CHAPTER 6

Stating the Obvious and Connectivity to Self*

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§6.01 TAKING THINGS FOR GRANTED VERSUS MANAGING REFLEXES IN A MIX OF LEGAL TRADITIONS

Numerous are the surprised, and even suspicious, reactions to an arbitrator asking about the meaning that counsel ascribe to a commonly used concept in international arbitration. Does the arbitrator not know what "cut-off date" means? Or understand that s(he) obviously can rule on the parties' claims in any order that s(he) feels is appropriate or convenient? How about the arbitrator's ability to "massage" the claim if it does not lend itself to a ruling or award as written? And everyone of course knows without asking that direct examination is a "no-no" beyond warm-up, and no one of course can call his or her own witnesses to be heard or cross-examined beyond the four corners of a witness statement.

Everyone "in the know" knows about these matters, and it is not worth spending time on them, let alone writing about them, in a procedural order.

Whatever the merit of these rather trivial examples, it is my view that too much is often taken for granted by too many at the beginning of an arbitration. And too little time is usually allocated at the outset to explore what exactly participants read into the quite standard documentation and the standard terminology, homegrown somewhere and then imported into new settings.

These thoughts I have entertained and also uttered many times before, so some of you may find them neither novel nor original. It is also true that matters that we have been passionate about for long risk appearing worn, repetitive and maybe even

* This chapter only addresses commercial arbitration, and makes scattered observations on arbitrating in Sweden with Swedes and others.

outdated. However, with the risk of yet again stating the obvious, it is not possible to look away from the fact that so much is taken for granted, especially in fora—like Sweden—with long arbitral traditions, developed arbitration practices and experienced arbitration counsel. Content is provided by a commonly shared vision, and gaps are filled in a uniform manner by counsel on both sides (if they are Swedish). In quoting an oft-quoted late American politician, it can be difficult for a non-Swedish arbitrator to know what it is that s(he) does not know or can take account of (*unknown unknowns*). And even where the arbitrator would be prone to conduct the proceedings in his/her household style, the efficiency of the arbitration is not enhanced when participants have partly differing models and structures in their heads that they act upon and see as the default position (failing directions to the contrary).[1]

Another question that could be asked more frequently by arbitrators is *do we really need all this in this case.* It is not an overstatement to say that proceedings are quite often unnecessarily inflated procedurally. Even where an arbitrator is confident enough not to fear looking inexperienced, questioning the necessity to use all proposed procedural tools could risk an appearance of disrespect or come out as belittling the importance of the case at hand. However, cumulation of procedural tools from different legal systems is, necessarily, bound to result in increased time and cost. The driver behind some cumulation may also be counsel's view of their ethical obligations under their own Bar Rules. While my observation is that Swedish arbitral counsel are well versed—and comfortable—in their deontological duties, which in my experience seldom appear to have clashed with how international arbitration is usually conducted, this may not be the case regarding all counsel coming from outside of Sweden. But in order for a discussion to be held, e.g., regarding the necessity for comprehensive oral testimony, everyone obviously needs to recognize that what may be a mandatory, or at least a best-practice, exercise before a national (foreign) court may not be a necessity in an international arbitration, e.g., in Stockholm. And even where it is recognized that procedural fairness in proceedings governed by Swedish *lex arbitri* may not require all the moves that counsel are used to seeing as compulsory, a mental barrier may exist on an individual level that can constitute a limitation to act outside of one's customary pattern or practice.[2]

So what can the aforesaid boil down to in practice, and how can arbitrators initiate a meaningful discussion that is conducive to leaner procedures without interfering with parties' right to use counsel of their choice? Maybe it would be useful to have an initial discussion (instead of interference in the examination of witnesses later on) to the effect that a Nordic-chaired arbitration would mostly be happy to have clearly worded documents speak for themselves (without witness mirroring, interpretation or corroboration), that we will assume that documents are not forged, and witnesses speak the truth (unless contra-indications exist) and that less text is often

1. I obviously recognize that (best) practices in international commercial arbitration are standardized in many respects, largely as a result of so-called soft law. This, however, does not in my view mean that there is one overriding uniform practice across continents and regions.
2. I have chosen generally not to give examples in order to maintain the discussion on an abstract, principled level.

more in terms of clarity. Swedish counsel, I will note, are mostly commendably good at brevity. And while also in Sweden, famous respondents' counsel have been known for their skills in muddying the waters, in Sweden, you can as a rule expect, and can as a tribunal indicate that you expect, symmetrical pleadings in the sense that arguments of opposing counsel are addressed head on (instead of offering an alternative narrative that never meets the other party's case).

Any such initial discussion between the arbitral tribunal and the parties is not only to set ground rules but also a tone. To increase predictability, it is also only fair for a tribunal to articulate up front its general expectations. While obviously a tribunal cannot and should not interfere with who does what in a party's counsel team, principled dialogue may at least plant a thought in the participants to (re)think roles in the team. Relative closeness to the context of the dispute and the legal tradition of the seat are of a nature to increase efficiency, as is obviously the best concrete knowledge in the team of the substantive question at hand. It is unfortunate when a chair needs to intervene in counsel's activities during oral testimony for time management or in order to shield a witness.

Also, the volume of documents and their character can, and often should, be discussed initially in an effort to coin the principle that, while some context obviously is necessary and useful, it is oftentimes sufficient to exhibit written evidence only for matters as and when those matters are in dispute instead of submitting, for all eventualities, everything related to the transaction underlying the dispute. It is not uncommon in Sweden that the aggregate number of exhibits does not exceed by much what we know as the bundle of core documents for the hearing. The tribunal could explain that it can be trusted to allow submission of documents later in the proceedings should a new point of disagreement arise that was not foreseen at the outset. While access to the opposing party's documents as a procedural right is seen as fundamental in certain procedural cultures, with ensuing obligations also for counsel, this of course is not true in others. And on a practical level, Nordic counsel would traditionally lean back if a moving party cannot substantiate its allegations instead of asking for document production to disprove a mere allegation. It is certainly the case that refraining from trying to disprove allegations that have not been corroborated by evidence or dispensing with proving what is fundamentally not in dispute (to provide context) are measures that keep the dispute centered on its core elements, not only saving time and money but also providing clarity to the adjudicators. While we all know the benefits of repetition in the learning process, counsel should assume that arbitrators pick up arguments after one or two presentations and that repetition also can have a numbing and distracting effect.

In order for a meaningful exchange to take place between all participants in the arbitration, it is of course important that we all fundamentally respect and accept other legal traditions as at least being adequate. In addition to a certain humility in all, taking the time to understand the rationale and functioning, as well as context, of the procedural measures proposed to be used will assist in identifying presumptions and tacit expectations and weed out cumulative procedural steps. We may all find novel ways to secure access to justice, due process and equal treatment; there is really no

acquired right to do things a certain way. From an arbitrator's perspective, the readiness of counsel to downshift and streamline procedures often reflects mastery of and confidence in the case.

All the above softly argues in favor of allowing conversational time at the outset of an arbitration in order to save time going forward. This may not only hopefully decrease the volume of materials on the record and time generally but also avoid constant interruptions due to disagreement down the road on matters that can arise from opposing legitimate expectations. There is of course no great wisdom in this observation but only common sense for an arbitrator to first endeavor to understand that (s)he may not share the parties' paradigm and then have the courage to ask for clarification. It will also require that counsel is sufficiently comparatively versed to take a healthy distance from his/her own jurisdictional habitat or, indeed, his/her own perception of what constitutes "best practices in international arbitration" to be able to explain what he/she deems applicable absent agreed or ordered regulation for the arbitration at hand. It is of course not efficient to have arbitrators manage procedural measures, the function and operation of which they do not understand.

Above, I have been advocating for more procedural discourse for clarity in the arbitral proceedings. In a somewhat different vein, I may advocate for less explanation of the basic elements of the law applicable to the merits, which sometimes occurs where legal argument is handled by quite junior lawyers (in a big team). Here, I would warn against underestimating arbitrators' general understanding of the law, even if foreign. Arbitrators' grasp of the law is not infrequently broad and holistic, especially in arbitrators of some seniority. It would be wise for a counsel team to have a senior lawyer well versed, e.g., in Company Law, Securities, or other Market Law, draft/plead necessary sections of submissions/pleadings. This would not only be useful to avoid potential irritation amongst the arbitrators but also to save time and money. Especially if arguments consist in explaining to foreign lawyers technicalities of local business laws, too junior a presentation will come out as—yes—technical and uninformed from the perspective of arbitrators who may have broad experience in cross-border transactions and will recognize patterns in regulation. While it is of course important not to overestimate an arbitrator's understanding of other trades, it is a fair assumption that he/she has a basic understanding of the functioning of the law generally. Reading an arbitrator's CV may help in the relevant respect. Seniority (partner) driven top-down structured cases tend to be more compelling than bottom-up structures.

It will have become obvious that I believe in communication and in an effort to actively listen and try to understand the expectations and tacit presumptions of all participants in an arbitration prior to agreeing or ordering the sequences thereof. This, of course, also presupposes the ability of the tribunal to identify and act upon a situation where prerequisites for consensual solutions do not exist. And I obviously do not need to qualify by further developing given limitations to openness and transparency that follow from the nature of adjudication.

§6.02 IS SWEDEN FORMALISTIC?

As surprising as many, especially among the Swedes, may find, I would like to answer in the affirmative. Swedish arbitration practitioners tend to be remarkably formalistic in certain respects relating to procedure, often drawing from civil law procedure in the courts. One area where I have also discerned a certain formalism is tribunal deliberations and the related procedure. While obviously deliberation for a final award requires some structure, my (anecdotal) perception is that Swedish arbitrators do not necessarily expect to discuss the case or the testimony as it proceeds but await a formal deliberation at the end. This is a phenomenon that I am still somewhat struggling to align with considering what we (Finns) have seen as a conversational tradition and a very open climate of debate in Sweden. A strong fear of prejudging the case may explain the restraint in discussing it as it proceeds.

§6.03 OUTSIDE PERCEPTIONS COUNT

I stated above that my impression is that Swedish counsel have good compasses when it comes to their deontological duties, something that I have noted also in other societies where ethical rules are largely principle-based and not casuistic. I also believe Sweden has and has had an open conversational climate regarding the duties of advocates. It is also obvious and attractive—to see the cordiality and collegiality that Swedish advocates pay to one another and the trust they place in each other's promises. I believe that the awareness among professionals that you are only as good as your word is even stronger in small societies such as Sweden (and Finland). And because Swedish counsel place trust in each other, they obviously—and rightly so—believe they are worthy of the same trust themselves. However, while Swedish advocates in Sweden are trusted to have friends plead before them or to be dissociated from close relationships high up the echelon of Swedish corporates when dealing with their cases, these situations may not look like arms' length relationships to parties or counsel from other cultures and legal traditions. While I, as a neighbor, am familiar with the respectful professional climate that exists inside the legal profession in Sweden—including the judiciary and academia—I believe that we Nordic lawyers need to pay particular attention to the reactions that may be prompted abroad from the fact that we are seen as closely knit and all know and liaise with one another professionally and otherwise. We should especially not be offended when particulars are asked about our relationships with one another, and we should be ready to engage in related discussions and disclosure (as far as our professional duties allow).

§6.04 SWEDISH PRACTITIONERS OF INTERNATIONAL ARBITRATION: ANECDOTAL

Having observed Swedish arbitration practitioners for long I find them generally very accomplished, well versed in law, including comparative law, and proficient language-wise (with the small caveat mentioned above that sometimes there exist assumptions

regarding the way forward shared among "those in the know" which are not always visible to those from outside of Sweden).[3] Swedes are also, as a rule, good at oral advocacy (something that we Finns admire, being less so). Whether prompted by peer pressure/observation or culture, I find that we can expect Swedish counsel to be sincere and truthful. And truth, even if farfetched, is compelling as we know. I already referenced above a skill of brevity, which often translates into clarity. And brevity and clarity often come out as confidence, also in the case at hand. As a Finn, I obviously also relate well to a capacity to lower the voice in order to be heard. And the Swedes will hopefully forgive a Finn for revealing that we often in Finland say that the Swedes, underneath their pleasant demeanor, are ultimately much tougher—and even more merciless—than us Finns. And I will not deny that I have made similar observations.

When I was a partner in a big law firm on both sides of the millennium (and on both sides of the sea that separates us), we thought that one of our biggest challenges was to be able to remain lead counsel in transactions involving our country(ies) and to be able to take the lead also in international arbitrations seated in the Nordic region. This was at the time when many international law firms were landing on our shores to establish themselves or to practice here. Though I cannot claim to have my finger on the pulse any longer, it seems to me that Sweden has done well and managed to foster and retain a corps of practitioners who are internationally competitive and deliver international products. I also think Finland has benefited from the Swedish arbitration world and ongoing cross-fertilization between practices in the two countries. And I hope there is more to come; even though the formal joint legislative projects between our countries are not as active as in the past, our joint traditions, also in arbitration, are well worth preserving and fostering.

3. Non-Nordic practitioners have been known to sometimes say that *arbitration in Sweden is very Swedish*.