

Arbitrator Deliberations: The Impact of the Unconscious on Decision Making

By Edna Sussman

Most studies of arbitration are devoted to discussions about the applicable law or the various procedural rules. It seems far more important to try to analyze how and why arbitrators make up their minds.

—Robert Coulson, President
American Arbitration Association, 1990¹

Mr. Coulson's discussion of what was known at the time about psychological influences on arbitrator decision-making presaged the vigorous discussion of that subject which developed recently, some 25 years later. With the explosion of best-selling books on decision-making and the popularization of the psychological learning on the subject,² attention has turned in conference after conference to its applicability to arbitrators.

I. Introduction

The literature which studies the psychological phenomena that are the subject of this article refers to them as "biases." Because the word "bias" has such profound negative connotations in the field of arbitration, this article borrows the nomenclature used by Professor Guthrie, and refers to biases as "binders."³ The biases/blinders discussed here are those that are simply human nature. While constraints imposed by the law to increase certainty and predictability, such as specifying elements for causes of action and establishing burdens of proof, are effective to some degree, ultimately decisions are made by judges and arbitrators who are human beings. Their minds function anatomically just as do the minds of others. Legal training cannot and does not alter that fundamental reality.

The human brain has both an intuitive and a deliberative component, a fact long known and discussed as far back as Plato. It has been now scientifically proven. Recently Nobel Prize winner Daniel Kahneman popularized what he refers to as System 1, our fast, automatic, high capacity, low effort, and intuitive mode, and System 2, our slow, deliberate, limited capacity and high-effort mode.⁴ His modern research-based analysis essentially posits that we cannot function without both and that human decision making operates with System 1 making intuitive judgments which are sometimes modified by System 2's deliberative process.

This dichotomy mirrors the two traditional models with which judging has traditionally been viewed: the "formalist" model pursuant to which it is believed that judges apply the law to the facts in a logical and deliberative way, and the "realist" model pursuant to which it is believed that judges follow their intuition to reach

their judgment and later rationalize their judgment with reasoning.⁵

Scholars have explored System 1 and System 2 as it impacts legal decision-making. Research has shown that, as with all human beings, the intuitive reactions of System 1 play a significant role in judges' decision making.⁶ Given the similarity of the tasks, one must conclude that those same impacts affect arbitrators' decision making also.

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It is the unconscious intuitive processes, the binders, which are addressed in this article, with suggestions to foster a more robust deliberative overlay and improve the quality of decisions by arbitrators. In order to provide a context that reflects actual arbitrator decision making, the results of a survey of arbitrators I conducted in October of 2012 (the "2012 Arbitrators Survey") are reported. The survey, which was distributed both in the U.S. and to colleagues around the world, drew 401 responses.

II. Unconscious Binders

Guthrie, Wistrich and Rachlinski, in their leading works on the subject of judicial decision making, addressed the question of why it can be difficult to get a decision in a case right with studies conducted with hundreds of judges.⁷ They identified three sets of blinders that are the psychological influences that can lead to erroneous decisions: informational blinders, cognitive blinders and attitudinal blinders.⁸ These categorizations are useful and are adopted here.

A. Informational Binders—Inadmissible Evidence

The 2012 Arbitrators Survey confirmed that arbitrators usually allow evidence to be introduced that would not be admissible in court. Yet studies with judges have confirmed that inadmissible evidence, once heard, has a

profound impact on decisions made by judges. Judges who saw a clearly privileged document devastating to the plaintiff's case ruled for the defendant about twice as often as those who had not seen it. Only 75% of Judges who saw a recall notice, an inadmissible subsequent remedial measure, ruled for the defense while 100% of the judges who had not seen it did so.⁹ As one court put it, you can't "un-ring the bell."¹⁰ Given the unconscious, this result is not surprising.

What can arbitrators do to try to overcome this blinder? First and foremost, arbitrators should really do what they say they will do and consciously weigh the reliability of evidence they have promised to assess as to weight. Reviewing preliminary conclusions of the case to see if the outcome would differ if unreliable evidence admitted on that basis had not been introduced may serve as a check by showing the arbitrators the extent to which such pieces of evidence have influenced their thinking.

B. Cognitive Blinders—Heuristics

Cognitive blinders are patterns of deviation in judgment which can lead to perceptual distortion, inaccurate judgment, or illogical interpretation. They include heuristics, mental shortcuts that permit people to solve problems and make judgments and react to situations quickly and efficiently without constantly stopping to think about the next course of action.

1. Hindsight Blinder

Studies have shown that subsequent events color decision making. For example, in one study 57% of judges who were told a flood had taken place and no precautions had been taken found negligence while of the judges who were not told about the subsequent flood only 24% found negligence.¹¹ The very nature of arbitration calls for an evaluation of events after the fact, thus making the process particularly vulnerable to the hindsight blinder. Hindsight has been described as the most "troublesome problem for judges."¹²

The burden of proof may in some instances be of assistance in countering hindsight. If one isolates and lists the facts that were proven as of the relevant time frame from later biasing events and applies the burden of proof just to the earlier facts, it should assist in minimizing the impact of hindsight.

2. Anchoring Blinder

Numbers wholly irrelevant to a decision can have a dramatic influence on damages findings. In one study judges who heard a demand in a settlement conference of \$10 million awarded \$2.2 million while other judges given the same facts, but only told that there had been a request for a lot of money, awarded \$800,000.¹³ In another study judges who heard a motion to dismiss for failure to meet the court's \$75,000 jurisdictional minimum award-

ed a mean of \$880,000 while those who had not heard the motion awarded a mean of \$1,200,000 on the same facts.¹⁴ Study after study has proven that people will be anchored in their response by numbers that bear no relationship to the question they are asked to answer and will unconsciously use the number as a focal point and adjust from it.

The 2012 Arbitrators Survey results demonstrated that many arbitrators find that quantifying damages is often more difficult than determining liability. There is often no clear right answer, perhaps opening the door for the influence of the anchoring blinder. Awareness of the anchoring blinder while analyzing the damages evidence should assist arbitrators in avoiding falling prey to it.

3. Framing Blinder

In a fascinating experiment, the same two sets of adjectives in a different order were used to describe two people.

- Alan—intelligent-industrious-impulsive-critical-stubborn-envious
- Ben—envious-stubborn-critical-impulsive-industrious-intelligent

The study found that the initial adjective colored the subject's assessment of the later adjectives, leading the experiment subjects to view Alan as an able person with certain shortcomings and Ben as a problem whose abilities are hampered by his serious difficulties.¹⁵

Arbitrators are conscious of the fact that differences in the quality of the lawyering can affect their decision. Arbitrators do try to look beyond the manner and style of presentations to ascertain the true story. Again, recognition of the psychological influence that a well-crafted presentation can have should serve to heighten arbitrator's ability to overcome well-framed but faulty arguments.

4. Confirmation Blinder

In the context of arbitral decision-making the confirmation blinder is a particularly pernicious blinder. All arbitrators say that they keep "an open mind" until the close of the hearing, and surely arbitrators honestly believe that to be true. However, the psychological learning suggests this to be a blinder in and of itself. Waites and Lawrence concluded in their foremost article on the subject of psychology and arbitrators: "A typical arbitrator concludes the initial phase with a single dominant story in mind.... This would mean that for most arbitrators, the actual arbitration presentation is a process of filtering through the evidence to test their individual hypothesis about the case.... Arbitrators...will make every effort to fit their perceptions of the facts and circumstances of the case into the story they have formed.... "¹⁶

The 2012 Arbitrators Survey results support this conclusion. Eighty-eight percent of the arbitrators formed a preliminary view of the merits of the case at least 25% of the time after only receiving the prehearing submissions while 37% formed such views at least 50% of the time. Sixty percent of the arbitrators changed their view from their preliminary determination only 30% or less of the time.

Making sure that both “stories” are played for discussion throughout the proceeding would help to counter this blinder. Consider whether it would be useful to have the co-arbitrators sum up the evidence each day over lunch, but have them switch which side’s evidence they are marshaling from time to time to assure that all perspectives are being fully considered throughout the process.

III. Attitudinal Blinders—Background and Experience

In a striking study, researchers worked with staunch supporters of candidates in the 2004 U.S. presidential elections. Statements by the candidates were played for them. The study demonstrated that the reasoning part (System 2) remained completely inactive; any negative information about their candidate was simply filtered out automatically. The information simply never reached the deliberative part of the brain.¹⁷

Each arbitrator is uniquely influenced by his or her lifetime experiences and cultural influences and, like judges, is influenced by that background. Summing up these influences on arbitrators, Shari Diamond referenced the “affinity effect” which occurs when “decision-makers are influenced by their cultural backgrounds, their prior experiences, and their personal associations in formulating their understanding of and judging the behavior they must consider in reaching their decisions.” And the “expectancy effect” which causes “beliefs about the world and preconceived notions about the likely credibility of particular types of witnesses affect how decision-makers evaluate evidence” and causes decision-makers to be more “likely to reject information that is inconsistent with their beliefs and expectations.”¹⁸

IV. Improving Arbitrator Decision Making

The following suggestions are offered to arbitrators to assist in assuring the active engagement of the brain’s deliberative faculties and of unconscious blinders. Many arbitrators already take many of these steps, but there is value in developing a list:

- As you consider your decision and as you write the award consider the opposite side, assuming each to be correct.

- Identify why you may be wrong, what are the important pieces of evidence that go the other way and why are they not reliable or credible.
- Consult your co-arbitrators.
- Make sure you elicit the independent thinking of each member of the tribunal.
- Create a checklist with columns for each party and list the facts that favor that party.
- Create a checklist listing the legal claims and the elements of each claim and review how and whether they have been met looking at it from each side’s perspective.
- Reduce your reliance on memory; look for record citations for all of the important facts.
- Replay how you reached your conclusion and think about what evidence you rejected and why.
- Write down your reasoning, even if you are issuing a bare award.
- Estimate the odds of being wrong. If they are too high, rethink the case.
- Try to identify any significant evidence that would be inadmissible or is unreliable that may have influenced you and consider the outcome without that evidence.
- Focus on the blinders and consciously consider whether you may have been influenced by them.
- Don’t take too many cases. Make sure you leave enough time to think through all of the issues, both factual and legal.
- Leave time to sleep on the award so that you can go back and review it with fresh eyes.
- Consider what you would have needed to have presented to you to have come to the opposite conclusion and consider whether in fact such evidence was presented.
- Ask yourself what the losing party would feel that you overlooked in your analysis.
- Consider, if somebody were to have concluded the other way, how would he or she write it, where and how would he or she differ?

As arbitrators learn more about the blinders that affect their thinking, best practices to foster a more engaged deliberative process are likely to evolve to improve the quality of decision making.

V. Advice for Arbitration Counsel

Many sources offering guidance for effective advocacy have been published. Such tips as reading everything a prospective arbitrator has written, developing an appealing “story,” tailoring the manner and substance of the presentation to appeal to the specific arbitrators, are all practices which are, in fact, designed to understand and/or play to the unconscious of the arbitrator. To the wealth of literature on the subject, consider three additional thoughts for counsel addressed specifically to uncovering and addressing or deflecting unconscious blinders.

A. How Many Arbitrators

If the size of the case warrants it and the accuracy of the decision is paramount, consideration should be given to having three arbitrators rather than one. The suggestion in the literature that “group decision-makers might be better equipped to combat some of the more pernicious cognitive blinders like hindsight bias”¹⁹ should not be ignored. Groups can remember more facts than individuals and in deliberating with one another can share remembered information leading to a more accurate determination. Three arbitrators bring different backgrounds and experiences to the arbitration and bring to the deliberations “differing insights and views of the events and motivations” which “provide the group with a more complete perspective out of which a better quality decision can be made.”²⁰

B. Tapping the Social Scientists

Jury consultants have long been employed in the United States as a response to the importance of selection and messaging in winning cases. Users of jury consultants find them useful and their widespread use is a testament to their utility. The arbitration community is just beginning to explore the arbitrators’ psychology. In cases that warrant such an additional expenditure, utilizing the services of social scientists to assist with an understanding of the psychological dimensions may be useful. Waites and Lawrence concluded in the foremost article on the subject of psychology and arbitrators that, like the mock jury used to prepare for a jury trial, “the most useful scientific tool we have in preparing for an arbitration hearing is a mock arbitration panel study.”²¹ To facilitate parties’ ability to assess their case with input from arbitrators the American Arbitration Association recently launched an online arbitration case evaluation product called CaseXplorer Arbitration. Three or five arbitrators from AAA’s database of arbitrators selected by the users provide evaluative responses and feedback in a short time frame based on the materials provided on line.²²

C. Enhanced Arbitrator Interviews

There is general approval of interviews of prospective arbitrators in the arbitral community, with only 12%

of the respondents to the 2012 Queen Mary and White & Case International Arbitration Survey considering them inappropriate.²³ However, there was lack of agreement as to precisely what kinds of questions were permissible. Can we and should we now ask questions tailored to the dispute to flush out psychological drivers? While it might be argued that allowing an expansion of permissible questions would open a Pandora’s Box and counsel could easily find themselves, even inadvertently, contaminating the neutrality of the prospective arbitrator, in the wake of the new information about psychology and the arbitrator a more detailed discussion of what should or should not be permissible in an arbitrator interview may be inevitable.

VI. Conclusion

While legal principles and precedents impose some rigor on decision making by arbitrators, subconscious factors that inevitably influence every person also play a significant role. With the current recognition of the psychological influences, a reexamination of best practices in arbitrator decision making is in order and concrete debiasing steps that arbitrators can take to improve the quality of their decisions should be considered.

Endnotes

1. Robert Coulson, *The Decisionmaking Process*, 45 ARBITRATION JOURNAL 37, 37 (1990).
2. Recent best-selling books on the subject include: DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); RICHARD H. THALER/ CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009).
3. See Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 420 (2007) (hereafter “Misjudging”).
4. Kahneman, *supra* note 2 at 19-105.
5. Chris Guthrie/Jeffrey Rachlinski/ Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. R. 101, 102-103 (2007) (hereinafter “Blinking on the Bench”); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L. J. 1 (1998).
6. *Id.*
7. Andrew Wistrich/Chris Guthrie/Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L.R. 1251, 1279-81 (2005) (hereafter “Inadmissible Information”).
8. Misjudging, *supra* note 3 at 421.
9. Inadmissible Information, *supra* note 7 at 1294-98. Misjudging, *supra* note 3 at 422-24.
10. See *National Labor Relations Board v. Jackson Hospital Corp.*, 257 F.R.D. 302, 307 (D. Col. 2009).
11. Misjudging, *supra* note 3 at 432-33.
12. Chris Guthrie/ Jeffrey J. Rachlinski/ Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 825 (2001) (hereafter “Inside the Judicial Mind”).
13. Inadmissible Information, *supra* note 7 at 1288-91.
14. Misjudging, *supra* note 3, at 43.

15. Inadmissible Information, *supra* note 7 at 1266.
16. Richard C. Waites/James E. Lawrence, *Psychological Dynamics in International Arbitration Advocacy*, in *THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION*, 109-110, 114 (Doak Bishop and Edward G. Kehoe Ads. 2010).
17. Drew Westen/Pavel S. Blagov/Keith Harenski, Clint Kilts/Stephan Hamann, *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints and Partisan Political Judgment in the 2004 U.S. Presidential Election*, 18:11 *JOURNAL OF COGNITIVE NEUROSCIENCE*, 1947 (2006).
18. Shari Seidman Diamond, *The Psychological Aspects of Dispute Resolution*, *INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS*, ICCA Congress Series, No. 11, 631-633, London 2002 (Albert Jan van den Berg ed., 2003).
19. Misjudging, *supra* note 3 at 452-53.
20. *Waites/Lawrence*, *supra* note 16 at 115.
21. *Id.* at 118, 119.
22. See <http://www.casexplorerarbitration.com/>.
23. Queen Mary University of London/White & Case, 2012 *International Arbitration Survey: Current and Preferred Practices and the Arbitral Process*, at 6.

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