The Powers of Arbitrators in Continental Europe

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This paper summarizes the main powers of arbitrators in a number of European countries, and more precisely in Belgium, the Federal Republic of Germany, France, Greece, Italy, Sweden and Switzerland. It would have been the desire of the author to extend the study to other countries but the short time available has not made this possible.

As a general rule, the powers of the arbitrators are such as they may be exercised by, or conferred to, private persons. Although there are some exceptions, the arbitrators cannot exercise any of the powers which pertain to the public function of the administration of justice. This, of course, may hamper the proper and satisfactory conduct of arbitration proceedings.

The disadvantages of such a situation are, to a various degree, obviated by granting the arbitrators or the parties themselves the right to apply to the court seeking its assistance, or requesting the court to perform those functions which are precluded to the arbitrators.

The specific situations where, in the various countries, recourse to the courts may be made, will be considered concurrently with the discussion of the powers and duties of the arbitrators in the conduct of proceedings.

I Jurisdiction of the Arbitrators

In some countries, problems relating to the existence and validity of an arbitration agreement, or of an arbitration clause, are submitted to the arbitrators, provided of course that they have been properly appointed. This rule has been affirmed in Italy by the Court of Appeal of Genoa with judgement 15 February 1949, *Rota v Floré*[1], and then by the Court of Cassation with judgment 20 December 1952, n. 3251 *Levante v Commune Secci*[2], the decision of the arbitrators may subsequently be appealed to the competent Court of Appeal. Prior to the enactment of the new rules on arbitration the problem was not settled in France, where the Supreme Court, in a case of an arbitration clause, had denied that the arbitrators could decide upon the validity of the contract embodying such clause, whilst the Courts of Appeal had repeatedly affirmed that the arbitrators could decide the issue, subject to the control of the courts at the time of the order of enforcement[3]. The new rules on arbitration approved with Decret n. 8–354 of 14 May 1980, regulate the problem in two different provisions. Art. 26 states that if the jurisdiction of the arbitrators is disputed, the arbitrators have the power to decide upon the validity and limits of their appointment. Art. 18 states that in the case of one of the parties to an arbitration agreement commencing proceedings before the judicial authority, the court must declare its lack of competence when the arbitrators have not yet entered upon the reference unless the arbitration agreement is null on its face (manifestement nulle).

The power of the arbitrators to decide on a dispute relating to their jurisdiction is expressly affirmed in Belgian law by art. 1697 Code Judiciaire, according to which the arbitral tribunal has the power to decide on its competence and for this purpose, to consider the validity of the arbitration agreement.

Similarly, art. 9 of the Swiss Intercantonal Arbitration Convention[4] provides that if the validity of the arbitration agreement is disputed, the arbitral tribunal shall . . . determine its own jurisdiction either with an interim award, or with its final award.

II Conduct of Proceedings

1. *Rules applicable*

Unless otherwise agreed by the parties, the arbitrators are free to establish their own rules of procedure, provided that they give the parties a fair chance to present their case. Art. 1694 of the Belgian Code Judiciaire states that the arbitral tribunal must give to each of the parties a fair opportunity to present his case.

Paragraph 1034 of the Zivilprozessordnung (ZPO) of the Federal Republic of Germany provides that the parties must be heard and para. 1041 states that the award can be set aside, *inter alia,* when the parties were not granted a proper hearing.

Art. 20 of the French Decret no. 80-354 of 14 May 1980 states that, if the parties have not decided otherwise, the arbitrators are free to fix the conduct of the arbitration, but that the guiding principles of judicial proceedings set forth in articles 4-10, 1 and 13-21 of the Code of Civil Procedure shall apply. Among them there are those on the allocation of the burden of proof, the discovery of documents and the right of the parties to present their case.

Art. 886 of the Greek Code of Civil Procedure states that the parties have the same rights and obligations and that they must be called upon to appear at the hearing and to present their case either orally or in writing.

Art. 816 of the Italian Code of Civil Procedure states that the arbitrators may regulate the proceedings in the manner they think fit, but that in any event they shall assign time limits to the parties for the submission of pleadings and production of documents, as well as for the submission of replies.

Sec. 14 of the Swedish Arbitration Act states that the arbitrators shall give each party a sufficient opportunity to present his case orally or in writing.

Art. 24 of the Swiss Intercantonal Arbitration Convention states that the rules of procedure are determined by agreement of the parties or, failing such an agreement, by the arbitral tribunal; art. 25 then provides that the rules which have been selected shall observe the principle of equality of the parties, permit them to exercise their right to be heard, to examine the pleadings and documents, and to attend the hearings.

2. *Directions*

The arbitrators may order the parties to exchange pleadings and documents within specified time limits, and fix one or more hearings for the examination of witnesses and for oral arguments.

In Belgium art. 1695 Code Judiciaire states that save the case of legitimate impediment, if one party duly summoned does not appear or does not submit his pleadings within the time limit fixed for that purpose, the arbitral tribunal may proceed with the case and decide, unless the other party applied for an adjournment. In the federal Republic of Germany, in France, Greece, Italy, Sweden and Switzerland and the existance of these power ensues from the general rule whereby, unless otherwise agreed by the parties, the arbitrators may fix their own rules of procedure. They also impliedly result from the fact that the arbitrators, as it will be seen, must deliver their award within a specified time limit. In issuing their directions the arbitrators must however observe the fundamental rule previously discussed, viz. they must give the parties a fair chance to present their case.

3. *Examination of witnesses*

In all countries the examination of witnesses in arbitration proceedings is permissible. In some countries the arbitrators themselves are allowed to take, at their discretion, the initiative of examining witnesses: this rule has been upheld in Italy by the Court of Cassation[5], and appears to be implied in the provision of art. 1696 of the Belgian Code Judiciaire, according to which the arbitral tribunal may order the examination of witnesses, as well as in the provision of sec. 15 of the Swedish Arbitration Act.

Nowhere do the arbitrators have the power to compel the attendance of witnesses before them. In some countries, however, the arbitrators or the parties may seek the assistance of the judicial authority. This is so in Belgium, where art. 1696 Code Judiciaire states that the arbitral tribunal may authorise the parties or any of them to apply to the court in order that the witnesses may be examined by a judge appointed by the court; in the Federal Republic of Germany,

where there exists a similar provision; in Greece, where art. 888 of the Code of Civil Procedure states that upon request of the arbitrators the attendance of witnesses may be compelled by the judicial authority; in Sweden, where sec. 15 of the Arbitration Act states that the parties, or any of them may request the judicial authority, *inter alia,* to compel the attendance of witnesses before it if the arbitrators deem it convenient, in which event the examination takes place before such judicial authority and not before the arbitrators; in Switzerland, where art. 3 of the Intercantonal Arbitration Convention states that the high court of common civil jurisdiction of the canton in which the arbitration takes place shall be competent, *inter alia,* to assist in the enforcement of the measures requested by the arbitral tribunal for the examination of witnesses.

No judicial assistance is obtainable in Italy, where, therefore, the examination of witnesses is possible only if the witnesses voluntarily attend. The same conclusion seems to be valid also in France, for the cases of intervention of the judicial authority are specifically set forth in art. 17 of decret no. 80-354, and do not include the taking of evidence.

In most countries the arbitrators do not have the power to administer oaths. This is so in France (art. 21 of Decret no. 80-354), in the Federal Republic of Germany (paragraph 1035 Zivilprozessordnung), in Greece (art. 888 Code of Civil Procedure) Italy, and Sweden (sec. 15 Arbitration Act).

In Switzerland the administration of oaths by arbitrators is forbidden in some cantons (eg. Zurich: sec. 251 Code of Civil Procedure) although the witnesses must be admonished to say the truth and such an admonition may be prescribed for the validity of the deposition. Administration of oaths by arbitrators is expressly allowed in belgium, where art. 1696 Code Judiciare states that if a witness refuses to swear, the arbitrators may authorise the parties to apply to the judicial authority.

4. *Appointment of experts*

As a general rule, arbitrators may appoint experts either on their own initiative or following a request of the parties. Art. 1696 of the Belgian Code Judiciaire expressly

grants the arbitrators this power. Art. 21 of the French decret mp-80-354 provides generally that 'les actes d'instruction et les procés—verbaux' are made by all arbitrators if the arbitration agreement does not authorise them to entrust these acts to one of them. The actes d'instruction' which are called by the new French Code of Civil Procedure 'mesures d'instruction', include examination of witnesses and appointment of experts.

The power of the arbitrators to appoint experts is not disputed in Italy. Court of Appeal of Florence 25 January 1952, *Pineschi v Pineschi*[6], Court of Cassation 25 May 1960, no. 1353, *Spinetti v Tagliabue*[7].

In Sweden such power is expressly granted to arbitrators by sec. 15 of the Arbitration Act. The position in Switzerland is similar to that in France, for reference is made in art. 3 of the Intercantonal Arbitration Convention to 'mesures probatoires' which may be ordered by the arbitral tribunal, and these include expert evidence.

5. *Production of documents*

A reasonable degree of uniformity exists also with respect to the power of the arbitrators to order the production of documents. This power is expressly granted in Belgium by art. 1696 Code Judiciaire, in France, by art. 20 of decret no 80-354 and in Sweden by sec. 15 of the Arbitration Act. The arbitrators may order the production of documents also in Switzerland whilst they have no such power in Italy or, at least, their order is not enforceable.

6. *Conservative measures*

Nowhere do the arbitrators have the power to order conservative measures, such as attachments and arrests. Such power is expressly excluded in Italy by art. 818 of the Code of Civil Procedure from which it appears that conservative measures may be ordered by the judicial authority, even when arbitration proceedings are pending, in which event the court who granted the conservative measure is also competent for its validation.

III The Award

1. *Time for delivery of the award*

In most of the countries considered, there is a statutory time limit for the delivery of the award. The time limit is six months in Belgium (art. 1698 Code Judiciaire), France (art. 16 of decret no. 80-354), Sweden (sec. 18 of the Arbitration Act). The time limit is ninety days in Italy, (art. 820 Code of Civil Procedure). The time limit is counted from the acceptance of the appointment in Belgium, France and Italy and from the request of arbitration in Sweden. No Statutory time limit exists in Greece and in Switzerland.

Only in Italy the arbitrators are expressly given the power to extend the statutory time limit, for a maximum period of ninety days, when they decide to take the evidence of witnesses or to appointment experts.

In all the countries considered the time limit may either be fixed or extended by the parties.

2. *Interim awards*

Arbitrators may deliver interim awards in Belgium (art. 1699 Code Judiciaire), in Italy[8], in Sweden (sec. 19 Arbitration Act) and in Switzerland (art. 32 Intercantonal Arbitration Convention, in France the power to deliver interim awards was deemed to exist under the previous arbitration law on the basis of art. 1012 Code of Civil

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Procedure, wherein reference is made to the enforcement of awards even if of an interim nature (mêmes préparatoires)[9]. This provision is not reproduced in the decret no. 80-354; however art. 35 of the decret states that the award deprives the arbitrators of their jurisdiction over the dispute which is settled therewith, and this may imply that the arbitrators continue to have jurisdiction over other disputes which may have been submitted to them, but have not been settled by the award.

References

1. 1949 Foro Padano, I, 243.
2. 1952 Fore Italiano, Repertorio sub heading 'Arbitramento' no. 63–64.
3. Hean Robert, Arbitrage Civil et Commercial, IV Edition, Paris 1967, p.403.
4. The Swiss Intercantonal Arbitration Convention (Concordat Suisse sur l'Arbitrage) was adopted the 27 March 1969 and approved by the Federal Council the 27 August 1969. The following Cantons have adhered to the Concordat: Berne, Schwyz, Unterwald-Le-Haut, Unterwald-Le-Bas, Fribourg, Soleure, Bâle-Ville, Bâle-Campagne, Saint-Gall, Tessin, Vaud, Valais, Beuchâtel and Genève.
5. Judgment 13 May 1965, no. 916, 1965 Giustizia Civile, 1,2261.
6. 1953 Giurisprudenze Italiana, I, 2, 69.
7. 1961 Foro Italiano, 1, 99.
8. Court of Cassation 7 August 1950, no. 2419 ACNA v Ministero Difesa, 1951, Foro Italiano, I, 22; Court of Cassation 6 February 1970, no. 250, Comune di Bari v Compagnia Meridionale del Gas, 1971, Giustizia Civile, I, 360,
9. J. Renard, op. cit. p.262.

Fiction—Or Is It?

This discourse was 'found' recently after a Board meeting at Headquarters

It was a beautiful day, warm, a gentle wind, and with the promise of more to come. Today I was to assume Chairmanship of a Board for the first time, and for me a new Board at that. For years I had been a member of Boards, and had reached those heady heights of Chairing Working parties or even Committees, but today, today was the first time I could really give some direction.

The journey to Gloucester Place was pleasant, the people on the Underground generally good natured, no doubt they were holiday-makers or tourists, and it went quickly without hold up. Into No. 98, a friendly wave and cheery greeting from Liz, the receptionist, from Margaret, the typist, a few words of banter from a Vice President, up to the first floor and then at the door of the Council Chamber.

I hestitate; it is ajar. Straighten my tie, and run a finger around my collar. Yes, that's more comfortable; right, ready! Now careful, let's make a dignified entrance to a Committee of new faces all wondering what their new Chairman is like. First impressions and all that.

In we go with a broad smile, genial greeting, a ready hand for the handshakes and—nobody there! Oh, panic, have I got the date right? A quick rummage through the Agenda. Yes, the date and time is right, and the board in the Front Hall said it was the Council Chamber. Oh, well, it is probably right for the Chairman to arrive first anyway, and it is still three minutes before starting time.

However, the minutes go by and first arrives the member of staff who is servicing the Board. A few minutes chat elicits the information that of the seven members who form the Board one was on holiday, another had written in apologising and nothing from the remainder. We ought, therefore, to have five; enough for a quorum and get something done, making it all worthwhile. However, as the time moves on it is clear that the total participation is the Chairman and two members, one of whom is really co-opted to handle a special interest. The first decision to make is whether we can continue, for we do not really have a quorum.

A few moments discussion reinforces the point that we have, all three, travelled collectively a very long way and given up time in both travelling and the meeting which could have been very productively spent at our respective office desks. No argument then Chairman, let's do something useful. Come on secretary, let's get started.

Item 1 Apologies—far more absences than apologies.

Item 2 Composition of the Board—Seven names on the order paper with two unfilled vacancies. Have we any applications from the membership to sit on a Committee? Well, there are two but they do not express any interest in this particular Board. Never mind, they are volunteers, and on today's showing that would be helpful. Please write to them secretary and invite them to join us at the next meeting.

Item 3 Minutes of the previous meeting. Well, since only one member was present then and now he proposed that they should be signed. We do not really have a seconder.

Item 4 Matters Arising. With only one