CHAPTER 15

What Is the Difference Between a Judge and an Arbitrator?

Emilia Lundberg & Fanny Gleiss Wilborg

§15.01 INTRODUCTION

Is the role of an arbitrator the same as the role of a judge? The short answer is "no, not at all." Although both arbitrators and judges administer justice, being an arbitrator is not like being a judge in a court of law. Even though arbitrators are sometimes described to non-lawyers as "private judges," this description can be misleading because there are, in fact, big differences between the tasks carried out by arbitrators and those effectuated by judges. However, despite these differences, the questions put before a court in a civil matter and an arbitral tribunal are often the same, and therefore comparing the two makes sense.

Comparisons between arbitration and civil litigation are often undertaken from the perspective of the parties or parties' counsel. In this chapter, by contrast, we will explore the issue from the decisionmaker's perspective. Having experience as both state judges and arbitrators, we have observed the differences between the roles first-hand. Some of the differences are necessary, some are beneficial, but others may be unnecessary and arguably detrimental to the administration of justice. It is our hope that by highlighting varying perspectives, disparities, and alternatives, our reflections can catalyze improved arbitral processes.

§15.02 SWEDEN'S STATE COURT JUDGES: POWERS & DUTIES

As our readers likely know, an arbitration is rooted in an agreement, whereas a court proceeding is rooted in law. This fundamental difference is crucial, but in what ways? For the purposes of this chapter, we will focus solely on Swedish civil law cases where the parties were free to choose either a state court or an arbitral tribunal for their

dispute. We will begin by laying a foundation regarding the powers and duties of judges and arbitrators.

In Sweden, the judiciary's power is primarily derived from and governed by the Instrument of Government (*Sw. Regeringsformen*), which is the country's constitution, and the Code of Judicial Procedure (*Sw. Rättegångsbalken*). The Instrument of Government establishes the principle of the separation of powers, including the independence of the judiciary from other branches of government. It also sets out the general principles of justice, such as the right to a fair and public trial. The Code of Judicial Procedure details the rules that judges must follow in the administration of justice. It sets out rules for conducting trials, the presentation of evidence, the role of judges and other court officials, and the rights and obligations of parties involved in legal proceedings.

Judges in Sweden are appointed by the government, are almost never replaced, and perform their duties without risk of personal liability. Still, judges are required to follow relevant laws and regulations, as well as case law and legal precedent established by higher courts, and a judge's decision is subject to review by appellate courts. A Swedish judge in a court of general jurisdiction handles a wide array of cases, both criminal and civil cases, and while judges are experts at court procedure and managing a courtroom, it is unusual for a judge to specialize in any particular area of the law.

In Sweden, judges are required to take an oath of office before assuming their duties. The oath is set out in Chapter 5 section 7 of the Swedish Instrument of Government and reads as follows:

> I swear to exercise my office with loyalty, impartiality, and in accordance with the law and regulations, to the best of my ability and understanding. I shall protect the fundamental values and rights upon which the Swedish Constitution is founded, including the rule of law, human rights, democracy and gender equality.

The purpose of the oath is to emphasize the importance of upholding the law and the principles of justice and to ensure that judges remain independent and impartial in the performance of their duties.

§15.03 ARBITRATORS: POWERS & DUTIES

Disputes that are subject to arbitration clauses necessitate the existence of arbitral tribunals. Unlike a court, to which an application may be made at almost any time, an arbitral tribunal must be created before it can exercise any jurisdiction over the dispute and the parties.[1] Each arbitrator on a tribunal is a neutral third party appointed to resolve a dispute between two or more parties outside of court. In contrast to judges, most arbitrators are attorneys with limited experience managing a hearing or drafting an award, and they are often hand-picked because of their expertise in a certain legal

1. The absence of a standing body of arbitrators can be disadvantageous when there is a "pre-arbitral" phase that requires time-sensitive decisions. Most arbitral institutions have processes to accommodate emergency arbitrations, but even in these situations, an arbitrator must first be appointed.

field. Furthermore, under general contract law, an arbitrator can be held liable for damages if a party suffers a loss due to an arbitrator's negligence.[2]

The powers of an arbitrator acting under the Swedish Arbitration Act or under the rules of the SCC Arbitration Institute (Stockholm Chamber of Commerce (SCC)) vary depending on the specific arbitration agreement. Any power that an arbitrator has originates from the parties and their agreement.[3] The origin of powers differentiates an arbitrator's work from that of a sitting judge in ways that permeate every step of the proceedings.

One other key difference between the role of an arbitrator and that of a judge is the issue of compensation. Unlike a judge whose salary is paid by the state, an arbitral tribunal must secure payment of its fees and expenses from the parties. Even though an arbitral tribunal does not need to concern itself with payment issues when an arbitration is being administrated by an established institution, the arbitral tribunal still must keep track of events that may require a deposit of additional funds.

§15.04 CONFIDENCE AND INDEPENDENCE

[A] Confidence and Independence: Parties' Perspective

One of the most appealing features of arbitration compared to litigation is that parties get an opportunity to choose at least one arbitrator. Unsurprisingly, the parties choose arbitrators who instill confidence. When appointing an arbitrator, the party can ensure that the tribunal includes someone with relevant expertise and skills, or even with a known opinion on disputed legal issues. By contrast, if parties take the case to court instead, they cannot choose the judge. Pursuant to Chapter 11 section 3 of the Instrument of Government, only the court itself can decide how cases shall be allocated among the judges. Chapter 4 section 11a of the Code of Judicial Procedure further ensures that cases are distributed in a neutral way since it clarifies that the court must have rules in place that clarify how a case is assigned to a specific judge.

In theory, decisions should be the same regardless of which judge is assigned to a case. However, in practice, outcomes vary significantly. For example, in the court where one of us served, a hearing was held before three judges. At the end of the oral hearing, circumstances necessitated a re-hearing before a new set of judges. The new set of three judges conducted the re-hearing, deliberated, and reached a judgment. A few weeks later, one of the judges from the first hearing expressed that he had been surprised when reading the judgment since he had been almost certain that he and his two co-judges would have reached the opposite decision.

---

2. The SCC rules include a general exclusion of liability for arbitrators. By contrast, in an ad hoc arbitration it is common that the parties agree to exclude arbitrator liability.
3. An arbitrator's power is, of course, also governed by law. In fact, the powers, duties and jurisdiction of an arbitral tribunal arise from a complex mixture of the will of the parties, the law governing the arbitration agreement, the law of the place of arbitration, and the law of the place where recognition or enforcement of the award may be sought.

As noted above, being able to choose arbitrators is a powerful tool since different arbitrators also often reach entirely divergent conclusions. To illustrate anecdotally, in two arbitration cases, the tribunals drafted two versions of the award, reaching two completely opposite outcomes. In both instances, the arbitral tribunal deliberated and agreed on an outcome, of which one of the co-arbitrators was strongly in favor. The draft award was circulated among the arbitrators and, subsequently, another co-arbitrator requested continuing deliberations. After the continued deliberations, all the arbitrators came to different conclusions, and a new award was drafted, reaching the opposite judgment. The commonality between these two disputes is that they were both decided on law rather than evidence. Looking back at the two versions of the final awards, both versions in both disputes could be defended.

Nevertheless, although parties can choose their own arbitrator in an arbitration, in our experience, it is still difficult (if not impossible) to predict how the arbitrator will decide a specific case.[4] Every decision is made case-by-case based on the myriad circumstances unique to each dispute. An arbitrator (or a judge) is independent and free to change her mind on legal issues. But perhaps 100% certainty is not necessary; rather, if parties have confidence in the person deciding the case, it is easier to accept the award, whatever it may be.

[B] Confidence and Independence: Decisionmaker's Perspective

Having established that outcomes are influenced by who decides a case and that it is easier to feel confident in the decisionmaker (and the decision) if you have chosen her, we must consider how/if decisionmakers themselves are affected by whether they were selected by the parties.

According to the principle of the courts' independence expressed in Chapter 11 section 2 of the Swedish Instrument of Government, no authority, not even the Parliament, may decide how a court should act. This rule has been construed to cover not only the courts' independence from the outside world but also the individual judge's independence internally in relation to the other judges, including the head of court. In essence, when deciding a case, a judge in a civil court must not be controlled by colleagues, any of the parties, or the head of the court.

Naturally, parties expect that it should not matter if their dispute is tried in court or before an arbitral tribunal. Either way, both independence and confidence are expected from the judge/arbitrator. An arbitrator should not be connected to a party to the case at issue, so, in theory, the judges and arbitrators should be similarly positioned. But, again, the parties provide the arbitrator with billable hours and ultimately pay the arbitrator's fees. As such, one can imagine that a selected member of the arbitral tribunal considers the arguments brought forward by the party who

4. Even if you are allowed to ask a presumptive arbitrator questions before appointing her, the possible questions are limited and can only be focused on availability, conflict or experience in general terms.

appointed her more closely than a state court judge would have done. However, it must be pointed out that in our experience, this can in fact be a good thing.

As mentioned above, since payment is not a consideration among judges, the courts may be the recipients of higher perceived confidence. However, there are other factors that influence the work performed by the judges that do not adversely impact an arbitral tribunal. For example, there is an informal (and sometimes formal) hierarchy among state court judges that may influence how they work together. In Sweden, a constant evaluation process between judges is part of the career path. The judges often know each other and have worked together on many different cases. When reaching a decision, hierarchy and professional dynamics among the judges can have positive impacts but also undermine independence.

§15.05 TRANSPARENCY AND CONFIDENTIALITY

Transparency is a procedural concept that denotes openness, accessibility to information, clarity, and reliability of the judicial process. For example, one aspect of transparency is civil litigation being open to the public.

In arbitration, transparency more often refers to the parties involved. In general, arbitration is considered to be a private and confidential process where the parties can agree to keep the proceedings and the outcome confidential.[5] The hearings are not open to the public. However, there are situations where transparency in arbitration is important, such as in cases where the public has a significant interest in the outcome of the arbitration, or where transparency can contribute to the fairness and legitimacy of the arbitration process. Though transparency and confidentiality may appear to be two opposing concepts, that is not entirely true.

The rule of thumb in arbitration is transparency between the parties and the tribunal. The tribunal cannot communicate with only one party. All evidence, documents, etc., must be visible and open to all participants. These transparency safeguards ensure that both parties are treated equally. For example, arbitrators avoid even making a telephone call to only one party regarding administrative matters without informing the other party about the conversation. Thus, emails to everyone or phone/video conferences involving all participants are the preferred forms of contact in an arbitration.

In a Swedish state court, a judge can contact one party's counsel without the other party's counsel being made aware of it. There is no requirement for a party to be privy to all communication between the court and the other party. The possibility for the judge to communicate with only one side can sometimes be a strength and an advantage for the judge as compared to the arbitrator. Once in a dispute, the parties and counsel often lack confidence in one another, and even simple matters of a practical nature tend to cause lengthy disputes. Communicating with only one party allows the judge to expedite cases that would otherwise be mired in argument.

5. Although the idea of transparency was once unfamiliar in international arbitration, recent regulations have popularized the concept.

The access to procedural precedents in civil court matters is, of course, also an advantage for judges compared to arbitrators. However, this advantage should not be overstated. Since procedural lapses in arbitration can be grounds for a challenge of an arbitral award under the Swedish Arbitration Act, the Swedish courts have clarified how arbitrators must deal with procedural matters in an arbitration.[6]

§15.06 WRITTEN SUBMISSIONS

The conduct of an arbitration may require the arbitral tribunal to undertake a considerable amount of administrative work. In a court, there is an existing administrative structure to handle logistics, such as structuring evidence or making sure that submissions are filed on time. There are templates for all sorts of written communication and IT systems that are designed to facilitate the management of a case. An arbitrator might have some templates of her own, but certainly no comparably sophisticated system. Objectively, an arbitrator must perform far more administrative work than a judge.

One thing that creates administrative work is written submissions. Written submissions play a crucial role in litigation and arbitration, as they allow the parties to present their arguments, evidence, and legal authorities to the judges or arbitrators in a clear and concise manner. Despite the importance of the submissions, a judge might not be involved in that process at all. It is not unusual for a judge to get involved in a case just before the main hearing. The judges' comparatively late arrival to the dispute is a huge difference when compared to the arbitral process. In an arbitration, the arbitrators study the submissions closely when they have been filed.

A timetable for, *inter alia,* submissions is always established as a first step when an arbitration is referred to an arbitral tribunal. The timetable outlines the key milestones and deadlines for the various stages of the arbitration. It is surprising that a timetable is not always established initially in a civil court, as it is an important component of the process that helps to ensure that the proceeding is conducted efficiently, fairly, and in a timely manner.

§15.07 THE PRELIMINARY MEETING

One main difference between an arbitration and a civil proceeding is the preliminary meeting, which plays a key role in a civil proceeding, but only a subordinate role (if any) in an arbitration. At the preliminary meeting in a civil court, the judge aims to clarify the parties' positions and, almost more importantly, help the parties reach a settlement. The state court judge must, under law, try to settle the dispute. Since all participants are aware of this requirement, the preliminary meeting serves as an opportunity for the parties to settle. This rarely happens in an arbitration. For obvious

6. *See*, *e.g.*, NJA 2019 p. 171.

reasons, an arbitrator must not get involved in the parties' settlement negotiations unless the parties instruct an arbitrator to do so.[7]

Another thing that differs is how the judge approaches the case at the preliminary meeting. The judge is often very active and asks a lot of questions, many more than is usually the case for an arbitrator in an arbitration. Also, it is common that an arbitration lacks a preliminary meeting. If there is a preliminary meeting, it is often focused only on practical matters and not matters of substance. In our experience, almost all arbitration proceedings benefit from a preliminary meeting. Instead of increasing the time and money spent, our conclusion is that a preliminary meeting actually reduces the time and money spent on arbitration. A preliminary meeting makes the proceeding run more smoothly and reduces the instances of misunderstandings among the parties and tribunals.

Whilst arbitrators would benefit from following the courts' example and regularly summon parties to a preliminary meeting, the judges could learn from the arbitrators and provide the parties with an agenda before the meeting. An agenda should list the issues that the judge plans to go through at the meeting, but also a list of questions on the substance of the dispute if the judge plans to ask such questions at the meeting. Otherwise, counsel stands no chance of preparing properly, and the meeting may not be as productive as it could have been.

Regarding the judge's task to clarify the parties' positions on the merits at the preliminary meeting, it could be argued that the counsel's performance level is generally higher in an arbitration, and therefore, the need for clarification is reduced. But even if that is sometimes true, that explanation is too simple. A judge tends to openly dissect the dispute, compared to the arbitrator's more cautious approach. This divergence in method is also expected by the parties. They do not expect an arbitrator to ask a plethora of questions on substance or reveal ambiguities in the parties' written submissions. However, being a bit provocative, one could also argue that the arbitrator does not want to reveal anything to the parties beforehand and, therefore, stays silent up until the award is rendered. For arbitrators, being perceived as neutral is paramount. Neutrality is, of course, commendable, but if the arbitrator does not sort out the case, the arbitrator risks being unclear or missing key points in the future award.

§15.08 THE FINAL HEARING

[A] The Right to a Hearing

A party's right to a hearing is fundamental and laid out in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. For court cases, this right is included in the Code of Judicial Procedure: as a default rule, a case shall be

7. We must mention Article 26 under the DIS Rules stating: "Unless any party objects thereto, the arbitral tribunal shall at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues." From a Swedish perspective, it is an interesting but unfamiliar thought that the arbitrator should at every stage of the arbitration seek to encourage a settlement.

decided on after a final hearing (with some listed exceptions). In arbitration, a hearing shall be held if requested by a party or if the arbitral tribunal deems it appropriate. In the mainstream of commercial arbitration, it is unusual to conclude proceedings without at least a brief hearing.

Given this assumption, one might ask: are there any differences between a court case and an arbitration with respect to (i) whether a hearing shall be held; and (ii) how the hearing itself is conducted—and do any such differences have any effect on the decision-making?

[B] When Can a Case Be Judged Without a Hearing?

In an arbitration where party autonomy is crucial, and the arbitrator's power is derived from the parties and their agreement, an arbitral tribunal would seldom initiate a final hearing if the parties have agreed that the dispute can be tried without a hearing. By contrast, it is not certain that a state court would always accept the parties' instruction to decide a case without a hearing. If there is no consent between the parties, and one party requests a hearing, a hearing will most certainly be held—regardless of whether requested in an arbitration or a court proceeding.

Another area of comparison between courts and arbitral tribunals has to do with whether an online hearing should be regarded as a hearing (in the context of a party's right to a fair trial or hearing)[8]. In general, the state court has vast possibilities to conduct online hearings or to examine parties or witnesses remotely. This is also the default position in the court of appeal where, as provided for in the Code of Judicial Procedure, witnesses are not called again; instead, the video recordings from the district court are played. A hearing held remotely or in a "mixed mode" (remotely to some extent, for example, witness examinations held online) in a civil court case would probably be considered "a hearing."

Recently, the traditional divide between acceptance of online hearings in courts and rejection of online hearings in arbitration has shrunk significantly, and online hearings and remote examinations are now common in arbitration as well. Before the COVID-19 pandemic, the general opinion of the arbitration community was that remote witness examinations were of less value as evidence. Fortuitously, with a greater understanding of the digital tools, and perhaps with a glance at court proceedings, the common position today is that a hearing held remotely gives as good a basis for decision-making as a "live" hearing. Also, the prevailing view is that an online hearing would also be regarded as "a hearing" in an arbitration. In the case of the *Svea Court of Appeal*,[9] the court held that an online hearing against one party's will was not a procedural error that could give reason to set aside the final award.

8. Stefan Lindskog, Virtuella slutförhandlingar i skiljeförfaranden mot parts bestridande, SvJT 2021 s. 293, Lars Edlund, Om virtuell förhandling—en replik, SvJT 2021 s. 401, Kristoffer Löf, Remembrance of Things Past—a reply to Stefan Lindskog's argument that only a traditional hearing is a hearing in arbitration, SvJT 2021 s. 407.
9. Svea Court of Appeal, Final Award dated June 30, 2022 in case T 7158-20.

Having said that, both arbitral tribunals and courts prefer to conduct hearings remotely only with the consent of both parties. Some arbitral tribunals may be more reluctant than courts to proceed with an online hearing without the consent of both parties. But does this reluctance undermine the tribunals' ability to assess the case? We would say it does not.

[C] Are There Any Differences in the Conduct of the Hearing That Influence the Decision-Making?

The Code of Judicial Procedure has historically been built on certain principles, specifically the principle of oral proceedings and the principle of immediateness. Both principles have been modified to some extent, but, as a primary matter, following the principle of immediateness, a party must present its case and its evidence orally, and it should be done at the final hearing (and only there). The final award is based on what has been brought forward at the hearing. Opening statements and closing arguments should therefore be conducted in full orally before the judges of the court at the final hearing; examinations of witnesses are conducted by examination-in-chief, cross-examination, and a redirect examination. Witness statements rarely occur. Post-hearing briefs are not admitted, not even on costs.

This judicial focus on oral argument is extremely disparate from the arbitral approach, especially in international arbitration, where more emphasis is placed on written statements and expert opinions and where skeletal arguments and post-hearing briefs are often used. An arbitral tribunal relies more on written material, and the final hearings are generally shorter than in a court case.

These preferences reflect different traditions. A state court judge, who is trained to deal with the principle of oral proceedings and the principle of immediateness, is accustomed to listening to and absorbing extensive oral pleadings. An arbitrator, however, especially an international arbitrator, is trained to absorb lengthy written documents before and after the hearing. The expert opinions and witness statements must be thoroughly reviewed before the hearing, especially if there is only a cross-examination at the hearing—or no examination at all. Arbitrators are used to evaluating witness statements and considering post-hearing briefs in their decision-making process. Court judges are not.

But what are the ramifications of these two different preferences? For a party in a court case, acknowledgment of these preferences could inform a strategic approach when proposing that witness statements should be used or when the party wishes to refer to documents without comments. Using the methods of an arbitration in a court case might mean taking the risk that the court does not absorb the facts in the way that one hopes. However, a party who intends to bring oral evidence or argument into an arbitration should consider the risk that the arbitral tribunal has a shorter attention span than a court and therefore truncates the available time. In that scenario, the party's counsel should be prepared to summarize on the spot, which could affect the argument's overall efficacy.

[D] The Organization of the Hearings

There are several administrative arrangements that must be made before and during a hearing, arrangements that the state court judge does not take any part in. The task of organizing hearings (the responsibility of the sole- or the presiding arbitrator) should, however, not be underestimated, and this is a great difference between the roles of a judge and an arbitrator. A suitable hearing room must be provided, with break-out rooms for the representatives of the parties; there should be technical arrangements regarding recording and remotely held examinations, document sharing, etc., and practical arrangements regarding lunch and other facilities must be made. Many arbitrators arrange pre-hearing conferences to facilitate and arrange the hearings. Parties and their counsel should bear in mind that the organization of hearings is a workload put on the chair of the arbitral tribunal. The court judge has the luxury of focusing only on the dispute.

§15.09 THE FINAL AWARD AND THE MAKING OF THE FINAL AWARD

The Code of Judicial Procedure contains regulations regarding the court's final award, the formal criteria (it must be dated and undersigned, etc.) and requirements regarding the merits. There are also rules on the deliberation process. Additionally, there are working methods that have been developed over a long period of time for the decision-making process. There are certain traditions and habits at every court, as at any workplace. The judges know each other, and they work together on a daily basis. As noted above, some courts have developed templates and standard documents for drafting awards, and they have IT and operational support to facilitate the drafting.

In arbitration, there are certain rules regarding the formal criteria of the final award. But that's almost it. An arbitral tribunal is constituted for each dispute alone, and the arbitrators may not know each other. A tribunal may grapple with differences in culture and divergent approaches to the deliberation, the decision-making process, the drafting of the award, and the definition of best practices.

[A] The Rules and the Law

The Arbitration Act states that a final award should be made in writing and should be signed by the arbitrators and that an award shall also include the date of the award and the seat of the arbitration. The SCC Arbitration Rules contain the same requirements as the formalities of an award. The Arbitration Act also states that the dispute shall be ruled by the law or set of rules that the parties have agreed on. In a similar vein, the SCC Arbitration Rules state that the award shall state the reasons upon which the award is based (Article 42).

Neither the Arbitration Act nor the SCC Arbitration Rules contain further regulations on the content of the award. An award can however be set aside if, among other reasons, the arbitral tribunal has exceeded its mandate, and this is likely to have

affected the outcome of the case. There are no regulations regarding the deliberation process.

The Code of Judicial Procedure stipulates more detailed requirements regarding the content. Namely, the Code states that if there has been a final hearing, the judgment must be based on what has been put forward at the main hearing (Chapter 17 section 2, the principle of oral proceedings and the principle of immediateness). The Code (Chapter 17 section 7) also dictates that an award must contain: (i) the name of the court, (ii) the date and seat for rendering the award, (iii) the decision, (iv) the claims and objections of the parties and the facts that the claims and objections are based on, and (v) the basis for the award including the court's conclusions on the arguments and evidence presented in the case. The Code of Judicial Procedure also contains regulations regarding when and how the court shall deliberate after the final hearing.

The Code of Judicial Procedure (Chapter 16), the SCC Arbitration Rules, and the Arbitration Act all contain rules providing that a decision shall be made by a majority vote and rules regarding the next steps if a majority fails to be achieved. There is a specific order to the voting process in a court (voting question-by-question, and the youngest judge shall be the first to vote) that is not stipulated in arbitration. The rules when failing a majority also differ. The differences in voting requirements and processes can, of course, affect the outcome of the decision.

[B] The Decision-Making Process: The Deliberation

As alluded to above, in addition to the "hard" rules governing how courts deliberate, there are also "soft factors" that influence the process. Do these soft factors impact decision-making?

In our experience, the deliberations start as soon as the final hearing has ended, in litigation as well as in arbitration. At the very least, fundamental issues are then identified and discussed. In a Swedish court, the first opinion is usually given by the youngest judge. This matter is not regulated for arbitrations, and there is no obvious best practice. Furthermore, the chair in a Swedish court will usually not make the first draft of the judgment. In an arbitration, by contrast, the chair will usually make the first draft of the award.

The deliberation process is influenced by several circumstances. If the judges/arbitrators know each other well, the discussion can be constructive, open, and ego-free. However, an overly familiar dynamic could lead to a failure to thoroughly debate the issues at hand. Further, the deliberation process in a court, where the youngest lawyer speaks first, can result in issues being well explained since that person is at the beginning of his or her career and is motivated to do a good job. However, this can inhibit an open discussion if the young lawyer feels reluctant to be an opponent to an elder colleague who will evaluate him. Similar conditions can, of course, exist among arbitrators. Clearly, all those matters can affect the discussion, but it is not feasible to draw any general conclusions.

Some argue that arbitral tribunals are "freer" in their deliberation and decision-making processes and that arbitrators tend to let fairness and justness influence the

decisions to a larger extent than a state court would. It is also a common opinion that courts are more "formal" and that their attachment to a certain order for decision-making leads to square and close-minded judgments. While we understand these arguments, we posit that the differences in approach may be best explained by the fact that court judges are trained in a special working method and that arbitrators more often act as counsel. As such, arbitrators are used to other types of problem-solving and dispute resolution. The differences might not be material but are, of course, reflected in the judgment and in the wording of the final award.

[C] The Content of the Award

As cited above, the Code of Judicial Procedure (Chapter 17 section 7) contains detailed requirements regarding the content of the award and in which order the questions shall be considered. Does the lack of such regulation in arbitration make the decision-making process or the award rendered in an arbitration different from that of the courts?

In our experience, there are differences between awards rendered by a court and awards rendered in an arbitration. However, the dissimilarity is not wholly explained by the differences between the law and the rules but instead by the working methods and differences in experience between judges and arbitrators. The judges are trained in a method that originated from the Code of Judicial Procedure and developed over a long time. Young court lawyers have been supervised by senior colleagues and have been influenced by them regarding the structure, the order in which the issues are tried, and the language. This training is clearly evident in decisions and awards rendered by courts—the structure of the award and the reasoning are laid out in a certain way, regardless of which court or from what judge it is rendered. If a Swedish arbitral award is written by an arbitrator who serves or has served as a court judge, one can expect the award to be written in the same way as an award rendered by a court.

However, if the arbitral tribunal consists of arbitrators not trained in court, the award may be written in another manner. Arbitrators who mainly act as counsel are accustomed to writing in another way. Submissions from a party address the issues from other perspectives, use different word choices, and handle the presentation of evidence in an argumentative manner. This approach can be seen in any award written by an arbitrator with vast experience in acting as counsel. For example, the facts that the parties' claims are based on (*Sw. rättsfakta/grunderna*) are summarized in another way (if at all summarized), and the evaluation of evidence might not be highlighted as clearly as in an award rendered by a court. The structure and the order in which the issues are judged may also differ.

Since arbitrators tend to be more used to handling written documents, witness statements and opinions,[10] one might see differences in this respect in relying on and evaluating the written documents.

10. *See* above §15.08[C] regarding the hearing.

An award rendered in an arbitration also contains an introduction setting out a number of facts relating to the arbitration (identification of the arbitration agreement, a description of the dispute, specific procedural agreements of the parties and rulings of the arbitral tribunal). This section has no counterpart in a final award rendered by a court. An award rendered by an arbitral tribunal also contains the reasoning behind its determination of costs for arbitration. Obviously, there is no need for this section in an award rendered by a court.

[D] "To Write for the Court of Appeal"

In certain instances, a court will dismiss a claim on the very first ground, or alternatively, a court will grant a claim on the first ground, even though the claimant relied on several grounds. For example, hypothetically, if a claim is dismissed since it is time-barred, is it then necessary to try the questions of breach of the agreement, the right to damages, and the amount of such damages? A court would most definitely try the other issues, even if the outcome remained the same. The reason for this is the principle of the court hierarchy. If a district court does not try all the issues, and the court of appeal rules the opposite (the claim is not time-barred), the claims regarding breach of the agreement and damages would be dealt with only in one instance—in conflict with the court hierarchy. The case could then be remanded to the district court for a full trial.

When we sit as arbitrators, we most often try the dispute in full, even if the outcome is not affected. It probably has partly to do with our experiences as court judges, but it could also be due to our understanding of the assignment we have been given by the parties. A party must feel that it has been heard and understood, and its willingness to accept a dismissal is greater if the party sees that all grounds have been tried. In arbitration, one does not "write for the court of appeal" but may "write for the losing party." Needless to say, costs remain an important consideration. A losing party is likely unwilling to pay to read unnecessarily lengthy reasoning on all grounds for dismissal. The reasoning in those sections should be written carefully and concisely.

As it is not a requirement, arbitrators who have not served in a state court may rule differently and may not try the dispute in full if it is not necessary. This approach may be in deference to cost considerations and/or if the described scope of work and assignment is narrower.

[E] Challenge of the Award

If a district court judge writes an award with the court of appeal in mind, an arbitrator does so with the risk of challenging the award in mind. This risk affects award writing in a way that has no obvious counterpart in a court proceeding. Due to the risk of challenge, a final award in an arbitration contains considerations of procedural decisions and reasoning related to issues such as the tribunal's impartiality and giving each party an equal and reasonable opportunity to present its case.

In a court proceeding, the court is obliged to produce recitals, clarifying the parties' claims and positions. Recitals are not always produced and circulated in an arbitration. Therefore, the arbitral tribunal must verify the claims, positions, and the assignment from the parties before rendering the award. This additional step may also be reflected in the award in unique ways as compared to an award rendered by a court.

[F] The Party-Appointed Arbitrators

In this context, it is interesting to review the position of the party-nominated arbitrator. In a court dispute, the court has no connection at all with the parties and cannot be claimed to be under any influence. In an arbitration, each arbitrator, however, appointed, is under the duty to act impartially and to decide on the issues in a fair and unbiased manner. Nevertheless, questions commonly arise regarding whether an arbitrator tends to rule in favor of the party who has appointed them. In our opinion, while a preferential tendency may exist– it is not a tendency to rule in favor. Rather, it is an ambition to thoroughly analyze the facts and claims/objections brought forward by the party who has appointed you. A party-nominated arbitrator might ensure that the arbitral tribunal properly understands the case being advanced by that party. This ensures that all circumstances are considered and improves the quality of the judgment. In our opinion, a tendency for arbitrators to rule in favor of the party who has appointed them is exceedingly rare.

[G] Dissenting Opinions

Are dissenting opinions more common in court than in arbitration? To our knowledge, yes. In a court, dissenting opinions are not a big issue. Most of the court judges (handling a vast number of cases) have, on occasion, dealt with a dissenting opinion. The threshold is higher in an arbitration, and an arbitrator is generally more reluctant to hold a dissenting opinion. The arbitration community frequently discusses whether or not dissenting opinions should even be permitted. An arbitral tribunal renders an award that cannot be appealed, and this may be a reason why tribunals strive to decide unanimously.

§15.10 CONCLUSION

To summarize, there are differences between being a judge in a state court and an arbitrator, but the similarities are greater than the differences. The most striking difference is that a court judge has a substantial duty to try to settle the case, whereas an arbitrator must not get involved in the parties' settlement negotiations. What can we learn by reflecting upon this difference? Would it be prudent for a court judge to de-emphasize settlement? Would it be in the parties' best interest if the arbitrator initiated settlement negotiations?

In our view, judges have a tendency to be overeager to settle a dispute, an eagerness that can reduce the trust in the judge. A court judge who is responsive and respectful of the parties' willingness to settle can be particularly well-equipped to assist the parties in arriving at a settlement. Settlement benefits the parties by increasing efficacy and decreasing costs. Those benefits apply in arbitration as well, but most arbitrators hesitate to assist in any settlement negotiations. Alternative approaches do exist; however, for example, according to the rules of the German Arbitration Institute ("DIS"), the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or individual disputed issues (section 26, 2018 DIS Arbitration Rules). Also, Annex 3 of the DIS Arbitration Rules states, as a measure for increasing procedural efficiency, that the arbitrator can provide the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all the parties consent. As commercial arbitration becomes more time-consuming and more costly, perhaps arbitrators should have the duty to encourage an amicable settlement.

It is also interesting to, on the one hand, reflect upon the motivation of an international arbitral tribunal to shorten the oral phase of the proceedings as far as practicable and, on the other hand, the principles of oral proceedings and the principle of immediacy that influence the hearing in a state court. There is a tendency in Swedish arbitration to rely more and more on documents and witness statements. However, at the same time, witnesses are often called regardless of the witness statements and are subject to examination-in-chief, followed by cross-examination and re-direct-examination. Sometimes, the examination-in-chief is merely a "warm-up" and shorter than a standard examination-in-chief. In Swedish courts, there is a tendency to rely more on documents (but not yet on witness statements), and parties more often refer to documents quite briefly. It is not certain that this mixture of methods of undertaking the hearing and taking evidence is an effective compromise.

The purpose of this chapter was to encourage further reflection on how best practices are exercised in commercial court proceedings and arbitration. We hope that by highlighting varying perspectives, disparities, and alternatives, our reflections have sparked additional thoughts and discussion regarding the optimization of arbitral processes.