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Criticism of Arbitration: How to Use It

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In the 1980s, a study conducted by Stanford University showed that after watching the same television reports on the Sabra and Shatila massacre in Beirut, both a pro-Israeli and a pro-Arab group concluded that the coverage was biased in favor of the other side. The researchers found that the partisans of the two groups evaluated the fairness of the facts and arguments used in the reports according to their own divergent views as to the merits of each cause and what would constitute impartial coverage.

But what does this have to do with arbitration? Could a similar mechanism influence users' opinions as to the quality of arbitration and its results? If so, these biases must be kept in mind when criticism is used as a source of ideas for improving arbitration, in order to avoid making mistakes.

Many empirical studies conducted over the years have revealed a phenomenon known as group polarization: after discussion within a group, the group's members tend to adopt a more extreme position than the position held by the average member prior to discussion. There are various theories as to why this happens, and some of the most commonly cited reasons are:

1) *Information*. The information and arguments used in any group that has a predisposition in a given direction will naturally be biased in the same direction. This means that as the discussion advances, each member acquires from the other members of the group more arguments and information to support the view that they were originally disposed to hold, which tends to entrench their position.

2) *Confidence*. People with more extreme views tend to be more confident, and as people gain confidence, their views tend to be more extreme. As the members of a group perceive that the others share their view, they tend to become more confident that they are right and, consequently, assume opinions that are less cautious.

3) *Comparison and social acceptance*. Most people want to be seen favorably by the members of their group. For this reason, it is common for their views to reflect the way they wish to present themselves to others. On discovering the opinion of the others in the group, some people will adjust their own views in the dominant direction in order to obtain more support within the group. In parallel, people can diminish the importance of contrary information and arguments, or fail to share the information

and arguments with the group, because they feel that they would be perceived less positively by the other members of the group (hidden profiles). In more aggressive contexts, where caution can be seen as a weakness, more prudent opinions tend to give way to more hard line positions, leading the group to more extreme views.

There is no reason to think that groups involved in arbitrations are immune to this type of bias. If, for example, the legal culture puts excessive value on the attorney's role as a promoter of conflict and maximizer of individual interests, there will be a strong incentive for the attorney to maximize (i.e. exaggerate) facts and arguments that favor the client. And both attorney and client will tend to end up believing what initially might have seemed an exaggeration, not only because that was their original predisposition, but also because the more extreme view suits their interests. As the joke goes, "Is your injury serious?" "I won't know until I talk to my lawyer". People are always ready to look for and absorb information that supports the beliefs they already hold, and less ready to see information that contradicts those beliefs (the confirmation bias).

If this is true, it is to be expected that over the course of an arbitration proceeding, the successive discussions within the team composed of a company's outside counsel, in-house counsel, and members of its management and operating staff will tend to reinforce the arguments favorable to the company's side of the dispute and make the team as a whole more confident in its position (if the evidence produced in the proceeding does not clearly contradict the team's theory). The same phenomenon is likely to occur in the group on the other side of the dispute, and the greater the complexity of the factual and legal issues, the more space there is for this polarization process, since the "right decision" is far from being obvious. Thus, for example, arguments that go against the majority position in the case law, and therefore seemed difficult to sustain at the beginning of the arbitration, can come to be perceived as the most logical and reasonable position, supported by a few courageous voices in the courts. And perhaps, as time passes, the group will come to believe that the dominant position in the case law is obviously outdated and that any decision contrary to the group's line of argument is in "manifest error". In this example, it is easy to see how, on the other side of the table, any decision contrary to the "well-settled" case law would also be taken to be "manifest error".

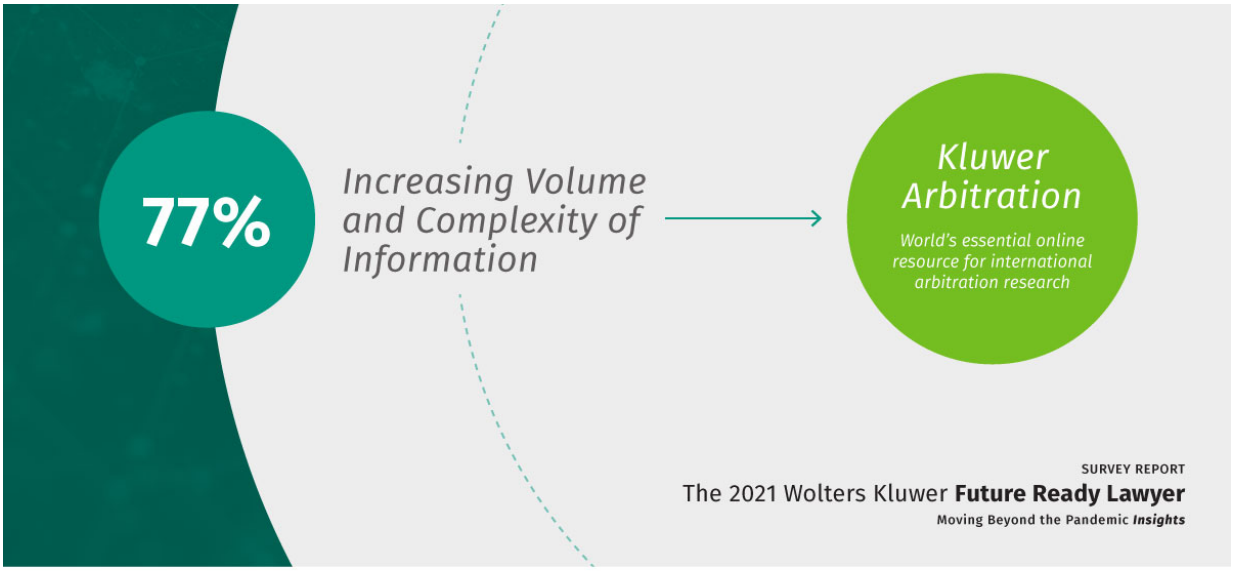
When this process of group polarization occurs, sparked by the members' preconceived ideas, it is quite natural for the losing party – or even both parties – to criticize the arbitrators' award. The most common argument put forward by the dissatisfied party is that the arbitrators were not sufficiently "technical" in their interpretation of the facts or the law. But exactly the opposite argument is also made, that the arbitrators were "too technical" and failed to take the "fairness" of the decision into account. This goes to show that perhaps the real reason behind the criticism is not an "error" in the award, but the simple fact that it was unfavorable to the position defended by the dissatisfied party. Which brings us back to the Stanford study: each group felt that the facts and arguments in the reports were unfairly portrayed because they contained elements contrary to the group's cause.

There are, of course, ways to counterbalance group polarization. Companies and groups that have deliberative mechanisms that encourage dissonant voices and seek

out contrary information and arguments can generate less polarized opinions. Attorneys themselves have incentives to look at the other side of the picture. Still, whether these checks and balances are frequently used or sufficient to counteract cognitive biases and the human tendency to group polarization is another question altogether.

The objective of this text is to draw attention to the importance of taking the phenomenon of group polarization into account when interpreting and applying the criticism that is sometimes made of arbitration. To adopt criticism whole, and wave it as a banner for reform, can lead to diagnostic errors and cause serious harm to arbitration and society's perception of it: society's acceptance is, after all, fundamental to a system of dispute resolution based on a private agreement between the parties. It can be useful to ask, for example, whether the criticism was made before or after the outcome of the case was known, which party is making the criticism, and whether the criticism is isolated or has been voiced in a statistically significant number of cases.

This is not to suggest that arbitration does not have defects or that it shouldn't be criticized. On the contrary: taking into account parties' natural biases and the reasons behind their criticism increases the chances that the real value of parties' comments can be extracted and used as an essential tool to improve arbitration and to ensure that it continues to serve its users.[1)]



References

↑1 VALLONE, Robert P., Lee ROSS and Mark R. LEPPER. *"The hostile media phenomenon: biased perception and perceptions of media bias in coverage of the Beirut massacre."* Journal of Personality and Social Psychology. 1985, 49(3): 577-585. For some of the ideas explored here, see SUNSTEIN, Cass. *Why societies need dissent*. Cambridge: Harvard University, 2005, and KAHNEMAN, Daniel. *Thinking, fast and slow*. New York: Farrar, Straus and Giroux, 2011.

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