

# Empirical Research on Legal Reasoning in Commercial Disputes - Then and Now

## **Kluwer Arbitration Blog**

February 3, 2018

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*Please refer tot his post as: S.I. Strong, 'Empirical Research on Legal Reasoning in Commercial Disputes - Then and Now', Kluwer Arbitration Blog, February 3 2018, <http://arbitrationblog.kluwerarbitration.com/2018/02/03/legal-reasoning-international-commercial-arbitration/>*

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Critics of international arbitration often express concerns about the quality of legal reasoning in arbitration, even though conventional wisdom within the international community suggests that international arbitral awards reflect relatively robust reasoning that is often on a par with that of decisions rendered by commercial courts. Why the discrepancy?

I have written elsewhere about how unconscious biases may work against the perception of international arbitration (see "Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration", 2018 University of Illinois Law Review), but other factors may be at play in this case. In particular, the problem may simply be that very few empirical studies exist regarding legal reasoning in arbitration.

The situation may have been very different if Soia Mentschikoff, the first woman to teach at Harvard Law School (1947) and a former dean of the University of Miami School of Law (1974-82), had been able to complete her ground-breaking empirical work in the area of commercial arbitration. During the 1950s and 1960s, Mentschikoff conducted empirical studies using hypothetical disputes resolved by arbitrators from a variety of backgrounds. The goal was to determine whether and to what extent legal reasoning differed according to the arbitrator's professional experience. Although Mentschikoff never wrote up her final conclusions, a number of preliminary observations are reflected in "Commercial Arbitration" (1961) 61 *Columbia Law Review* 846 and "The Significance of Arbitration - A Preliminary Inquiry" (1952) 17 of *Law and Contemporary Problems* 698.

The University of Chicago has kept Mentschikoff's working papers and it is possible that an aspiring young researcher could eventually complete Mentschikoff's work. However, contemporary scholars are currently developing a number of new studies that appear quite promising.

One major project involves a large-scale, international study conducted by the University of Missouri's Center for the Study of Dispute Resolution. The research seeks to improve our understanding of how

judges and arbitrators resolve complex commercial disputes in both national and international settings by exploring potential differences between (1) judicial and arbitral decision-making; (2) national and international decision-making; and (3) common law and civil law decision-making. The study will not only help parties make more informed choices about where and how to resolve their legal disputes, it will also assist judges and arbitrators in carrying out their duties by improving counsel's understanding about how to best to craft and present legal arguments and submissions. The study also helps providers of judicial and arbitral education offer educational programming that better meets the needs of judges and arbitrators.

The study includes several different elements, including a series of semi-structured interviews of domestic and international judges and arbitrators; a detailed survey of domestic and international judges and arbitrators; and a coded (qualitative) analysis of judicial decisions and arbitral awards involving domestic and international commercial disputes. All of the various components focus on legal reasoning, including factual reasoning as it affects legal reasoning, and thereby provide key insights into previously unstudied issues. The research is funded in part by a grant from the AAA-ICDR Foundation, although neither the Foundation, the AAA nor the ICDR plays any role in the gathering or analysis of the data so as to ensure the objectivity and independence of the study.

The research is currently ongoing, and those with experience serving as judges or arbitrators in national or international commercial disputes are invited to complete an anonymous electronic survey that can be found here: < <https://www.surveymonkey.com/r/commercial-dispute-strong> >. The survey should take approximately twenty minutes to complete, and participation is entirely anonymous. The survey will remain open until 11:59 p.m. Central Daylight Time (CDT) on May 1, 2018. Only those with experience serving as judges or arbitrators in national or international commercial disputes are eligible to participate, although there are no restrictions relating to nationality or the level of seniority.

As the preceding suggests, empirical research in international arbitration has a bright future, and it will be interesting to see where the field moves next. Although Soia Mentschikoff is no longer with us, she would doubtless be pleased with current developments relating to legal reasoning in commercial arbitration.