Kluwer Arbitration Blog

Young Arbitrators Sweden (YAS) Arbitration Day 2023 Recap: Celebrating 20 Years of Innovation and the Advantages of the Odd "Loose Cannon"

Jake Lowther (SCC Arbitration Institute) and Madeleine Engzell (Magnusson) · Sunday, December 31st, 2023

On 23 November 2023, Young Arbitrators Sweden (YAS) held its fifteenth annual Arbitration Day (Sw. *skiljeförfarandedagen*) at the historic Central Post Office Building (Sw. *Posthuset*), the home of the Stockholm International Hearing Centre (SIHC). This year, YAS celebrates a milestone of 20 years since its founding and the larger venue reflects the ongoing success of the organization's flagship event.

This blog post provides some highlights from the subjects covered, including artificial intelligence (AI) and environmental, social and corporate governance (ESG) in arbitration, construction arbitration, Swedish sports arbitration, selection of arbitrators, clients' perspectives and the Arbitration Institute of the Stockholm Chamber of Commerce's (SCC) practice note on *prima facie* decisions on jurisdiction.

AI and Arbitration – The Swedish Perspective

Given Sweden's reputation as a modern and innovative jurisdiction, it will not unsurprising that the accelerating developments at the intersection of AI are also taking place here. The day's first panel discussion featured William Wigström (Trubl), Max Junestrand (Leya Law) and Sebastian Berglind (Vinge), moderated by Viktor Fransson (Trygg-Hansa).

Mere days after the launch of the 2024 Vis Moot AI Policy, attendees were treated to a real-time demonstration of AI's possibilities. By uploading the 31st Vis Moot Problem and related material, the potential of tools like the Leya platform became evident. Within moments, the AI tool was drafting summary emails to send to the partner and client identifying the main issues, as well as responding to questions on the governing law and procedural rules.

Although not quite "ready-to-send", AI is famously continuously improving. Moreover, given the anecdotal preference for editing text rather than starting from scratch, the results are often "ready-to-use". Indeed, Mr. Junestrand referred to results from a Harvard study demonstrating that lawyers using AI tools were 12% faster, and their work was assessed to be 40% better quality. Mr. Wigström demonstrated the Trubl platform, which is initially focused on consumer law to provide

the public with a usable tool, thus making law more accessible.

The panel agreed that AI is already contributing to the development of the law and, ultimately, because of AI, we will have "better law". AI was predicted to mainly be used for the "grunt work", rather than the rendering of decisions in a judicial sense. Moreover, (human) legal counsel were not considered to be in real danger and the panellists expected lawyers to be working for at least the next five to ten years. However, panellists agreed we are facing a "revolution" that will reshape the world, like the advent of electricity.

Construction Disputes in Arbitration

The panel on construction disputes was comprised of Kristina Ljungström (Norburg & Scherp), Daniel McKiernan (Gernandt & Danielsson), Sara Johnsson (Mannheimer Swartling), and Jacob Ericson (Westerberg & Partners), moderated by Erik Hedström (Mannheimer Swartling). Such disputes are increasingly complex and evidence-heavy, and the panel agreed on the importance of Procedural Order No 1 (PO1). A well-drafted PO1 is often a very usable tool to create an effective procedure. However, it is surprisingly often a "problem child", with barely any regulations. By requesting a detailed PO1, the parties can set their expectations for the tribunal.

The panelists held different views on the merits and weight of witness statements and oral evidence. The influence of counsel was often more discernible in written witness statements than oral evidence. However, in some cases, the length of time between the events in question and the hearing may increase the weight of the written witness statements. However, the conclusion was that construction disputes are not usually won with witness evidence. What matters is the documentation.

Also discussed were the merits of the increasingly common use of post-hearing briefs in Sweden as opposed to an oral closing statement only. In the case of new issues or questions arising during the hearing, post-hearing briefs may be useful, particularly considering the growing size of the cases. However, it was considered that these submissions should be limited. The arbitral tribunal also has a key role in limiting the unnecessary growth in the scope and size of submissions.

The Client's Perspective

Attendees were also treated to a panel of in-house counsel, with Johan Gustafsson (Trygg-Hansa), Emma Bliman Blomstervall (Infranord AB), Rebecka Krönmark (H2 Green Steel), and Isak Willborg (Bravida) moderated by Filippa Exelin (White & Case).

Ms. Exelin opened with reference to the Code of Conduct of the Swedish Bar Association, including that "*the principal responsibility of an Advocate is to show fidelity and loyalty towards the client" who is "obliged to represent and act in the client's best interests.*" Yet for the panelists, lawyers were often a "necessary evil". Panelists advised attendees to build the confidence of individuals on an in-house team early and become their trusted adviser.

Other advice was to bear in mind the extensive costs and limited certainty of outcome in a dispute, and the client's level of familiarity with arbitration. The importance of honest and accurate advice,

including on the probabilities of success, was also stressed. Often this advice is directly relayed to the client's board and anything to assist the in-house counsel's briefing on the merits of an arbitration was thus appreciated.

Additionally, lawyers should ask questions about the client's business, its goals, and how it generates revenue. Do not second guess the commercial decisions being made. Moreover, listen closely to the client's answers, as they may lead to more opportunities to assist, build the relationship, and therefore also generate more billable hours.

As for arbitration, the panelists considered the chief advantage to be the possibility to choose one's arbitrator, and to a lesser extent, the confidentiality of proceedings.

The SCC's *Prima Facie* Decisions on Jurisdiction

In April 2023, the SCC released its practice note *Prima Facie* Jurisdiction between 2013–2023. Author Adam Runestam (Hammarskiöld) considered the question of jurisdiction, which may be considered first on a *prima facie* basis by the SCC, secondly on a more thorough basis by the tribunal, and thirdly, in certain cases, by the courts. At the SCC, the question of jurisdiction typically arises in the event of a non-responding or objecting respondent. In such cases, the SCC Board will consider whether there is a "*manifest lack of jurisdiction*" before proceeding to administer the case.

Between 2013 and 2023, the SCC dismissed only 11 out of 269 cases due to a manifest lack of jurisdiction, reflecting the SCC's pro-arbitration approach and priority to ensure effective case administration and to reduce "*the risk of filibustering*". There is no risk to due process, as an arbitral tribunal, faced with an ongoing jurisdictional objection, will then conduct its own analysis of the question.

Choosing an Arbitrator

The final panel of Shirin Saif (Roschier), Mathilde Hofbauer (Hannes Snellman), Emma Munde (Wallin & Partners), and Tobias Hamrin (Delphi) moderated by Julia Nordgren (Hannes Snellman), discussed choosing an arbitrator.

One of the tips provided was to continue attending conferences to broaden one's professional network. Of course, the task of selecting candidates for appointment will depend on the nature of the dispute, e.g., international or domestic, large and or complex, the industry, and the role, e.g., co-arbitrator, chairperson, or sole arbitrator. However, it was worth bearing in mind the importance of this task, given that clients consider it to be the primary advantage of arbitration.

Although different lawyers have different routines, for some it was helpful to prepare a table of the candidates, with photos, ages, backgrounds, experience, and potential conflicts, including relationships to opposing counsel and the party-appointed arbitrators. Here there can be the opportunity to add the "wild card", a younger, up-and-coming candidate. Factors that might favour the "wild card" include the size of the dispute, how interesting it will be to a more senior arbitrator, and whether such a senior candidate would even have the time to take on the case. Bear in mind a

younger practitioner might also pay more attention to your case than a senior candidate.

One tantalizing possibility mentioned was the use of AI tools to help identify suitable arbitrator candidates. However, in the absence of that, the dream arbitrator should be engaged, read-up on the case and prepared. They should be clear and determined, daring to take a position and put their foot down, but without riding roughshod over the dispute. The dream arbitrator is certainly not an additional counterparty in the dispute. Here, cultural and legal backgrounds can also be decisive, but also focus areas, such as an M&A expert versus a generalist. In some, perhaps weaker cases, it may even be worth taking the risk to appoint the "loose cannon", whose decision makes waves in the arbitration community.

Sports and ESG Arbitration

The day also featured two individual presentations. First, Christine Stridsberg (Swedish Supreme Court), spoke on different sports dispute resolution models. There are surprisingly many models and bodies deciding on sports disputes. Cases include disputes where players breach a contract or whether a transfer has been fulfilled, doping cases including suspensions, and sponsors claiming damages and disputes concerning the competition rules. Finally, Ms. Stridsberg talked about how war can create sports disputes, with the example of FIFA and UEFA's ban of Russia from the World Cup qualifying playoff after Russia's invasion of Ukraine, which Russia appealed to the Court of Arbitration for Sport.

Second, Elsa Arbrandt (Cederquist) spoke on the increasingly important topic of ESG (previously discussed on the Blog) and arbitration. Although the subject of ESG raises many questions, Ms. Arbrandt focused on the European Commission's proposed Directive on corporate sustainability due diligence, which aims "*to foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies' operations and corporate governance*". The Directive is designed to affect the entire value chain and thus more extends beyond a mere M&A style due diligence process.

The talk confirmed that ESG-questions can and will be the subject of arbitration in growing number, particularly given the advantages of arbitration in terms of efficiency and expeditiousness. This means there will also be an increased demand for competent counsel and arbitrators to deal with ESG disputes. However, the pace of development is such that there is and will continue to be a dearth of good decisions on the subject to guide the way forward.

Conclusion

This year, YAS Arbitration Day fittingly coincided with the celebration of Thanksgiving. Given the feast of interest discussions and debates, there is plenty to be thankful for in Sweden and not least the packed schedule of events and programs planned for the next 12 months, including the launch of a "Second Chair" retreat for more senior YAS practitioners. The day's program demonstrates that after 20 years YAS has no plans to rest on its laurels.

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