

The Invisible Gorillas in International Arbitration?

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In *The Invisible Gorilla*, Christopher Chabris and Daniel Simons explore a classic experiment that won them an Ig Nobel Prize (2004). Their research considers how our own perceptions and memories can fool us into thinking something is true (when it is false) or lead us to miss things that are far more profound. This research has critical implications for international arbitration. For practitioners, it can affect how we consult with clients, gather evidence to support a position, make arguments to a tribunal, or interpret results for our clients. For arbitrators, it implicates how tribunals may perceive, interpret and act upon evidence. For commentators, it has the potential to shape our perceptions about the system, our resulting commentaries and recommendations.

So what is this classic experiment? In a less than one-minute film, two teams of people are moving around passing basketballs. One team wears white shirts and the other team wears black. People watching the video are then asked to count the number of passes made by the players wearing white t-shirts while ignoring any passes made by players wearing black t-shirts. The participants are instructed to watch the video carefully and be sure to include both aerial and bounce passes in the ultimate count. Consider participating yourself—or having your friends try it—by clicking here and watching the first video.

But this experiment is not really about the mental acumen of observers to count passes—or the skill of lawyers to focus on evidence or apply the law. As the book explains, the experiment was actually designed to test something else. Halfway through the video, a female student wearing a full-body gorilla suit walks into the scene, stops in the middle of the players, faces the camera, thumps her chest, and walks off after spending nine seconds on-screen. Amazingly, roughly half of the observers who watch this video typically miss the gorilla. The first time I saw the video, I missed the gorilla. When using the video to teach law students, my students suffered from a similar fate. In one year, all twenty-four of the students in the class missed the gorilla all together.

Even people who believed and confidently asserted that they would not miss something so obvious, nevertheless made the error of missing the proverbial gorilla. But why? It is because human beings experience errors of perception and other cognitive biases. In the case of the gorilla, the perception error derives from the lack of attention to an unexpected object. When we devote our attention to a specific object, we may not notice unexpected ones—even when they are salient, potentially important and appear right where we are looking. As Chabris and Simons put it, people “concentrat[ed] so hard on counting the passes that they were ‘blind’ to the gorilla right in front of their eyes.”

So what are the potential implications for international arbitration?

For lawyers who are consulting with clients, it means that we may miss obvious (yet critical) permutations in cases that are unexpected. Imagine two scenarios in the context of investment treaty arbitration. First, an investor's counsel that looks for government abuse may find precisely what they are looking for; but they may ignore, to their detriment, conduct by third parties that may have a critical impact on liability or issues that may not immediately relate to the merits but may ultimately be critical. Second, a respondent's counsel may expect and find evidence of a narrative about an exploitative investor; but they or their client may miss other attributes about the value of the investment, misbehavior by a third party or other ways to constructively solve the dispute. In our focus and effort to create typical narratives, to construct caricatures or to "win", we may inadvertently miss the "gorilla in our midst."

Chabris and Simons do not stop with a single experiment. Instead, they explore other every day illusions that can color our perceptions of reality, impact the accuracy of our memories and potentially influence our actions. They consider, for example, how witnesses can be confident—and wrong—about their recollections of events and how this can improperly sway finders of fact. While they focus on the U.S. justice system, one cannot help but wonder if, in the context of international arbitration, whether tribunals properly take into account the perceived confidence of witnesses and how this can affect the interpretation and application of evidence.

Recollection of evidence can be affected by one's preconceptions, basic cognition errors (i.e. seeing what we expect to see even when it is not there—or missing something right in front of us), the order in which information is presented and the malleability and degradation of our memory over time. A classic example of this later element involves "flashbulb memory". The day after the Challenger explosion, two psychology professors asked their students to write down a detailed description about the explosion and answer a set of questions. When those same students were asked years later to recollect what had occurred, although the students were strikingly confident about the accuracy of their memories, their answers about basic questions (how they learned about the explosion, what time they had learned about the explosion and who they were with) varied dramatically from their contemporaneously recorded memory. Although many were shocked by the discrepancies when confronted with their initial written responses, they nevertheless persisted in believing their current recollection was accurate. As Chabris and Simons put it, "rich details you remember are quite often wrong—but they feel right." One can only imagine the implications of this inaccurate memory recollection of witnesses. Yet one might also speculate about the implications for tribunals in international arbitration who render awards a year or more after hearings are complete.

Given some of these regular processing errors are the by-product of human cognition, we should open ourselves to the possibility that we may not fully understand what our limitations are when practicing in and commenting upon international arbitration. As Robbennolt and Sternlight have put it in the context of civil litigation, "Good Lawyers are Good Psychologists" and we should start paying attention to the role that cognitive biases can play. That message applies with equal force to international arbitration. It behooves us to give serious consideration to how cognitive biases impact our discipline. Cognitive biases and every day illusions (such as perception, memory and confidence errors) do not mean those experiencing them are evil or somehow inferior. Rather, it simply means that we are human and that we can and should work to try to address the inadvertent errors that create unintended consequences for parties and those impacted by the results.

The international arbitration community might therefore consider three key questions. First, would it be useful to have studies that evaluate how arbitration practitioners, arbitrators and commentators are subject to cognitive biases and every day illusions? Second, if so, what should those studies focus upon? Third, how should we use those findings to promote efficiency, fairness and legitimacy in

international arbitration? My personal hope is that simply asking the question will promote the integrity of the process and encourage us to think systemically about our own blindness, and even our blindness. In a time of global transition of the international economic system, making an effort to redress inadvertent errors—that can have multi-million dollar implications or affect state sovereignty—is the right thing to do to promote the integrity in international arbitration.