Arbitrators on the Witness Stand! Comparative Approaches

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Can arbitrators be called to give testimony on the arbitral procedure before the court in charge of annulment or enforcement actions? Courts in England and Norway had to tackle this issue and have given a similar answer to this question: arbitrators can be asked to give testimony as to the elements of facts of the proceedings. Courts have however been careful not to interfere with the arbitrators' freedom of judgment and refused to hear them on the grounds of their decisions.
These decisions are commented below, and are put in perspective with other cases from the Paris Court of appeal and the practice of the Swiss Federal Tribunal.

England
The question of whether arbitrators can be called as witnesses in subsequent court proceedings is not subject to any provision of the English Arbitration Act 1996.
There is, in the words of Gordon Blanke, "a discrete body of English common law that sheds light on the issue" ("Whether Arbitrators Can be Called as Witnesses: the Position under English Law", (2008) 74 *Arbitration* 2, p. 114).
Duke of Buccleuch (1871-1872, L.R. 5 H.L. 418) constitutes the leading case in this area. In that case, the House of Lords held:

> "1. That the umpire was a competent witness, like any other person to prove matters material to the issues [i.e. determining the arbitrators' jurisdiction].
> 2. That questions might be properly put to him for the purpose of proving the proceedings before him, so as to arrive at what was the subject-matter of adjudication when the proceedings closed, and he was about to make his award.
> 3. That as regards the effect of the award no questions could properly be put to the umpire for the purpose of proving how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it."

The court observed that it did not know of any objection to the very possibility to hear arbitrators as witnesses. For the court, the reasons preventing judges from testifying and being cross-examined did not extend to arbitrators. The arbitrator could therefore be questioned as to what took place before him. The House however refused to hear arbitrators on the content of the award. It held:

> "As soon as the award is made it must speak for itself . . . but cannot be explained or

> varied or extended by extrinsic evidence of the intention of the person making it"

There are indeed good reasons for not allowing the arbitrators to give testimony on the content of the award, one of which being that the arbitrator is *functus officio* once the award is rendered. He can therefore not deviate from or modify the award in any way once it is signed (subject to a limited right to correct and interpret it).
Moreover, admitting testimony on the content of the award would jeopardize its finality:

> "The award taken by itself is something certain and fixed, and settles the rights of the parties; but if evidence be admitted of the intention and state of mind of the umpire when he made it, its certainty is destroyed, and its effect depends on his memory . . ."

This early case was confirmed in *Dare Valley Railway Co* in which the court ruled:

> "I can see no reason why the arbitrator should not be just as well called as a witness as anybody else, provided the points as to which he is called as a witness are proper points upon which to examine him" (L.R. Eq. 429 at 435).

English courts have later held that the testimony of arbitrators should only be heard in exceptional circumstances, when the facts of the case could not be ascertained by any other means:

> "In the view of the Court this is an exceptional case, and in this exceptional case the Court has arrived at the conclusion that the only way in which it can satisfactorily deal with the matter before it, is by having the assistance of the evidence of the arbitrators, who, being independent persons, can tell the Court what it is unable to ascertain from perusal of the affidavits on one side and the other – namely what are the essential facts of the case" (*Leisarch v Schalit* [1934] 2 K.B. 353).

This issue has again been dealt with by the House of Lords in a Scottish case in which the Court held that "in proceedings where the award itself was not in issue, it was not incompetent to call the arbiter as witness" (*Cooperative Wholesale Society Ltd v Ravenseft Properties Ltd* (No.2) (2002) S.C.L.R. 644).

Under English law, arbitrators are therefore not privileged from giving testimony and can be called to testify in setting-aside proceedings. Their testimony is nonetheless limited to the factual account of the arbitration procedure and it is therefore excluded that the arbitrators would have to explain the reasoning that led to the award or provide clarification on their state of mind at the time the award was made.

Norway
The Supreme Court of Norway rendered on 14 March 2008 a decision relating to the right of a party to call an arbitrator as a witness in proceedings brought for the annulment of an award (*Trygg-Hansa*, Bertrand, "The witnessing arbitrator," http://avocats.fr/space/edouard.bertrand; Langeland *et al*., "Supreme Court Rules on Arbitrators as Witnesses," ILO Newsletter, 10 July 2008).
The dispute related to a reinsurance agreement. The arbitral tribunal had made an award based on a clause which provided that the interpretation of the reinsurance contract would be made "from a

practical view and on the basis of equity rather than in a strict legal sense".The losing party applied to the Norwegian courts for an order vacating the award on the grounds that no party had asserted this interpretation provision in the arbitral proceedings, and the arbitral tribunal had therefore breached due process requirements in applying it without hearing the parties' arguments in this respect.

In order to establish that this provision had been asserted before the arbitral tribunal, the opposing party requested permission to call the three arbitrators as witnesses.The court of first instance authorized the testimony of the president of the arbitral tribunal. This decision was upheld on appeal and before the Supreme Court.

The Supreme Court noted that, while calling arbitrators as witnesses was in principle prohibited, this prohibition was not absolute. It is permissible under Norwegian law to request the testimony of an arbitrator as to what actually happened during the arbitral proceedings. However, the testimony of an arbitrator may not address his personal view of the case, nor can it be used to clarify or supplement the award.

France

French courts have adopted a different approach and considered that the arbitrators should enjoy a privilege similar to those of judges when it comes to being heard as witnesses. In a case dated 1992, a party challenging an arbitral award requested leave of the court to order the arbitrators to appear before the court. Such request was rejected on the following grounds:

> "The arbitrator . . . is not a third party in relation to the dispute which he has decided . . . On accepting his functions, he assumes the status of a judge, as a result of the contract appointing him. He therefore enjoys the same rights and is subject to the same duties as a judge, and it is not legally possible for a judge to be heard in person in proceedings to which he is not a party" (Paris Ct App., May 29, 1992, *Consorts Rouny*, Rev. arb. 1996.408).

The position of the court was expressed in general terms and has been approved by scholars (Dubarry, Loquin, 1992 RTD Com. 588; Fouchard: "Le statut de l'arbitre dans la jurisprudence française", Rev. arb. 1996.325).

Switzerland

In Switzerland, the practice concerning testimony of arbitrators further differs. Section 102 of the Federal Law on the Federal Tribunal sets a deadline to the arbitral tribunal to submit its comments on a motion to set its award aside. The arbitral tribunal's failure to submit any such comments bears no consequence.

The Swiss Federal Tribunal can therefore seek observations from the arbitrators on the way the arbitration was handled. This however constitutes a mere invitation made to the arbitrators who are not bound to appear before the tribunal and remains rare in practice.

Conclusion: A brief analysis shows that testimony by arbitrators in subsequent court proceedings is subject to various practices which differ from jurisdiction to jurisdiction. The extent of the rights and obligations of arbitrators arising in setting-aside or recognition and enforcement proceedings of an international award remains to be defined.

Edouard Bertrand notes that the admissibility of the arbitrators' testimony raises a number of questions: Is the arbitrator entitled to refuse to testify? Is the arbitrator entitled to receive compensation for the time spent on his testimony? In cases where there are several arbitrators, should the president alone testify? What would happen if the testimonies of the arbitrators differ with

one another? Could an arbitrator be subject to cross-examination? Should this issue be dealt with by institutional arbitration rules?

It seems there is at least one point of agreement: the scope of the arbitrators' testimony is limited and it can only bear on the factual account of the arbitral proceedings. On the contrary, arbitrators' testimony cannot involve the substance of the award, which cannot be altered in any way. In any case, one may wish that courts would only make arbitrators witnesses in exceptional circumstances, when the evidence cannot be secured by any other means. This could otherwise well become yet another guerrilla tactic in international arbitration.