

Legal Realism in International Arbitration

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Ten years ago virtually all international arbitration was in a black box. The awards were accessible to the parties and virtually no one else. One had vague impressions about the quality of arbitration generally and individual arbitrators in particular. But there was no objective data from which to judge these impressions.

Investment arbitration changed all that. The decisions are public and subject to intense scrutiny. To date almost all of the commentary about these investment awards has focused on the merits of the decisions rather than the quality of the decisionmakers. But that is beginning to change. Empirical research is now in the works in which the patterns of voting behavior of individual arbitrators is under intense scrutiny. And some of these scholars are not part of the traditional international arbitration community and are willing to risk casting light on questionable practices.

For example, I attended an ASIL conference last weekend at UCLA on the subject of international economic law which included panels on investment arbitration. I will not go into the details, but it is quite clear that the research established, shall we say, "irregular" voting behavior by particular arbitrators. Arbitrator A interpreted a BIT to guarantee a particular investment protection in one case and then in the next case interpreted the exact same BIT to provide no such guarantee. Arbitrator B never votes against the party that appointed him. Arbitrator C has over two dozen arbitrations at any one time and it takes him on average X number of months from the hearing date to render an award. Arbitrator D has served as arbitration counsel arguing a particular perspective and then ruled precisely the opposite while serving as an arbitrator in another case.

The days when arbitrators are appointed based on general impressions are nearing an end. Legal realism is entering the world of international arbitration in the near future, and the reputations of many arbitrators will rise and fall when it comes.