Psychology and unconscious bias explored in Vienna

13 March 2019

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Vienna Arbitration Days 2019 considered the impact of psychology and unconscious bias on arbitration, the importance of maths and economics and the use of artificial intelligence tools in assessing damages.

The event at the Palais Niederösterreich attracted more than 200 delegates and began with a speech by **Anna Joubin-Bret**, secretary of UNCITRAL. She provided an overview of UNCITRAL's activities, including its work on procedural reforms of investor-state dispute settlement and expedited proceedings under the UNCITRAL rules. She urged the attendees to communicate with UNCITRAL to ensure that its work is truly reflective of its users and stakeholders.

Catherine Rogers of Penn State University and Queen Mary, University of London, gave a keynote speech discussing the development of Arbitrator Intelligence, which is due to launch later in 2019. The project seeks to use data-driven analysis of an arbitrator's track record to assist parties in making more informed selections of arbitrators. She discussed the steps that have been taken to moderate the potential risk of a disappointed party seeking to undermine the arbitrator by providing negative feedback. Because 80% of the information in Arbitrator Intelligence reports is objective and factual, there is a limit to how much a disgruntled party can affect the feedback on a particular arbitrator, she said.

Psychology and its impact on arbitration

The first panel addressed psychology and its impacts in arbitration. The speakers each gave a short presentation on a particular psychological dynamic in arbitration, which may affect the outcome if not anticipated and managed by participants.

Moderator **Edna Sussman** discussed cultural difference by reference to the Hofstede Dimensions and the studies that have demonstrated that people from countries with a higher "power distance" and who accept that some people have more power than others are more likely to be persuaded by expert testimony.

Philippa Charles of Stewarts noted that, far from being cultural chameleons, arbitration practitioners are – at least, to some extent – influenced by their nationality and the approaches to society which that nationality imports. She explained the work of Dutch professor Geert Hofstede, which broke down cultural hard-wiring into six characteristics, where a high or low score tends to illustrate a particular national characteristic which is distinctive. For example, she drew out the overwhelming influence in US nationals of a preference for individualism, and how that feeds into a drive for success. Charles also considered the issue of high-context and low-context cultures. These cultural differences can greatly affect a tribunal's understanding of evidence.

Quoting a well-known arbitrator who defined her approach as "Freudian," Edna introduced the next subject of legal subconscious. **Giuditta Cordero-Moss** of the University of Oslo focused on the imprinting of a decision-maker's home legal culture on their approach to legal issues. Using as an example a contractual pricing mechanism dispute where the contract fails to stipulate price revisions and where the parties' dealings have changed materially, she contrasted the instinctive textual approaches of a Norwegian-trained lawyer and a British-trained lawyer. Consistent with their respective legal cultures, the Norwegian-trained lawyer is more likely to allow for changed circumstances and the British-trained lawyer more likely to adhere to the contractual terms strictly, she suggested. Thus, the differing approaches lead to different results in Giuditta's example: the challenge for practitioners (and especially for arbitrators) is to apply the relevant applicable law without being influenced by one's personal legal culture – and to be aware of the risk that a subconscious comparison of the applicable law in the case with the way in which the case would be decided under one's "own" law is not always an appropriate way to check if the outcome is sensible.

To place the discussion of framing in the context of the scholarly literature, Edna highlighted the Applied Legal Storytelling movement which focuses on how storytelling, or "narrative theory," affects what lawyers and judges do in actual cases. **Claudia Winkler** of Negotiation Academy, which provides online training for negotiators and mediators, drew on her experiences to look at framing and its effect on one's receptiveness to a proposition. In the negotiation context, the way in which an offer or proposal is framed may affect the recipient's response: engaging either the recipient's risk adversity or risk acceptance. The effect of the choice of presentation has far wider implications, including in cross-examination questioning and a tribunal's appreciation of the gulf between the parties' positions. Winkler also considered the importance of being aware of the alternative framing that is likely to come from the other party and addressing it proactively rather than being defeated in a "battle of the frames."

Closing the session with practical guidance on how counsel can counter these biases, Sussman quoted **Lucy Reed**'s comment that "what mock arbitration therefore does is to change the lawyers' biases about their own cases. It allows them to see whether what they think are the

most important points to make are (or are not) as good as they think, and therefore whether their clients are likely to win (or not)." **Philip Anthony** of DecisionQuest (a mock trial/arbitration provider based in the US) highlighted two particular advantages of mock arbitration. First, having the mock judge's private feedback assists the party in addressing any quasi-emotional or experientially driven responses. Second, the effect and influence of a dominant arbitrator or judge on the rest of the panel can be explored. By matching the mock arbitrators as closely as possible to the selected panel, parties have an opportunity to assess how much a dominant arbitrator may affect the proceedings and potentially the outcome.

Maths and economics in arbitration

The second panel was chaired by **Günther Horvath** and focused on the importance of mathematics and economics in arbitration. The panellists discussed the issues of delayed calculations in construction disputes. They also discussed the quantification of damages and the specific challenges created by the use of artificial intelligence (AI).

Wendy MacLaughlin of quantum experts firm GBsqd explained the complexity in establishing reasons for the late completion of a project by means of forensic analysis. She emphasised that delay analysis in construction projects should not be perceived as a "black box". She also observed that arbitrators and counsel often do not have the required software to view the programme of works used during the construction works. One of the challenges faced by arbitrators is the fact that the use of the different methodologies can lead to different results, despite being based on the same set of facts. For example, the expert could rely on the actual progress records or use software with hypothetical calculations. In the first case, the expert would rely on the actual progress of works and investigate the impact of delay events based on actual progress records. In the second case, the expert would be impacting the original schedule of works and thereby derive the expected (not actual) delay. MacLaughlin explained that one methodology is not necessarily better than the other. Rather, the arbitral tribunal has to make its choice based on the available data and contractual requirements.

Howard Rosen of Secretariat International explained the importance of the ability of counsel and arbitrators to manage economic and industry skills in arbitral proceedings. Arbitrators may face difficulties understanding the evidence, necessitating the use of experts. Such experts should use plain language and provide practical examples that would complement an academic approach with practical market knowledge. The effective presentation of data is of utmost importance. Bringing the message across in a clear and understandable manner requires time and cannot be underestimated by counsel. In this respect, arbitrators should also approach the presentation of the quantification of damages in an efficient manner and not leave it for "Friday afternoon" at the end of a long hearing. Howard noted the importance of AI tools for the quantification of damages but noted that an AI system raises various ethical, practical, and legal issues, such as who should be designing and maintaining the system, what should be the basis used by the system to "learn," and will the result be considered valid evidence.

Independent arbitrator **Manuel Conthe** focused on the role and impact of time-lags in the assessment of risks. Manuel referred to the "curse of knowledge," a cognitive bias under which an individual assumes that others have the technical Vienna legal expertise to understand what he or she is explaining. In arbitral proceedings, the time-lag between the events that led to a dispute and the actual time of arbitration unavoidably imposes a "curse of knowledge" upon arbitrators and causes discrepancies between the assessments of facts at the different stages of the dispute. It is important for tribunals and parties to be aware of this phenomenon as both influence the decision-making process. Manuel explained why subsequent remedial measures

cannot be used as proof of previous negligence, as "everything is obvious once you know the answer" – a concept which is reflected in the US Federal Rules of Evidence. Manuel also addressed the award of interest as an economically important issue of damages calculation.

Unconscious bias and the impact of science

Building on the preceding panels, the third panel considered – from the perspective of counsel – the myriad ways in which unconscious bias affects arbitral proceedings. The panel was moderated by **Klaus Peter Berger** of the University of Cologne. After discussing the different types of bias that affect arbitration proceedings, the panel suggested possible solutions and mitigating measures, including through the use of technical tools.

The panel first discussed how the legal background and training of arbitrators often affects their decision-making, particularly with respect to evidentiary rulings. For instance, while practitioners from civil law jurisdictions may undertake a more inquisitorial approach to evidence, thereby limiting party-initiated disclosures, arbitrators from common law jurisdictions may more broadly permit such disclosures. **Floriane Lavaud** of Debevoise & Plimpton and **Cecilia Carrara** of Legance discussed the challenges of mitigating such bias.

Next the panel considered a range of other biases, including self-serving bias, where decision-makers resolve ambiguities in a manner favourable to themselves, and hindsight bias, where decision-makers perceive certain facts as being more predictable than they actually were at the time. The panel focused especially on the cultural biases of arbitrators, vis-à-vis gender and race. In particular, the panellists discussed how gender and racial biases may affect how arbitrators assess the reliability of witnesses. The panellists cited numerous efforts to tackle such biases in the selection of arbitrators, including the Pledge on Equal Representation in Arbitration and the ArbitralWomen arbitrator database.

The panellists then considered technical tools for mitigating bias. Lavaud raised the applicability of hidden bias tests and training modules, such as the Implicit Association Test and Project Implicit, both co-founded by psychologists at Harvard University and the University of Virginia. **Carsten van de Sande** of Hengeler Mueller discussed the increasing use of AI in arbitration, but also the risk of AI tools leading to dysfunctional results, because not all relevant elements to disputes are taken into consideration when developing the original algorithms. Carrara discussed the Council of Europe's first European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems. In the context of technical tools, the panellists underlined the importance of ensuring equal access, warning that any existing procedural unfairness may be further entrenched otherwise.

To conclude, **Paul Oberhammer** of Wilmer Hale raised the importance of not losing sight of the fundamental goal to ascertain the underlying truth. Specifically, Paul delved into the distinctive concepts of "scientific" and "legal" truths and the influence of such modalities on advocacy techniques. The panel emphasised that arbitrators are often self-aware of their biases, and will indeed try to look beyond the manner and style of presentation of counsel to ascertain the underlying facts.

Vienna Arbitration Days took place on 1 and 2 March and was co-organised by Arbitration Austria, the Vienna International Arbitration Centre, the Austrian Yearbook of International Arbitration, ICC Austria, Young Austrian Arbitration Practitioners and UNCITRAL.

*Reporting by **Philippa Charles** of Stewarts, **Florian Haugeneder** of Knoetzl, **Floriane Lavaud** of Debevoise & Plimpton and independent arbitrator **Edna Sussman***