Affiliation and Affinity: Unconscious Drivers of Arbitrator Decision-Making

By Edna Sussman

A great deal has been written in recent years about the impact of the unconscious on decision-making by arbitrators with a focus on heuristics and informational biases.[1] Since arbitrators are people, they like all people, have cultural, social and legal backgrounds and their own experiences and predilections which they bring to the arbitration. These predispositions form affiliation and affinity biases which can influence decision-making. This aspect of the unconscious has commanded less attention in recent years. This article endeavors to provide additional insights relating to these neglected biases.

A. Empirical Studies

Study 1. Puig and Strezhnev explored whether party appointed arbitrators suffer from an affiliation effect that their selection and appointment might create, i.e., a cognitive predisposition to favor their appointing party. The authors used what they described as a novel experimental approach to filter out differences that might be explained by other affiliation effects in order to isolate the causal effect of affiliation with the appointing party. They found that on average arbitrators were about 18 percentage points more likely to award all costs to the winning party when they were appointed by the winner rather than the loser. Similarly, on average arbitrators appointed by the claimant were about 15 percentage points more likely to choose the claimant's damages proposal compared with the arbitrators appointed by the respondent. The authors conclude that their results show that "being appointed by one of the parties in the dispute directly changes the behavior of arbitrators."[2]

Study 2. Drawing on Geert Hofstede's seminal work which identified value differences across cultures, a study was conducted to examine how an argument is evaluated in the context of different values relating to the large/small power distance value identified by Hofstede.[3] As defined by Hofstede, power distance is the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally. Comparing studies of subjects from a country with a high power distance where people accept that some people have more power than others with those from a country with a lower power distance where an equal distribution of power is important, the study showed that expert testimony was more persuasive in the high power culture than it was in the low power culture. A subsequent study bore this out, showing that subjects from lower-power cultures were less likely than subjects from high-power cultures to accept expert testimony from as expert with lesser expertise in the area in question because it was of lesser quality.[4]

Studies 3-6. Several studies have been conducted to examine outcomes in investment treaty cases. One study that examined over 400 investor-state arbitration cases before the International Center for the Settlement of Investment Disputes (ICSID) found that arbitrators who are pro-investor tend to find in favor of investors and arbitrators who are pro-state tend to find in favor of the host state, concluding that the "empirical analysis shows that arbitrators appear to be influenced, in some cases, by their policy views and do not simply apply the law as it stands when deciding investment cases." The study was based on a personnel data set of over 350 arbitrators (including coding for gender, age, nationality, legal origin, specialization, academic versus practitioner, elite educational institution, elite ICSID arbitrator) and an analysis by five external experts in investment arbitration of the decisions rendered.[5] Another study that explored systemic bias, examined 140 investment treaty cases for trends in legal interpretation of jurisdiction and admissibility, rather than case outcomes. It found that (1) arbitrators favor the position of claimants over respondent states and (2) the position of claimants from major Western capital exporting states over claimants from other states.[6] Contrary to these conclusions, a study reviewed three investment treaty awards arising out of virtually the same facts relating to the text of the U.S.-Argentine bilateral investment treaty which came to conflicting determinations and concluded that no decision-making pattern could be discerned based on the arbitrator's personal backgrounds or by which party they were appointed.[7] Another examination of investment treaty decisions concluded that the "statistical analyses consistently showed that, at a general level, the outcome of investment treaty arbitration was not reliably associated with the development status of the respondent state, the development status of the presiding arbitrator, or some interaction between those two variables."[8] The lack of consistency in these findings has been noted by scholars.[9]

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B. Implications for Arbitration: Social Culture

Arbitrators are people and like all people have their own frames of reference, experiences and societal inputs that guide their thinking and their decision-making processes. Each arbitrator, like each judge, is uniquely influenced by his or her lifetime experiences and cultural influences.

As Justice Holmes said, "[t]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[10]

His comment was echoed by Justice Cardozo who said, "[i]f you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge, just as the legislator gets it, from experience and study and reflection; in brief, from life itself."[11] English judges similarly acknowledge that a judge's individual circumstances can predispose a judge. As Lord Phillips noted, "[b]ias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge toward a particular view of the evidence or issue before him."[12]

International arbitration by its very nature draws parties, counsel and arbitrators from across the globe, all products of their own culture. Over the decades significant harmonization of international arbitration has been achieved but no degree of harmonization can neutralize the predispositions that are the natural consequence of one's background and experiences.

Speaking of this aspect of human nature in the context of arbitrator decision-making, Shari Diamond referenced psychological influences at the 2002 ICCA Congress. The "affinity effect' 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 behaviour they must consider in reaching their decisions." And the "expectancy effect" causes "beliefs about the world and preconceived notions about the likely credibility of particular types of witnesses [to] 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."[13]

Thus, how arbitrators view the arguments and the evidence presented can be heavily influenced by their affinity and expectancy. Sociologists have long studied these differences across cultures. As noted earlier, Geert Hofstede and later Edward Hall identified a variety of cultural values that varied across the globe.[14] Sensitivity to these different values is important for fully appreciating presentations by parties and counsel from different countries and understanding the context of their business relationships.

Scholars have discussed cultural differences in perceptions of arguments. Hornikx references the distinction typically made with respect to culture and argumentation comparing Greek (Western) and Chinese (Eastern) reasoning. He reports on the theories that "Westerners prefer analytic reasoning, and are believed to focus on attributes of the object to assign it to categories, and a preference for using rules about the categories to explain and predict the object's behaviour. Easterners, influenced by Taoism and located in Asia, are believed to prefer holistic thinking, a type of thinking that involves an orientation to the context or field as a whole, including attention to relationships between a focal object in the field, and a preference for explaining and predicting events on the basis of such relationships."[15]

Speaking of a cultural influence that echoes Hofstede's value difference of individualism versus collectivism (the relationship between the individual and the group) Stavros Brekoulakis states: "For example, a decision-maker that values altruism, as opposed to individualism, will be more likely to rate society over commercial activities or individual rights. His or her values may therefore critically affect his or her decisions in a number of legal disputes, such as whether to rate mandatory rules over contractual freedom, consumer and environmental protection over business transactions, or host state regulatory autonomy over investment protection."[16]

The high-context versus low-context value across cultures is also of particular significance in arbitrations. In high-context cultures the spoken word is just a part of the message and may be muted with non-verbal communication an essential element, while in low-context cultures people speak directly and speak their mind. In high-context cultures, there may be a reluctance to say no directly or to making disparaging comments about others, while in low-context cultures more direct communication is expected and more confrontational language is not taken amiss. Witnesses will generally testify in accordance with their own cultural orientation. Thus, witnesses and often counsel from high-context countries may be misunderstood by arbitrators from low context cultures while witnesses from low-context cultures might be found to be offensive to arbitrators from high-context cultures. As Karen Mills observes based on proceedings she has witnessed, the arbitrator's failure to appreciate and take into account such cultural differences in witness testimony and counsel presentation has led to miscarriages of justice.[17]

C. Implications for Arbitration: Legal Culture

Legal culture may also influence how arbitrators fulfil their roles. Not only are there major differences in procedural practices stemming from different legal cultures,[18] but arbitrators may approach their role very differently on

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important legal issues that impact the merits directly regardless of the choice of law specified in the contract. A few examples serve to illustrate the point.

Courts in civil law jurisdictions approach their role quite differently than those in common law jurisdictions. Civil law jurisdictions conduct their proceedings pursuant to the principles of *iura novit curia*, the court knows the law, while in the adversarial common law system the courts rely heavily on the parties' submissions concerning both the facts and the law.[19] There appears to be general agreement that, as a matter of due process, if an entirely new approach will be pursued by the arbitrators, the parties must be given an opportunity to comment. However, the extent to which arbitrators may feel that they are permitted or even obligated to pursue independent lines of reasoning may well depend on the legal culture in which the arbitrators were trained.[20]

Jurisdictions diverge as to whether supervening developments and considerations of fairness permit the decision-maker to vary contract terms to accord with current realities. The difference between deference to the terms of the contract in the United Kingdom and in New York and willingness to vary those terms based on subsequent developments in many civil law jurisdictions can make all the difference in the outcome.[21] Differences in the application of the legal duty of good faith vary significantly across jurisdictions and may well influence decision-makers.[22] Arbitrators' training may cause them to view the matter from the perspective of their own legal background. While crafting the award to pay lip service to the choice of law provision consistent with the dictates of the parties' agreement, arbitrators may find a way to achieve a result consistent with the unconscious influence of their own legal culture. As Justice Scalia pointed out, quoting Chancellor James Kent, "I most always found [legal] principles suited to my views of the case."[23]

Jurisdictions also diverge on when and to what extent extrinsic evidence can be considered in interpreting the contract. While most contracts have a choice of law provision to govern the merits of the dispute and counsel might expect the arbitrators to honor that choice of law, attitudinal influences based on the arbitrators' legal training may impact contract interpretation. J. Karton, in his study of the evolution of contract law in arbitration, concluded that the civil law perspective on contract interpretation is becoming dominant in international commercial law with arbitrators seeking the true intention of the parties and considering a range of extrinsic evidence. He cited examples in which tribunals considered extrinsic evidence where they were charged with applying the law of a common law jurisdiction even though a common law court would likely have excluded such evidence.[24] Karton does not identify the legal background of those arbitrators, but it is significantly more likely that arbitrators accustomed to looking beyond the written word will do so even where the applicable law would not permit it.

D. Conclusion

That arbitrators are people and thus subject to these attitudinal blinders is self-evident. Yet, people feel that they are free of prejudice or bias, which gives them the illusion of objectivity.[25] Arbitrators must consciously endeavour to overcome these blinders to offer the parties a truly impartial proceeding. Arbitrators can minimize the impact of cultural differences by acquainting themselves with the presentation and speaking styles of the culture of the witnesses and lawyers appearing before them. While arbitrators are often selected because of their backgrounds and experience, arbitrators should take care to assess the case that is presented before them, and to consciously endeavour to overcome any affinity they might have for any of the parties as a result of their background.

In light of the human condition, Jan Paulsson acknowledged that "skilled advocates need to be attuned to the culture of the arbitrators they face is self-evident; it is an obvious and essential element of the internationally active advocate's credibility and persuasiveness."[26] Counsel will in the first instance consider whether their choice should be governed by the appointment of an arbitrator with an affinity resembling that of their client. That is not always the overriding consideration but in arbitrations in which cultural differences are significant care should be taken in the selection of arbitrators to appoint arbitrators accustomed to assessing witnesses from different cultural backgrounds and who have a reputation for independence and impartiality in their decision-making. Counsel may also consider legal culture in deciding which legal tradition would be most advantageous to their client in the case before them in the selection of the arbitrator.[27]

Like other unconscious biases our tendency to be influenced by affiliation and affinity is unknown and possibly denied by our conscious minds. It is, by definition, hiding in plain sight. We must all bring it into the open to combat its unintended influence.

Endnotes

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