

# Kluwer Arbitration Blog

## Psychology in Oral Advocacy: Using Science to Persuade International Tribunals

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On June 22, 2021, the Dispute Resolution Interest Group (“DRIG”) of the [American Society of International Law](#) hosted the webinar “Psychology in Oral Advocacy: Using Science to Persuade International Tribunals.” The event featured [Doak Bishop](#), [Ula Cartwright-Finch](#), [Jennifer K. Robbennolt](#) and [Sabina Sacco](#), and was moderated by DRIG co-chairs [Simon Batifort](#) and [Rémy Gerbay](#). This post summarizes the webinar’s key takeaways.

Traditional legal education revolves around teaching sound legal reasoning, good research, and writing skills. When studying court decisions or arbitral awards in law school and professional courses, the psychology of decision-makers is largely ignored on the assumption that legal decisions are driven primarily by rational, conscious considerations. However, behavioural research and neuroscience teach us that this assumption is largely incorrect.

**How the human brain operates:** Relying on insights from the field of cognitive psychology, Ula Cartwright-Finch explained that human decisions are not based only on rational factors. Humans have two ways or systems of thinking. System 1 is fast, intuitive, automatic and allows us to make quick decisions. System 2, on the other hand, takes effort. It is slow, deliberate and logical. Humans operate on System 1 most of the time. But problems can arise if we allow System 1 to make decisions for which we should actually use System 2.

The decisions of professionally trained legal decision-makers can also be influenced by irrational or irrelevant factors. An analysis of sentencing decisions made by juvenile court judges in a U.S. state over a 16-year period found that, when a prominent local college football team lost unexpectedly, judges gave harsher sentences throughout the following week. The effect was larger for sentencing judges who studied at the team’s university.

Although emotions or cognitive biases may influence decision-making in certain situations, there are other unconscious influences that are more consistent and constant in a person’s mind. In the case of international arbitration, each arbitrator has his/her own personal sense of fairness and may have a strong desire to be seen as competent and ethical. The fact that they are party-appointed and desire to be appointed in the future can also have an impact. There are also specific techniques that advocates can employ to influence arbitrators’ thinking. For example, ‘priming’ consists of

exposing a person to one stimulus (such as a word), which can influence how that person responds to a subsequent stimulus (such as another word). Another example is metaphors. Neuroscientific studies show that metaphors engage the human brain in a fundamental way. When people hear a metaphor, it connects them to a basic physical experience. As such, metaphors engage more of the human brain as compared to more literal description of facts.

**Cognitive biases in legal decision-making:** Jennifer K. Robbennolt explained that cognitive biases (a kind of heuristic) are ways in which humans simplify or take shortcuts in making daily decisions. They operate in the realm of System 1 thinking. As shortcuts that help process information and make decisions quickly, they make it very efficient for humans to navigate the world. However, difficulties arise when decision-makers use these shortcuts to make more complex judgments.

One of the relevant biases is ‘anchoring’. When people make judgments, they often unconsciously begin the judgment process at some initial value, and then make adjustments away from that value.

This helps the brain quickly get to a useful answer. But sometimes the human brain anchors automatically and unconsciously on irrelevant values, and those end up influencing final judgments. A second example is ‘framing’, *i.e.* how decision-making is influenced by the way a problem is presented. A third example is ‘hindsight bias’. In the legal environment, decision-makers assess situations and behaviour with the benefit of hindsight, although it is typically appropriate to judge the behaviour of the actor from his/her position at the time he/she engaged in that behaviour. This bias makes it difficult for people to take a forward-looking perspective, because once we become aware of the result, we tend to reinterpret all other known factors about the event in light of that outcome. We not only start to think that the outcome was inevitable, but also that it would have appeared inevitable to others. A fourth example is ‘confirmation bias’?the tendency for people to process information in a way that confirms their current preconceptions, attitudes, beliefs, and even moods. People pay closer attention to and better remember information that is consistent with their preferences and hopes. By contrast, people tend to avoid, discount, and forget information that challenges those beliefs and preferences. When information is ambiguous, we interpret it in ways that concur with our preconceptions, attitudes and hopes.

**Advocacy strategies based on psychology:** Doak Bishop explained that one of the most important psychological strategies for advocacy involves framing the argument. Studies have shown that two different ways of framing any issue can lead people to reach dramatically different results. One aspect of framing is linguistic—it involves using specific words to call to mind certain word associations, which in turn can influence what, and how, the decision-maker thinks. Another aspect is subject-matter framing?placing the case into the frame of a specific law or moral framework which evokes different associations from the brain and thus can be more or less persuasive to the audience. Bishop concluded that an advocate should consciously seize the opportunity to frame the case in a persuasive way at an early stage of the proceeding and should not necessarily accept the way the opposing party frames the case.

Moving on to ‘self-persuasion’, Doak Bishop explained that communication experts referred to that principle as the “holy grail of persuasion research” because it overcomes the key obstacle to persuasion, which is resistance to the message. This occurs when the audience starts to develop in

their own minds counter-arguments to the message. One way to reduce resistance to the message is by weaving the facts of the case into a story. Stories do not create as much resistance because they do not explicitly contain a message that the audience is being asked to accept. Another way to reduce resistance is to break up the argument by posing questions to the tribunal from time to time. Questions do not evoke the same mental response of critical analysis as factual assertions. Instead, they invite a different way of thinking: an open-minded, interactive attitude of searching for the right answer, instead of simply accepting a predetermined one.

**Impact of advocacy strategies on tribunals:** According to Sabina Sacco, research suggests that System 1 has a greater impact on decision-making than arbitrators or judges realize. Some of the factors that may make certain arbitrators or judges prone to intuitive decision-making are lack of awareness of how the brain works, excessive self-confidence, and lack of time.

In Sacco's view, decision-makers are particularly affected by framing bias, confirmation bias and anchoring. The brain tends to focus on: 1) information called to its attention by salient external stimuli (bottom-up attention), and 2) information that the brain deliberately chooses to focus on (top-down attention). The way parties present or "frame" their case is thus likely to influence what information the arbitrators or judges focus on. With respect to confirmation bias, research suggests that arbitrators and judges tend to focus on evidence and arguments that confirm their initial position and disregard the evidence that opposes it. The question is whether the story told by a party and the evidence on record will have sufficient impact on a decision-maker to override his or her original intuitive conclusions. As to anchoring, research shows that even exposure to an irrelevant value may have an impact on the decision. That said, Sacco warned that advocacy strategies can sometimes backfire. Overstatement and exaggeration rarely help a party's case. Framing and anchoring should be based on the facts and supported by the evidence.

Sacco suggested several strategies to address the impact of these biases. The first step is to raise awareness among arbitrators and judges as to their existence. Another is to establish rigorous processes for decision-making that force arbitrators and judges to reach deliberate rather than intuitive conclusions. Yet another is to appoint a tribunal secretary, who could assist time-crunched arbitrators with administrative tasks and liberate more time for deliberative thinking. Finally, by referring to these biases in their submissions, counsel may assist in defusing automatic reactions and prompt the tribunal to think deliberately.

**Factoring in notions of fairness and equity in oral advocacy:** Bishop referred to the "fairness instinct" in pointing out that arbitrators generally decide cases in a way that vindicates not only the law but also their own sense of fairness about how the parties treat each other. Advocates should therefore focus on the equities of the case—the facts that show whether the parties treated each other fairly—because that can be the strongest weapon an advocate has to persuade an arbitrator. The objective is to appeal to the arbitrators' own sense of fairness about the case, in addition to putting the case into the relevant legal framework.

**Final tips on advocacy strategies:** Cartwright-Finch argued that since a massive amount of our brain is devoted to visual processing, the use of images is of utmost importance. She referred to

the case *OAQ “Tafnet” v. Ukraine* in which, at the hearing, claimant’s counsel relied on CCTV footage showing men taking over premises of the company in which the investor had invested.

The footage clearly had an impact on the tribunal because it was referred to at length in the award. Cartwright-Finch concluded that the use of story-telling to complement the evidence is key to winning a case. Robbenolt also explained psychological research showing that the easier it is to process a message, the more memorable and persuasive it is. It is important to make the message simple, use unambiguous fonts and graphics, and avoid jargon and big words. This helps with persuasion because messages are perceived as more intelligent and persuasive when they are easy to process.

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