ARTICLE: Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators

NAME: Giacomo Rojas Elgueta*

BIO: * S.J.D. Candidate, University of Pennsylvania Law School; Assistant Professor of Private Law, University of Roma Tre. I am grateful to those who gave me comments at the 2009 European Association of Law and Economics Annual Conference.

LEXISNEXIS SUMMARY:
... The possibility of ordering discovery in arbitration proceedings can also be inferred by article 19.2 of the UNCITRAL Model Law, which states, "the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence." ... While most institutional arbitration rules make it clear that ordering the production of written documents is under the control of the tribunal, the IBA Rules grant parties the right to make discovery requests, broadening the use of party-initiated discovery. ... Reasons for Limiting the Scope of Discovery in Arbitration Proceedings U.S. courts have traditionally interpreted the absence of an agreement between the parties mandating broad discovery in arbitration proceedings as an implicit waiver of the judicial procedural protections offered in court litigation. ... Behavioral law and economics warns that arbitrators, like other human beings, can suffer from bounded rationality, making them the victims of biases and heuristics and impeding the role assigned to them by national arbitration laws and institutional rules as "wise gatekeepers of discovery." ... Where the parties prefer not to increase their transaction costs by framing optimal procedural rules as part of the agreement, arbitration institutions would thus offer rules governing discovery that are binding on the arbitral tribunal.

HIGHLIGHT:
Several authors and practitioners have bemoaned the excessive use of
discovery in current international commercial arbitration practice. In comparison to court litigation international arbitration is losing its cost-effectiveness and attractiveness.

This study explores the reasons for this present tendency, and argues, as a tentative thesis, that the overuse of discovery is a consequence of cognitive illusions on the part of both parties and arbitrators. Based on insights provided by behavioral law and economics, studies on cognitive psychology, and human behavior, it will be argued that arbitrators have failed to properly exercise their role as the gatekeepers of discovery. More specifically, it will be shown that heuristics and biases affect their decision-making process when it comes to discovery.

This study suggests that arbitration institutions should more strictly regulate the use of discovery and reduce arbitral discretion in order to restore arbitration's original efficiency and fundamental values.
National laws, international conventions and institutional rules grant parties and arbitrators a great deal of freedom to work out the rules of arbitral procedure. In international commercial arbitration, mandatory limitations upon the freedom of parties (or the arbitral tribunal) to conduct arbitration proceedings are extremely uncommon. Instead, parties' freedom to agree upon the arbitral procedure is a common feature in international commercial arbitration regulations.

Article V(1)(d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") contemplates, among other reasons, setting aside an arbitral award in cases where the arbitral procedure was not in accordance with the agreement of the parties. Article 3 of the Inter-American Convention on International Commercial Arbitration provides that the rules of procedure set by the Inter-American Commercial Arbitration Commission apply in the absence of an express agreement between the parties. Article 19.1 of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law) provides that "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings." In the U.S., the Federal Arbitration Act (hereinafter FAA) does not contain an express recognition of the parties' freedom, but courts have generally recognized it.

Arbitration institutions also grant parties broad freedom to select their procedural rules. Article 15.1 of the International Chamber of Commerce 1998 Rules of Arbitration (hereinafter ICC Rules) provides that when the Rules are silent, proceedings shall be governed by any rule the parties may set. Article 14.1 of the London Court of International Arbitration 1998 Arbitration Rules (hereinafter LCIA Rules) encourages parties to agree upon the conduct of their arbitral proceedings.

2. Arbitrators' Procedural Discretion

In addition to parties' freedom, broad procedural discretion is granted to international commercial arbitrators. Provided that there is a respect for the due process canon and parties' agreements upon specific procedural rules, arbitrators can set almost any procedural norm that they consider appropriate.

Article 19.2 of the UNCITRAL Model Law sets out a blanket clause granting arbitrators the power to conduct the arbitration in such a manner as they consider appropriate. The same principle is confirmed by article 15.1 of the UNCITRAL Arbitration Rules (hereinafter UNCITRAL Rules). Article 15.1 of the ICC Rules, article 16.1 of the American Arbitration Association International Arbitration Rules (hereinafter AAA Rules), and article 14.2 of the LCIA Rules also grant the arbitral tribunal broad discretion in conducting the arbitration proceedings.

3. Arbitration Rules and the Right to Discovery

The power to decide a range of evidentiary issues falls within the arbitrators' procedural discretion. The broad discretion highlighted above implies that the tribunal has a fairly substantial degree of freedom to define the manner of
evidence-taking, including the right to, and the amount of, pre-hearing discovery.

The leading arbitration institutions grant the arbitral tribunal broad discretion on whether and how to conduct pre-hearing discovery. Article 20.1 of the ICC Rules provides that "the Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means." n10 Even if this provision does not expressly contemplate the use of discovery in arbitration proceedings, the common interpretation supports the arbitrators' power to order discovery. n11 Article 22.1 of the LCIA grants arbitrators the power "to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient," as well as the power to order parties to produce any relevant document or classes of documents. n12 The same power is granted to the arbitral tribunal by article 19.2 and 19.3 of the AAA Rules, and by article 24.2 and 24.3 of the UNCITRAL Rules.

The possibility of ordering discovery in arbitration proceedings can also be inferred by article 19.2 of the UNCITRAL Model Law, which states, "the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence." n13 In the United States, Section 7 of the FAA, which regulates the taking of evidence in arbitration proceedings, does not specify any particular discovery rule. n14 Nonetheless, courts have traditionally held that this section grants arbitrators broad discretion to adopt discovery. n15

In contrast to the provisions quoted above, articles 3.2 and 3.3 of the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration (hereinafter IBA Rules) expressly permit party-initiated discovery requests (Requests to Produce). n16 While most institutional arbitration rules make it clear that ordering the production of written documents is under the control of the tribunal, the IBA Rules grant parties the right to make discovery requests, broadening the use of party-initiated discovery.

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4. Use of Discovery in Arbitration's Original Form

Even if the flexible and broad language of the rules mentioned above leaves discovery to arbitrators' discretion as a possible procedural tool, its use in international commercial arbitration has traditionally been intended to be more limited in scope than in litigation before national courts. n17 This traditional approach encourages arbitrators to use their discretion quite narrowly when they consider requests for document production and issue orders to produce documents. n18

Discovery is a procedural device alien to the civil law tradition where, at the outset of the proceeding, parties submit favorable documentary evidence along with the factual allegations on which they rely to meet their burden of proof. n19 Without a specific court order, there is no obligation to submit an unfavorable document. Unlike in the United States, in civil law systems a party is not expected to disclose to its adversary all of the relevant documents in its possession, especially detrimental ones.

Thus, in the common law tradition, and particularly in the United States where discovery rules are broadest in scope, arbitration has been regarded as a narrower alternative to the expansive discovery regulation (Rules 26-37) of the
Federal Rules of Civil Procedure. n20 The idea of arbitration as a way of limiting discovery is apparent in several courts' opinions. Without an agreement between both parties on whether and how to conduct pre-hearing discovery, courts have upheld arbitrators' discretion to limit the volume of discovery sought by the parties. In O.R. Securities, Inc. v. Professional Planning Associates, Inc., the United States Court of Appeals for the Eleventh Circuit stated that "arbitration proceedings are summary in nature to effectuate the [*172] national policy of favoring arbitration, and they require "expeditious and summary hearing, with only restricted inquiry into factual issues." n21 According to the court in Transport Workers Union v. Philadelphia Transportation Company, "although arbitration hearings are of quasi-judicial nature, the prime virtue of arbitration is its informality, and it would be inappropriate for courts to mandate rigid compliance with procedural rules." n22

5. Reasons for Limiting the Scope of Discovery in Arbitration Proceedings

U.S. courts have traditionally interpreted the absence of an agreement between the parties mandating broad discovery in arbitration proceedings as an implicit waiver of the judicial procedural protections offered in court litigation. n23

Several arguments against a broad use of discovery in arbitration proceedings have been proposed. First, discovery has traditionally been viewed as an overly intrusive, time-consuming, and expensive process that is susceptible to abuse by parties. n24 The burden of disclosing broad general categories of documents, such as minutes or other internal documents, often jeopardizes a cooperative climate between parties during the proceedings. In fact, requests for production of internal documents could be, and sometimes are, used to harass the adversary. n25 In addition, in the event that the arbitral tribunal allows [*173] for broad discovery, parties might have more opportunities to contest arbitrators' decisions, thereby increasing arbitration costs and creating grounds for strategic behavior. n26

Second, since arbitrators lack the authority to sanction noncompliance, there are normally difficulties and uncertainties encountered when enforcing discovery orders. n27 The law of the arbitral situs governing procedural matters could empower national courts to assist arbitral tribunals in this enforcement. However, the assistance of national courts in an arbitral proceeding normally delays the proceeding and raises arbitration costs. Furthermore, parties often agree to submit a dispute to arbitration for the specific purpose of keeping their internal documents as confidential as possible. Discovery, as applied in national courts, would run contrary to arbitral parties' aspiration to preserve a high level of confidentiality. n28

Finally, limiting the scope of discovery in international arbitration has been identified as a fundamental way of treating parties from different legal traditions equally. Parties from civil law countries might perceive an extensive use of discovery by the arbitral tribunal as unfair, since they are not used to the systematic disclosure of unfavorable documents or to being confronted at a hearing with evidence not submitted by the opponent at the outset. n29 The latter is particularly true when requests for documents are submitted as a device to obtain factual information that can serve as a basis for potential further allegations, rather than to confirm previous allegations of fact. n30 As discussed above, in civil law systems factual allegations are submitted and made available to the opponent from the outset of the proceedings.
For all these reasons, when the parties decide to include an arbitration agreement in their contract without expressly specifying broad discovery, or in the absence of a later agreement ordering arbitrators to allow broad discovery, parties' intention should be interpreted as a pre-commitment not to use discovery in the same way that it would be used before a court. As one leading practitioner has pointed out: "A decade ago, legal scholars would all agree that discovery had no place in international arbitration. When one was asked in the United States why arbitration was becoming increasingly popular, the most common answer was that in international arbitration there was no discovery." n31

6. Arbitrators as Gatekeepers of the Limited Use of Discovery

When parties are silent on the extent to which discovery is to be allowed, the traditional view adopted by the courts and supported in the doctrinal debate is that arbitrators should allow only a limited use of discovery. n32 Therefore, the absence of a prior agreement on the scope of discovery should be interpreted as if the parties intended to have limited discovery, the original, default model of arbitration discovery.

According to a basic cost-benefit analysis, by choosing the default model for arbitration proceedings, parties demonstrate their willingness to waive their right to discovery when the costs of receiving a lower level of judicial protection are outweighed by the benefits of the speed, efficiency, and lower cost of arbitration.

Consequently, arbitrators' discretionary procedural powers are justified by the need to protect parties' choice of waiving certain procedural rights to gain a higher degree of effectiveness. Following this logic, arbitrators should discharge their duties as the "wise gatekeepers" of discovery, selecting the amount necessary to comply with the parties' desire for an efficient, economic, and speedy proceeding.

The absence of precise procedural rules is commonly regarded as one of the greatest advantages of arbitration in comparison with the mandatory procedural rules that govern litigation in national courts. n33 "This is useful in that it enables the arbitral tribunal to make procedural decisions that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute." n34 Thus, according to several commentators, informality, flexibility, speed, neutrality, an efficient mix of civil law and common law, and innovative procedures are among the number of positive effects produced by arbitral discretion. n35 Such broad discretion should allow arbitrators to tailor procedures to a specific set of factual and legal issues, selecting procedural rules appropriate to the contours of each dispute "rather than forcing all cases into the type of ill-fitting off-the-rack litigation garment found in national courts." n36

Consequently, arbitrators will be in a position to meet the discovery needs of each case while keeping in mind that, according to the original intent of arbitration, in the absence of a contrary agreement, parties often select arbitration to limit the scope of discovery. n37

Therefore, arbitral discretion should be used to order discovery in those limited circumstances where the production of a document is fundamental to proving a fact that has already been alleged. n38
The next part of this study will explore whether the conventional wisdom discouraging a broad use of discovery in international arbitration is justified, in light of the cost-benefit analysis. [\*176] Subsequently, it will be discussed whether the original view of arbitration as a cost-effective alternative to court litigation is still true, and whether arbitral procedural discretion regarding discovery is the appropriate response to the need for narrow discovery. Finally, some potential solutions for restoring arbitration's original attractiveness will be offered.

II. A Cost and Benefit Analysis of Discovery

1. The Traditional Economic Analysis of Discovery

Despite the above arguments against a broad use of discovery, some authors have highlighted broad discovery's advantages, arguing that it can bring a sharper definition to issues and identify misleading evidence. n39 Supporters of broad discovery claim that it discourages gamesmanship, prevents trial by ambush, and promotes justice by requiring parties to disclose unfavorable documents. n40 Some law and economics scholars have argued that the costs associated with discovery are justified by the fact that sharing information helps parties accurately evaluate their positions, and leads to a convergence of expectations that facilitates settlement. n41 Economic models of settlement assume that the sharing of information will bring a convergence of estimates as to the likely outcome of the case thereby facilitating settlement. n42

These models are all based on "rational choice theory," the dominant theoretical paradigm in microeconomics, which assumes that individuals choose the action that will maximize their net benefits. Under this assumption, unless parties have substantially different [*177] predictions about the outcome of a case, they will tend to reach an out-of-court settlement before trial, since trials are more costly and time-consuming than settlement. Consequently, since expensive litigation is less likely when parties can accurately estimate their strengths and weaknesses, anything that improves those estimates, such as expanded discovery, should be favored. n43 This advocacy of discovery is open to at least two fundamental criticisms favored, respectively by Game Theory and Behavioral Law and Economics.

2. Discovery under the Scrutiny of Game Theory

Discovery is a typical situation in which an individual decides upon an action based in part on how other individuals (e.g. its adversary) are likely to act. As in other strategic games, a party deciding whether and how much discovery to request will take into account the anticipated behavior of its adversary. Game theory provides useful insights into strategic decision-making, and therefore is a useful tool for reconsidering the (dis)economies of discovery. n44

For example, each party could assume that its adversary will invest a significant amount of money on discovery in order to gain a litigating advantage, and consequently, do the same in order to avoid ending up in a weaker position during the hearings. n45 "One likely reason that litigating parties engage in excessive and abusive discovery is that they are locked into a Prisoners' Dilemma game, fearful that their opponent will abuse discovery and gain a litigating advantage." n46 As in the typical Prisoners' Dilemma, each party, fearing that the other party will not cooperate, ends up in a worse situation (i.e. [*178] overspending) than the one that would be reached had
Furthermore, a party might employ an abusive strategy in which it withholds disclosure of documents, in order to force its opponent to bear additional expenses in bringing motions to compel discovery. Another strategy might be for a party to threaten to increase its adversary's costs by engaging in additional discovery unrelated to the merits of the case. In such circumstances, the threatened party, fearing excessive costs or the disclosure of highly confidential internal documents, might be more willing to settle on terms largely dictated by the threatening party.

In light of these potential strategic behaviors, the cost-benefit analysis proposed in the traditional economic model of settlements must be reconsidered. Since strategic behaviors could lead parties to overspend on discovery and/or enter unfavorable settlements, it is plausible that in many cases, the benefit of avoiding litigation through settlements does not outweigh the costs borne by parties in broad pre-trial discovery.

On the basis of this conclusion, the parties' selection of arbitration must be considered to represent parties' pre-commitment to avoid wasteful expenditures associated with broad discovery. Thus, a cost-benefit analysis, when coupled with the insights of game theory, actually supports the original position favoring a more limited scope for pre-hearing discovery.

3. Discovery under the Scrutiny of Behavioral Law and Economics

The assumption behind "rational choice theory," that individuals are rational actors, capable of decisions that will maximize their wealth, has been questioned by scholars of behavioral law and economics. In 1957, Herbert Simon coined the expression "bounded rationality" to indicate that actors often fail to satisfy the utility- maximization prediction due to heuristics, mental shortcuts that simplify decision-making. Subsequent research in the behavioral sciences demonstrated that individuals are systematically biased when predicting the results of different events. Both heuristics and biases lead actors to make decisions that contradict the predictions of rational choice theory.

Among the biases described by behavioral law and economics, the self-serving or egocentric bias is particularly helpful when reviewing economic models that support a broad use of discovery for settlements. Several experimental studies have demonstrated that people engage in confirmatory mental searches for evidence that will support a theory they wish to believe while discounting evidence to the contrary (e.g. that their own marriage will succeed despite the high divorce rate). Contrary to the conventional assumption characterizing the law and economics literature, empirical studies show that the exchange of information promotes a further divergence of expectations, rather than leading to a convergence of estimates, and thus facilitating settlements.

These experimental results suggest that, during discovery, parties interpret collected information in ways which serve their interests and reinforce their prior beliefs. Opposing parties will tend to interpret an identical set of information in a way that will favor their own position. These outcomes run counter to the traditional law and economics prediction that broad discovery will enable parties to more accurately estimate the likelihood of prevailing.
unlikely to be effective because ... people seem to use additional evidence to solidify their [*180] views, rather than to alter them." n56 Once again, a broad use of discovery seems to produce wasteful litigation expenditures that outweigh the benefits of a potential settlement.

Both game theory and behavioral law and economics challenge the arguments in favor of broad discovery, and instead provide arguments supporting the original conception of arbitration as a parties' pre-commitment to the limited use of discovery.

III. Reconsidering the Effectiveness of Arbitrators as Gatekeepers

1. The Real Scope of Discovery in Current International Commercial Arbitration

The cost-benefit analysis conducted in the second part of this study strengthens the intuition, commonly expressed by both courts and scholars, that the scope of discovery should be limited if arbitration is to be a cost-effective alternative to court litigation.

As described above, arbitrators' procedural discretion has been traditionally championed as the ideal remedy for ensuring the proper use of discovery to meet the specific needs of each case, without the expanded use permitted in pre-trial litigations. n57 This idea is enhanced by institutional rules that normally establish, as the default principle, control over disclosure by the tribunal as opposed to the party-initiated discovery principle typical in court litigation. For example, article 24.3 of the UNCITRAL Rules expressly provides for the tribunal's control of discovery, stating that "at any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine." n58

In exercising control over discovery, arbitrators are expected to assess the reasonable proportionality between the burden of producing a document and the potential that the document will enlighten the tribunal. n59 Institutional rules rely heavily on arbitrators' ability to perform this balancing. Article 14.2 of the LCIA Rules states that arbitrators are compelled "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or [*181] expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute." n60 The ICDR Guidelines for Arbitrators Concerning Exchanges of Information clearly provide that, in the absence of a parties' agreement, it is the tribunal who retains final authority to apply the appropriate level of information exchange. n61 In setting that standard, the tribunal shall manage the exchange of information with a view to maintaining efficiency and economy. n62

Efficiency, economy, and cost-effectiveness are the common guidelines that arbitrators are expected to follow when discharging their role as gatekeepers of the proper scope of discovery. Unfortunately, contemporary international commercial arbitration proceedings are generally flooded by documents, submissions and production requests. Arbitrators, far from exercising their role as strict gatekeepers, are often reluctant to reject requests for production of documents. In many cases, they appear to have opened arbitration proceedings to requests that are unnecessary to the resolution of the dispute. n63

Practitioners lament that arbitration proceedings are becoming as drawn-out
and expensive as court litigation, squandering the original cost-effectiveness that made arbitration a competitive alternative to traditional litigation. In addition, a recent U.S. court decision, which allows arbitration parties to apply directly to U.S. courts to take evidence located in the United States when the arbitration proceeding is held abroad, may further increase the cost of arbitration. On December 19, 2006, the District Court for the Northern District of Georgia, broadened the interpretation of "foreign or international tribunal" in section 1782 of Title 28 of the United State Code, and granted a party to a private arbitration held in Austria the right to take evidence from a U.S. non-party. This opinion rejected previous interpretations of § 1782 by the Second and Fifth Circuits, which had held that "foreign or international tribunal" includes only governmental tribunals and not private international arbitration panels. The application of § 1782 to international arbitration proceedings expands the use of pre-trial discovery even further and risks compounding the departure of current arbitration practice from its original foundation as a cost-effective alternative to court litigation.

In light of this tendency, it is not surprising that the 18th Congress of the International Council for Commercial Arbitration was entitled "Back to Basics?". The study argues that one of the reasons why international arbitration has become so cumbersome and expensive, and consequently is no longer perceived as an attractive alternative to court litigation, is that arbitrators have failed to properly exercise their role as discovery's gatekeepers.

Before discussing the various alternatives to broad arbitral discretion that would enable arbitration to recover its former attractiveness, this study will explore the potential reasons for such a failure on the part of arbitrators.

2. The Conventional Explanation for the Excess of Discovery

Article V(b) of the New York Convention allows an arbitral award to be set aside where parties have been unable to present their case. Article 18 of the UNCITRAL Model Law states that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." The general principle of due process, and the specific right to equal opportunity in presenting the case, are common principles in national arbitration laws as well as institutional rules. Article 15.2 of the ICC Rules provides that "the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case." Equivalent principles are affirmed by article 14.1(i) of the LCIA Rules and by article 15.1 of the UNCITRAL Rules.

One possible explanation for the current tendency to flood proceedings with a multitude of documents and requests for their production is arbitrators' fear of breaching their duty to assure a fair and equal procedure. This fear often leads arbitrators to err on the side of ordering production of evidence even when that document is not perceived as vital and granting requests for production even when the document's relevance and materiality is dubious. However, even if the desire to avoid allegations of misconduct or serious procedural irregularity represents a plausible explanation of current tendencies, it cannot fully explain the excessive use of discovery.

As reiterated throughout this study, a narrow use of discovery is considered to be one of the foundational characteristics of international arbitration. Courts have repeatedly opined that parties cannot expect to receive the same
judicial protections in arbitration proceedings that they receive before a court. n73 Therefore, not only is rejecting a request for production or failing to order disclosure of non-vital documents not considered a form of misconduct but, on the contrary, should be celebrated as representing a proper respect for the parties' original intention. In fact, as argued above, n74 in the absence of an agreement [*184] between the parties specifying broader terms of discovery, arbitrators are expected to interpret their contractual intention as one of narrow discovery.

3. Explaining the Excess of Discovery as a Result of Cognitive Illusions

Cognitive psychology literature examines the way in which human beings make complex decisions and studies the concept of bounded rationality. It not only explains parties' self-serving interpretation of evidence, n75 but also can serve as a useful device to analyze arbitrators' decision-making processes.

Professors Rachlinski and Guthrie and Judge Wistrich describe the results of an empirical study that shows even experienced, well-trained, and highly motivated judges are vulnerable to cognitive illusions (e.g. anchoring, framing, hindsight bias, representativeness heuristic, and egocentric biases) that influence their decision-making processes. n76 Systematic errors in judgment are part of the very nature of human thought and cognitive decision-making processes. Empirical studies have shown that even sophisticated and well-trained actors, such as doctors, real estate appraisers, engineers, accountants, options traders, military leaders, lawyers and psychologists themselves, incur systematic errors in judgment. n77 These results suggest that arbitrators, even if normally more highly experienced and trained than average individuals, are not immune to such cognitive errors.

4. The Other-Regarding Behavior

Assuming that arbitrators are perfectly rational actors, they should strictly discharge their role as gatekeepers of discovery in order to signal to future parties that they will conduct an efficient and cost-effective proceeding in comparison to court litigation. Self-interested arbitrators, searching for new appointments, would appear to have the right incentives not to allow broad discovery and to maintain arbitration as an attractive dispute resolution process. n78 The current [*185] practice, however, does not confirm behavior that might be expected under "rational choice theory" predictions.

Instead, it seems plausible that arbitrators often decide not to impose restrictions and to honor parties' requests for production of documents not only to ensure that parties receive a fair and equal proceeding, but also as the consequence of a more unconscious perceptual bias. The departure from rational self-interest implied by the concession of broad discovery can be explained as "other-regarding behavior." Experimental literature on human behavior has shown that in some social contexts, individuals make decisions influenced by their perceptions of what others expect and desire from them, as opposed to self-serving motives. n79

The fact that arbitrators have been appointed by the parties, or at least that these parties have favored their appointment, could distort perceptions regarding the relevance and materiality of a request for production of evidence. Arbitrators, experiencing unconscious pressure from the expectations of the requesting party and their sense of gratitude for the appointment, might feel...
obliged to grant requests more often than would be expected. The unique social context surrounding the arbitration proceeding alters arbitrators' perception about the true necessity for documents, and shifts the mode of behavior from one that maximizes the cost-effectiveness of arbitration to one that instead maximizes parties' expectations.

In this regard, it is important to point out that when parties agree to submit their dispute to arbitration, they often prefer that the proceeding be cost-effective. Notwithstanding this ex ante expectation, once a dispute arises each party will attempt to depart from its pre-commitment to reducing the burden of proceeding, and use everything at its disposal to prevail. The role of arbitrators should be to preserve this ex ante commitment of the parties. The limitations of bounded rationality, as argued above, can shift arbitrators' perceptions and lead [*186] them to assign more relevance to ex post discovery requests than ex ante expectations.

5. The Availability Heuristic

Behavioral law and economics offers another explanation for the tendency of arbitrators to allow excessive production of documents. When deciding whether to order a party to produce a document or grant a request for production, arbitrators must estimate the relevance of that particular evidence. This decision-making process is subject to the "availability heuristic," n80 a mental shortcut whereby memory of a salient event alters one's estimation of a different event's relevance or probability. n81

For example, with regard to the medical practice, it has been argued that when doctors deviate from accepted guidelines, they base their decisions more on previous experiences than on the unique characteristics of the present patient. A successful treatment prescribed in the past that is vividly recalled but statistically anecdotal will lead the doctor to overemphasize this episode, while ignoring guidelines that are statistically more reliable. This heuristic leads actors "to ignore base rates and overestimate the correlation between what something appears to be and what something actually is." n82

Any assessment of the degree of discovery to be allowed is susceptible to the distorting influence of salient examples, even where these are statistically aberrational. For example, an arbitrator can more easily recall cases in which other arbitrators were charged with allegations of misconduct, influencing him to overestimate the probability of such allegations occurring and, therefore, leading him to grant more discovery than is proper.

Furthermore, an arbitrator unconsciously compares the case before him with cases encountered in the past. The solutions adopted in the more vivid and salient cases of his career, which were probably influenced by the basic characteristics of the arbitrator's legal system, could affect his decision more than the present characteristics of the case. Repetition of behaviors is a natural mechanism that people unconsciously adopt in order to reduce the costs of decision-making. [*187] The result is that an arbitrator could decide upon a certain amount of discovery not because of the individual characteristics of the present case, but because that amount had proven effective in other illustrative cases. n83

The availability heuristic not only offers a possible explanation for the abuse of discovery in international arbitration, but also builds a strong case
against arbitral discretion as an essential measure to develop appropriate procedural rules corresponding to the needs of each dispute. Behavioral law and economics warns that arbitrators, like other human beings, can suffer from bounded rationality, making them the victims of biases and heuristics and impeding the role assigned to them by national arbitration laws and institutional rules as "wise gatekeepers of discovery."

IV. Possible Solutions to Restore the Limited Scope of Discovery in Arbitration

It would be beyond the scope of this study to recommend detailed solutions to the problem of excessive discovery that characterizes the current international commercial arbitration practice. Nevertheless, using the reasoning developed in earlier sections, one can sketch a possible route that arbitration institutions might take to restore the economy, efficiency, and effectiveness of arbitration proceedings.

In the current practice, when parties fail to reach an agreement, it is common for the tribunal to issue procedural orders establishing the scope of discovery. Normally, the tribunal defines the procedural rules once it has heard the legal and factual issues of the case, as well as each party's preference regarding management of the evidence-taking process. n84

Once a dispute has arisen, parties tend to depart from their original pre-commitment to solving the dispute through a simple, cost-effective, and quick proceeding, and instead flood the tribunal with any production request that might shift the case in their favor. Meanwhile, arbitrators fail to adequately perform their role as the gatekeepers of discovery, displaying a greater inclination to please parties' ex post requests than their ex ante expectations. Behavioral law and economics can be helpful in shedding light on both problems. Parties will often interpret evidence with a self-serving bias; consequently, increasing the amount of information available produces a deeper divergence of expectations and increases wasteful expenditures, rather than leading to settlement. At the same time, arbitrators tend to grant these ex post requests, due to the influence of "other-regarding preferences" and "availability heuristics."

Given this pattern, it is necessary to identify a remedy to ensure, first, that parties do not renege on their ex-ante pre-commitment to limiting the use of discovery in the absence of a mutual agreement to the contrary, and second, to dispel arbitrators' cognitive illusions in order to restore the original values underlying arbitration.

The solution proposed in this study is that arbitration institutions adopt a set of procedural rules to reduce the degree of arbitral discretion used, and ensure that the tribunal may only order the production of documents that, at first glance, seem vital to the case's decision and not merely "relevant and material" as is currently provided by institutional rules. n85 These rules must be included in the set of institutional rules that apply by default when parties have failed to agree on different procedural measures.

This approach is the reverse of the one proposed with the IBA Rules, which can either be adopted by parties to the arbitration agreement or, in the absence of any such agreement, be followed by the tribunal as useful but non-mandatory guidelines. This latter solution, called an "opt-in strategy", has been shown to
be ineffective for the reasons outlined above. Instead, an "opt-out strategy" would better serve the effectiveness and economy of arbitration. Including stricter procedural rules among those offered by arbitration institutions implies that, in the absence of any agreement to the contrary, these rules would be mandatory both for the parties and the tribunal. Where the parties prefer not to increase their transaction costs by framing optimal procedural rules as part of the agreement, arbitration institutions would thus offer rules governing discovery that are binding on the arbitral tribunal. Such an approach takes into account the fact that parties and arbitrators are affected by bounded rationality and suggests, in the absence of an opt-out agreement, the application of mandatory rules to overcome the heuristics and biases of the arbitration's actors.

[*189] This solution, which lies within the domain of behavioral law and economics, is labeled "libertarian-paternalism." According to libertarian-paternalism, in cases where individuals remain silent about their preferences, a legal system should set rules that steer people's choices in directions that will improve their welfare (paternalism approach). On the other hand, the opt-out option ensures that individuals remain free to select particular solutions which they consider to better serve their preferences (libertarian approach). In the case under scrutiny in this study, the opt-out option could be invoked only through parties' agreement.

The following and final considerations set potential guidelines regarding discovery, which should be included by arbitration institutions in their rules binding arbitrators.

First, arbitration institutions should consider raising the standard for ordering or granting requests for a document's production. Article 3.3(b) of the IBA Rules requires parties to show that requested documents are relevant and material to the outcome of the case. The ICC Rules do not specify any standard binding arbitrators who decide to summon a party to provide additional evidence. The same is true for article 24.3 of the UNCITRAL Rules.

Arbitration institutions should institute a strict standard making clear that arbitrators can order production of new documents, or grant such a request, only when the evidence is vital to the resolution of the case. As argued above, leaving arbitrators too much freedom in balancing and weighing the materiality of evidence risks undue influence from cognitive illusions.

Second, requesting the production of categories of documents should be expressly banned (in contrast, this practice is allowed under article 3.3 of the IBA Rules). Parties should be allowed to request only those specific documents known to be vital to the outcome of the case. Allowing the discovery of an entire category of documents enables "fishing expeditions" aimed at collecting information in the hopes of finding new grounds for additional allegations.

Furthermore, reducing the tribunal's discretion in deciding which of the parties shall bear the arbitration costs, or in what proportion parties shall bear them, should be also considered by arbitration institutions. As highlighted by Frank H. Easterbrook, "requiring the loser to pay the winner's legal fees and costs would do a great deal to cut off the attractiveness of unnecessary discovery requests." n92

Finally, arbitration institutions should consider the feasibility of
providing a mandatory cutoff date for discovery, and limits on the quantity of discovery. In the current practice, institutional rules empower arbitrators to set both time and quantity limits. Strict discovery limits have advantages over those set by the tribunal. Choosing institutional rules would mean that the parties pre-commit to binding, strict limits, which prohibit ex post departures from the ex ante ambitions of the parties. At the same time, this pre-commitment avoids the scenario in which arbitrators, under pressure from one party, fail to enforce their prescriptions. Since especially complex cases might require more time and a greater number of documents, arbitration institutions should search for rules that successfully avoid limits that are under-inclusive or over-inclusive. One possible solution could be to frame different rules for different categories of cases.

The rules suggested here should assist with both of these concerns: ensuring that parties do not depart from their mutual pre-commitment to using discovery in a limited fashion, and overcoming arbitrators' tendency to satisfy parties' unilateral ex post requests during the proceedings. By taking into account subtle cognitive illusions which affect the decision-making processes of parties and arbitrators' alike, this study has offered a means to restore the original, founding values [*191] behind arbitration that make it an efficient and cost-effective alternative to litigation.

Legal Topics:
For related research and practice materials, see the following legal topics:
Civil Procedure
Discovery
General Overview
Civil Procedure
Alternative Dispute Resolution
Arbitrations
Foreign Arbitral Awards
International Law
Dispute Resolution
Arbitration & Mediation
Agreements

FOOTNOTES:


n2. United Nations Conference on International Commercial Arbitration, June 10, 1958, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 7, 1959) art. V(1)(d) ("1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties .... ").

n3. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245, art. 3: "In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission."
n4. See UNCITRAL Model Law on International Commercial Arbitration art. 19.1 (2006) ("Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.").


n6. See International Chamber of Commerce, Rules of Arbitration art. 15.1 (1998) ("The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle ... .").

n7. See London Court of International Arbitration Rules art. 14.1 (1998) ("The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so ... ").


n9. See UNCITRAL Model Law on International Commercial Arbitration art. 19.2 (2006) ("The arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.").


n15. Born, supra note 11, at 472.

n16. See IBA Rules on the Taking of Evidence in International Commercial Arbitration art. 3.2 (1999) ("Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal a Request to Produce. Art. 3.3: A Request to Produce shall contain: (a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist; (b) a description of how the documents requested are relevant and material to the outcome of the case; and (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party."). On the 1999 IBA Rules, see Van Vechten Veeder, Evidential Rules in International Commercial Arbitration: From the Tower of London to the New 1999 IBA Rules, 65 Arbitration 291 (1999); IBA Working Party, Commentary on the New IBA Rules of Evidence in International Commercial Arbitration, 2 Bus. Law Int'l 14 (2000).

n17. See Born, supra note 1, at 83 ("It is widely recognized that one of the reasons that parties agree upon arbitration to resolve their disputes is to avoid the expense and delay of discovery.").


n19. See, e.g., Italian Code of Civil Procedure, art. 184 ("the investigating judge, whether he believes they are admissible and material, admit evidences proposed by the parties").
n20. See von Mehren, supra note 18, at 111. (stating that discovery in arbitration "should respond in a manner which satisfies the factual needs of the dispute without plunging the arbitration into the excesses of discovery which sometimes accompany litigation."); see also Born, supra note 11, at 484 ("Even in common law jurisdictions, like the United States, discovery tends to be more limited in arbitration than in litigation.").


n23. Arbitrators are not judges of a court nor are they subject to the general superintending power of a court. Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system. Those who choose to resolve dispute by arbitration can expect no more than they have agreed. One choosing arbitration should not expect the full panoply of procedural and substantive protections offered by a court of law.


n26. On the risk of strategic behaviors triggered by a wide use of discovery see infra II.2.

n27. See Born, supra note 11, at 476.

n28. Id.

n29. Id.; see also Hafter, supra note 25, at 347.

n30. Hafter, supra note 25, at 348.


n32. See Born, supra note 1, at 83.


n34. UNCITRAL Notes on Organizing Arbitral Proceedings (1996).

n35. See Born, supra note 1, at 43-46.

n36. See Park, supra note 8, at 459 (description of the standard arguments in favor of arbitral discretion).
n37. It would be interesting for this argument to recall § 7(c) of the Revised Uniform Arbitration Act: "An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." The official comment to the provision states: "The approach to discovery in Section 17(c) is modeled after the Center for Public Resources (CPR) Rules for Non-Administered Arbitration of Business Disputes, R. 10 and United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, Arts. 24(2), 26. The language follows the majority approach under the case law of the UAA and FAA which provides that, unless the contract specifies to the contrary, discretion rests with the arbitrators whether to allow discovery... It should be clear that in many arbitrations discovery is unnecessary and that the discovery contemplated by Section 17(c) and (d) is not coextensive with that which occurs in the course of civil litigation under federal or state rules of civil procedure. Although Section 17(c) allows an arbitrator to permit discovery so that parties can obtain necessary information, the intent of the language is to limit that discovery by considerations of fairness, efficiency, and cost. Because Section 17(c) is subject to the parties' arbitration agreement, they can decide to eliminate or limit discovery as best suits their needs. However, the default standard of Section 17(c) is meant to discourage most forms of discovery in arbitration." Revised Uniform Arbitration Act § 7(c) (2007).


n41. See William M. Landes, An Economic Analysis of the Courts, 14 J.L. &


n44. For a general introduction to game theory, see Howell E. Jackson et al., Analytical Methods For Lawyers 34 (2003). For an application of game theory to the process of deciding how much to invest in litigation, see Gordon Tullock, Trials on Trial: The Pure Theory of Legal Procedure 49-69 (1980).


n47. For an explanation of the Prisoners' Dilemma, see Jackson, supra note 44, at 37.

n48. See Bone, supra note 46, at 2006-07.

n49. See John K. Setear, The Barrister and the Bomb: The Dynamics of
Cooperation, Nuclear Deterrence, and Discovery Abuse, 69 B.U. L. Rev. 569, 584-93, 615-28 (1989); Frank H. Easterbrook, Discovery as Abuse, 69 B.U. L. Rev. 635, 637 (1989) ("The party in a position to threaten exhaustive discovery can claim for itself in settlement a portion of the costs that should not have been imposed in the first place. Sometimes threats must be carried out; as in war, both sides lose.")

n50. See Bone, supra note 46, at 1985.


n52. These research studies were initiated in the 1970s by Amos Tversky and Daniel Kahneman, whose studies are now collected in Choices, Values, and Frames (Daniel Kahneman & Amos Tversky eds., 2000).


n55. See Korobkin & Ulen, supra note 43, at 1093-94.

n56. Id. at 1094.

n57. See supra I.6.

n59. See Park, supra note 8, at 465.


n62. See id. at § 1.a.

n63. See Born, supra note 1, at 90-91.

n64. See Hanotiau, supra note 31, at 90.


n66. NBC v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999); In re Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999).

n67. The 18th Congress of the International Council for Commercial Arbitration entitled "Back to Basics?" was held in Montreal, Canada on May 31-June 3, 2006.
n68. United Nations Conference on International Commercial Arbitration, June 10, 1958, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 7, 1959) art. V(b): "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."


n71. See London Court of International Arbitration Rules art. 14.1 (1998) ("The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal's general duties at all times: (i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent."); see also UNCITRAL Arbitration Rules art. 15.1 (1976) ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.").

n72. See Kenneth Rokinson, "Pastures New' (Review of Arbitration Act 1996), in Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration 213, 221 (Julian D.M. Lew & Loukas A. Mistelis eds., 2007); see also Born, supra note 11, at 494.

n73. Born, supra note 11, at 495 ("In general, U.S. courts have been unwilling to accept claims that an arbitrator's refusal to order production of vital evidence is misconduct, amounting to a failure to permit a party the opportunity to present its case.") (citing Nu Swift PLC v. White Knight I SA, Mealey's International Arbitration Report, at E-1 (Feb. 1997) (rejecting proceedings to vacate award on grounds that arbitral tribunal refused to order document discovery)); see also supra I.4.
n74. See supra I.5.

n75. See supra II.3.

n76. Chris Guthrie et al., Inside the Judicial Mind, 86 Cornell L. Rev. 777-830 (2001); see also Bone, supra note 46, 1986-90.

n77. Guthrie et al., supra note 76, at 782-83.

n78. This is not the case for party-nominated arbitrators when the relationship between the appointing party and the arbitrator falls within the logic of a repeated game. When an arbitrator has the opportunity to be reappointed in future arbitrations by the same party, the prediction of rational choice theory is that the arbitrator will take into account the impact of his current action on the future decisions of his appointing party. In this scenario, it seems plausible to argue that a rational arbitrator will be inclined to please the appointing party's requests for production of documents because of his private interest in being reappointed by that same party for a future arbitration. On repeated game mechanisms in general, see George J. Mailath & Larry Samuelson, Repeated Games and Reputations: Long-Run Relationships (2006).


n81. See Korobkin & Ulen, supra note 43, at 1085-90.

n82. Id. at 1086.
n83. See id. at 1114.

n84. See Born, supra note 11, at 484.

n85. See, e.g., IBA Rules on the Taking of Evidence in International Commercial Arbitration art. 3.3 (1999) ("A Request to Produce shall contain: (b) a description of how the documents requested are relevant and material to the outcome of the case.").

n86. In particular, see paragraphs 3-5.


n88. See IBA Rules on the Taking of Evidence in International Commercial Arbitration art. 3.3 (1999) ("A Request to Produce shall contain: (b) a description of how the documents requested are relevant and material to the outcome of the case.").

n89. See International Chamber of Commerce, Rules of Arbitration art. 20.5 (1998) ("At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence.").

n90. UNCITRAL Arbitration Rules art. 24.3 (1976).

n91. See, e.g., IBA Rules on the Taking of Evidence in International Commercial Arbitration, art. 3.3 (1999) ("A Request to Produce shall contain: (a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and
specific requested category of documents that are reasonably believed to exist.

n92. See Easterbrook, supra note 49, at 645; see also Robert D. Cooter & Daniel L. Rubinfeld, An Economic Model of Legal Discovery, 23 J. Legal Stud. 435, 455-56 (1994) (proposing a rule aimed at enhancing the pursuit of an efficient dosage of discovery: "The two-part rule would require the defendant to bear the costs of reasonable compliance up to a level deemed appropriate for this class of cases, beyond which the reasonable costs of complying with further discovery requests would shift to the plaintiff.").