The Psychology of Persuasion in International Arbitration - A Project
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**Introduction**

This project has its genesis in the creation of a Special Issue on Arbitrator Bias for the online journal Transnational Dispute Management.\(^1\) Our reflection on various forms of bias in arbitral decision-making, conscious or unconscious, positive or negative, led to the realisation that insufficient attention was being given to the psychological factors at play in the arbitral process. In the wider context, the implications of the cognitive element of professional activity are a growing field of practical interest and academic study.\(^2\) More specifically, what triggers which decision-making processes

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in the mind of international arbitrators? What persuades an international tribunal and why?

Thus we stepped into the ‘twilight zone’ of the human dimension of arbitration.

We initiated a pilot study based firstly on qualitative evaluation research, a method designed to improve professional qualifications in various areas. We explain our approach below. We are now seeking to refine this method by applying research findings in modern neuroscience and cognitive psychology concerning the decision-making process generally. Our aim is to find out whether these findings can be applied to arbitration in practice and if so, how they assist arbitrators and counsel engaged in the process.

At the time of writing, this is a work in progress, with a view to eliciting further scholarship, as well as a series of practical workshops on how psychological insight assists the international arbitration process on both sides of the ‘bench’. Although this project presents undeniable academic interest, we feel that it is important to emphasise its practical perspective, and to stress that its primary purpose is to provide a set of tools for the use of arbitration practitioners.

This chapter therefore looks at the art of persuasion in international arbitration from the psychological angle, on the basis of what our project has yielded so far, and examines issues for the continuation of our work.

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3 House, E.R./Howe, K.R. (1999): Values in evaluation and social research, Sage Communications Inc.: “We want to cast the core fact-value distinction [fact as objective, value as subjective] another way. We want to contend that fact and value statements are not dichotomous; rather, the two blend together. Evaluative statements consist of fact and value claims intertwined, melded together, and so do most claims in evaluation. Furthermore, we want to contend that evaluators can draw objective value conclusions by collecting and analyzing evidence and following the procedure of their professional discipline. (…) The concept of IQ is a good example: it has both fact and value elements to it.”
4 On which the authors welcome feedback and comments.
What are we hoping to achieve? Why does this matter?

What is the value of a better awareness of the psychological factors at play in the arbitral process? What can be achieved with psychological self-awareness that cannot be achieved without?

On a basic level, one might posit that self-awareness through psychological insight is in itself valuable to make international arbitration a more enlightened process overall.

These authors, however, would go further. We argue that some of the very core features of international arbitration are such as to make psychological insight essential to the maintenance of the quality and integrity of the arbitral process. Psychological insight also has the potential to provide arbitration professionals with a powerful tool to assess from within concerns about and criticisms of the process, and of arbitral decision-making, and address them.\(^5\)

Psychological research findings on human decision-making as an everyday occurrence, based on neuroscience,\(^6\) provide the following helpful elements.

**The autopilot**

The limbic system (the centre of emotion) in the human brain continuously classifies incoming information as ‘important’ or ‘unimportant’. The same information is then evaluated again as being ‘positive’ or ‘negative’, on the basis of past experience and

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\(^6\) Klein (1999). See Selected bibliography at the end of this chapter.
connection with pleasant or unpleasant emotions. The limbic system thus stores and evaluates a large amount of information, strongly associated with memories of emotion. It sifts through and computes this information unconsciously, using heuristics (initial impressions, educated guesses or intuitive judgments based on past experience), to find its way through the complexity of impressions and information. We will call this process the ‘autopilot’.

The autopilot works like an automatic system of information management and control of attendant activities. Its primary use is to ‘unburden’ the brain. A good everyday example is the routine of driving a car. Once the routine is mastered, the driver need not concentrate constantly on driving technique, perception of information and traffic rules. These are managed automatically so that the driver’s mind is, so to speak, ‘free’ to do something else: speaking to a passenger, say, or thinking about the day ahead.

The autopilot is particularly well-developed in trained professionals, whereas beginners use the different strategy of ‘switching on’ conscious analytical thinking more frequently when presented with information they need to process. The coexistence of these two separate systems of reasoning in the human brain is well-recognised, and in the context of other research on decision-making the ‘autopilot’ is referred to as ‘intuitive’ judgment and conscious analytical thinking as ‘cognitive reflection’ or ‘the ability or disposition to resist reporting the response that first comes to mind’.  

Let us take an example connected with the environment of a law firm: that of junior lawyers following a training seminar aimed at teaching them client interviewing techniques. The purpose is to develop communication skills that will elicit from the client the elements of information necessary to identify the applicable legal issues. The junior lawyers learn that they cannot simply rely on the clients’ characterisation of the problem. As a further step, the junior lawyers should also be taught that it is not sufficient to identify the legal issues. In addition, various possible solutions should be outlined.

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Experienced lawyers know that this further step is a crucial one, which must be practised early and honed on, so that clients are not only given a statement of their problem, but ways in which it may be solved.

Let us assume now a junior lawyer who, improperly or insufficiently supervised, fails properly to assimilate the last step of offering solutions. After some time in practice, the junior lawyer will come to master the client interviewing technique, but keeps coming short of outlining proper solutions. The incomplete technique becomes the autopilot, without the junior lawyer realising its shortcomings.

Here lies the problem: the autopilot lets us down. It provides a false sense of familiarity and security, even where some of the information presented to us (the clients’ information for the junior lawyer in the above example; evidence, in the case of arbitrators) would not be classified in the same way as the autopilot process suggests were it analysed by conscious thought.

Thus in excluding important information ab initio, or classifying it as unimportant, or underrating its complexity, the decision-making process is hampered from the start.

Linking this to the task of persuasion, the advocate facing an international arbitration tribunal will want to ‘play to’ the autopilot to advance the best arguments of his or her case. For complex or novel issues, the advocate will ensure that the tribunal collectively does not underrate or dismiss certain important elements that may stand in the way of a neat, simple outcome. The arbitrator who is aware of these psychological processes will ‘switch on’ the analytical thinking process more systematically, and compare the outcome of his/her analytical thinking with his/her initial impressions (the autopilot).
Relevant elements of international arbitration

The arbitral process, with its specific components and features, presents several elements which lend themselves to psychological probing. The following areas are just a sample.

Choice of decision-makers

One distinguishing feature of arbitration as a means of dispute resolution is that the parties can choose to have a say in the composition of the tribunal. This feature comprises several built-in psychological elements.

First, in a privately paid-for process where party appointments are valued or seen as a ‘fundamental right’, parties may feel empowered with an element of control over, if not the entire tribunal, at least their nominee. The fine line walked by the party-appointed arbitrator in terms of impartiality, integrity and loyalty has long been the subject of criticism and comment. In ensuring that their appointing party’s case is properly understood by the tribunal (to use the oft-heard description of the role of the party-appointed arbitrator), the party-appointed arbitrators may tend to discount the more complex, or weaker, aspects of the nominating party’s case.

Second, arbitrators are free agents. Unlike judges, they have no tenure, and operate in a competitive market for services. The quest for future appointments may colour the arbitrators’ behaviour, and impact on their decision-making. They may be reticent to render difficult, or unpopular, decisions and prefer to split cases down the middle. In a three-member tribunal, they may tend to rely on dissents rather than look for consensus in deliberations, which could imply a degree of compromise that they consider would affect their eligibility for reappointment. They may have a perception of their own impartiality and independence in a given case, or their ability to keep

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10 Ibid.
hermetically separate their role as counsel in one case, arbitrator in another, that is at odds with that which an outsider would consider acceptable.

Third, arbitrators operate within a (restricted) peer group of fellow arbitrators and counsel, whose overall view of each other’s performance essentially dictates the potential success and longevity of an arbitrator’s career. At the same time, there are few, if any, instances in which arbitrators individually obtain specific, reliable feedback on their skills and performance. Likewise there are few, if any, fora where arbitrators can freely exchange views on difficult ethical questions or disclose their uncertainty of approach in certain situations without being concerned about affecting their reputation and future appointments. Arbitrators therefore need to develop, and maintain, a strong internal compass of values, which they are prepared to defend and stand by, whilst at the same time constantly auto-evaluate the accuracy and soundness of their performance and measure it in terms of their ‘marketability’.

**Impartiality (and contrast with personal preferences)**

Impartiality is a *sine qua non* feature of the function of an arbitrator. Individual arbitrators may “translate” this requirement into different attitudes.

Some will stick to a regimented, detached manner before the parties, giving no indication of their reaction to what is unfolding before them. It is very difficult for these arbitrators to engage with the case, and reliance on the autopilot becomes harder to gauge. Also, lack of communication with counsel prevents the clarification of the more difficult points, and thus the ‘switching on’ of the analytical thought process occurs less systematically than perhaps it should be.

Yet these same arbitrators inevitably have personal preferences as to a style of case or presentation. This jars with the detached attitude they adopt, creating a tension that remains unresolved. Hence in a sense they may be more prone to be persuaded by the advocate whose style or approach they happen to favour. In deliberations with their fellow arbitrators they may adopt the same detached, apparently inscrutable manner, giving off the impression that their mind has been made up from an early stage,
without being willing consciously to verify the premises on which their decision rests, relying, they say, on their judgment and experience.

Other arbitrators, unfettered by the outward attitude of perfect control, are more readily prepared to engage with counsel on both sides in equal measure. Thereafter in deliberation they reflect upon the experience and consciously assess the elements of the case on each side before making their decision.

**Privacy versus public scrutiny, and precedent**

The international commercial arbitration process has historically been private. Only the parties were privy to the arbitrators’ behaviour, exercise of judgment, values and thought process. In issuing an award in a given case, arbitrators did not look to make pronouncements beyond the four corners of that particular case. In a system in which awards were not publicly disseminated, they did not look to make legal history. Similarly, the desirability or marketability of a given arbitrator was not primarily measured by the contents of his/her awards. Rather it may have been his/her contribution to a process perceived by the parties as inherently fair as a whole, and where they had an opportunity to air their grievances to a tribunal willing to listen.\(^\text{11}\) Or his/her standing as a scholar in the community, or retired judge, or business person of high repute.

Lack of precedent, historically a staple of arbitration, is less prevalent in the current age of corporate governance and transparency of process. In certain areas of international arbitration dealing with issues of public interest (namely investor-to-State arbitration), many disputes are in the public domain from the start. The vulnerability of arbitrators is correspondingly exacerbated, for whilst the arbitration process has been forced to become more public, no corresponding protection has been afforded to the decision-makers, whose every utterance in an award is pored over and dissected by the investment arbitration community with exacting standards. The

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\(^{11}\) Donna Shestowsky, ‘Misjudging: Implications for Dispute Resolution’ (2007) *Nevada Law Journal* 487 (arguing that disputants are not primarily guided by outcome accuracy considerations when evaluating dispute resolution procedures, and that they focus more on how they were treated).
investment arbitration awards that have been branded poorly reasoned, unpredictable, and downright irreconcilable in this field may to an extent be a symptom of this phenomenon. Calls are being made for the implementation of a review or appeal system that, assuming it is feasible, may provide as much of a safety net for arbitrators as it would assist consistency in development of this nascent legal field.

Until this phenomenon is addressed, there is room for argument that it can present a real threat to the integrity of the international arbitration process, both investor-to-State and commercial, as the same arbitrators often straddle both disciplines.

Lack of appeal or review

In a process that allows limited or no review of decisions, it is hard to resist the thought that there is little room for error. This is a tall order for any human decision-maker, hence perhaps the criticism that certain arbitrators tend to ‘split the baby’ – a Solomonic outcome with which arbitration as a process is regrettably associated, to a greater or lesser degree.12

A review or appeal system in investment arbitration could also, arguably, bring the case-by-case decision-making process of arbitrators closer to that of State judges. Psychological studies have aimed to show that one factor setting apart judicial decision-making from a layperson’s, or even a lawyer’s, is what is termed ‘second-order reasoning’13: the ‘higher-order decisions trumping reasons that would otherwise provide a valid basis for a decision’,14 such as, for example, precedent.

Global aspects of international arbitration

To the practitioners of international arbitration, both counsel and arbitrators, the multi-cultural nature of the process is a reality they encounter under many guises in

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13 Schauer, supra, note 1.
14 Simon, supra, note 1.
their daily practice. Many experienced international arbitration practitioners do not give it a second thought.

In order to reflect this practical reality, international arbitration practice has developed guidelines on procedure and arbitrators’ conflicts of interest, to name but two, that seek to provide a common ground between common law and civil law traditions, with a view to accommodating practitioners hailing from different legal cultures. Such is the truly international character of the international arbitration process that there are proponents of the application of a self-standing transnational ‘arbitral legal order’ as overarching applicable law in international arbitration.

A closer look at some of the ramifications of the global nature of international arbitration highlights the specific challenge that it presents to arbitrators and counsel, which offers fertile ground for psychological insight.

This challenge can be summed up as one of communication.

The challenge of communication arises not only between counsel and arbitrators from different legal and cultural backgrounds, but also between arbitrators on the same panel, and the perception by arbitrators of the witness evidence presented to them. Because the processes involved in communication have deep roots in culture, emotion and education, the autopilot may prove especially influential.

The multi-layered process of putting across a message in the international arbitration procedure, and ensuring it is understood, calls for the development of particular skills. Reliance on ‘instinct’ and one’s own perceived ‘open-mindedness’ is likely to prove insufficient in the face of calls for measurable standards of arbitrator behaviour.


For counsel, the awareness of the psychological factors at play is bound to enhance the persuasive quality of their case. For arbitrators, it will help chart a course in what can be a minefield of potential misunderstandings and misperceptions.

**Overall picture**

In a confidential process, operating under the gaze of a restricted and demanding peer group, with few external means of testing the soundness of one’s skills and judgment, how vulnerable are arbitrators to persuasion? Either overly vulnerable, or so unwilling to step out of their comfort zone as to resist persuasion completely. Hence the need for a measure of psychological insight to restore the balance.

The above features provide a good example of the workings of our research method. How helpful to arbitral decision-making is the maintenance of a regimented, detached manner before the parties? It may be deliberately adopted by an arbitrator as a strategy to fulfil the requirement of impartiality. The arbitrator may believe that the strategy can be dropped as soon as he or she becomes aware that it does not work. However, applied persistently, this manner can culminate into a permanent outward attitude of perfect control and become a ‘value-based’ attitude, learned in the course of practice as an arbitrator, or even as early as in law school.

How helpful to arbitral decision-making is the belief that the arbitrator must master all details and materials of the case ‘first off’ not to endanger the perception of his/her authority, and to ensure that no important part of the case is misunderstood?

Where these attitudes are routinely adopted, we would expect to see them reflected in the replies to the questionnaire, which constitute the ‘data’ used in the first step of our evaluation.

In the next step of our evaluation, we confront these attitudes with other requirements of the arbitration process: for example, the requirement to ensure that the arbitrator obtains missing information, or a clearer understanding of certain issues, necessary to draft the award. The arbitrator could turn to the parties for assistance, ‘There is an uncertainty on my side on issue XY. Please help me get a better understanding of this
issue.’ This scenario, however, may be perceived as incompatible with the permanent outward attitude of perfect control, or mastery of the evidence or issues. Therefore the ‘perfect control’ demeanour may be considered unhelpful to the performance of the arbitrator’s role, as it prevents the arbitrator from communicating frankly the reality of uncertainty.

For arbitration counsel, knowledge of these likely reactions will provide insight into the most effective persuasion strategy for a given tribunal, and in developing criteria for choosing arbitrators in the first place. It places a few objective points of analysis on that trigger point that makes one think, “This is the right arbitrator for us”, or “This tribunal will follow our argument on this”.

The multi-cultural nature of international arbitration in turn provokes the following thoughts. Advocates (and parties) hailing from countries with a strongly-established litigious culture tend to perceive arbitration as a competition to be won. The evidence and legal arguments presented to the tribunal are determined by the question: will it help me to win the case?

With this basic criterion of evaluation, these advocates and parties have a deeply-embedded tradition of competition amongst individuals. This is true of many fields of human activity: sports, politics, and business. (We call this a ‘value-based attitude’, a concept further explained below). In the international arbitration context, the advocate holding this value-based attitude may well misread the impact of a certain style of presentation of evidence on arbitrators holding different value-based attitudes – a well-known occurrence is the reluctance of arbitrators hailing from a civil law background towards the aggressive, or prolonged, cross-examination of witnesses.

Similar situations occur in cases where one party and its advocate come from a less litigious legal tradition, or a country with little or no tradition of arbitration. Arbitrators may misread the advocate’s presentation as lacking a certain conviction or ‘fighting spirit’. The advocate may view the attitude of strong individual competition as superficial.
Our project aims at examining ways in which arbitrators and counsel in these situations can be aware of the influence of the autopilot and find workable, and effective, channels of communication.

**Challenges and methodology**

In order to probe areas such as persuasiveness, the brain’s approach to and handling of complex facts and concepts, cultural bias, emotion, and collegial and isolated decision-making in international arbitration, we face three main challenges: first gathering data, second analysing it, and third identifying objective criteria to be used by practitioners in evaluating the psychological dimension of persuasion in the arbitral process.

Before we delve further into methodology, it is also important that we emphasise what our method of research is **not**. Studies on arbitration-related decision-making carried out on domestic arbitrators and juries in the US (for example, Professor Donald Wittman’s study)\(^\text{17}\) generally proceed along the following lines: they focus on a limited number of pre-determined parameters to the exclusion of others (in the Wittman research: are arbitrators and juries likely to make higher awards where the Respondent has deep pockets?) and aim to provide a statistical overview of the outcome of decision-making within these limited parameters (Wittman: yes, both arbitrators and juries in 383 cases will award higher compensation where the Respondent has deep pockets).

These studies, whilst they isolate one possible factor of decision-making, shed no light on other possible intervening factors (e.g. emotion) or triggers. In the words of John Dewey, this method “sets forth the **results** of thinking, it has nothing to do with

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the *operation* of thinking."¹¹⁸ As such, therefore, these studies shed little light on the theory of persuasion in decision-making.

In contrast, our study – at this stage a pilot study - is focused on international arbitration. It seeks to identify precisely that which is less developed in the statistical approach used in other studies: what persuades and triggers decision-making in international arbitrators, who operate in a process characterised by several unique features, each carrying psychological components (we do not single out only a few parameters). In Dewey’s words, we seek to focus on the ‘operation’ of decision-making.

In order meaningfully to focus on the ‘operative’ part of decision-making, we need a methodology that provides heightened ‘explanatory strength’, by which we mean that it explains possible motivations, rather than stop at observing these motivations. The ‘explanatory strength’ of the statistical methodology is comparatively low.

Consider, again, Professor Wittman’s study on arbitrators and juries as an example. Arbitrators and juries are likely to make higher awards where the respondent has deep pockets. This leaves unanswered the question why this is the case. Why are these arbitrators and juries guided in the decisions by the Respondents’ financial means? In the terms of our study: what underlying values are guiding – as an unstated, implicit knowledge of this professional group - their decision-making with regard to the financial means of the Respondents?

Our first step is to identify the psychological issues faced by arbitrators, and to find the appropriate categories for them. To this end, qualitative evaluation research is more effective than other research methods, statistical or experimental, because it proceeds, not from an outcome-orientated, statistical mode of research (where data is slotted into pre-determined parameters and categories), but ‘from the inside’, using anecdotal information from a cross-section of the arbitrators themselves.

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Gathering data: Getting arbitrators to open up

The first challenge is that the application of a psychological angle to international arbitration is uncharted territory in many respects,\textsuperscript{19} not least of which the fact that there is no representative empirical data regarding international arbitrators and practitioners of international arbitration. In addition, unlike court trials, the vast majority of arbitration hearings are not open to the public, ruling out field work. So we set about finding a way to obtain relevant data.

We started with the arbitrators, a fairly contained group which is well-suited to our methodology. \textit{Qualitative evaluation methodology}, rather than placing statistical emphasis on a large number of case studies, proceeds from the basis of a limited sample of ‘information-rich’, and illuminative, participants. Qualitative data is especially useful where different participants are expected to manifest varying outcomes based on their own individual experience and circumstances.

For our target group of arbitrators, this data is obtained by circulating questionnaires\textsuperscript{20} and conducting interviews.\textsuperscript{21}

The data documents the existing practical knowledge of arbitrators about the arbitral process. There are various components to this knowledge. Some of the components are explicit, and easily reflected on. Others are implicit, and never reflected on. Yet all these components of professional knowledge are used by arbitrators to guide the way in which they conduct themselves and communicate in professional situations.

\textsuperscript{19} With the exception of studies carried out comparing arbitral decision-making to decision-making by jurors in the domestic American context. See, e.g., Drahozal, supra note 2; also Donald Wittman, ‘Arbitration in the shadow of a jury trial: Comparing Arbitrator and Jury Verdicts’ (2003-2004) Dispute Resolution Journal, available at <http://findarticles.com/p/articles/mi_qa3923/is_200311/ai_n9463732/?tag=content;coll1>. The methodology in these studies is, as we explain above, the polar opposite of that which we are adopting for this project.


\textsuperscript{21} Forthcoming.
Analysing data: The documentary method of interpretation

How is it possible to access the implicit, never-reflected-upon components of the arbitrators’ professional knowledge? By means of a method of analysing answers called the documentary method of interpretation. It is a partly inductive, and partly deductive, method. In contrast to the traditional quantitative method of research, which fits data into pre-ordained categories, the qualitative method is data-led: the categories emerge from a deepening study of the data itself. It is well-known and applied in various modern scientific disciplines such as linguistics, sociology and pedagogy.

The documentary method of interpretation takes into account all social phenomena that are considered meaningful. In everyday communication between individuals, these phenomena might comprise activities like telling a story, passing judgment on a professional performance, or answering questions. These phenomena are considered as data documenting underlying patterns – either the patterns of an individual’s thinking and social acting, or those of a social group (say arbitrators). The process of interpretation consists in finding and identifying these patterns by placing the data within initial ‘categories’. As investigation into the data progresses, the initial identification of categories is constantly being reassessed in light of the deepening information, so as to allow the natural emergence of certain patterns. The application of this method ensures that we remain ‘within the data’: we avoid subsuming it in pre-labelled categories which may turn out to be inadequate.

As the process evolves, more connections amongst the data become evident, thus unveiling the underlying patterns.

The patterns lie in structural regularity, rather than statistical regularity: they may evidence a collective form of telling a story; a way of performing evaluations by using a set of specific criteria; a mode of thinking to identify an issue. These structural regularities of thinking and social acting belong to the existing practical

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knowledge of arbitrators, and are used to give meaning to the arbitrator function and mode of being.

The scientific component lies in the process of making explicit, and reflecting upon, what is done without reflection in everyday life: identifying social phenomena by using structural regularities which make them meaningful.

**Deeper analysis: Identifying values**

As a next step following qualitative evaluation research, we distinguish (i) evaluation, (ii) social values, and (iii) value-based attitudes.

**Evaluation** incorporates value judgments referring to programs, social institutions, or politics; value judgments are made on the basis of certain procedures and in accordance with certain given criteria.23

**Social values** build up a value system in which they are inter-related, especially by a structure whereby values are distinguished according to a preference ranking.

The notion of **value-based attitudes** concerns the ‘implicit’, never-reflected-upon knowledge referred to above. This notion is needed to carry out the empirical reconstruction of social values in practical, everyday life. The reconstruction in turn is necessary, given the abstract and vague character of the information obtained when people are asked to identify their prime values. By way of example, Americans might answer: ‘It is individuality, of course’ or ‘It is success’. But what is the practical manifestation of individuality or success? How does this social value determine their practical everyday activities? Value-based attitudes provide insight into the process of ‘how-it-is-done’ because these attitudes are determined by an existing implicit practical knowledge.24

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23 R. House, R. Howe (1999). See Selected bibliography at the end of this chapter.
The example of the ‘rationalist’

How does the documentary method of interpretation work in this context? Let us take as an example the approach to arbitral decision-making which can be termed ‘rationalistic’. Let us assume that this approach includes a certain value-based attitude. Let us assume further that a person (who will be called the ‘rationalist’) has an implicit practical knowledge about his/her ‘rationalistic’ approach – practical in the sense that he/she will make use of this knowledge in the professional activity of arbitration. By looking for data documenting this approach, we get access to the value-based attitude of a rationalistic approach.

What are the relevant types of values? In our initial search for preliminary categories, we could go back to the period of the history of philosophy termed ‘rationalism’. We do so, not because we believe that the history of philosophy will have a direct influence on the value-based attitudes on professionals of our time, but to see how rationalism emerged, and its influence on Western culture.

History tells us that the era of rationalism (the 17th and 18th centuries) saw the development of a new concept of science (led by Descartes, Spinoza, Leibniz). ‘Science’ was equated to ‘natural science’ and ‘mathematics’. ‘Scientific’ meant ‘represented by the formal language of mathematics’. Rationality was seen to rule the world. The thinking process held unlimited power. Connected with these beliefs were a strong optimism and conviction that a solution could ultimately be found to any problem.

Historical information thus provides indications of certain implied preferred values that may be taken into account in analysing the rationalistic approach to arbitration.

Firstly, there is a clear and highly-held appreciation of cognition (thinking), endowed with the power of absolute control. Emotions are sharply distinguished from thinking, and thinking can control emotions absolutely – a control that is considered necessary to all academic (scientific) professional pursuits. Only by excluding emotion from the outset can another high value be reached: the objectivity of research findings. Emotional reactions are considered to jeopardise this objectivity.
Secondly, mathematics and natural sciences were then the ideal model of science. Use of the formal language of mathematics and logic allowed the perfect realisation of the above concept of objectivity.

What of rationalism nowadays? A strong influence of rationalism can still be found in many fields of natural science, albeit in a modified way, including psychology oriented towards natural science as the ideal model of scientific research.

Finally, on this topic, we must stress the fact that the following questions are empirical in nature: What is the rationalistic approach to arbitration? How does it manifest itself? The concept of value-based attitudes will help us build adequate categories for identifying the rationalistic approach in the form of an underlying pattern – a pattern of behaviour underlying the data received in the questionnaires, and revealed by this data.

Measuring arbitral-decision making

The third methodological challenge of our research is to identify an objective measure for the evaluation of arbitral decision-making. In other words, how do we identify what arbitrators need to know and apply in the psychological dimension of the arbitral process? How do we elaborate applicable criteria for this evaluation?

Going back to the data, we evaluate it on two distinct levels: (i) the use of the implicit knowledge of arbitrators as the basis for a value-based attitude (a rationalistic approach); and (ii) gauging this implicit knowledge against certain features of the role of arbitrator.

The relevant features for level (ii) of the evaluation are found with the help of research findings of modern neuroscience and cognitive psychology, which refer to decision-making processes similar to those of arbitration; with the help of psychoanalysis, referring to psychological conflict structures potentially of relevance to the arbitral process; and with the insight provided by experienced arbitrators (in the questionnaires and in interviews).
Taking again the example of a rationalistic approach to arbitration, its strong belief in the unlimited power of the thinking process is questioned, both by modern neuroscience and cognitive psychology, as well as by psychoanalysis. It is submitted that arbitrators ought to consider these research findings, not as arguments for “irrationalism”, but towards the development of a higher level of rational professional behaviour.

At the time of writing, with our project still in its early stages of analysis, it is premature to attempt definite answers to these questions. However a number of avenues have already begun to emerge from the data collected so far, and we outline below these initial elements for further reflection.

**The questionnaire and what it has revealed so far**

This chapter is based on nineteen (19) completed questionnaires. The questionnaire is reproduced in Annex 1.

The respondents were asked to react to seventeen (17) statements, some of which broken down into several sub-propositions. Each statement or sub-proposition was to be ranked with a number from 1 to 5 according to the respondent’s level of agreement, with 1 meaning total agreement and 5 meaning complete disagreement.

The statements were organised under the following headings: Approaching a case; The Arbitral Process; Sympathies and Antipathies; External appearances and internal feelings; Sole arbitrator/panels.

At the time of writing, questionnaires keep coming in, and data analysis is still underway. Consequently the initial findings below are only preliminary. They are grouped under the categories that emerge as most obviously apparent at this early stage of analysis.
Individuality of the arbitrator

The first finding to emerge from the replies was the wide variety of the ratings to any given statement. Data analysis in our research method looks for ‘clusters of similarities’ – trends and patterns in the answers that provide clues as to the applicable categories. There are very few such clusters in our data.

The questionnaire includes certain statements that were expected to attract consensus, for or against. The heading ‘Approaching a case’ comprised a list of mental techniques, including ‘(a) Breaking the difficulty down into components that I consider manageable’. It was expected that there would be little, if any, disagreement with (a), yet three (3) respondents completely disagreed, and two (2) rated the statement ‘in the middle’ – presumably neither agreeing nor disagreeing. Further down the same list, the technique mentioned as (c) ‘Working out a desirable outcome and working backwards’, was expected not to attract strong agreement – yet two (2) respondents strongly agreed, and three (3) gave it a middle ranking.

How can these findings be interpreted? Although it is premature to attempt a definite answer, the following questions arise, to be probed in the future steps of our research: Does the variety of replies indicate that arbitrators cultivate strongly individualistic approaches to decision-making? If so, where does the individualism take its source? Is it as a result of legal training? Is it one of the consequences the lack of appropriate fora for arbitrators to ‘test’ their approach, and have an opportunity to measure it against that adopted by others?

Reaching level (ii) of the evaluation, we can gauge the apparent professional individuality against the desirability of reappointment. Assuming that individuality is considered a ‘winning formula’ bringing repeat appointments, arbitrators would be asked to consider the following challenge: a deliberately individualistic approach to decision-making may be risky if the approach forms part of a routine that turns out to be incomplete, or wrong.
Strength of resolve about chosen approach

As mentioned above, one source of identification of the features against which to gauge the findings is the insight of experienced arbitrators. Some respondents to the questionnaire provided several additional written comments, or expanded on the reasons behind the ratings given to the various statements.

One comment was critical of the approach whereby arbitrators should achieve absolute mastery of the material put forward by the parties. The respondent felt that arbitrators should be able to admit that they do not understand everything about a case, and ask for help. Furthermore, the respondent stressed that fellow arbitrators on a tribunal are an important source of help, by filling in information such as cultural background or commercial aspects of a case.

Yet, unexpectedly, a majority of respondents (9) disagreed with the following statement in the questionnaire: ‘I often get the sense that I am missing an important part of a party’s case and rely on discussing with my fellow arbitrators to fill in the missing parts.’ What inference may be drawn from these disagreements? A lack of intellectual humility, or lack of awareness of limitations?

How can this attitude be explained? If the data reveals indications of a rationalistic approach to arbitration, this value attitude might be consistent with a rationalistic approach to arbitration. We might add that this is a prime instance where a ‘rationalistic’ approach does not necessarily mean a ‘rational’ approach.

Refusal to allow recognition of emotions or unconscious preferences

The interplay of emotions in the course of arbitration has been mentioned above. One important area where this happens has not yet been alluded to. We mention it here because it was raised by some respondents in their replies.

One important tenet of arbitration is the equal opportunity given to the parties to tell their story and express their grievances. The arbitrator, in trying to understand properly the whole story, necessarily makes use of what is called in micro-sociology
‘taking on the role of the other’, seeing things from the other’s perspective. In so doing, the arbitrator will mentally refer to his/her stock of knowledge about everyday life and situations – and about emotions.

The arbitrator who tries to understand the case presented by the parties without factoring in the parties’ emotions is discounting ab initio an important factor to his/her understanding of the case, and ultimately to his/her decision-making. Of course parties resort to arbitration precisely because they trust arbitrators not to allow their own emotions to clutter their judgment. This, however, does not mean that arbitrators cut off all contact with their own emotional responses in order to gain an objective understanding of a party’s case.

An important distinction should be made between one’s emotional reactions and the process of understanding the emotions of others. Whilst arbitrators must control their own emotional reactions to a case, failure to give proper recognition to the parties’ emotional reactions arguably hampers the arbitrators’ understanding of the case as it discounts the part played by the parties’ emotions in the circumstances leading up to the dispute.

The following example illustrates our point. Let us assume a high-value case between an investor and a State entity, in which allegations are made that the agreement between the parties was procured by bribery or influence peddling in the former government of the State entity, and is therefore void. Direct evidence of such transactions is hard to come by; on occasions it is restricted to innuendoes, and counsel’s emotionally-charged rhetorics. Allegations of this type are met by arbitral tribunals in different ways. Certain tribunals tend to refuse to acknowledge such allegations absent hard evidence (which admittedly is unobtainable); others will allow them as a factor in their decision, albeit according them relative importance in accordance with the perceived robustness of the allegations. In all cases, however, these are troubled waters in which arbitrators feel distinctly ill at ease.

Allowing for a full overview of the case, bribery allegations included, is likely to inform the arbitrators’ understanding of other aspects of the dispute in a way that
excluding them does not. One of the aims of the project is to seek to provide tools for arbitrators and counsel to navigate these troubled waters.

**In lieu of a conclusion: avenues for further insight**

The early findings of the pilot study show that the psychological paths to persuasion appear more multi-faceted than was anticipated.

This project is, in many ways, an incremental learning process. We learned that certain expectations of what might be “typical” reactions have to be modified because the respondents’ approaches to the arbitration process turn out to be more individualistic than initially expected. We also learned that the preliminary category of the rationalistic type of approach is more nuanced than had been anticipated. Objectivity in the project rests in its readiness to rethink presuppositions (including personal bias, habits of culture, and theoretical preferences). Also, knowledge is principally gained as the study unfolds, rather than just in its final outcome.

The next step of our study will include interviews based on these initial findings. We propose to focus on the respondents’ awareness of some of the psychological challenges posed by the arbitral process: sympathies and antipathies (with parties and advocates), internal feelings (including the outward attitude of control, the personal ideal of an arbitrator’s professional behaviour, the importance of the judgment of fellow arbitrators), and personal experiences as sole arbitrators and in a panel. We are aiming for a deeper understanding of the reactions and motivations of arbitrators, which will inform in due course the elaboration of tailored psychological tools to assist international arbitration practitioners. It is unlikely that we will get to the bottom of the fascinating and complex motivations behind the persuasion of international arbitrators, but every step is valuable knowledge, which hopefully can contribute to the progress of international arbitration.


ANNEX I: THE QUESTIONNAIRE

Thank you for filling out this questionnaire. Please return it before 30 September 2009 to Prof Flader at multitex@zedat.fu-berlin.de or via the OGEMID anonymous reply facility at http://www.transnational-dispute-management.com/ogemid/anon.asp.

Methodology:
Please rate each statement below with a number from 1 to 5, indicating your level of agreement, with 1 meaning that you totally agree with the proposition, and 5 that you completely disagree with it. Please also feel free to add any comments of your own.

These are not multiple choice questions. Where there are several statements in a paragraph, each statement must be rated.

Background

Age:

Male or female?

Nationality:

Number of cases as an arbitrator:

Today’s date:

Approaching a case

1. I make regular use of mental techniques such as the following to see through a complicated case. My usual technique is:
a. Breaking the difficulty down into components that I consider manageable;
b. ‘Boxing in’ similar facts as they come along;
c. Working out a desirable outcome and working backwards;
d. Discussing with fellow arbitrators;
e. Asking parties for clarification;
f. I do not believe in techniques and rely on my training, experience and personal judgment.

2. I often get the sense that I am missing an important part of a party’s case, and rely on discussions with my fellow arbitrators to fill in the missing parts.

3. As a sole arbitrator I am constantly concerned about misunderstanding a party’s argument or evidence.

4. As an arbitrator my greatest worry is to find that I change my mind about the outcome of the case mid-way through writing my award.

The Arbitral Process – Sympathies and Antipathies

5. I am sensitive to the way in which an advocate appearing before me presents his/her case. I find that I am better disposed towards a party’s case if the style of advocacy used by their counsel appeals to me.

6. I approach every case in the same manner and try to be as detached and regimented as I can, so as to give every party an equal chance, and not to prejudice a party who may be less at ease with the process.

7. I am of the view that parties will be satisfied with the arbitration process, regardless of the outcome, if they have had the opportunity to tell their story to the tribunal and air their grievances.

External appearances and internal feelings

8. In the course of a case in which I am sitting as an arbitrator, I feel that I must adopt an outward behaviour of control and assurance, when in fact inwardly there are feelings of uncertainty, inadequacy and uncertainty of thought.

9. The outward attitude of control which I feel I must adopt as an arbitrator is prompted by:
   a. My own perception of an arbitrator’s behaviour;
b. The expectations of fellow arbitrators sitting with me on the panel;
c. The expectations of the parties and their counsel.

10. My personal ideal of an arbitrator’s professional behaviour is:
   a. The legal scholar;
   b. The diplomat;
   c. The reasonable commercial business person;
   d. The judge;
   e. The parental figure.

11. The judgment of my fellow arbitrators and other colleagues in the arbitration field is an important gauge of my perception of my capabilities as an arbitrator.

12. In a professional career there is a progression from a junior, inexperienced status to an experienced one. As an arbitrator, I feel that I am always learning and never quite graduate to the ‘experienced’ status.

13. I am very much aware of the fact that my decisions as an arbitrator must be “right”. I feel my decisions are always “right” to the best of my abilities.

14. The reward of a job well done, to the best of my abilities and knowledge, is:
   a. A feeling of personal accomplishment;
   b. The anticipation of future appointments;
   c. Peer recognition in my field;
   d. Enhanced prestige in my professional circles.

Sole arbitrator /panels

15. When acting as a sole arbitrator I feel:
   a. Isolated as I do not have anyone to turn to;
   b. I cannot completely trust my own reactions and prefer the collegiality and comfort of two other arbitrators on the panel;
   c. Vulnerable;
   d. All-powerful.

16. When acting on a panel of three arbitrators, I feel:
   a. Proud to have been selected alongside distinguished colleagues;
   b. Conflicted; I will have to make compromises to my judgment and findings;
c. Confident that I can bring them round to my point of view;
d. Confident that as peers and professionals, we will find a common
ground;
e. Most of the time I feel sidelined as the two other arbitrators always
seem to get along better with each other than they do with me.

17. To me the ‘dark side’ of arbitration could be described as:
   a. The ever-present possibility of reaching a totally wrong decision;
   b. Losing visibility in professional arbitration circles;
   c. Not knowing how I rate amongst my peers;
   d. My rate of appointments diminishing for no apparent reason;
   e. Being ‘black-listed’ by certain law firms because of an unpopular
decision.