Kluwer Arbitration Blog

A Few Words On The Tension Between Efficiency And Justice

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[Editor's Note: The following blog is re-published free of editorial errors in the original publication.]

In the current zeitgeist focusing on the need for efficiency and speed in arbitration, we are at risk of over-correcting to the point of diminishing important functions of the arbitral process.

There is little doubt that the arbitral process generally has become too much like litigation, and needs to be more efficient and less costly. As a result, arbitrators are being encouraged to speed things along, and rules such as the IBA Rules on the Taking of Evidence are being tightened in order to vest arbitrators with the discretion to require quicker resolution and shorter final hearings.

But good justice, like fine wine, takes time. Without detracting from the importance of making arbitration more efficient and less costly, I submit that we are at risk of going too far in the other direction. Over-correction – with overly compressed procedural calendars and too-short final hearings – has a number of serious consequences that affect the quality of the arbitral process and its output long term. The message here is simply that *too much* efficiency will exact too high a price.

For example, psychological studies have shown that we are all vulnerable to subconscious cognitive biases that distort our decision-making process. Compressing hearings hinders the parties' ability to purge these biases from the decision-making process.

The "attribution bias" correlates the value of a proposition to the perceived standing or stature of the idea's proponent. History is filled with examples of bad ideas that were accepted because the source was esteemed, and of good ideas that were rejected because the source wasn't. A newcomer to arbitration who sits opposite one of the field's "stars" faces the disadvantage of having his or her arguments, at a minimum, not enhanced by a track record and of having the "star's" arguments given more weight based merely on the source.

"Anchoring" is a phenomenon whereby the mind's reasoning process is affected by an irrelevant deliberately-suggested number. In its basic form, a claimant demands an inflated amount in order to move a negotiation's center of gravity towards the number the claimant really seeks. In that form, it is recognizable and simplistic, but as explained below, there are subtler forms that can artificially impact a decision.

Arbitrators generally, and particularly those who concentrate on their craft, are better able than

most people to recognize and manage cognitive biases. As it turns out, though, even the best legal minds can fall victim to them.

In a fascinating experiment, two groups of United States federal judges were asked to quantify the damages for serious personal injuries in a case. The group that was asked to rule first on an obviously meritless motion to dismiss the case for failure to meet the court's $75,000 jurisdictional minimum awarded substantially lower damages than the control group that had not been presented with such a motion. *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 791 (May 2001). The motion had served as an anchor, an artificially low number that caused the judges' frames of reference to be lowered subconsciously.

That experiment and related research revealed that "judges rely on the same cognitive decision-making process as laypersons and other experts, which leaves them vulnerable to cognitive illusions that can produce poor judgments. Even if judges have no bias or prejudice against either litigant, fully understand the relevant law, and know all of the relevant facts, they might still make systematically erroneous decisions under some circumstances simply because of how they – like all human beings – think." *Id.* at 829.

I trust you'll accept the idea, then, that at least some arbitrators can be subject to at least some of these biases. And these are only a few examples. Other factors, such as culture and gender bias, also can affect the decision-making process.

And that's where time comes in.

For example, Sir Francis Bacon explained the "confirmation" bias: "The human understanding, when it has once adopted an opinion […] draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects; in order that by this great and pernicious predetermination the authority of its former conclusions may remain inviolate." Francis Bacon, *Novum Organum* 57 (Peter Urbach & John Gibson eds. & trans., Open Court 1994) (1620).

The implications for the arbitral process are fundamental since once an arbitrator begins to form views about the merits of the case, confirmation bias can kick in, causing the arbitrator to subconsciously filter information so as to embrace what is perceived as supportive of the view adopted and reject information that runs counter.

Counsel need adequate time and opportunity to put forth the evidence and arguments needed to neutralize such biases. In examining the phenomenon of "primacy" and "recency" in persuasion, researchers have found that people are influenced most by the information they receive first. See articles cited in *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, Jansen Voss, 29 LAW & PSYCHOL. REV. 301, 312 (2005). A strategy suggested by psychologists to overcome this effect is to lengthen the trial or hearing in order to dissipate the disproportionate weight attributed to the first-received evidence as a result of the confirmation bias and primacy and recency. Id.

One of the basic means of persuasion is, of course, to alter the target's information set – you give the decision maker more information. If viewed through a confirmation bias additional information can make the decision maker *more* convinced than before, but we would expect that an arbitrator acting in good faith and seeking to render a fair and objective decision based on the law and facts

eventually could be made to detect and neutralize the bias when faced with enough information to the contrary and given an opportunity to reflect.

The opportunity to argue "live" gives counsel an opportunity to counter biases and convey much better the true picture of what's at work. While that might be done "on the papers" alone, we know that a great part of human communication is non-verbal and that the most effective communication is interactive. Trying to overcome cognitive biases "on the papers" alone is akin to trying to convey an image of the *Mona Lisa* through words alone.

As the revised IBA Rules on the Taking of Evidence and institutional rules properly grant more control to the tribunal to manage the proceedings and the evidence, we risk, as a result of the current environment, shortening procedural calendars and hearings to a point that won't allow counsel and the parties to overcome inherent and unseen biases that all decision makers, from top federal judges to arbitrators, experience. An adequate opportunity to persuade and, ideally interact with the tribunal through oral argument is important if we are to maximize the chances that the ultimate decision will be the product of an objective and fair application of law to the facts.

However, the issue is more complicated than simply purging cognitive biases from the process. The impact of the drive to make arbitration more efficient and speedy becomes doubly acute when combined with legal traditions that value a document-based process that de-emphasizes oral advocacy and testimonial evidence.

Studies have shown that parties' satisfaction or lack of satisfaction with an adjudicative process is affected foremost by their perception of whether they were treated fairly. *See* Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215, 233 (2001) (concluding from four large-scale studies that laypersons' satisfaction with courts is based foremost on how fairly they feel they were treated rather than the ultimate outcome).

The opportunity for parties to tell their story in an adjudicative process serves an important cathartic function, an escape valve for the frustrations that come from a feeling that one has been wronged. For arbitration to serve that purpose, parties must feel that they have had a fair opportunity to be heard and have their case adequately considered. Hearings that are compressed, procedural calendars that are short, and decisions that are based heavily on the papers make for an undoubtedly efficient process. But that efficiency comes at the risk of allowing distorting biases to affect the decision, having decisions made without a fuller appreciation of what really happened, and depriving parties of the opportunity to have someone listen to their story.

The opportunity for the tribunal to see witnesses and hear the nuances and substance of their testimony gives the tribunal a fuller picture of what truly happened and what value to attribute to their testimony. A witness' veracity cannot optimally be gauged without the opportunity for the tribunal to see and hear the witness under questioning by the proponent's and opponent's counsel. Certainly important issues such as good faith, bad faith, intent, and a witness' fluency, arrogance and intelligence (all of which can bear on the proper interpretation of letters, emails and contracts that are offered in evidence) are best appreciated when the witness is before the tribunal and subject to proper questioning.

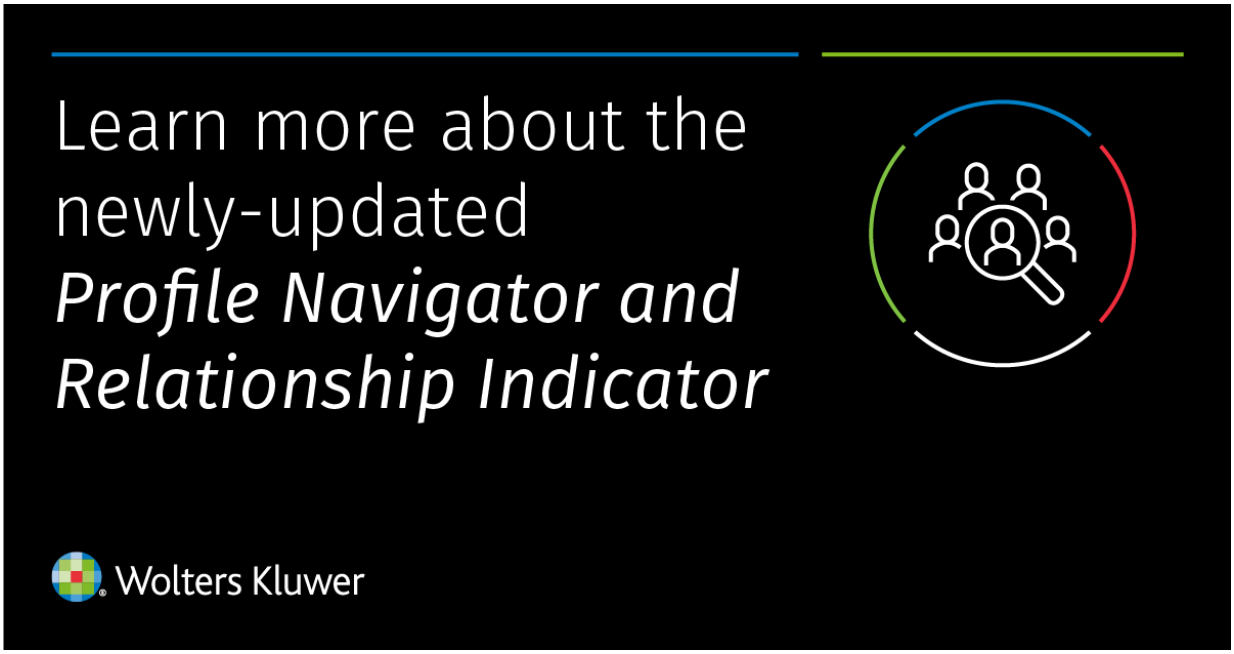
The drive towards efficiency and speed, compressing as it does hearing time and calendars, risks curtailing those opportunities, and most worrisomely, cross-examination. Cross-examination has

been described as “the greatest legal engine ever invented for the discovery of truth.” *California v. Green*, 399 U.S. 149, 158 (1970); *White v. Illinois*, 502 U.S. 346, 356 (1992). The opportunity to confront their “accuser” – meaning question the other disputant – is an important aspect in instilling in parties that they have had a fair opportunity to put forth their case and have their case adequately considered.

No well-meaning arbitrator would suggest that counsel should be denied an adequate opportunity to be heard or present live testimony when appropriate. That’s the easy part. And this is not a plea for never-ending hearings, less tribunal control, or *carte blanche* for counsel to inject whatever evidence or testimony counsel wants.

The point here is simply to urge caution on where to set the control knob. It is a suggestion that the critical part of the adjudicative process is human interaction and that the drive towards efficiency risks diminishing that element of the process *too much*.

Some cases will be suitable for fast tracks, compressed hearings, and resolution via papers, especially when both parties agree. But when in doubt, we should set the control knob in the direction that makes for more, not less, human interaction with the tribunal, even if the price is less “efficiency.”



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