Kluwer Arbitration Blog

Vienna Arbitration Days: How to Deal with Biases and Cultural Differences and Other Practical Issues

Floriane Lavaud (Debevoise & Plimpton) and Edna Sussman (Fordham University School of Law) · Thursday, April 18th, 2019 · ArbitralWomen

In the beautiful surroundings of the Palais Niederosterreicher, the 200+ delegates at Vienna Arbitration Days (VAD) 2019 were warmly welcomed by members of the Organising Committee, representing ArbAut, VIAC, AYIA (the Austrian Yearbook of International Arbitration), ICC Austria, YAAP (Young Austrian Arbitration Practitioners), and UNCITRAL. Anna Joubin-Bret, UNCITRAL's Secretary, provided an overview of UNCITRAL's work streams, including its work on ISDS procedural reforms and expedited proceedings under the UNCITRAL rules.

The **keynote speech** from Professor Catherine Rogers of Penn State University and Queen Mary, University of London discussed the development of Arbitrator Intelligence, which is due to launch later in 2019. Adopting an engaging presentation, Catherine considered the points of relationship between the storylines of James Bond films and the sorts of scenarios which arise in international arbitration, contrasting Bond's gadgets with the most-used gadget in arbitrator selection, *i.e.*, the old-fashioned word-of-mouth recommendations.

Arbitrator Intelligence seeks to unlock a wider range of options for parties and appointing counsel by using an in-depth data-driven analysis of an arbitrator's track record to assist parties in making more informed selections of arbitrators. Delegates were encouraged to explore the AIQ (the Arbitrator Intelligence Questionnaire) to see the depth of information which it seeks to extract. Such information being objective and factual, there is a limit to how much a disgruntled party, for example, can affect the feedback on a particular arbitrator. The more data submitted via the AIQ, the more likely it is that the reports generated by Arbitrator Intelligence will be of high value to users.

The **first panel session** of the VAD featured four ArbitralWomen: Edna Sussman (independent arbitrator and mediator), chair, Philippa Charles (Stewarts, London), Giuditta Cordero-Moss (University of Oslo) and Claudia Winkler (Negotiation Academy), as well as Dr Philip Anthony from DecisionQuest (a leading mock trial/arbitration provider based in the U.S.). Within the umbrella topic of psychology and its impacts in arbitration, the four speakers each gave a short presentation on a particular psychological dynamic in arbitration, which may affect the outcome if not anticipated and managed by participants.

Edna Sussman opened the discussion on cultural differences by reference to the Hofstede Dimensions and the studies that have demonstrated that people from countries with a higher

"power distance" and who accept that some people have more power than others are more likely to be persuaded by expert testimony. Philippa Charles noted that far from being cultural chameleons, arbitration practitioners are—at least, to some extent—influenced by their nationality and the approaches to society which that nationality imports. She explained Professor Hofstede's six cultural hard-wiring characteristics, where a high or low score tends to illustrate a particular national characteristic which is distinctive. She drew out the overwhelming influence, for example, in US nationals, of a preference for individualism, and how that feeds into, for example, a drive for success. Philippa also referred to high-context and low-context cultures, which can greatly impact a tribunal's understanding of evidence.

Giuditta Cordero-Moss focused her presentation on the imprinting of a decision-maker's home legal culture on their approach to legal issues. Using as an example a contractual pricing mechanism dispute, she contrasted the instinctive, textual approaches of a Norwegian-trained lawyer and a British-trained lawyer. The differing approaches led to different results in Giuditta's example: the challenge for practitioners -and especially for arbitrators- is to apply the relevant applicable law without being influenced by one's personal legal culture.

Claudia Winkler drew on her experiences training negotiators and mediators to look at **framing** and its effect on one's receptiveness to a proposition. In the negotiation context, the way in which an offer or proposal is framed may affect the recipient's response, engaging either the recipient's risk adversity or risk acceptance. The effect of the choice of presentation has far wider implications, including in cross-examination questioning and a tribunal's appreciation of the gulf between the parties' positions. Being aware of the other party's alternative framing and addressing it proactively, rather than being defeated in a "battle of the frames," is also key.

Closing the session with practical guidance on how counsel can counter these biases, Edna quoted Lucy Reed comment that "what mock arbitration therefore does is to change the lawyers' biases about their own cases. It allows them to see whether what they think are the most important points to make are (or are not) as good as they think, and therefore whether their clients are likely to win (or not)." Dr. Philip Anthony highlighted two particular advantages of mock arbitration: First, having the mock judge's private feedback assists the party in addressing any quasi-emotional or experientially-driven responses. Second, the effect and influence of a dominant arbitrator or judge on the rest of the panel can be explored. By matching the mock arbitrators as closely as possible to the selected panel, parties have an opportunity to assess how much a dominant arbitrator may affect the proceedings and potentially the outcome.

The **second panel**, consisting of Wendy MacLaughlin (GBsqd LLP), Howard Rosen (Secretariat International), and Manuel Conthe (Independent Arbitrator), was chaired by Dr. Günther Horvath (Dr. Günther J. Horvath Rechtsanwalt GmbH) and focused on the importance of mathematics and economics in arbitration. Wendy MacLaughlin explained the complexity in establishing reasons for the late completion of a project by means of forensic analysis. She emphasised that delay analysis in construction projects should not be perceived as a "*black box*." One of the challenges faced by arbitrators is that the use of the different methodologies can lead to different results, despite being based on the same facts (for example, relying on the actual progress records vs. using software with hypothetical calculations). Wendy explained that one methodology is not necessarily better than the other. The arbitral tribunal has to make its choice based on the available data and contractual requirements.

Howard Rosen explained the importance of the ability of counsel and arbitrators to manage

economic and industry skills. Experts, in turn, should use plain language and provide practical examples that would complement an academic approach with practical market knowledge. Bringing the message across in a clear and understandable manner requires time and cannot be underestimated by counsel. Arbitrators should also approach the presentation of the quantification of damages in an efficient manner and not leave it for the end of a long hearing. Howard noted, although AI tools are very useful in the quantification of damages, they raise various ethical, practical and legal issues, such as who should be designing and maintaining the system, what should be the basis used by the system to "learn," and whether the result should be considered valid evidence.

Manuel Conthe focused on the role and impact of time warps in the assessment of risks. Manuel referred to the "curse of knowledge," a cognitive bias under which an individual assumes that others have the technical and legal expertise to understand what he/she is explaining. In arbitral proceedings, the time-lag between the events that led to a dispute and the actual time of arbitration unavoidably imposes a "curse of knowledge" upon arbitrators and causes discrepancies between the assessments of facts at the different stages of the dispute. It is important for tribunals and parties to be aware of this phenomenon as both influence the decision-making process.

Building on the preceding panels, the **third panel** considered—from the perspective of counsel—the myriad of ways in which unconscious bias affects arbitral proceedings. The panel featured two ArbitralWomen: Floriane Lavaud (Debevoise & Plimpton) and Cecilia Carrara (Legance), as well as Paul Oberhammer (WilmerHale), Carsten van de Sande (Hengeler Mueller), and moderator Klaus Peter Berger (Center for Transnational Law). After discussing the different types of bias that affect arbitration proceedings, the panel suggested possible solutions and mitigating measures, including through the use of technical tools.

Floriane and Cecilia discussed the effect of the arbitrators' legal background and training on their decision-making, particularly with respect to evidentiary rulings, and how to mitigate such bias. For instance, practitioners from civil law jurisdictions may undertake a more inquisitorial approach to evidence, thereby limiting party-initiated disclosures, while arbitrators from common law jurisdictions may more broadly permit such disclosures.

Next, the panel considered a range of other biases, including self-serving bias, where decision-makers resolve ambiguities in a manner favourable to themselves, and hindsight bias, where decision-makers perceive certain facts as being more predictable than they actually were at the time. The panel focused especially on the cultural biases of arbitrators *vis-à-vis* gender and race, in connection with how arbitrators assess the reliability of witnesses. The panellists cited numerous efforts to tackle such biases in the selection of arbitrators, including the Pledge on Equal Representation in Arbitration and the ArbitralWomen arbitrator database.

Among the technical tools for mitigating bias, Floriane mentioned the hidden bias tests and training modules, such as the Implicit Association Test and Project Implicit (Harvard University-University of Virginia). Carsten discussed the increasing use of artificial intelligence (AI) in arbitration, but also the risk of AI tools leading to dysfunctional results, because not all relevant elements to disputes are taken into consideration when developing the original algorithms. Cecilia discussed the Council of Europe's first European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems. They all stressed the importance of ensuring equal access, warning that any existing procedural unfairness may be further entrenched otherwise.

To conclude, Paul raised the importance of not losing sight of the fundamental goal to ascertain the underlying truth and distinguished between “scientific” and “legal” truths and the influence of such modalities on advocacy techniques. The panel emphasized that arbitrators are often self-aware of their biases and will indeed try to look beyond the manner and style of presentation of counsel to ascertain the underlying facts.

This entry was posted on Thursday, April 18th, 2019 at 7:11 am and is filed under Arbitrator Intelligence, Arbitrators, Bias
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