A NEW PERSPECTIVE IN THE RELATIONSHIP BETWEEN ORDINARY JUDGES AND ARBITRATORS IN WESTERN EUROPE LEGISLATIONS

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I. INTRODUCTION: THE COURTS' ROLE IN THE ARBITRATION PROCESS

The modern history of internal and international arbitration law can be studied through the development of relations between arbitration and ordinary justice. The history of international arbitration can be seen as falling into four periods: early twentieth century industrialization, the war economy from 1936, post-war recovery and reconstruction, and finally the phase of economic expansion, which saw a remarkable growth in foreign relations.[1]

The relationship between the phenomenon of arbitration and features of the economy and of the political-institutional situation is highly evident at the international level of arbitration, and also at the internal level.

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1 Minoli, "L'Italia e l'arbitrato commerciale internazionale", *Atti of the Vlll National Convention of the Italian Association of Civil Procedure Scholars* (Pavia, 23-26 May 1968), Milán, 1971, pp. 31 y ss, especially 36 y ss.

Today I would say that a fifth period should be added, which can be recognized not only by the features of the economy —which cannot but have an influence on the most common way to resolve commercial disputes, apart from ordinary proceedings— but also by specific juridical aspects.

The New York convention of 10 June 1958, on the recognition and execution of foreign arbitration awards, was ratified by most countries of the world,[2] and has, partly in virtue of its jurisprudential applications, become the standard text on the subject and has a powerful influence on national legislation.

Amongst European Union members, the increasing number of forms of economic and political integration cannot, in my opinion, but lead to legislative change, which must be inspired by the potential harmonization of internal arbitration law too,[3] at least of the basic principles not in contrast with specific features of each single legal system. As regards those features, it should be noted that they can represent an impediment to the standardization of regimes, more so in the case of proceedings before the ordinary judicial authority,[4] than for proceedings before an arbitration court, which is freed from the concept of national sovereignty, in order to be subjected to the free decision of the parties undergoing arbitration.

It is generally held that in the course of the 20th century, the relationship between arbitration and ordinary justice evolved from an idea of competition, which created hostility, to one of tolerance, and is now moving towards collaboration.[5] People speak of the judge's complemen-

2 Also by the People's Republic of China, with the law of 2 December 1986, official accession on 22 January 1987 with two reservations, which came into force on 22 April 1987, so it can be said, as regards the number of people to whom it is applicable too, that the New York Convention is one of the sets of regulations with the widest international application.

3 Certainly much more so than the European Convention on International Commercial Arbitration, adopted in Geneva on 21 April 1961, implemented in Italy with law num. 418 of 10 May 1970, both for its limited range of application and for its scanty concrete incidence.

4 On the problems of the shaping of civil procedure law *cfr*. Kerameus, "Necessity of and Limitations to Procedural Unification", *Essays in Honour of Jack Jacob*.

5 Lalive Poudret,b Raymond, *Le droit de l'arbitrage interne et internationale en Suisse*, Lausanne, 1989, pp. 271 y ss.; Goldman, *L'action complementaire des juges et des arbitres en vue d'assurer l'efficacité de l'arbitrage commercial international in 60*

tary action, and this implies a trend towards equality, which has in recent years replaced the rivalry between the said judge and the arbitrators,[6] in recognition of the considerable social usefulness of the alternative means of resolving disputes.

The judge's role is no longer simply that of guardian of public order, especially in international arbitration, nor does he confine himself to enforcing the arbitration award.

The marked independence of arbitration and its efficacy mean, particularly with a view to collaboration, that the judge is not limited to guaranteeing the results ex post, by means of exequatur or the law of judicial appeal against an arbitration award, but also and most importantly helps to ensure that the resolution of the dispute is in conformity with the law, in the firm conviction that the protection offered by arbitration proceedings should be as efficacious and as effective as possible, not only concerning the implementation of the award, but also the course of the proceedings, the expression of the due process of law (the right of defence), the right to evidence, and the use of provisional, preventive and satisfactory remedies.

It may seem paradoxical to state that "The law of private arbitration is concerned with the relationship between the courts and the arbitral process".[7]

It is however significant that the regulation of this relationship, with a view to collaboration, has left its mark on major reforms, such as the law of international arbitration in Switzerland, contained in chapter 12 of the federal law on private international law of 18th December 1987, which came into effect on 1st January 1989, or the spanish law num. 36 of 5 December 1988, amended in 2003. But we shall return to that briefly later.

It should however be said that even during a period of history described as competitive-hostile, the needs of life proved stronger than legislative obstacles and expressed themselves through the parties' contractual autonomy. The "caractère fortuit dû à un accident de l'histoire" of

ans après, París, Régard sur l'avenir, 1984, pp. 271 y ss.; David, *L'arbitrage dans le commerce international*, París, 1982, pp. 74 y ss.; and in general the Atti of the Vl International Congress in Mexico.

6 *Ibidem*, p. 274.

7 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, Londres, 1989, p. 3.

the distinction between the various forms of arbitration,[8] the end shows itself in terms of the relationship between ordinary judge and arbitrators.

However, international arbitration has always had greater aspirations to independence, due to its obvious tendency to seek shelter from a single national legislative system. Both the French legislator of 1981 and the Swiss one mentioned, chose the liberal path through a mass of ad hoc regulations. But the growing proceduralisation and the urge to regulate and provide for every act, have led a discerning scholar of the subject to wonder, almost by way of provocation, whether pressures towards new forms of arbitration are not emerging, a sort of contractual international arbitration.

The current era, when the ordinary judge/arbitrator relationship is one of tolerance, has brought independence in internal arbitration too.

But there are signs that this "tolerant" spell is coming to an end: in Italy with law num. 28 in 1983, amended in 1994 and again in 2006 the jurisdictional award was set free from the Court's *exequatur.* It is no longer necessary for a judge to intervene for the arbitrators' decision to be born, alive and kicking. The decision is freed from the control of the Court, which assists, with state power, only to give the award a binding nature. When the award stands on its own two feet, there is much discussion as to what its "mandatory" efficacy is. But stand it does. The period of "probation" is over.

For its part, jurisprudence backed by considerable doctrine clearly confirms the independence of the arbitration clause.[9]

We have seen that this general relationship between arbitrator and judge is to be found in a number of recent laws of European countries, laws that show that the "period of tolerance" is over, which is also true of the recent Italian law on arbitration reform in 2006.

[8] See para 4.

[9] Cassation, section un., 18 May 1978, num. 2392, *Mass. Foro. it.*, 1978, c. 460; Cass., 28 October 1973, num. 2801, *idem* 1973, c. 787; Schizzerotto, *op. cit.,* p. 134; Zaccheo, "Contratto e clausola compromissoria", *Rivista Trimistale di Diritto e Procedura Civile*, 1987, pp. 423 y ss. and ivi citations.

II. Arbitration Reforms in Europe. The Italian Law

It might be interesting to cast an eye —even superficially— over the reforms that have taken place in various European countries. In Italy, the law concerning arbitration underwent major amendment with legislative decree no. 40, of 2 February 2006. As regards arbitrators and ordinary judges, it can be said that the liberty of the former was strengthened.

I shall cite three examples, as we cannot examine all the new regulations.

a) The new article 817 (Code of Civil Procedure) states that the arbitrators decide upon the validity and the content of the arbitration agreement and on the regular constitution of the board/panel of arbitrators. This disposition also applies even if the arbitrators' powers are challenged before the ordinary judge. As we can see, the principle of *Kompetenz-Kompetenz* is faithfully observed.
b) Article 819 ter (Code of Civil Procedure) then states that arbitrators' jurisdiction is not ousted by the same suit being pending before the judge, nor by there being a connection between the dispute that they must resolve and another suit pending before the ordinary judge. Here again the chains binding the arbitrators to the ordinary judge have been broken; previously the latter's jurisdiction overwhelmed that of the arbitrators.
c) Finally, article 824 bis (Code of Civil Procedure) states that the arbitrators'award has the same effects as the judgement pronounced by the ordinary judge, save for executive effectiveness, which is set in action only by the ordinary judge's *exequatur*.

There are then still moments when the judicial authority is of help in arbitration. When the panel is being constituted, if one party does not appoint an arbitrator or if agreement is not reached as to the third arbitrator; or when it is necessary to replace an arbitrator who is not fulfilling his role.

Collaboration is increased with the new article 816 ter (Code of Civil Procedure) and with the power of the Presiding Judge of the ordinary Court to order witnesses to appear before the arbitrators.

III. The Spanish Law

In Spain, law no. 36 of 5 December 1988 had already made radical changes in arbitration law as contained in the law of 22 December 1953, by simplifying it and granting the institution a considerable degree of independence.[10]

This independence is particularly evident in title II, article 5 and ss., which is devoted to the arbitration agreement, which had thus combined the special agreement and the general arbitration clause. Article 8 provided for this independence and explicitly separated the arbitration agreement from the grounds for annulment of contract, to which the agreement refers.

What is more interesting is article 43, which regulates the *auxilio jurisdiccional* procedure.

In fact article 27 states that the arbitrators might ask for the help of the trial judge of the place where the arbitration proceedings are taking place, in order that the latter might take evidence that they themselves cannot.

This trend is confirmed by law num. 60 of 23 December 2003, which came into effect on 27 March 2004.

Article 7 asserts the independence of the arbitration system, which no longer claims to be an alternative to the juridical trial, but offers itself as a separate, settled and independent system.[11]

Article 23 gives the arbitrators the power to issue provisional remedies.

Article 33 confirms judicial assistance in the taking of evidence.

The conclusion to be drawn from this —necessarily rapid and superficial— examination, is that in spanish law there are many cases of contact

[10] On the Spanish Law, Ramos Méndez, "La nuova disciplina dell'arbitraggio in Spagna", *Rivista Trimistale di Diritto e Procedura Civile*, 1990, pp. 241 y ss.; Iriarte, Ángel, "El reconocimiento y ejecucibn de laudos extranjeros segjn el artículo 60 del proyecto de ley de arbitraje", *Actualidad Civil*, 1988, pp. 1901 y ss; *id*., "Algunas notas críticas al proyecto de ley de arbitraje en sus disposiciones referentes al arbitraje commercial internacional", *Rev. Gen. Der.*, 1988; La China, "La nuova legge spagnola sull'arbitrato", *Rivista di Diitto Processuale*, 1990, pp. 486 y ss. previously: Ramos Méndez, *Arbitraje y proceso internacional*, Barcelona, 1987; Verdera y Tuells, "International commercial arbitration and the Spanish Court of Arbitration", *Journal of International Arbitration*, 1986, lll, p. 61.

[11] Cucarella Galliana, *El procedimiento arbitral*, law 60/2003, Bolonia, 23 December, 2004; Gonzalo Quiroga, *Orden pjblico y arbitraje internacional en el marco de la globalizacibn commercial*, Madrid, 2003.

between arbitrators and ordinary judge, with a view to collaboration rather than control, and that the most significant part of this is the assistance of the judge, at the arbitrator's request, in the probative inquiry.

The social usefulness of arbitration, as an efficacious alternative means of dispute resolution, is thus confirmed.

IV. The Swiss Law

On 1 January 1989, the Swiss federal law on international private law of 18 December 1987 came into effect. Section 12 is devoted to international arbitration, which thus has its own ad hoc regulations.

Section 12 is a skeleton-law, very synthetic and inspired by a liberal and innovative idea; because of the very specific nature of international arbitration, the law leaves ample space to the wishes of the parties.[12]

The liberal style which, as I said, inspires the new law, is particularly marked in matters of procedure. According to article 179, it is the parties themselves who control not only the appointment of the arbitrators but also their revocation or replacement. Only in the event of no agreement being reached does the ordinary judge assist. Article 180 states that a challenge to an arbitrator, in the cases provided for, is decided by the arbitration court itself; the judge can, however, intervene in disputed cases. The Court of arbitration is guarantor of its own impartiality, which increases its responsibility.

Article 183 grants the arbitration court the power to issue provisional remedies, unless otherwise agreed by the parties. This provision is profoundly innovative, not only as relates to article 26 of the Swiss concordat (which reserves provisional remedies to the ordinary judge), but also as concerns article 8, num. 5 of I.C.C. regulations, which allow the arbitrational *référé* only if the parties undergo it. In the same way, other laws allow arbitrators to issue provisional remedies (e.g. article 26 of Cnudci regulations), but provision for this is always required in the arbitration agreement. The same happens with article 1051 of the Dutch Civil Code. Here however, the power derives directly from the law, unless otherwise agreed. Obviously the arbitrators have no means of coercion; article 183, para 2, allows the arbitration court to request the collaboration of the competent

12 Lalive, *op. cit.*, nota 5, pp. 270 y ss.

judge, if the party against whom the ruling has been made does not submit to it of his own free will.

It should be emphasised that the power of initiative is given directly to the arbitrators, and not to the party in favour of whom the ruling has been made.

Article 184 allows a similar request for the judge's cooperation "for the execution of the probatory proceeding". The broad wording means collaboration can be used for any investigative need, although with the limitation —which is not really a limitation, but an obvious consequence— that the judge will apply domestic legislation.

As if the broad wording of articles 183 and 184 were not enough, Swiss law also contains an all-encompassing universally applied rule, which has aptly been called a "clause paraplui".[13] According to article 185, "further judicial collaboration" is permitted: it would be interesting to hear of the first cases of this in action. So far, it cannot be excluded that the law might also be used for the unification of a number of arbitration proceedings, or for third party intervention, although these are not expressly provided for.

V. The Austrian Law

One of the most recent laws on arbitration in Europe is the Austrian one, which came into force on 1 July 2006, largely inspired by the Uncitral *model law*,[14] which is applied to both internal and international arbitration.

13 There has already been wide and particularly competent elaboration of the doctrine: apart from the already mentioned commentary of Lalive, *idem*; Walter, "L'arbitrato internazionale in Svizzera", *Rivista Trimistale di Diritto e Procedura Civile*, 1989, pp. 517 y ss.; Reymond, "La nouvelle loi Suisse et le droit de l'arbitrage International. Réflexions de droit compare", *Rev. Arb.*, 1989, pp. 385 y ss.; Budin, *La nouvelle loi suisse sur l'arbitrage international*, 1988, pp. 51 y ss.; Bucher, *Le nouvel arbitrage international en Suisse*, Basel-Frankfurt, 1988 (1989 german edition); Samuel, *The New Swiss Private International Law Act*, *in International and Comparative Law Quarterly*, 1988, pp. 681 y ss.; Habscheid, "Il nuovo arbitrato internazionale in Svizzera", *Rivista di Diritto Processuale*, 1989, pp. 738 y ss.

14 See Aschauer, "Il nuovo diritto austriaco dell'arbitrato", *Riv. Arb*., 2006, pp. 237 y ss., and citations therein; Zeiler, *Schiedsverfahren,* Vienna-Graz, 2006; Kloiber, Rechberger, Oberhammer, Haller, *Das neue schiedsrecht*, Vienna, 2006.

Various rules stress arbitral independence and the relationship of collaboration with the state judge.

Thus article 584 affirms the principle of arbitral *Kompetenz-Kompetenz*, in the case of a petition made before the state judge.

Article 578 says that the state judges can interfere in the business of arbitration only in very explicit cases, in order to make arbitration more independent.

Article 602 provides for a considerable amount of help from the judge in taking evidence before the arbitrators.

Article 607 states that the award has the same effects between the parties as a state Court decision, and is enforceable without state *exequatur*.

The Court of arbitration can issue provisional remedies; however the competence of the state judge is not excluded, especially before the arbitrational Court has been constituted and when the injunction must be issued *ex parte.*

In essence, the Austrian law confirms the existing trend towards greater arbitral independence.

VI. Some other European Laws

The same can be said of the *Danish Arbitration Act 2005* (Law num. 553 of 24 June 2005), which is also based on the Uncitral *model law*: article 16 grants independence to arbitral jurisdiction; article 27 provides for the assistance of the ordinary judge in taking evidence and to request the Court of Justice of the European Communities to give a ruling thereon.[15]

In Belgium the law of 27 March 1985 on international arbitration acted on a proposal made by Marcel Storme in 1981, and confirmed the state judge's lack of jurisdiction to hear an application for the cancellation of an arbitrators' award which has no connection with Belgium.

Article 1696 of the judicial code provides for judicial assistance from the *Tribunal de premiPre instance*; article 1697 confirms the jurisdiction of the arbitral Court to decide on its own jurisdiction.

In Germany, the Arbitral Proceeding Reform Act came into force on 1 January 1998, and the subsequent amendments made necessary by the *ZPO* reform of 27 July 2001 and by the Law of Contracts Reform Act of 26 November 2001, were incorporated into the tenth book of *ZPO*.[16]

15 Hertz, *Danish Arbitration Act 2005*, Copenhagen, 2005.

16 Schwab-Walter, *Schiedgerichtsbarkeit*, 6a. ed., Munich, 2000.

Section 1041 allows the arbitral Court to issue interim measures of protection; section 1050 provides for Court assistance in taking evidence and other judicial acts; section 1055 states that "the arbitral award has the same effect between parties as a final and binding court judgement".

Moreover, according to sections 1062 and 1032 the *Oberlandsgericht* has jurisdiction in deciding on the admissibility of arbitration, before the arbitral Court has been constituted.

The English *Arbitration Act,* however, reserves considerable power over arbitration proceedings to the state Court.

Apart from the Court's power to remove an arbitrator in the cases provided for by article 24, article 32 grants the Court the Determination of preliminary point of jurisdiction, and its decision is considered subject to appeal (article 32, num. 6).

Article 42 provides for a good deal of assistance, in which "the Court may make an order requiring a party to comply with a peremptory order made by the Tribunal".

In France the 1981 reform (decrees num. 80-354 of 14 May 1980 and num. 81-500 of 12 May 1981, article 1442-1507 National Code of Civil Procedure (NCCP), sought to strike the right balance between the principle of arbitral freedom and that of safety/security.

Both the contents of the code and the trend in jurisprudence have defined the figure of the juge d'appui in order to make this latter effective in judicial assistance with arbitration (see articles 1444 and 1493 on difficulties arising in the constitution of the arbitral Court; article 1457 on the référé), without encroaching on the principle of *Kompetenz-Kompetenz* (article 1466).[17]

Recently the Comité français de l'arbitrage submitted a text for arbitration reform,[18] in which, while reaffirming arbitral freedom, they increased and improved the powers of the juge d'appui both as regards the administration of evidence (article 1465) and concerning conservative and protective measures.

17 Bolard, "Les principes directeurs du procès arbitral", *Riv. Arb.*, 2004, p. 511; Derains, "La practique de l'administration de la preuve dans l'arbitrage commercial international", *Riv. Arb*., 2004, pp. 781 y ss.; Kassis, *L'autonomie de l'arbitrage commercial international*, París, 2005.

18 Devolve, "Présentation du texte proposé par le comité français de l'arbitrage pour une réforme du droit de l'arbitrage", *Riv. Arb*., 2006, pp. 491 y ss.

VII. The Uncitral Model Law on Arbitration: Reform of Interim Measures of Protection

I have made several mentions of the Uncitral Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, which was the inspiration for various recent reforms in European countries.

It is extremely difficult to examine it properly with limited space.

For the purposes of this paper, it will suffice to emphasise:

Article 16 adopts the two important principles of *Kompetenz-Kompetenz* and of separability or autonomy of the arbitration clause. The arbitration tribunal may rule on its own jurisdiction.

There exists a trend in favour of limiting Court involvement in international commercial arbitration. This seems justified in view of the fact that the parties with an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in Court.[19]

Article 27 states that the arbitral Court, or a party with the arbitral Court's approval, may ask for assistance from the State Court of where the arbitration is taking place "in taking evidence". The wording in the Austrian and Danish national reforms is particularly broad, and covers both oral and documentary evidence. Witness the care devoted to judicial assistance required in the search for the truth.

Finally, it should be noted that the most recent session of Uncitral (19 June-7 July 2006) for amendments to the *model law* was about interim measures. In the interests of arbitrators' independence, wide powers for the arbitral Court were proposed, despite the reservations of some countries, such as France, Italy and Belgium.

VIII. Conclusions

To conclude, I hope that it has been demonstrated that the prospect of judicial collaboration is prevailing over that of judicial control, despite the differences proper to the various systems, and especially despite the different problems of internal arbitration with respect to international.

[19] See points 20 and 21 of the explanatory note by the Uncitral secretariat.

Moreover, the judge still has a dual role: on the one hand as guarantor of the effects of arbitration, on the other, in providing assistance, because of the arbitrators' lack of means of coercion appropriate to their judicial powers.[20]

An improved understanding of their reciprocal functions, and of their independence,[21] may strengthen that solid relationship, which is at the same time guarantee for the parties and of the efficiency of the instrument for dispute resolution. And it may also help to stop criticism being levelled at appeals against the award, thus thwarting the outcome of arbitration.

It is in this sense that the constant, discreet presence of the judge should be viewed; he can be called on not only and not so much by the parties, but by the arbitral college itself, especially where the law in force is least adequate, that is in the middle phase of arbitration, the probatory inquiry, and in the issuing of interim measures.

20 See note 113.

21 Carpi, "Libertà e vincoli nella recente evoluzione dell'arbitrato", *Quaderni della Rivista Trimistale di Diritto e Procedura Civile*, Milán, 2006, pp. 3 y ss.