbitration to which Italy has adhered: in particular, the New York Convention of 1958¹³ and the Geneva Convention of 1961,¹⁴ which entered into force in Italy on May 1, 1969 and August 3, 1970, respectively.

A. Article One

Article one, by amending article 812(1) of the Code of Civil Procedure (C.P.C.), does justice to the cause of arbitration by abolishing an obsolete restriction whereby only Italian citizens could act as arbitrators.

Although the bar to foreign arbitrators applied only to *arbitrato rituale*, the amendment is to be praised as representing the dutiful acknowledgement of an elementary need of international arbitration which hardly deserves comment. Further, it represents an act of due abidance with the principle already adopted by the drafters of the Geneva Convention of 1961.

B. Article Two

By entirely rephrasing numbers five and six of article 823(2) of the C.P.C., article two of the Law sets the main principles characterizing the features of the new discipline of arbitration as summarized below.

13. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as New York Convention].

14. European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364 [hereinafter cited as Geneva Convention of 1961].

1. The award must contain an indication of the place where the arbitrators rendered their deliberations.¹⁵ The former text of the article in question merely referred to the date and place in which the award was subscribed by the arbitrators: the impact of the amendment is considerable for the reasons discussed below.

2. Under the new text of article 823(2)(6), the award must contain the signatures of all the arbitrators, together with an indication of the date on which each signature is affixed. This signature may be affixed in a place other than where the deliberation was rendered, even if outside Italy. If there is more than one arbitrator, the various signatures may be affixed in different places without the need for the arbitrators to reconvene in a personal conference. Throughout the Law a distinction is thus created between the deliberation (that is, decision) of the award, which is to be carried out in Italy by the arbitrators in personal conference, and the signing of the award, which can take place outside of Italy (each arbitrator being allowed to affix his signature individually).

3. Finally, a new paragraph is added to the text of article 823, reading as follows: "The award has binding force between the parties as of the date of its last signature."

C. *Article Three*

As a due corollary to the principles laid down in article two of the Law, article three of the Law further provides:

1. that the award must be issued in a number of originals equal to that of the parties;

2. that one original of the award must be delivered to each party within ten days of the last signature even by registered mail;

3. that the party intending to secure enforcement of the award within the territory of the Republic must, within one year from receipt of the award, deposit the original with the Magistrate Court (*Pretura*) of the place where the award is deliberated, together with the agreement to arbitrate, or the arbitration clause, or an equivalent document;

15. C.P.C. art. 823(2)(5).

4. that the time limit noted above is peremptory in nature.

D. Article Four

In accordance with the principles illustrated above, article four of the Law brings about the proper amendments to article 829(5) of the C.P.C., establishing the grounds of nullity for lack of formal requirements of the award. Under the former text of article 829 the award was null and void (*rectius*, legally inexistent) if the deposit of the award with the Magistrate Court, which was then compulsory, was not effected by the arbitrators within the unreasonably short time limit of five days from the date in which they signed the award. Under the new rules, the deposit is no longer obligatory, and the parties may, if they so wish, deposit the award with the Magistrate Court within one year from its receipt.

This amounts to a paramount novelty in the Italian arbitral milieu, as it sanctions the fall of a long lasting idol: the principle whereby in *arbitrato rituale*, the award was null and void if deposit with the Magistrate Court was omitted or delayed beyond five days from the date of signature, as sternly sanctioned by the former article 829(5) of the C.P.C. This was the logical consequence stemming from the jurisdictional (or procedural) nature of *arbitrato rituale*, whereby the award came into "legal existence" only after securing the *exequatur* from the Magistrate Court.

With the deposit of the award with the Magistrate Court thus becoming facultative, it will be up to the interested party to decide, in its prudent discretion, whether it wishes to keep the award at the merely obligatory stage, or secure the *exequatur* by depositing the award with the Magistrate Court within one year from its receipt. The new Law, therefore, recognizes the contractual nature of arbitration even within the framework of *arbitrato rituale*.

VI. The Impact of the Reform on the Legal Discipline of Arbitration in Italy.

Through the reform, the Italian legal discipline of arbitration has vastly improved. This reform, although *de minimis* in terms of the number of rules touched upon, was strategically

aimed at revising only those norms which still hampered the harmonious insertion of the New York and Geneva Conventions into the Italian legal system. In addition to this specific revision, a more general improvement of the legal framework of arbitration (domestic, as well as international) resulted, in the fulfillment of business needs which have overwhelmingly emerged in the last decades.

As pointed out above, purely contractual arbitration (i.e., *arbitrato irrituale*), though widely practiced, is unavoidably afflicted by an "inner weakness," because this type of arbitration only gives rise to awards which can never be granted the leave of enforcement (*exequatur*). This involves the necessity of recourse to the judiciary (though somewhat simplified by the availability of a summary procedure, the *decreto ingiuntivo*) should the award need enforcement against a recalcitrant losing party.

On the contrary, when choosing jurisdictional or procedural arbitration (*arbitrato rituale*), the parties were, in the past, always forced to go to the very end of the road. In other words, they could not avoid a sanction of nullity, which would have deprived the award of all legal effect, in the event that the arbitrators failed to deposit the award with the Magistrate Court (to secure the *exequatur*) within the unreasonably short term of five days. The parties were thus faced with an irreversible course of action which might have proven uselessly burdensome in many circumstances. This course was particularly burdensome where no interest existed to secure the *exequatur* in Italy by means of the deposit, as for example, whenever the losing party was prepared to honour the award spontaneously or enforcement was to take place against parties located, or owning assets, outside of Italy.

The overall unfairness of the dilemma thus imposed upon the potential utilizers of arbitration hardly needs further elucidation. The result was a slowing down in the progress of arbitration, in striking contrast with the practice prevailing in other countries. This was even more true in the field of international arbitration, where recourse to *arbitrato irrituale* still entailed problems of recognition and enforcement under the New York Convention. Recourse to *arbitrato rituale* was not to be suggested light-heartedly to a foreign party, in view of the stringent mandatory rules limiting (without the scope of the Geneva Con-

vention of 1961) the arbitral function to Italian citizens, and making the deposit of the award obligatory in Italy even if the enforcement was ultimately to take place in another country.¹⁶

It must be recognized that even prior to the reform, the Italian judiciary did its utmost to overcome the difficulties pointed out above. The Supreme Court of Cassation went so far as to explicitly hold that even *arbitrato irrituale* falls within the scope of the New York Convention.¹⁷ But a different principle may prevail in other countries. The *Oberlandesgericht* of Hamburg, for instance, held that the New York Convention is not applicable to *arbitrato irrituale*.¹⁸

After the reform a situation of full legal certainty prevails, since recourse to *arbitrato rituale* no longer entails the arbitrators' obligation to deposit the award with the Magistrate Court. The parties themselves are now granted the reasonable time of one year to decide whether they wish to secure the *exequatur* in Italy by means of deposit. It is expressly provided that before the lapse of this time limit, and afterwards, if the parties choose not to effect the deposit, the award shall maintain its binding force as if it were a contract, subject only to the ordinary periods of limitation (delays of prescription) as set forth by the law.

In the framework of the New York and Geneva Conventions, the elimination of the obligation to deposit the award in Italy is greatly welcomed. In the past, whenever an award stemming from *arbitrato rituale* was to be enforced abroad, the legal necessity of the prior deposit in Italy brought about the ghost of

16. See Bernini, *The Enforcement of Foreign Arbitral Awards by National Judiciaries: A Trial of the New York Convention's Ambit and Workability*, in *THE ART OF ARBITRATION* 51 (1982).

17. Judgment of Sept. 18, 1978, Court of Cassation, No. 4167, reprinted in 4 *Y.B. COM. ARB.* 296 (1979).

18. The judgment of the *Oberlandesgericht*, denying the application of the New York Convention to the Italian *arbitrato irrituale* was criticized by some writers. See Lalive, *Enforcing Awards*, in *INTERNATIONAL ARBITRATION — 60 YEARS OF ICC ARBITRATION* 326 (1984); Ferrante, *About the nature (national or a-national, contractual or jurisdictional) of ICC Awards under the New York Convention*, in *THE ART OF ARBITRATION* 129 (1982); Bernini, *The Enforcement of Foreign Arbitral Awards by National Judiciaries: A Trial of the New York Convention's Ambit and Workability*, in *THE ART OF ARBITRATION* 51 (1982). Other writers argue to the contrary, asserting that *arbitrato irrituale* should not fall within the scope of the New York Convention. Their views coincide with the holding of the German Court. See Sanders, in 4 *Y.B. COM. ARB.* 233 (1979); A. J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 48 (1981).

the "double *exequatur*," in flagrant contradiction with the provisions of the conventions. Now, the facultative nature of the deposit has smoothly inserted awards rendered in Italy into the system of recognition and enforcement of foreign arbitral awards devised by the drafters of these conventions.¹⁹

VII. The Impact of the Reform on International Commercial Arbitration

The new Law will greatly help the enforcement of bilateral and multilateral conventions on arbitration to which Italy has adhered. Whenever the arbitral venue is to be located within the territory of the Italian Republic, foreign parties as well as foreign arbitrators will feel at ease by facing rules and practices generally accepted at the international level.

No esoteric principles drawn from Italian domestic legislation will obstruct the inception or the regular progress of international arbitration. After the close of proceedings, the issuance of an award requires the presence of the arbitrators in Italy only at the stage of deliberation of the award, when the decision on the whole of the issues involved is actually formed, unanimously or by majority. Total informality is allowed insofar as the drafting of the award and the affixing of the signatures are concerned. As a matter of fact, after deliberation of the award, the arbitrators are not obligated to reconvene, since the whole process can take place by correspondence. The arbitrators exhaust their function by delivering the award to the parties, even by registered mail, within ten days of the date in which the signature is affixed on the document by the arbitrator last signing the award.

Under the new Law, therefore, not only are foreign citizens dutifully allowed to act as arbitrators, but their participation in proceedings carried out in Italy is made easier by limiting to the barest minimum the requirements which may burden the fulfilment of their duties. Also the arbitrators' responsibility is confined to the performance of their functions, and they need not worry any longer about the deposit of the award with the Magis-

19. With reference to the binding nature of the award as opposed to its definitiveness, see Bernini, *supra* note 16, at 56-61; Bernini, *Observations Regarding Recognition and Enforcement of Foreign Arbitral Awards in Italy*, in *COMMERCIAL ARBITRATION* 39, 54 (1974).

trate Court which, as pointed out above, was entrusted to the arbitrators under the former rule of article 825 of the C.P.C.

Foreign parties may now have access to arbitration in Italy without undue fear concerning the legal status of the ensuing award. Prior to the reform, a foreign party had to be keenly aware of the difference between *arbitrato rituale* and *arbitrato irrituale*; both types of arbitrations, if handled carelessly, could in fact raise problems at the level of international arbitration. Now, even if such difference still exists in principle, the "drama" is taken out of the choice. Furthermore, after the reform, if a foreign party elects to arbitrate in Italy, the arbitration agreement or clause will be conclusively construed, in light of the amended provisions of the C.P.C., as giving rise to *arbitrato rituale* — in other words, to arbitral proceedings in full compliance with the New York and Geneva Conventions. Should the parties still wish to refer to *arbitrato irrituale* (with the aim of securing an award binding only at the contractual level without any legal possibility for the award to be granted the *exequatur* in Italy), they will have to unequivocally state their intent whilst drafting the arbitration agreement or clause.

The practice under the new Law is still too young to allow considered conclusions on the role which is left to *arbitrato irrituale* after the amendments to the discipline of *arbitrato rituale*. It is expected that *arbitrato irrituale* will survive, at least up to a certain extent, whenever there exist situations in which the parties are reasonably confident of spontaneous abidance with the award. This may be the case, for example, when one is faced with arbitration in the framework of close-knit trade associations, where parties, as a general rule, do not fail to comply with arbitration awards. A contrary course of action would be considered repugnant to their status as members and would even call for sanction from the association as such. In Italy, as pointed out above, *arbitrato irrituale* is generally the rule with quality (or commodity) arbitrations carried out within the framework of the respective trade associations (for example, grain, leather, and silk).²⁰ Be that as it may, it should be emphasized that a foreign party is free to agree, under Italian law, to the type of arbitration which it deems is suited to its needs, and

20. R. DAVID, L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL 135-36 (1982).

may accede in Italy to any proceedings in pursuance thereof. The autonomy of the parties represents a sacrosanct principle which is given full recognition under the Italian law on arbitration.

In preparing the reform, special attention was paid to the regulations laid down in the New York and Geneva Conventions, as well as to the rules of the major bodies and associations administering international arbitration. The lawmaker was not insensitive to the needs of international commercial arbitration, and thus provided the means for the effective harmonization of the Italian domestic provisions with the principles and practices generally accepted in the international business community.

VIII. The Legal Doctrine and the New Features of *Arbitrato Rituale* After the Reform

No judicial decision has yet appeared defining the impact of the Law on the overall features of *arbitrato rituale*. The problem has been tackled by legal writers with divergent conclusions.²¹ The majority view, though expressed with some minor

21. Andrioli, *La novella sull'arbitrato*, in DIRITTO E GIURISPRUDENZA 249 (1983); Bernini, *La legge 9 Febbraio 1983, n. 28 e la modifica dell'arbitrato: prospettive internazionali*, in RASSEGNA DELL'ARBITRATO 193 (1984); Caroni, *L'arbitrato rituale e le nuove modifiche*, in TEMI ROMANA 298 (1983); Carpi, *Gli aspetti processuali della riforma dell'arbitrato*, in RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 47 (1984); Fazalari, *Primo incontro con una . . . lieta novella*, in RASSEGNA DELL'ARBITRATO, 1°-2°, at 1 (1983); Ferrante, *Legge 9 Febbraio 1983, n. 28 e prospettive di sviluppo dell'arbitrato rituale*, in RASSEGNA DELL'ARBITRATO 251 (1982); Franchi, *Brevissime osservazioni sulla legge 9 Febbraio 1983, n. 28, contenente modificazioni alla disciplina dell'arbitrato*, in RIVISTA DI DIRITTO CIVILE 219 (1983); Giardina, *La nuova disciplina dell'arbitrato in Italia*, in RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 449 (1983); Montesano, *Sugli effetti e sulle impugnazioni del lodo nella recente riforma dell'arbitrato rituale*, in FORO ITALIANO, 160 (1983); Nicoletti, *La legge 9 Febbraio 1983, n. 28, e la modifica dell'arbitrato*, in GIURISPRUDENZA ITALIANA 308 (1983); Nicotina, *LA DICHIARAZIONE DI ESECUTIVITÀ DEL LODO ARBITRALE* (1983); Nobili, *La formazione del lodo arbitrale e la legge 9 Febbraio 1983, n. 28* in RASSEGNA DELL'ARBITRATO, 1°-2°, at 21 (1983); Punzi, *La Riforma sull'arbitrato*, in RIVISTA DI DIRITTO PROCESSUALE, 7-8 (1983); Recchia, *Nuove prospettive sull'arbitrato commerciale in Italia*, in RASSEGNA DELL'ARBITRATO, 1°-2°, at 41 (1983); Ricci, *Legge 9 Febbraio 1983, n. 28: modificazioni alla disciplina dell'arbitrato*, in COMMENTO LEGGI CIVILI 733 (1983); Selvaggi, *Legge 9 Febbraio 1983, n. 28 e l'efficacia del lodo arbitrale*, in RASSEGNA DELL'ARBITRATO, 1°-2°, at 69 (1983); Sette, *La nuova normativa in tema di arbitrato*, in LEGALITÀ E GIUSTIZIA 72 (1983).

differences,²² is that *arbitrato rituale*, in full abidance with the principles laid down in the New York Convention, should be construed as consisting of two stages. The first stage exhausts itself at the moment the signing of the award by the arbitrators is completed, when the award thus acquires "binding force between the parties" under the proviso of article 823 of the C.P.C. as amended. The second stage then opens up, in which the parties, at their sole discretion, may secure enforcement of the award in Italy by depositing the award with the Magistrate Court (*Pretore*) within one year from receipt of the award itself. Should the parties elect not to effect the deposit within one year (a decision which is now facultative), the award will remain in force at the contractual level, in other words, merely binding between the parties.

Under a minority view,²³ the award already at the binding stage can be deemed to have acquired the status of *res judicata*, with the sole limitation that it cannot be used to start execution proceedings against the debtor with the aim of attaching its assets. This further result can be reached only after securing the *exequatur* from the Magistrate Court by means of the deposit as described above.

To fully understand the impact of this doctrinal "querelle" one should expound on the notion of *res judicata* as elaborated by the Italian doctrine, which draws a distinction between *res judicata* in a formal sense and in a substantial sense.²⁴ This dual notion cannot be fully equated with the theories prevailing in other countries; however, a comparative essay on this interesting subject matter would be redundant in view of the purposes of this Article.

It is respectfully submitted that the doctrinal dispute in progress in Italy, whilst susceptible of having a certain impact on the legal qualification of domestic awards, does not carry any substantial weight on the system of enforcement provided for

22. An exhaustive definition of the legal nature of the award stemming from *arbitrato rituale* was formulated by Montesano, *supra* note 21. Other writers also emphasize the contractual nature of the award in *arbitrato rituale*, by adopting theoretical arguments which sometimes diverge in the framework of each individual theory. See, e.g., Andrioli, Bernini, Carpi, Fazzalari, Ferrante, Giardina, Punzi, Recchia, *supra* note 21.

23. See Ricci and Selvaggi, *supra* note 21.

24. M. CAPPELLETTI & J. PERILLO, *CIVIL PROCEDURE IN ITALY*, 251 *et. seq.* (1965).

under the New York Convention. That system is based upon the notion of a "binding" award, as opposed to the system formerly prevailing under the Geneva Convention of 1927.²⁵ In conclusion, whether one adopts the majority or minority view as put forward by Italian writers, there is no doubt whatsoever that the ghost of "double *exequatur*" has finally faded away. This was just the result that the lawmaker wanted to achieve by enacting the new law.

IX. Arbitration Between State or Public Entities and Foreign-Owned Business Firms.

This topic is of paramount importance in the framework of contemporary practice of arbitration at the international level. It therefore deserves mention to complete the picture of the legal discipline of arbitration prevailing in Italy today.

No special legislative rules exist in Italy concerning participation of State or public entities (governments or government controlled bodies, to use an accepted terminology) in international arbitration. The problem, therefore, must be approached, as it is in other countries, in light of the principles prevailing at the international level with regard to a number of critical issues which are generally included within the scope of this complex subject matter. The doctrinal contributions and the precedents (arbitral as well as judicial) are overwhelming; the ad hoc treatment of this many-sided problem would, therefore, exceed the bounds of a study mainly devoted to domestic legislation.²⁶ As succinctly stated by article 10(1) of the Constitution, "The Italian legal order shall conform to the generally recognized rules of international law." The Constitution further provides that:

Italy renounces war as an instrument of offense against the liberty of other peoples and as a means of resolving international disputes; she will agree, on conditions of equality with other States, to the limitations of her sovereignty necessary to an organization for assuring peace and justice among nations; and will promote and favor international organizations constituted for this

25. Convention for the Enforcement of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302. See *supra* note 19.

26. For a recent survey of the problem see K. BÖCKSTIEGEL, *ARBITRATION AND STATE ENTERPRISE* (1984).

purpose.²⁷

This propensity to international law paves the ground for the recognition, as a part of the Italian legal order, of internationally accepted principles such as *pacta sunt servanda* and just compensation for expropriatory measures (the latter being expressly consecrated in article 42(3) of the same Constitution). Furthermore, as a due corollary to the above principles, the doctrine of sovereign immunity has been construed by Italian courts in a restrictive fashion.²⁸

In view of the above, one may soundly argue that Italy is wide open to the prevailing trend favoring international trade and cooperation, and that there is no reason to believe that the general legal principles applying to international commercial arbitration

do not apply when one of the parties is a State or another public entity, only in view of this particular circumstance. As far as the applicable international conventions are concerned, this does not seem to be open to doubt, especially in view of the broad wording, and even more the broad policy of the New York Convention. The practice of courts and of arbitral tribunals confirm this assumption.²⁹

In Italy, the Court of Cassation has manifested full awareness concerning the impact of the most advanced theories in the field of international trade and arbitration law. In a recent judgment,³⁰ which is possibly open to criticism as to the decision of the case at issue but is to be praised for its intrinsic cultural weight,³¹ the learned justices unequivocally underlined a number of facts and circumstances which can be summarized as follows:

1. a mercantile "societas" has not come into existence, composed of merchants and economic operators which have

27. COSTITUZIONE art. 11 (Italy).

28. M. CAPPELLETTI & J. PERRILLO, *CIVIL PROCEDURE IN ITALY* 96 (1965).

29. Luzzatto, *International Commercial Arbitration and the Municipal Law of States*, in 157 *RECEUIL DES COURS* 9, 87-88 (Academy of International Law 1977) (footnote omitted).

30. Judgment of Feb. 8, 1982, Court of Cassation, No. 722, reprinted in 9 *Y.B. COM. ARB.* 418 (1984).

31. Goldman, *Lex Mercatoria* in *FORUM INTERNATIONALE* 20 (1983); Giardina, *Arbitrato Transnazionale e Lex Mercatoria*, in *RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE* 754 (1982).

agreed and convened on the binding force of certain common principles and rules;

2. transnational or mercantile law (*lex mercatoria*) has acquired, as a body of precepts, full status of citizenship, and mercantile (or commercial) arbitration is to be placed within this framework of this body of precepts;

3. the ensemble of binding principles thus identified is independent of the municipal law of the States and: "its assertion takes place through the adhesion of the economic operators to the values of their environment (*milieu*);"³²

4. in the mercantile "*societas*," lacking organized structures and bodies institutionally expressing norms, the law is to be detected at the "diffused" state;

5. lacking sovereign powers, the mercantile "*societas*" is forced to resort to the enforcement power of sovereign systems, such as the national States.

It should also be recalled, with reference to international commercial arbitration, that in addition to the other multilateral conventions, Italy has also adhered to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.³³ The ensuing result is that no antagonism can be said to exist between the basic principles of the Italian legal order and recourse to arbitration as a means of settling disputes involving the State as well as other public entities. As a matter of record, Italian state controlled bodies have already participated in ICSID arbitrations.³⁴

In the light of this background, it appears safe to argue that the doctrines developed at the international level concerning arbitration with States and state controlled bodies are in tune with the philosophy already prevailing in Italy. No major problems can therefore be envisaged concerning issues such as implied waiver of sovereign immunity through the signing of an arbitration agreement, the abidance with the principles of *pacta sunt servanda* and "just compensation" for expropriatory mea-

32. Judgment of Feb. 8, 1982, Court of Cassation, No. 722, reprinted in 9 Y.B. COM. ARB. 418 (1984).

33. Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 160.

34. See the arbitral award in AGIP Company S.P.A. (Italy) v. Popular Republic of the Congo, 64 RIVISTA DI DIRITTO INTERNAZIONALE 863 (1981) (French original), 21 I.L.M. 726 (1982) (English translation), 8 Y.B. COM. ARB. 133 (1983) (English translation).

tures, or the acknowledgement that contracts between States and private law persons can be removed, at least to a certain extent, from domestic law and made subject to international rules.³⁵

35. The literature on this subject is vast. For a summary of the issues involved see the Award of Feb. 16, 1983, No. 3493, rendered under the Rules for the ICC Court of Arbitration, in *SPP (Middle East) Ltd. v. Arab Republic of Egypt* (First defendant) and the Egyptian General Company for Tourism and Hotels (Second defendant), in 9 Y.B. COM. ARB. 111 (1984).

The arbitrators, when dealing with the problem of the so called "denationalisation of the applicable law," expressed themselves as follows:

The theories which have emerged on the subject differ sometimes to a considerable extent. Some have gone so far as to invoke under certain circumstances full "denationalisation" of international contracts to the extent that they should only be governed by Rules and Principles drawn from International practice and Trade usages. Others do not discard the reference to domestic laws, provided, however, that even when placed within the legal framework of a domestic system, arbitrators are empowered to apply those principles of international law which ensure protection to the contractual rights of the private party vis-à-vis the sovereign state.

In the field of international investments the problem has been expressly dealt with in Article 42(1) of the ICSID Convention reading as follows:

The Tribunal shall decide a dispute in accordance with such rules of the law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party of the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Obviously the specific proviso of art. 42 only applies to investment agreements and disputes that may arise thereunder. However, we take the view that "in the world today, there is no reason why this solution should be limited to a particular category of state contracts. In other words, the rule formulated in article 42 can be considered as illustrative of a principle of wider application." [Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784, 786 (1981)].

9 Y.B. COM. ARB. 116 (1984).

For further general reference on the subject, see, e.g., Goldman, *supra* note 31; R. DAVID, *supra* note 20; Böckstiegel, *The Legal Rules Applicable in International Commercial Arbitration Involving States or State Controlled Enterprises*, in INTERNATIONAL ARBITRATION, — 60 YEARS OF ICC ARBITRATION 117 (1984); 1 W. L. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 36.01-.04 (1984); A. J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 29-40 (1981).