Kluwer Arbitration Blog

Arbitrators as Flamingos of Many Colors

Pichrotanak Bunthan · Tuesday, February 9th, 2021

This post summarizes the International Court of Justice President Joan Donoghue's discussion, on Delos Dispute Resolution's TagTime series, with Dr. Kabir Duggal and Amanda Lee regarding cognitive biases of arbitrators, which are also applicable to judges. Judge Donoghue analogized the origin of those cognitive biases to how flamingos obtain their pink color, provided some examples where such cognitive biases occur, and suggested ways to respond to these biases.

The Literature on Cognitive Biases

The literature on cognitive biases suggests that all of us experience cognitive biases in our everyday lives. Therefore, it is inevitable that arbitrators are also subject to cognitive biases in their professional work. These biases are very difficult to overcome.

Examples of cognitive biases include, amongst others, confirmation bias and anchoring bias. Confirmation bias arises when an arbitrator gives more weight to evidence that supports his or her provisional view while downplaying other evidence. Anchoring bias often arises when numerical figures are introduced into evidence and thus is particularly relevant in questions of quantum.

The term "bias" has a pejorative connotation in the arbitration world. However, "bias" here refers only to the mere predilections and subtle influences on how each individual approaches the task before the tribunal, without suggesting an independence and impartiality issue that would give rise to a legitimate challenge of the award.

Cognitive sciences suggest that counsel, in their advocacy, may try to lure a tribunal towards a particular conclusion on two levels: (1) attracting the tribunal with a general impression that a specific outcome or conclusion is correct and (2) furnishing all exhibits supporting that general impression.

In this case, cognitive scientists recognize two modes of cognition that are in play for tribunal members. The first one is intuitive thinking, sometimes called "System 1" thinking, which draws arbitrators to feel that a particular conclusion is the right one. The second mode is sometimes called "System 2" thinking, which is a more deliberate and analytical form of thinking processes.

Arbitrators often react to parties' arguments by forming a System 1 impression that something feels right. The literature suggests that arbitrators would do well to check this intuitive response

with System 2 thinking. Close reflection is necessary because this proposed solution faces a risk that an arbitrator will succumb to confirmation bias, thereby, with the arbitrator's feather colors, overvaluing the evidence that supports the conclusion reached in his or her System 1 thinking.

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Tribunal members often have to decide based on complex, incomplete, and inconsistent information. To make such a decision, arbitrators individually and collectively have to use mental shortcuts or heuristics, which are ideas, methods of reasoning, or approaches that have emerged from their professional experiences.

In that sense, arbitrators are like flamingos of variant colors. Flamingos in nature are all pink. However, they are not born with this color, but their diets, such as shrimps and other small organisms, gradually turn their feathers pink.

As a comparison, each tribunal member also has his or her own color of feathers, and such "color" was acquired through his or her professional "diet." The color here represents the perspective and thought process that each arbitrator has. The professional diets refer to, for example, where one gets his or her legal education, whether one is trained in common law or civil law system, or his or her area of expertise.

It should be emphasized that the variation of arbitrators' feather colors here refers only to those of professional experiences, without detracting from the importance of diversity and full representation concerning fundamental characteristics, for instance, geographic region, level of development, capital export/import, and gender.

Example 1: Common Law and Civil Law Distinction

Arbitrators from common or civil law backgrounds may have been exposed to different training. Such training might produce differences, for example, as regards the use of experts in legal proceedings. Training in the common law system is very focused on litigation and, thus, on law as an adversarial process in which each party gets a chance under a fair and balanced procedure to prove its case. Consequently, the concepts of the burden of proof and the standard of proof are crucial for decision-makers to deal with questions of facts. For arbitrators trained in the civil law system, on the other hand, there is a greater emphasis on the court reaching its own appreciation of the right answer.

This distinction in training can lead to different perspectives on a tribunal's role in appointing scientific and technical experts. A civil law court would typically appoint an expert to advise or answer complex, technical questions and rely on that advice. However, court-appointed experts are not widely used in the common law system. Instead, consistent with the notion of an adversarial process, a party's basic task is to prove the facts, or engage its own experts to do so, as an ordinary course of its pleadings.

The second common distinction between the two systems is the style of legal drafting. The decisions of civil law courts generally describe the parties' positions in a detailed and isolated

manner and then state the court's conclusion without much detailed explanation of the reasoning. Common law courts do the exact opposite as they usually do not lay out in detail the arguments of each party but give very detailed reasonings of their conclusion.

Although trained in the common law system, Judge Donoghue has come to agree that having court-appointed experts in some situations is the right way to proceed. Regarding the style of legal drafting, while continuing to believe that it is vital for tribunals to provide explicit and detailed reasonings, Judge Donoghue has come to support the civil law practice of setting out clearly and in an isolated manner the arguments of each party. This description gives clarity to the losing party that the court understands the counsel's arguments but disagree or decides otherwise regardless.

Example 2: Use of Key Terms and Principles

The same terms and principles may not have the same meanings to different people. For example, there is a long-standing jurisprudence within the European Court of Human Rights (**ECtHR**) on the phrase "margin of appreciation." While European-trained lawyers may be used to utilizing that phrase without giving explanation, the phrase may not have the same meaning to lawyers trained outside of systems influenced by the European Convention on Human Rights (**ECHR**).

Another example is the term "manifest." Under Article 52 of the International Centre for Settlement of Investment Disputes Convention (**ICSID Convention**), one ground of annulment of the award is "that the Tribunal has manifestly exceeded its powers." In addition, Rule 41(5) provides an expedited procedure if a claim is "manifestly without legal merits." Even in this situation where both provisions are within the ICSID ecosystem, the term "manifestly" does not necessarily have identical meanings. Outside of the ICDSID context, the term may be understood in a very different way.

In these instances, arbitrators should be mindful that others may not share the same understanding or appreciation of the use of specific terms or principles. They should be prepared to explain what a term or principle means and why it is applicable in a given situation while being ready to accept that others may disagree.

Suggested Approaches to Arbitrators' Cognitive Biases

Arbitrators should not strive to have their "colors" bleached out, and as the cognitive bias literature suggests, it is challenging to do so. Instead, they should invest more time, effort, and energy into examining and acknowledging the effects that their individual "diets" have on the "colors" of their feathers, such as:

- analyzing and questioning their own in-built perspectives with great care and reflecting on what drives them towards a particular conclusion or instinct; and
- opening their minds and listening carefully to understand why their colleagues have different conclusions or instincts and the "diets" that cause such differences.

The tribunal secretary might also play an important role in responding to cognitive biases amongst arbitrators. For example, the tribunal secretary may point out that the tribunal may also wish to

consider exhibits X, Y, and Z, which may not support a given conclusion. This is particularly helpful in mitigating arbitrators' confirmation biases in their System 2 thinking processes as cautioned above.

Conclusion

A flamingo acquires its pink color through its diet, while arbitrators acquire their perspectives and heuristics through their professional experiences. Since arbitrators have different professional experiences, in a way, they are like flamingos of varied "colors" conceived by their distinct professional "diets." These "colors" may heighten cognitive biases, such as confirmation bias and anchoring bias. To cope with these cognitive biases, Judge Joan Donoghue suggests that arbitrators should make efforts to examine and question their own cognitive biases and the reasons thereof internally. In addition, within the tribunal, a tribunal secretary may question those biases as well. Both internal and external forms of questioning arbitrators' cognitive biases are necessary to ensure that the best result is reached in every case.

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