YCAP 2022 SPRING SYMPOSIUM: The Next Generation of Arbitrators and Pre-Conditions to Arbitration

Young Canadian Arbitration Practitioners (YCAP), in conjunction with ICC Young Arbitrators Forum (YAF) and Western Canada Commercial Arbitration Society (WCCAS), held its Spring Symposium on Monday, May 2, 2022. The event was held both in-person and virtually, and was hosted at Burnet, Duckworth & Palmer's Calgary office as well as by Arbitration Place for the hybrid portion. Over 40 arbitration professionals attended in-person and virtually from across Canada and beyond.

The Spring Symposium included an engaging discussion about the next generation of arbitrators followed by an interactive discussion of pre-conditions to arbitration and the jurisdiction of the tribunal. Opening remarks were delivered by Eric Bédard (Partner, Woods, Montréal) as Vice-President – Events and Education of YCAP, highlighting YCAP's important role in fostering relationships among young arbitration practitioners and promoting engagement in international arbitration.

The Next Generation of Arbitrators

The first discussion was moderated by Jocelyn Turnbull Wallace, (Associate, McCarthy Tétrault, Calgary), who kicked off the discussion by introducing the distinguished speakers: Joanne Luu (Partner, Burnet, Duckworth & Palmer, Calgary) and Myriam Seers (Partner, Savoie Laporte, Toronto). Joanne Luu and Myriam Seers have a wealth of arbitration experience and have been named to the Arbitration Place NextGen Arbitrators Roster. Among other accomplishments, Myriam Seers has been appointed arbitrator by the International Court of Arbitration of the ICC and serves as the Vice-Chair of the ICC Canada Arbitration Committee. Joanne Luu is a Fellow of the Chartered Institute of Arbitrators and has published book chapters in The Leading Practitioners' Guide to International Oil & Gas Arbitration and Arbitration World.

Joanne Luu and Myriam Seers shared valuable insights on several issues, including the challenges facing young arbitrators and what counsel should know about hiring younger arbitrators.

Chief among the topics discussed were the many advantages to hiring younger arbitrators. Joanne Luu cited cost-effectiveness as a significant advantage to appointing younger arbitrators. She further emphasized that younger arbitrators are well-positioned to offer flexibility in terms of scheduling, are often well-versed in a range of emerging topics such as blockchain and cryptocurrency disputes, and are likely to approach disputes with exceptional rigour and enthusiasm as they work to grow their practice. Myriam Seers noted that age diversity is another form of diversity, and just like other forms of diversity, drawing from a variety of backgrounds and experiences can improve decision-making. A key takeaway was that when considering potential commercial arbitrators, counsel should bear in mind that younger arbitrators may be open to flexible fee arrangements to accommodate the unique needs and budgets of commercial parties.

Another key topic of discussion was what steps aspiring arbitrators should take to get their first appointment. Myriam Seers encouraged those individuals to consult broadly on this topic, and to make it broadly known within their network that they are taking on appointments as arbitrator. She stressed that many senior practitioners remember the challenges of being a younger arbitrator and are eager to provide advice and referrals to skilled younger arbitrators. Finally, she encouraged young arbitrators to get involved with arbitral institutions and national committees, such as the ICC Canada Arbitration Committee.

Discussing the challenges of acting as a young arbitrator, Joanne Luu described situations where counsel are unfamiliar with the procedural aspects and requirements of arbitration. She noted that it can be a challenge to guide parties through the arbitration process in these circumstances. Myriam Seers agreed, adding that the types of cases that are conducive to a younger arbitrator being named are frequently cases that involved inexperienced arbitration counsel or even self-represented parties.

Pre-Conditions to Arbitration and the Jurisdiction of the Tribunal

The second component of the Spring Symposium involved a lively panel discussion moderated by Kylan Kidd (Associate, Burnet, Duckworth & Palmer, Calgary). The discussion centred on pre-conditions to arbitration in multi-step dispute resolution clauses – clauses that provide for specific steps, such as a period of negotiation, before arbitration proceedings can be commenced.

The knowledgeable panel consisted of Romeo Rojas (Rojas Arbitration, Calgary), Sandra Lange (Associate, McCarthy Tétrault, Calgary), and Chris Elrick (Associate, Fasken, Vancouver). Romeo Rojas began by describing the nature of multi-step dispute resolution clauses. Despite being commonly requested and utilized by commercial contracting parties, these clauses can result in disputes about the interaction between jurisdiction and admissibility when parties fail to carry out the mandated pre-arbitral steps before commencing an arbitration.

Romeo Rojas discussed both pros and cons to multi-step clauses. In terms of advantages, these clauses can provide for a cooling-off period and can allow parties to narrow the issues that may ultimately proceed to arbitration. In contrast, disadvantages can include time spent negotiating in circumstances where there is no realistic prospect of resolution outside the arbitration process. Additionally, parties should consider whether a negotiation period may prevent a party from seeking interim measures through the court or arbitration process. Finally, negotiation periods can give rise to issues with limitation periods as well as issues where additional claims and counterclaims are not dealt with in accordance with the multi-step clause.

Sandra Lange discussed potential disputes about the interaction between jurisdiction and admissibility where a party fails to carry out contractually mandated pre-arbitral steps. In doing so, she emphasized the importance of interpreting the arbitration agreement in the specific circumstances in each case. She framed the inquiry as (1) whether there are pre-arbitral steps; and (2) whether those pre-arbitral steps have been satisfied. She noted that there is no consensus on the issue of whether procedural preconditions to arbitrations are a matter of jurisdiction or admissibility, but many recent cases have framed such procedural requirements as an admissibility issue rather than an issue of arbitral jurisdiction, depending on the circumstances. Chris Elrick discussed potential means to address such issues. He described a range of potential options available to arbitrators depending on the specific circumstances of each case, including sending the parties away to exhaust applicable pre-arbitration steps.

In discussing the uncertainties that can arise with stepped dispute resolution clauses, the distinguished panelists offered practical advice on how to mitigate these uncertainties. The overarching view of the panel was that simplicity and clarity are key when drafting arbitration clauses. Commercial parties can – and often do – resolve disputes through negotiation or mediation without any need for those steps to be contractually mandated. A key takeaway was that counsel should discuss the complexities associated with stepped dispute resolution clauses with clients before incorporating such clauses. Where such clauses are utilized, counsel should draft clauses containing clear and objective language to minimize the potential for disputes about whether pre-arbitral steps have been fulfilled. For example, a specified time period for negotiation leaves little room for ambiguity and is preferable to vague language requiring parties to make "good faith" efforts to resolve disputes.

Eric Bédard concluded the substantive portion of the Symposium by presenting thoughtful concluding remarks on behalf of YCAP. A bustling cocktail reception followed, providing attendees with an opportunity to network with other arbitration professionals.

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