Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making

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As international arbitration expands, arbitral decision-making comes under scrutiny, with many raising legitimate questions: how do arbitrators decide? Do they tend to favour certain classes of parties? This article examines arbitral decision-making and puts forward three main propositions. First, that the legal concept of bias needs revisiting. For arbitration law and practice to effectively respond to criticism about the integrity of arbitration, the focus of our inquiry should include not only apparent bias associated with individual arbitrators, but also implicit and systemic bias. Second, the article provides a critical assessment of the existing empirical studies on arbitral decision-making. Although empirical studies have provided useful insight in arbitral judicial behaviour, they all depart from the same behavioural assumption that arbitral decision-making is driven almost exclusively by extra-legal factors, such as the personal traits, policy preferences or financial incentives of individual arbitrators. The article discusses the theoretical and methodological limitations of such a behavioural approach, and it, finally, offers an alternative model for the analysis of arbitral decision-making, which takes into account the influence of the broader institutional context within which arbitrators are embedded. Drawing on institutional theories, the article compares the procedural design of international arbitration with that of national and international judiciaries, and provides a description of the institutional structures of international arbitration and how they can affect the way that arbitrators decide.

1. Introduction

The popularity and scope of authority of international arbitral tribunals has greatly expanded in the past forty years. International tribunals are now considered capable of deciding a wide range of disputes, even disputes implicating national public policy, which were previously falling in the exclusive domain of State courts. In the area of commercial arbitration, for example, it is now accepted that tribunals have authority to determine not only commercial claims pertaining

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to the formation, interpretation and performance of commercial contracts, but also statutory claims that may have crucial social implications,1 such as anti-trust claims, tax claims or claims arising out of securities transactions.2

Meanwhile, in the area of investment treaty arbitration, a significant number of international investment treaties have adopted arbitration as the preferred model of dispute resolution. Accordingly, international arbitral tribunals are now regularly reviewing investor claims concerning government measures, including financial and environmental measures, which would normally fall within the regulatory sovereignty of the host nation.3 Even disputes on sovereign debt bonds are now submitted before international tribunals.4

The remarkable rise of international arbitration has challenged the traditional concept of public justice to the point that, very recently, English courts allowed the referral of all aspects of a family dispute, including custody of and contact with the children, to arbitration noting that ‘it is up to parents to agree how their children should be brought up and, if they cannot agree, they should be entitled to choose how their disagreement should be resolved without state intervention’.5

However as international arbitral tribunals are increasingly becoming more popular, certain aspects of private decision-making come under scrutiny, often under intense criticism. Although criticism against investment and commercial arbitration arises in different fashion and volume, critical voices coming from both the public domain and academia raise legitimate questions, such as: who are these individuals that act as arbitrators and have the power to decide issues with important implications on national public policy and sovereignty? How do arbitrators decide?

Some years ago, The New York Times notoriously described investment arbitration proceedings under the North American Free Trade Agreement (NAFTA) in the following terms:

Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international

2 See for example, Karim Youssef, the Death of Inarbitrability, in Loukas Mistelis and Stavros Brekoulakis (eds), Arbitrability International and Comparative Perspectives (Kluwer 2009) 47: ‘In recent years, the scope of rights amenable to arbitration has grown to such an extent that, the concept of arbitrability (or its mirror image, inarbitrability) as central as it may be to arbitration theory, has virtually died in real arbitral life.’ See more general, Loukas Mistelis and Stavros Brekoulakis (eds) ibid.
3 According to the UNCTAD latest ‘Report on Recent Developments in Investor-State Dispute Settlement (ISDS)’, No 1 May 2013 (available at <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>, last accessed 28 August, 2013), in 2012 58 new cases were initiated, which constitutes the highest number of known treaty-based disputes ever filed in one year and ‘confirms that foreign investors are increasingly resorting to investor-State arbitration’. It is also reported by UNCTAD that the total number of known treaty-based cases rose to 514 by the end of 2012.
4 See Abaclat and Others v Argentine Republic, ICSID Case No ARB/07/5 where a dispute over a sovereign debt bond unrelated to a specific project in the host (in this case borrowing) State was recently brought before an investment treaty tribunal.
5 Re AI and MT [2013] EWHC 100 (Fam). In this case, the father and the mother were Jewish and requested by English courts to allow them to submit their dispute to the New York Beth Din. English Court endorsed the parties’ proposal on certain conditions. In particular Baker J stated that ‘I would endorse the parties’ proposal to refer their disputes to a process of arbitration before the New York Beth Din on the basis that the outcome, although likely to carry considerable weight with the court, would not be binding and would not preclude either party from pursuing applications to this court in respect of any of the matters in issue’.
tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged.6

Many scholars raise issues of impartiality of arbitrators, suggesting that arbitral decision-making is biased, apparently favouring investors and multinationals against states and weaker parties such as consumers and employees.7 Some countries have cited apparent bias of international arbitration as a reason to withdraw from the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.8

More recently, the 2013 UNCTAD Report on Recent Developments in Investor-State Dispute Settlement stated ‘the continuing trend of investors challenging generally applicable public policies, contradictory decisions issued by tribunals, an increasing number of dissenting opinions, concerns about arbitrators’ potential conflicts of interest all illustrate the problems inherent in the system [of international arbitration].’9

Naturally, thus, arbitral decision-making and the question of whether arbitration is a biased adjudicatory system has become one of the most critical subjects of discussion currently. Interestingly, accusations of bias in arbitral decision-making have prompted different reactions from arbitration practice and arbitration scholarship.

For arbitration practice, the issue of bias in arbitral decision-making is primarily associated with the ethics of the individuals acting as arbitrators. Accordingly, the response of arbitration regulatory bodies has been to strengthen the legal framework concerning the duty of arbitrators to disclose any issue that may give rise to appearance of bias. As a result, there is currently a variety of arbitration laws and in particular institutional codes of ethics regulating the conduct of individual arbitrators in minute detail.10 Potential arbitrators are advised not to ‘regularly spend considerable time’ with counsel for matters ‘unrelated to professional work commitments or the activities of professional associations or social organizations’.11 In the wake of the information technology revolution, potential arbitrators are further advised by peers to avoid social media and electronic social networks altogether, or limit their friends on Facebook or LinkedIn to truly social contacts.12

6 Anthony DePalma, NAFTA’s Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say, New York Times, 11 March 2001, A1. See also criticism coming from scholars: Barnali Choudhury, ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?’ (2008) 41 Vand J Transnat’l L 775. See also the collection of essays in Michael Waibel and others (eds), The Backlash against Investment Arbitration (Kluwer 2010), and in particular the essay of Gus Van Harten, Perceived bias in Investment Treaty Arbitration, at 434, arguing that the arbitration paradigm is not appropriate for investment treaty disputes, because the latter ‘concern the exercise of general regulatory powers that are typically subject to judicial review under constitutional or administrative law’.

7 See for example and in particular the essay of Gus Van Harten, Perceived bias in Investment Treaty Arbitration, in Michael Waibel and others (eds) ibid 432: ‘Investment treaty arbitration is characterized by an apparent bias in favor of claimants and against respondent states. This perception is reasonably held in light of structural features of the system, especially its use of arbitration to decide public law.’

8 Three states have denounced ICSID Convention in the last 5 years: Bolivia in 2007, Ecuador in 2009 and Venezuela in 2012.

9 UNCTAD Report (n 3).

10 See in particular the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.

11 ibid s 3.3.6.

12 See (n 23) and discussion below.
national courts have been trying to refine the appropriate standards of apparent bias of individual arbitrators arguing whether the right test is that of ‘reasonable appearance of bias’ or ‘reasonable suspicion’ of bias or a ‘real danger’ or ‘real possibility’ of bias.\textsuperscript{13}

Overall, the main focus of arbitration practitioners, courts and professional associations has been on whether \textit{individual conduct of arbitrators} may raise issues of \textit{apparent bias}. By contrast, for arbitration practice, \textit{implicit bias}, such as subconscious, cognitive or cultural bias, is extremely difficult to prove and should not be the concern of law. As the English Court of Appeal characteristically noted in \textit{Locabail} ‘the law does not countenance the questioning of a judge about extraneous influences affecting his mind’.\textsuperscript{14} Yet, increased regulation of the conduct of individual arbitrators has failed to appease criticism against the integrity of international arbitration, mainly because it has failed to address issues of implicit bias associated with the culture and the institution of arbitration.

Meanwhile, arbitration scholarship took a different approach to the challenges presented by arbitral decision-making. Influenced by the trend of legal empiricism and the scientific studies on national judiciaries, many scholars embarked on empirical studies on judicial behaviour of arbitrators. Using a variety of scientific methods such as statistics, interviews, and experimental techniques, these studies aimed to capture bias and assess its impact on arbitral decision-making. Yet, and despite their empirical approach, which suggests objective measurements and scientific conclusions, studies on arbitral judicial behaviour have arrived at diverging findings, failing to provide a comprehensive explanation of arbitral decision-making.\textsuperscript{15}

This failure owes mainly to two reasons: first, the intrinsic methodological difficulties associated with the use of empirical methods for capturing bias, due to the fact that bias is basically an unobservable phenomenon. Secondly, the fascination of these studies with \textit{behavioural} or \textit{attitudinal} theories on decision-making. Evidently influenced by similar works on US national judges, these studies depart from the behavioural assumption that arbitral decision-making is driven almost exclusively by extra-legal factors, mainly policy preferences or financial incentives of arbitrators. Based on this theoretical assumption, most of these studies take the same approach: they employ empirical techniques in order to analyse \textit{award outcomes} and identify \textit{voting patterns}. According to attitudinal theories, voting patterns betray the policy preferences or financial incentives of arbitrators, and therefore explain how arbitrators decide.

The attitudinal model and the use of empirical methods of analysis have undoubtedly provided useful insight in arbitral decision-making. Yet, they have clear limitations. The correlation between award outcomes, voting patterns and judicial attitude is simplistically linear.\textsuperscript{16} Thus, an attitudinal concept of

\begin{itemize}
\item \textsuperscript{13} See Section 2A.
\item \textsuperscript{14} \textit{Locabail v Bayfield Properties} [2000] QB 451, 471–72.
\item \textsuperscript{15} See Section 2 in detail.
\item \textsuperscript{16} Cornell Clayton and David May, ‘A Political Regimes Approach to the Analysis of Legal Decisions’ (1999) 32(2) Polity 249.
\end{itemize}
judicial behaviour unwarrantedly reduces arbitral decision-making to a policy or financially driven exercise.

Eventually, as the article argues, such limited theoretical approach fails to provide a comprehensive description of arbitral decision-making, as it leaves important determinants outside the scope of its analysis. One of the most important determinants that the attitudinal theory fails to take into account is the influence of the broader institutional context within which decisions are taken. The critical role of institutions in decision-making has long been acknowledged in legal scholarship. For institutional theories, judicial behaviour and values are shaped by a number of important institutional processes such as the method of selection and appointment of decision makers, their legal and professional training, their distinct professional role and tenure status, their financial and professional dependence on the institution and their sense of obligation towards it, the existence of stare decisis.

Taking an institutional approach, and drawing heavily on studies on national and international judiciaries, the article examines some institutional aspects of international arbitration. As is argued, the multilateral and fluid processes for selecting arbitrators, as well as the lack of tenured arbitrators and the lack of stare decisis underpin the pluralistic, diverse and democratic potential of international arbitration. This is particularly the case if international arbitral tribunals are compared to the highly structured and centrally controlled paradigm of national and international courts.

Of course, a comprehensive study of the institution of international arbitration needs to look beyond the surface of the procedural design, and examine whether international arbitration has developed implicit or informal institutional structures that may also affect arbitral decision-making. There are a number of crucial as well as complex questions relating to this inquiry: how, for example, certain ideological and legal values develop and dominate in international arbitration over the years, and how, perhaps implicitly, they may inform the judicial attitude of those individuals acting as arbitrators; whether international arbitration over time has developed informal processes that implicitly shape the legal concepts of those involved in the practice and teaching of arbitration; whether there are mechanisms in place that ensure that any individual, who aspires to enter the world of international arbitration, espouses certain legal values and ideological assumptions that conserve the status quo of international arbitration.

Such a complex inquiry goes beyond the scope and methodological reach of this article. It requires complex multi-methodological research, which combines both the conduct of empirical studies as well as the advance of a comprehensive structural theory for international arbitration. Nevertheless, the article offers some considerations about the appropriate approach and direction to such an inquiry as well as some central observations as a starting point for future research.

The article proceeds as follows: Section 2 discusses the reaction of arbitration practice and regulatory bodies to the criticism that arbitration is a biased dispute resolution system. It also discusses the position of arbitration law towards bias and impartiality. As is argued, the focus of arbitration law and practice on apparent bias associated with individual arbitrators, although
useful, fails to effectively address accusations against the integrity of arbitration. Accordingly, Section 2 revisits the legal concept of bias, arguing that arbitration law and regulation should shift its focus from apparent bias associated with individual arbitrators to all types of bias associated with the procedural design and institutional structures of arbitration. This broad legal concept of bias underpins the analysis and main theses of the article in Sections 3 and 4.

Section 3 turns its focus on scholarship, providing a critical review of the main studies on arbitral decision-making to date. As is argued, while they have provided important insight on arbitral judicial behaviour, empirical studies have failed to offer a comprehensive explanation of arbitral decision-making as they tend to exclusively follow an attitudinal approach, which exhibits important theoretical limitations.

Section 4 offers an alternative model for the analysis of arbitral decision-making. Drawing on institutional theories, the article compares the procedural design of international arbitration with that of national and international judiciaries, and provides a description of the institutional structures of international arbitration and how they can affect the way that arbitrators decide.

Overall, the article provides a critical examination of the current state of arbitration law and scholarship on arbitral decision-making, and offers an alternative account of judicial behaviour of arbitrators, taking into account the influence of the broader institutional context within which arbitrators are embedded. An institutional assessment of international arbitration is important not only to better explain arbitral decision-making, but also to inform policy decisions on structural changes of international arbitration. Recently, there have been proposals, advocated by very eminent and highly influential arbitration practitioners and scholars, arguing that the party-appointed system in arbitration should be abolished. Instead, it has been suggested that all members of an arbitral tribunal should be appointed by arbitral institutions. Other scholars have proposed that the model of multilateral selection of the investment treaty tribunals should be replaced by a new international investment court with tenured judges, who will be subject to the supervision of national courts or an appellate body. However, to design and implement structural changes more efficiently, we first need to develop a clear understanding on how arbitration operates as an institution, and what are the structures and processes that shape the values and attitudes of arbitrators. Otherwise, there is a danger that arbitration will emulate the institutional structures of national judiciaries, undermining the pluralistic, diverse and democratic potential of international arbitration.

2. Revisiting the Legal Concept of Bias

A. The Importance of Systemic Bias

For arbitration law and practice the issue of the integrity of arbitral decision-making is primarily associated with the ethics of the individuals acting as arbitrators. As criticism against arbitration became increasingly intense on the grounds that arbitrators favour certain classes of parties, arbitration practice,
perhaps intuitively, responded with more detailed regulation. There is currently a
plethora of arbitration laws, institutional rules and especially institutional codes of
ethics that set out rules and guidelines regulating the conduct of individual
arbitrators in minute detail.\footnote{See n 7 above.} The IBA Guidelines on Conflicts of Interest for
example advice that when ‘close personal friendship exists between an arbitrator
and counsel of one party, as demonstrated by the fact that the arbitrator and the
counsel regularly spend considerable time together unrelated to professional work
commitments or the activities of professional associations or social organizations’
the arbitrator should disclose the relationship.\footnote{See IBA Guidelines on Conflicts of Interest in International Arbitration s 3.3.6.}

Similar codes of ethics have been
promulgated by many other professional or institutional organizations such as the
American Arbitration Association\footnote{See the AAA Code of Ethics for Arbitrators in Commercial Disputes <http://www.adr. org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867>, last accessed 28 August, 2013.}
and the Chartered Institute of Arbitrators.\footnote{The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members <http://www.ciarb.org/resources/members-professional-code/code-of-conduct/>, last accessed 28 August, 2013.}
All of these ethical codes share the same lofty objective, namely to set forth
‘accepted standards of ethical conduct for the guidance of arbitrators and parties
in commercial disputes, in the hope of contributing to the maintenance of
high standards and continued confidence in the process of arbitration’.\footnote{The AAA Code of Ethics for Arbitrators in Commercial Disputes.}

Recently, arbitration practitioners have been looking into the ‘challenges’ that
information technology and electronic social media bring to arbitrators now-
adays. Some commentators have been calling for even more prescriptive
guidelines setting out how arbitrators should be dealing with social networks
such as Facebook or LinkedIn, suggesting that arbitrators should ‘avoid’ the use
of social media’ altogether or ‘limit their friends to truly social contacts’.

Meanwhile, national courts have also been focusing on the ethics of
individual arbitrators, trying to refine the appropriate standards of bias. In
England, for example, courts have adopted slightly different standards of bias,
such as ‘reasonable appearance of bias’\footnote{ASM Shipping Ltd of India v TTMI Ltd of England, [2005] EWHC 2238 (Comm.) (Q.B.).} or ‘reasonable suspicion’ of bias\footnote{R v Mulksshil [1990] 1 All E.R. 436, 441 (English Court of Appeal).}
or a ‘real danger’ or ‘real possibility’ of bias.\footnote{AT&T Corp. v Saudi Cable Co. [2000] 2 Lloyd’s Rep 127, 134–35 (English Court of Appeal).} Similarly, in the US different
Circuits apply different standards of bias, due to the fact that the Supreme

\footnote{cf also English Arbitration Act s 24(1): ‘A party to arbitral proceedings may... apply to the court to remove an
arbitrator... if circumstances exist that give rise to justifiable doubts as to his impartiality’ and UNCITRAL
Model Law on International Commercial Arbitration Art 12 (2) ‘An arbitrator may be challenged only if
circumstances exist that give rise to justifiable doubts as to his impartiality or independence...’ (emphasis added). See also the treatise of Gary Born, International Commercial Arbitration (Kluwer 2009) for a comprehensive
discussion on the topic and at p 1470 in particular. See also the recently published abstracts of LCIA Court
decisions on arbitrator challenges between 1996 and 2010 in Arbitration International, 27 (3) (2011).}
Court in *Commonwealth Coatings Corp. v Continental Casualty Co* failed to develop a single standard of impartiality.\footnote{93 U.S. 145 (U.S. S.Ct. 1968).} The Second Circuit for example requires ‘evident partiality’ by arbitrators,\footnote{Applied Industrial Materials Corp. v Ovalar Makine Ticaret Vé Sanayî, A.S., 492 F.3d 132, 137 (2d Cir. 2007) and Scandinavian Reinsurance v Saint Paul Fire & Marine Ins., 668 F.3d 60 (2d Cir. 2012).} whereas the Ninth Circuit applies a lower threshold amounting to ‘an impression of possible bias’.\footnote{New Regency Productions v Nippon Herald Films, 501 F.3d 1101, 1108 (9th Cir. 2007).} Finally, courts in civil law jurisdictions focus their analysis on ‘justifiable doubts’ of bias.\footnote{Justifiable doubts’ is required by many arbitration laws, such as the Model Law Art 12, and the Swiss Private International Law Act Art 180. See for example the following decisions of the Swiss Federal Tribunal: 4A_258/2009, 11 January 2010, ASA Bull., 2010, p 540 and 4A_458/2009, 10 June 2010, ASA Bull., (3) 2010, p 520, where the Court rejected the challenge to set an award aside despite the fact one of the arbitrator was actively involved in an earlier decision concerning the same case. The Court held that an arbitrator who had already participated in earlier decisions could raise doubts about appearance of bias only if he had taken a position on certain issues so as to be influenced in his future decisions. cf also the Paris Court of Appeal, decision of 12 February 2009 in *Tecnimont SPA v J&P Avax SA*, referred to ‘doubts that arose as to the existence of some undisclosed relations between’ the chairman of the tribunal and one of the parties.} Overall, the main focus of arbitration law and practice has been on the *individual conduct of arbitrators*. Setting out the appropriate standards of bias as well as clear ethical guidelines on conflicts of interests is important, as it focuses the minds of individuals acting as arbitrators. Yet, the increased regulation of arbitrators has failed to appease criticism against the integrity of arbitration, mainly because it has failed to address bias associated with the *system* of arbitration.

To develop more appropriate legal standards of impartiality and, more importantly, to produce more effective regulation for the field of international arbitration we need to revisit the legal meaning and concept of bias. In particular we need to distinguish between individual and systemic bias, and decide what type of bias matters for the integrity of arbitral decision-making.

Crucially, the distinction between individual and systemic bias goes beyond ethical considerations of individual decision-makers. Thus, the examination of systemic bias does not focus on whether a certain decision-maker has financial or personal interests in a certain dispute; rather, it focuses on whether an adjudicatory system is procedurally designed to systematically favour certain legal interpretations or certain groups of parties. If an adjudicatory system is systemically biased, the strong majority of the people selected and appointed to act as adjudicators will typically share the same values and take a similar position on fundamental legal, social, economic and political matters. A crude example of systemic bias would be the case of an adjudicatory system designed to select and appoint adjudicators who are graduates of a certain university, or members of a certain religion only.

Often there is virtually no difference between individual and systemic bias in practice. A judicial panel may well comprise of adjudicators who all happen to share similar values and legal views or prejudices, irrespective of the processes of their selection and appointment. For example, an environmental dispute may be submitted before a judge or a panel of judges who all happen to value free trade and commerce above environment. Such a judicial panel is also likely to arrive at a biased decision, as in the case where all members of a judicial
panel are selected and appointed because of their values and legal views or prejudices.

Such a biased decision however will be the result of coincidence and fortune (or rather lack thereof). As long as a certain adjudicatory system ensures that an assortment of individual biases and prejudices exists among its adjudicators, the integrity and fairness of that adjudicatory system will be safeguarded. On one occasion an environmental dispute may be submitted before a panel, the members of which in their majority happen to be environmentalists; on another occasion an environmental dispute may be submitted before a panel, the members of which in their majority happen to value free trade and commerce above environment.

By contrast, an adjudicatory system that is systemically biased, exhibits no assortment of bias. It is procedurally designed to favour the selection and appointment of decision-makers that share similar values and attitude of mind, and who will naturally favour certain legal interpretations and outcomes or certain groups of litigants. Here, the occurrence of partisan adjudicators is not the result of bad fortune; it is the result of a policy, implemented through carefully designed structures and procedures.

B. The Importance of Implicit Bias

From the above, it becomes obvious that to assess and evaluate systemic bias we need to look beyond the notion of apparent bias, which occurs where there is sufficient evidence of financial or personal interest of a certain arbitrator in a certain dispute. Crucially, we need to look into implicit bias too, namely bias associated with the values or cognition of arbitrators, as well as the culture embedded in international arbitration.

To date, arbitration law and practice have focused only on apparent bias. Implicit bias, such as subconscious, cognitive or cultural bias, is extremely difficult to prove, and therefore not of law’s concern. As the English Court of Appeal characteristically noted in Locabail ‘the law does not countenance the questioning of a judge about extraneous influences affecting his mind’. 31

National courts in various jurisdictions have repeatedly held that in order to accept bias ‘a reasonable third person would have to conclude that an arbitrator was partial to one party to the arbitration’. 32 Such rulings essentially prescribe an objective standard for observing and assessing bias in arbitral decision-making which seems to exclude any prejudice or predilection originating from subconscious, semi-conscious or cognitive bias which are extremely difficult to objectively quantify or indeed observe.

32 Moreltee Constr. Corp. v N.Y.C. Dist. Council Carpenters’ Benefit Funds, 748 F.2d 70 (2d Cir. 1984). English courts follow the very similar test of apparent bias stated in Porter v Magill [2002] 1 All ER 465, namely the test of what a fair-minded and informed observer would conclude having considered the facts. See more recently, A & 3 ORS v B X [2011] EWHC 2345 (Comm). Same approach is taken by the Swiss Federal Tribunal: see judgment of 9 February 1998, 16 ASA Bull. (1998) 634 referring to ‘doubts about the independence have to be demonstrate by objective factual observations that would lead any reasonable observer to have suspicions about the arbitrator’s independence’.
Equally, the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration provide that the doubts about an arbitrator’s impartiality must be in the mind of a ‘reasonable and informed third party’. Accordingly, all the specific situations, which according to the Red List of the IBA Guidelines warrant disqualification of an arbitrator, refer to examples that give rise to bias that can be identified with a certain degree of objectivity. These situations include, for example, the case ‘where the arbitrator is a manager, director or member of the supervisory board in one of the parties’, or the case where ‘the arbitrator has a close family relationship with one of the parties’.

However, focusing on objectively identified bias seems to be a stance dictated less by principles and more by practicalities, and in particular the inherent difficulties to capture or measure subconscious or cognitive prejudice in decision-making. Rau explains:

An abundant literature continues to remind us that decisionmakers who have lived in the world at all will invariably come to a case with perspectives and beliefs and preconceptions that bear the stamp of their past experiences. This is unavoidable—nor would we prevent it if we could.

Yet, decision-making can be equally affected, indeed distorted, by subconscious or cognitive bias. Here, the role of values in decision-making, which often escapes the inquiry of arbitration scholarship, is critical. Values may have a subconscious influence on cognition and eventually on legal outcomes. For example, a decision-maker that values altruism, as opposed to individualism, will be more likely to rate society over commercial activities or individual rights. His or her values may therefore crucially affect his or her decisions in a number of legal matters, such as whether to rate mandatory rules over contractual freedom, consumer and environmental protection over business transactions, or host state regulatory autonomy over investment protection.

Interdisciplinary studies, transcending law and anthropology, have shown how values affect the way people may perceive the same facts. In their study, Kahan, Braman and Hoffman examined how different subjects, with different values and cultural background, perceived a videotape of a high-speed car chase, shot from inside a police cruiser. Although the US Supreme Court in *Scott v Harris* had held that ‘no reasonable jury’ could watch the tape and fail to conclude that the driver posed a risk sufficiently lethal to justify deadly force to stop him, they ‘found that hierarchical and individualistic white males were significantly more likely to perceive that than were egalitarians and communitarians of either race or gender’.

Thus, implicit bias, such as cognitive and cultural bias, may have as a distorting effect in decision-making as conscious bias. A culturally homogeneous decision-making panel does not resemble the ideal of the neutral and

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33 See the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, General Standard 2(b), Explanation.
dispassionate third person that arrives at a legal decision untainted by any sort of bias or prejudice. Lady Justice was never conceived as inherently altruistic or individualistic, egalitarian or hierarchical.

To conclude the analysis of this Section, the legal concept of bias should widen and include both apparent and implicit bias. For arbitration law and practice to effectively respond to criticism about the integrity of arbitration, the scope of their concern and perhaps regulation should include not only apparent bias associated with individual arbitrators, but also systemic bias, including cognitive and cultural ones. Any type of bias matters, as long as it is the result of the institutional structures and procedural design.

With this wide concept of systemic bias in mind the following two Sections look first, into the existing arbitration studies on bias and decision-making, and secondly, into the institutional structures and procedural design of arbitration.

3. Assessing Empirical Studies on Arbitral Decision-Making

Judicial decision-making has always been a fascinating subject for scholars across different fields, not least because it is directly linked with fundamental questions relating to the concept and nature of law. The answer to the question of how judicial decision-makers decide heavily depends on the way we understand and approach law.\(^{36}\) For those embracing a positivist account of law as a closed, unified and hierarchical system, judges and other judicial decision-makers decide on the basis of legal text, precedent and legal rules found in legal codes or court jurisprudence.\(^{37}\) For those embracing a wider concept of law, which has moral, ideological, political and social considerations and implications, judicial decision-making depends, mainly or exclusively, on extra-legal factors such as policy preferences, values and ideology.\(^{38}\)

Against this theoretical background, a vast number of studies aimed to examine and explain the process of judicial decision-making employing different methods of analysis. Some scholars approached the subject analytically providing interesting theoretical accounts of judicial decision-making.\(^{39}\) However, the majority of the studies followed the strong trend of empiricism and inter-


\(^{38}\) See the classic attitudinal study here of Jeffrey Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model* (CUP, 1993) and *The Supreme Court And The Attitudinal Model Revisited* (CUP, 2002); cf also Lawrence Baum, *The Puzzle of Judicial Behavior* (University of Michigan Press, 1997) who however takes a more moderate approach than Segal and Spaeth towards attitudinal theories; cf also Judge Richard Posner in *How Judges Think* (Harvard University Press, 2008) who, being a Judge himself, interestingly notes that ‘[e]vidence of the powerful influence of politics on constitutional adjudication in the Supreme Court lies everywhere at hand’ at 277 and that ‘judging is “political”’, 369.

disciplinarity, particularly prominent in legal studies in the 1980s. Drawing on social sciences, empirical studies on judicial behaviour aimed to capture bias and assess its impact on judicial decision-making relying on scientific methods, such as behavioural analysis, statistics, interviews and experimental techniques. For scholars taking an empirical approach to judicial decision-making, bias is an observable and measurable phenomenon, despite its abstract and latent nature.

Initially, empirical studies focused exclusively on public decision-making and US judiciaries in particular. However, in the past twenty years an increasing number of scholars, from different legal fields, have taken great interest in private decision-making and international arbitration. The focus of legal scholarship on arbitral decision-making was prompted by the rapid increase in power and popularity of international arbitral tribunals. As the authority of international arbitration expanded to disputes with implications on public policy and national sovereignty, the function and role of international tribunals came under scrutiny, and often under intense criticism. International arbitration is now regularly accused of lacking legitimacy, as well as being inherently biased in favour of investors and large corporations.

Against this backdrop of fierce contestation about the role and legitimacy of international arbitral tribunals, the first studies on arbitral decision-making set out to examine how international arbitrators decide and whether they tend to favour certain groups of parties. Initially, the attention of scholars focused on commercial arbitration involving consumer or public policy disputes, but it quickly shifted on investment arbitration and disputes involving public international law and sovereign states.

Evidently influenced by the approach taken by studies on national judiciaries, the vast majority of studies on arbitral decision-making aimed to capture and measure bias in a scientific manner. However, empiricism presented arbitration scholars with significant methodological challenges.

For a start, it is very difficult to design a method whereby directly observe and measure bias. Although a small number of studies employed experimental methods, a classic social science technique, to examine arbitral

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40 Although the scientific study of judicial decision-making first began even earlier, in the 1940s with the pioneer studies of Herman Pritchett: see for example, Herman Pritchett, 'Divisions of Opinions Among Justices of the U.S. Supreme Court' (1941) 35 Am Pol Sci Rev 890. See in more detail about the early development of an empirical theory of judicial decision-making in David Danelski, 'Values as Variable in Judicial Decision-Making: Notes Toward a Theory' (1965–1966) 19 Vand L Rev 721. See also Catherine Rogers “The Politics and Empirics of International Investment Arbitrators” Santa Clara Int'l L Rev (symposium contribution) (forthcoming 2013).

41 See the New York Times piece (n 6) above. See also criticism coming from scholars: Barnali Choudhury, ‘Recapturing Public Power: is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?’ (2008) 41 Vand J Transnat’l L 775. See further about the critical voices Charles N Brower, Charles HBrower II and Jeremy K Sharpe, ‘The Coming Crisis in the Global Adjudication System’ (2003) 19 Arb Int’l 415; Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 Fordham L Rev 1521. See also the collection of essays in Michael Waibel and others (n 6), and in particular the essay of Van Harten (n 6) 434, arguing that the arbitration paradigm is not appropriate for investment treaty disputes, because the latter ‘concern the exercise of general regulatory powers that are typically subject to judicial review under constitutional or administrative law’. Critical legal scholars describe arbitration as an ‘intentional effort to quell the rights movements (civil rights, women’s rights, consumer rights, environmental rights) by replacing public concern for state-enforced rights with private social norms (or interests)’. See Amy Cohen, ‘Dispute Systems Design, Neoliberalism, and The Problem of Scale’ (2000) 14 Harv Negot L Rev 51, 55 referring to the work of Laura Nader, ‘From Legal Process to Mind Processing’ (1992) 30 Fam Conciliation Cts Rev 468, 472.
decision-making,\textsuperscript{42} the findings of experimental studies are usually treated with caution and a certain degree of uncertainty. As many scholars have noted, it is extremely difficult to simulate in an artificial setting the complex incentives and motivations that drive real-world behaviours, such as how arbitrators decide, or how parties select their arbitrators in the first place.\textsuperscript{43}

To overcome the methodological limitations of experimental studies, many scholars tried to measure bias in arbitral decision-making \textit{indirectly}, relying on proxy-variables. Proxy-variables have traditionally been very popular with US scholars examining public decision-making. By establishing a strong correlation between certain observable characteristics or traits of certain US judges and the way these judges voted on certain occasions, many studies have been able to claim general observations on judicial behaviour. Classic proxies of judicial behaviour are the political affiliation of a judge and the ideology of the official who appointed a judge. For example, a number of well-known studies have found that US Supreme Court judges that were appointed by a democratic government tended to vote more liberally, whereas US Supreme Court judges that were appointed by a republican government tended to vote more conservatively.\textsuperscript{44}

Similar proxies have been employed by scholars to explain arbitral judicial behaviour. Waibel and Wu, for example, have used the number of times that an arbitrator has been appointed by a state or an investor as a proxy that allowed them to make inferences on policy preferences and judicial attitude of arbitrators deciding investment treaty disputes.\textsuperscript{45} Of course, relying on proxies may lead to obviously crude and often unwarranted inferences on decision-making. Relying, for example, on the fact that an arbitrator is regularly appointed by investors to extrapolate on the judicial attitude of that arbitrator rests upon a generalization that may or may not be true, and which may


\textsuperscript{43} cf Joshua Fischman and David Law, ‘What is Judicial Ideology and How Should We Measure it?’ (2009) 29 Wash U J L Pol’y 146; see also Richard Posner, ‘Rational Choice, Behavioral Economics, and the Law’ (1998) 50 Stan L Rev 1551, arguing that it is very difficult to credibly select the experimental subjects, as experimental studies tend to select subjects more or less randomly while people in real life are ‘sorted to jobs and other activities’ in a rational, rather than random manner (at 1570–71). See also Christopher Drahozal, ‘A Behavioral Analysis of Private Judging’ (2004) 67 Law Contemp Probl 127, discussing the differences between experimental settings and real-world jury trials and the uncertainty associated with the findings of experimental studies (133).

\textsuperscript{44} See here the classic study of Cass Sunstein, David Schkade and Lisa Ellman, ‘Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation’ 90 Va L Rev 301 (2004), which have found correlation between judicial attitude and the ideology of the official who appointed a judge in a number of legal areas, including affirmative action, piercing the corporate veil, disability discrimination, race discrimination and review of environmental regulations. See further Cass Sunstein and others, \textit{Are Judges Political?: An Empirical Analysis of The Federal Judiciary} (Brookings Institution Press, 2006). For studies finding strong correlation between voting behaviour and the political affiliation of the judges: see for example, Smart S Nagel, ‘Political Party Affiliation and Judges’ Decisions’ (1961) 55 Am Pol Sci Rev 843, who looked into the political affiliation and voting patterns of more than 300 US justices. For a helpful overview of many of these studies see Fischman and Law (n 43) who also discuss the limitations of proxy-variables to measure decision making behaviour at 170.

\textsuperscript{45} Michael Waibel and Yanhui Wu, \textit{Are Arbitrators Political?}, 22 (forthcoming) <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12> (last accessed 28 August, 2013) cited here with authors’ permission. The final version of the study will be published soon.
overlook a range of other variables. Although certain arbitrators seem to attract regular appointments predominantly by investors and others predominantly by states, many arbitrators sitting in investment treaty disputes tend to receive appointments both by states and investors.

Moreover, a number of scholars have relied on behavioural methods of analysis in order to explain arbitral decision-making on the basis of incentives. Two types of incentives are usually associated with arbitral decision-making: first, the incentive to ‘split the baby’. Here, it is argued that arbitrators tend to render compromise awards in order to give each party in arbitration the reassurance of a partial victory. The incentive for arbitrators to ‘split the baby’ is primarily explained by financial considerations. As they are selected and paid by the disputing parties, arbitrators naturally tend to avoid extreme decisions such as a decision that awards the entire amount of damages requested by the claimant or a decision that rejects the claim altogether. Instead, arbitrators tend to grant awards that keep both paying parties relatively satisfied.

Here, big corporations and investors are largely assumed to be ‘repeat arbitration players’. Sternlight, for example, argues in the context of consumer arbitration that arbitrators may be consciously or unconsciously influenced by the fact that the company, rather than the consumer, is a potential source of repeat business. An arbitrator who issues a large punitive damages award against a company may not get chosen again by that company or others who hear of the award.

Van Harten makes similar observations about repeat players in investment arbitration noting the arbitrators may be influenced to appease actors who have power or influence over specific appointment decisions or over the wider position of the relevant arbitration industry. The symmetrical claims structure and absence of institutional makers of judicial independence create apparent incentives for arbitrators to favour the class of parties (here, investors) that is able to invoke the use of the system.

However, drawing inferences on arbitral decision-making on the basis of a single behavioural incentive is methodologically questionable. Many commentators

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46 See Fischman and Law (n 43) 144.
47 The classic example here is Charles Brower who is regularly appointed by investors and Professor Brigitte Stern who is regularly appointed by States.
48 Richard Posner, 'Judicial Behavior and Performance: An Economic Approach' (2004–2005) 32 Fla St U L Rev 1259, 1261; Rau (n 34) 523: ‘Repeat business for the arbitrator is likely only if he is able to retain the future goodwill of both union and management; the desire to do so may give him an incentive (in the hallowed phrase) to ‘split the baby’ in a single arbitration.’
49 Similar concerns have been raised by scholars in relation to investment treaty arbitration. See for example Gus Van Harten, Investment Treaty Arbitration and Public Law (OUP, 2007) 152–53, ‘as merchants of adjudicative services, arbitrators have a financial stake in furthering [arbitration’s] appeal to claimants’, which leads to an ‘apprehension of bias in favor of allowing claims and awarding damages against governments’; Choudhury (n 6) at 787.
50 Jean Sternlight, ‘Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration’ (1996) 74 Wash ULQ 637, 685; and further, ‘Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: a Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns’ (1997) 72 Tul L Rev 1.
have rightly observed that arbitral behaviour is a complex and multifaceted exercise, which can hardly be reduced to the simplistic proposition that ‘arbitrators decide in order to please the parties that pay them’. As Richard Posner notes ‘an arbitrator who gets a reputation for favoring one side or the other in a class of cases . . . will be unacceptable to one of the parties in any such dispute, and so the demand for his services will wither.’

The methodological challenges of drawing general conclusions on arbitral decision-making have prompted other scholars to focus on the behaviour of certain individual arbitrators. Profiling individual arbitrators can be done in a number of ways. In investment treaty disputes, for example, where arbitral awards are usually available in public, it is possible to count the times that an arbitrator has voted for or against states or investors to arrive at a rough estimation of his or her policy preferences. Alternatively, individual behaviour assessment may involve more sophisticated methods, such as examining the personal and professional background of arbitrators. David Schneiderman, for example, collected background information, including data on nationality, education and career, about the individuals that acted as arbitrators in three investment treaty arbitrations, namely in Enron, LG&E and CMS.54 His aim was to explain why the tribunals in these three cases, arising out of virtually identical facts and relating on the same text of a US-Argentine BIT, came to conflicting determinations as to whether Argentina was entitled to take advantage of the necessity defence in the wake of the 2001 economic crisis. Schneiderman was particularly keen to explain how two certain arbitrators (Albert Van Den Berg and Francisco Rezek) changed their mind about the defence of necessity from one case to another.

Similarly, Waibel and Wu amassed personal background information, such as nationality, gender, education, career, legal expertise and cultural background of about 350 arbitrators appointed to decide more than 400 ICSID arbitrations. Their aim was to identify links between the arbitrators’ personal background and their judicial attitude.55

Other studies have centred their analysis on arbitral awards rather than arbitrators. For example, by coding award outcomes and using statistical

52 Many commentators have noted that there is little evidence to support the proposition that arbitrators favour repeat players: see Drahozal (n 43) 127: ‘competition among arbitrators also gives rise to the possibility of ‘repeat player’ bias, in which arbitrators have an incentive to favor parties who are more likely to provide future business. To date, however, the evidence is inconclusive on whether such bias exists’; William Park, ‘Arbitrator Integrity’, in Waibel and others (n 6) 206 observes ‘no evidence supports the proposition that the arbitral system as it now exists provides incentives to produce inaccurate decisions that favor either claimants or respondents or even that such incentives actually exist. Common sense tells us that the big losers would be none other than professional arbitrators themselves if the process did not inspire general confidence’; cf also Samuel Estreicher, ‘Predispute Agreements to Arbitrate Statutory Claims’ (1997) 72 NYU L Rev 1344. At 1355: ‘Although having some force in the context of industry panels, the point is considerably overstated if arbitration is conducted, as is likely, before arbitrators chosen by the parties on an ad hoc basis. An employer may be a repeat player in the sense that it likely will be arbitrating disputes with more than one employee (or former employee), but arbitrators chosen on prior occasions are unlikely to be deemed acceptable by claimant representatives. Moreover, the real repeat players will be the lawyers for both defense and plaintiff bars in the area-such as the members of the National Employment Lawyers Association, a plaintiff group who can be counted on to share information within their group about the track records of proposed arbitrators.’

53 Posner (n 48) 1261.


55 Waibel and Wu (n 45).
methods of analysis, Franck has looked into whether a statistically significant percentage of awards favours investors or states, or whether the development status of a state may influence the decision-making behaviour of arbitrators sitting in investment treaty disputes. Keer and Naimar have applied similar methods to awards in commercial arbitration.

Statistical analysis of coded awards is faced with considerable methodological challenges too. Identifying the winning party for award coding purposes is a considerably complex task, especially in investment arbitration disputes, which typically involve a great variety of factual and legal issues, including jurisdictional as well as substantive ones. Kapeliuk rightly observes that ‘empirical research has often coded outcomes on a binary scale, in which the claimant wins if the arbitrator awards him or her something, and the respondent wins only if the claimant receives nothing’.

Finally, other scholars have relied on information and data collected through in-depth personal interviews. The classic study here is the work of Dezalay and Garth, who interviewed about 300 individuals working in the field of arbitration. Although their study looked into broader issues on social power and arbitration’s legitimacy, many of their findings are relevant to arbitral decision-making too. Similarly and more recently, Joshua Karton has relied on data collected through personal interviews to examine whether a legal culture specific to the international commercial arbitration community is emerging and how it may affect the way arbitrators decide on certain areas of contract law.

Yet, and despite their empirical approach, which suggests objective measurements and scientific conclusions, studies on arbitral judicial behaviour have arrived at largely diverging, often conflicting, findings on a number of issues. For example, on the fundamental issue of whether arbitrators in investment treaty disputes tend to favour investors over host states, Van Harten found ‘significant evidence that arbitrators favour first, the position of claimants over respondent states and second the position of claimants from major Western capital-exporting states over claimants from other states’.

However, Franck found that, in investment treaty arbitrations, states tended to be more successful (58%) than investors (39%). Franck’s study further found that the average amount of damages awarded (approximately US$10,56 Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 Fordham L Rev 1521 and ‘International Investment Arbitration: Winning, Losing and Why’ (2009) 7 Columbia FDI Perspectives 1.


58 They have used statistical methods of analysis to examine approximately 50 awards under the auspices of the American Arbitration Association, rejecting the view that arbitrators make compromise awards. More specifically, they have found that the majority of the awards (66%) awarded either the entire amount of damages requested (35%) or nothing at all (31%). Only 34% of the awards awarded part of the amount of damages requested, and even here arbitrators awarded a widely distributed percentage of the amount requested originally.

59 For various methods of coding in judicial decision making see Schneiderman (n 54) 156ff.


63 Franck (n 56). cf also the 2013 UNCTAD Report (n 3) stating that of the 244 concluded cases so far in investment-treaty arbitration, approximately 42% were decided in favour of the State and approximately 31% in favour of the investor, whereas approximately 27% of the cases were settled.
million) was a small portion of the damages typically requested by the investors (approximately US$ 343 million). Franck also found little evidence that the development status of a state influences the attitude of arbitrators sitting in investment treaty arbitrations.64 Likewise, Kapeliuk looked into 144 awards in investment arbitrations held under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) and found that ‘most awards dismissed all investors’ claims and more than 80% of all decisions rendered an award of less than 40% of the amount claimed’. She concluded that the evidence ‘clearly do not support the claim that investment-arbitration tribunals display a tendency to rule in favor of investors’.65

Similarly, there are conflicting findings on whether arbitrators’ personal background or the proxy-variable of ‘appointing party’ can influence arbitrators’ judicial attitude. Waibel and Wu found that arbitrators routinely appointed by investors tend to scrutinize the actions of host states more closely, as compared to arbitrators typically appointed by host states.66 They also concluded that arbitrators are more lenient towards host states from their own legal family and that some aspects of arbitrators’ personal background, such as whether arbitrators come from a development country or whether they are working as full-time private practitioners, have important repercussions on how these arbitrators decide.67

On the other hand, Schneiderman found that background indicators do not reveal much about arbitral decision-making, and they are unable to explain many of the decisions in the investment arbitration cases he examined. In particular, Schneiderman was unable to identify any decision-making pattern explained by arbitrators’ personal background or the proxy-variable of ‘appointing party’ in the investment treaty awards in Enron, CMS and LG&E.68

There is also disagreement between findings of empirical studies about whether certain procedural features of arbitration and investment arbitration, such as the fact that arbitrators are appointed and paid by the parties, may affect how arbitrators decide.

Van Harten’s empirical study suggests that the judicial behaviour of arbitrators is heavily influenced by the prospect of repeat appointments by regular users of arbitration, and by the ‘asymmetrical structure’ of investment arbitration, which allows only investors to bring a claim against states, but not the converse. According to Van Harten, the procedural structure of investment treaty arbitration creates apparent incentives for arbitrators to favour the investors, because they are the group of parties that can set the system of investment arbitration in motion and are repeat users of that system.69

65 Kapeliuk (n 60).
66 Waibel and Wu (n 45).
67 ibid.
68 Schneiderman (n 54).
69 Van Harten (n 51): ‘there was a strong tendency toward expansive resolutions that enhanced the compensatory promise of the system for claimants and, in turn, the risk of liability for respondent states.’
However, Kapeliuk, who looked into voting patterns of arbitrators who have received appointment of at least four times in investment cases under ICSID, found no evidence suggesting that the prospect of repeat appointments affected the judicial attitude of arbitrators.70 Likewise, Drahozal, applying behavioural studies on national judiciaries to domestic arbitration, found that there is inconclusive evidence supporting the proposition that arbitrators' judicial behaviour is driven by an incentive to favour parties who are more likely to provide future business.71 Lisa Bingham's empirical study came to similar conclusions about the prospect of repeat appointments in employment arbitrations, another area where allegations of repeat players and power asymmetries abound.72

Similarly, other studies in both commercial and investment arbitration found that the fact that commercial arbitrators are paid by the parties does not drive arbitrators to render compromise awards.73 Alternatively, it was found that, if there is a tendency of arbitrators to issue compromise awards, this type of judicial behaviour is associated with cognitive biases, such as extremeness aversion and anchoring, which is in fact common to all types of judicial decision-making, rather than decision-making in arbitration solely.74

Drawing attention to their diverging and often conflicting findings does not mean to question the importance of the empirical studies on arbitral decision-making. Indeed, they have offered useful insight in certain aspects of the multifaceted question of how arbitrators decide. However, to date all efforts to empirically measure bias in arbitral decision-making have resulted in descriptive inferences based on correlation, rather than empirically proven conclusions based on causation.75 The next Section discusses the critical theoretical limitations of the empirical studies on arbitral decision-making. More importantly it offers an alternative model for the analysis of arbitral decision-making. Drawing on institutional theories, Section 4 compares the procedural design of international arbitration with that of national and international judiciaries, and provides a description of the institutional structures of international arbitration and how they can affect the way that arbitrators decide.

4. An Institutional Approach to Decision-Making

As was already explained, to date empirical studies on arbitral judicial behaviour have resulted in diverging and often conflicting findings, and they have largely failed to provide a comprehensive explanation of arbitral decision-making.

70 Kapeliuk (n 60) 62.
71 Drahozal (n 43).
73 For commercial arbitration, see the study of Stephanie Keer and Richard Naimark, 'Arbitrators Do Not 'Split the Baby' – Empirical Evidence from International Business Arbitration' (2001) J Int'l Arb 18. For investment Arbitration, see Kapeliuk (n 60) 81 finding that 'the results thus show that arbitration tribunals involving elite arbitrators do not have a tendency to render compromise awards'.
74 Drahozal (n 43) 120, 124 'studies suggest (albeit tentatively) that arbitral decision-making, to the extent it is like judicial decisionmaking, is less subject than jury decisionmaking to some cognitive illusions, and equally subject to others.'
75 See Rogers (n 40) above for a comprehensive critique of empirical studies on decision-making in investment arbitration.
This failure owes mainly to two reasons: first, the fascination of these studies with *behavioural* or *attitudinal* theories on decision-making; second and interrelated, the exclusive reliance on scientific methods to capture bias.

Evidently influenced by similar works on US national judges, empirical studies on arbitral decision-making depart from the behavioural assumption that arbitral decision-making is driven almost exclusively by extra-legal factors, mainly policy preferences or financial incentives of arbitrators. Based on this theoretical assumption, most of these studies take the same linear approach: they employ empirical techniques in order to analyse award outcomes and identify *voting patterns*. According to attitudinal theories, voting patterns betray the policy preferences or financial incentives of arbitrators, and therefore explain how arbitrators decide.

Occasionally, some studies have attempted to corroborate their findings with personal and career background information about arbitrators, which can arguably betray policy preferences too. However, the working hypothesis for all empirical studies on decision-making has been the attitudinal suggestion that decision-making is driven by extra-legal factors relating exclusively to the individual decision-maker, such as his or her personal traits, preferences and incentives.

The attitudinal model and the use of scientific methods of analysis have undoubtedly provided useful insight in arbitral decision-making. Yet, they exhibit clear limitations, mainly because an attitudinal concept of judicial behaviour unwarrantedly reduces arbitral decision-making to a policy or financially driven exercise. Indeed, the correlation between award outcomes, voting patterns and judicial attitude is simplistically linear, and it fails to account for the complexities of decision-making. This observation may also explain the conflicting findings of the empirical surveys about whether arbitrators are influenced by policy preferences on not.

Moreover, such a behaviouristic account of arbitral decision-making is not familiar to many of the people that are actually involved in arbitration as practitioners or as arbitrators. People who practice arbitration and decide as arbitrators refuse to accept that they decide exclusively on the basis of policy preferences or financial incentives, and believe that they are guided by legal text and legal norms. Park, one of the most experienced arbitrators and arbitration scholars notes that

Arbitrators are supposed to arrive at some understanding of what actually happened and what legal norms determine the parties’ claims and defenses. In finding facts and applying law, arbitrators should aim at getting as near as reasonably possible to a correct view of the events giving rise to the controversy and to consider legal norms applied in other disputes that raise similar questions. Arbitration implicates a reasoned evaluation of facts and legal norms...

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76 Segal and Spaeth (n 38) and Segal and Spaeth (n 38).
78 See Section 2.
Eventually, such limited theoretical and methodological approach fails to provide a comprehensive description of arbitral decision-making, as it leaves important determinants outside the scope of its analysis. One of the most important determinants that the attitudinal theory fails to take into account is the influence of the broader institutional context within which decisions are taken.80

The term institution here is used to refer to the political and legal framework within which decision-makers are embedded. The critical role of institutions in decision-making has long been acknowledged in legal scholarship.81 For institutional theories, judicial behaviour and values are shaped by a number of institutional processes such as the method of selection and appointment of decision makers, their legal and professional training, their distinct professional role and tenure status, their financial and professional dependence on the institution and their sense of obligation towards it, the existence of stare decisis.82

Institutional theories recognize the importance of the personal traits, values and preferences of individuals in decision-making. However, they also look into the wider institution behind the individual, and examine how institutions shape the preferences and values of the individuals in the first place, as well as how institutional structures guide and constrain individuals in decision-making. Crucially, an institutional account of judicial behaviour does not reduce decision-making to policy preferences, as attitudinal theories do. Rather, for institutional theories, legal text and precedent are highly relevant in decision-making as they are considered important institutional factors. In that sense, an institutionalist account of decision-making transcends the classic debate between legalist and attitudinal theories on decision-making, as institutional theories accept the influence of both legal doctrine and policy presence on judicial behaviour. Decision-makers, who are institutionally embedded, are bound by legal precedent and text but they tend to decide on the basis of what they believe to be the most authentic interpretation and representation of law in light of the dominant values of the institutional context within which they decide.83

Despite the importance of institutional inquires on judicial decision-making, a comprehensive examination of the main institutional structures, processes

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80 The only exception here is the study of Dezaly and Garth (n 61), which however is dated; international arbitration is a very different institution that it was almost 20 years go, with the development of more complicated structured and the addition of several new players; see also Schneiderman (n 54) who also, albeit very briefly and narrowly examines institutional theories as part of four different models of analysis to explain conflicting determinations in three investment treaty awards (Enron, CMS and LG&E/ED).

81 Clayton and May (n 77) identify the first institutionalists (who they call 'old institutionalists') back to the 1920s and 30s: Robert Cushman, Leading Constitutional Decisions (Appleton-Century-Crofts, 1925); Edward Corwin, The Twilight of the Supreme Court: A History of Our Constitutional Theory (Yale University Press, 1934).

82 Clayton and May (n 77) 239. cf also Schneiderman (n 54) 27: 'this suggests that the legal structures associated with high court judicial decision-making are not likely the result of unconstrained judicial preferences or mere strategic calculations but are the product of a complex ensemble of practices, expectations, and legal norms.'

83 Clayton and May (n 77) 244.
and actors of international arbitration, and how they all influence the judicial behaviour of arbitrators is currently lacking in arbitration scholarship.\textsuperscript{84}

An institutional study on arbitration involves two interrelated inquiries. The first inquiry is to analytically look into and assess the procedural design of international arbitration. This is the purpose of the next two sections: Section 4A first looks into a variety of studies on national and international judiciaries. These studies offer important insight about the influence of the procedural design on judicial decision-making. Section 4B(i) then turns its attention to the procedural design of arbitration focusing primarily on the method for selection and appointment of arbitrators, and secondary on the lack of tenured post and the lack of \textit{stare decisis}.

The second inquiry is to look beyond the surface of procedural design and examine the implicit institutional processes and structures of international arbitration. The main focus of this inquiry is how certain ideological and legal values develop and dominate in international arbitration over the years, and how, perhaps implicitly, they may inform the judicial attitude of those individuals acting as arbitrators. This inquiry goes beyond the scope and methodological reach of this article. It requires complex multi-methodological research, which combines both the use of empirical techniques and the development of a comprehensive structural theory of international arbitration. Nevertheless, the last section (Section 4B(ii)) offers some considerations about the appropriate approach to such an inquiry as well as some central observations as a starting point for future research.

\textbf{A. The Institution of National and International Judiciaries}

A number of studies have examined different institutional aspects of the judicial paradigm of national and international judiciaries. As is well known, national and international judges are selected and appointed by a central authority, they are given life or fixed tenure and they are financially and professionally dependent on the state or an intergovernmental authority that has the management oversight of international courts and tribunals.\textsuperscript{85}

Many of these studies have found that such a judicial paradigm is associated with systemic bias resulting from certain institutional structures and processes. It has been demonstrated, for example, that the way that national and international judges are selected, appointed and promoted within national and international judiciaries is typically informed and governed by clear political considerations.

Mackenzie, Malleson, Martin and Sands in their recent study on international judges found that\textsuperscript{86}

‘evidence of politicization is apparent at both the nomination and selection stages . . . it is not unusual for individuals to be selected as a result of overtly political

\textsuperscript{84} Joshua Karton is possibly the only exception here, having looked into some of the institutional constraints on arbitral decision-making (see \textsuperscript{n} 62).

\textsuperscript{85} As regards, international courts and tribunals see the excellent study of Gary Born, ‘A New Generation of International Adjudication’ (2012) 61 Duke LJ 775.

considerations or even nepotism. Whatever form of nomination process is adopted, all nominated candidates must work their way through a highly politicized selection process.\textsuperscript{87}

Other studies have explained how governments use the selection and appointment process to shape the judicial behaviour of the World Trade Organisation appellate body,\textsuperscript{88} the European Court of Human Rights,\textsuperscript{89} or other international courts.\textsuperscript{90}

Further, it has been shown, albeit hardly surprisingly, that the institutional processes of shaping judicial values and behaviour of national judges begin much earlier than the time that a judge is first appointed in the judiciary office. Education, social background and the early professional life of potential judges are crucial factors that are heavily influenced by the class structure of a State and further contribute to the homogeneity of national judiciaries.

As Griffith notes,

[UK] judges are the product of a class and have the characteristics of that class. Typically coming from middleclass professional families, independent schools, Oxford or Cambridge, they spend twenty to twenty-five years in successful practice at the bar, mostly in London.\textsuperscript{91}

Griffith was of course writing these lines in the 1990s.\textsuperscript{92} Since then a range of policies was developed to reform the judicial appointment process and promote diversity.\textsuperscript{93} Yet, as is generally acknowledged, the deep-seated problem of lack of diversity in the judiciary of the United Kingdom persists, being a potent enabling factor to systemic bias in national judiciaries.\textsuperscript{94}
Similar observations about lack of variation of the judges’ background have been made in relation to international judiciaries, such as the international criminal tribunal, or other national courts. In the US Supreme Court, for example, ‘the last justice (successfully) appointed while living west of the Mississippi River was Anthony Kennedy in 1987’, while all current justices have attended either the Harvard or the Yale law school and they are all either Catholics or Jews. As Levinson notes, given the personal and educational background of the US Supreme justices there is no reason to believe that any current member of the Court knows much, if anything, about the American West, including, for example, issues surrounding access to and control of water or the complexities of American Indian life and Law.

Judicial values and behaviour are equally shaped by other institutional factors such as the distinct professional role and tenure status of national and international judges. The privileges of a tenured judiciary post accords national judges a status of established authority that further informs their attitude towards the law. National judges enjoy absolute immunity and they are often appointed to preside over commissions, committees and tribunals of all kinds. These privileges reinforce the perception of them, as well as their self-perception, as guardians of the State interests and order.

Stare decisis is another institutional determinant of judicial decision-making. Certainly, stare decisis serves important fair and equity purposes ensuring that judges arrive at the same conclusions in a group of cases that involve the same legal issues. At the same time, however, stare decisis has a constraining effect on judicial behaviour. Based on past decisions, the task of a judge is often reduced to construing the facts of the case before him in a way that fits the legal precedent. Even when judges are not technically bound by stare decisis, they tend to follow previous decisions because they are well aware that a decision that fails to adhere to judicial conformity is less likely to be accepted and be followed by other judges too.

The result of these institutional processes is that national judiciaries tend to be a cohesive group of decision-makers most of whom share ‘a unifying attitude of mind, a political position, which is primarily concerned to protect and conserve certain values and institutions’.

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95 See the study of Allison Danner and Erik Voeten, ‘Who is Running the International Criminal Justice System?’ in Deborah Avant, Martha Finnemore, and Susan Sell (eds), *Who Governs the Globe?* (CUP 2010) on international criminal tribunals, who have found that the variation in professional backgrounds of successful candidates has significantly decreased over time.


97 ibid.

98 Griffith (n 91) 25ff.


100 cf the fascinating study of Duncan Kennedy, *A Critique of Adjudication* (Harvard 1997) 155: ‘the work product of liberal and conservative lawyers and judges preserved in briefs and opinions biases or skews the legal work that follows, because it makes it easier to follow some lines of approach and harder to follow others.’

101 Posner (n 48) 1274.

102 Griffith (n 91) 19.
It is not suggested here that no differences exist among national judges on a number of legal and political matters. Political contestations in judicial-making are most obvious, for example, in the US Supreme Court where judges tend to take differing approaches to law on the basis of their general political stance as conservatives or liberals. However, all legal or policy disagreements between individual judges are well embedded within the prevailing culture of the broader institutional framework. State judiciaries allow individual judges to have and support their own policy preferences as long as they are not radical or they do not threaten to undermine the institutional status quo. Individually, judges may support the Republicans or the Democrats in the United States, or they may vote for the Conservative or the Labour or the Liberal Democrat party in the UK. Collectively, though in their role and function, they are neither political partisans nor radicals. They tend to preserve and reinforce the values, relationships and interests of the prevailing institutional groups at a certain time.103

Richard Posner, a US Court of Appeal judge himself, further explains how the institutional structure of national judiciaries shape judicial attitudes so that they reflect the dominant political and legal views of the institution itself:

A career judiciary can be expected to be methodologically conservative and therefore unadventurous. Promotion in a career judiciary as in any other branch of the civil service depends ultimately on one's ability to perform to the satisfaction of one's superiors, and it is difficult to see how the supervisors in a career judiciary will benefit in their own careers from having bold, experimentally minded subordinates.... We can expect the output of a career judiciary to display low variance, to be of uniformly professional quality, but to be uncreative.... With the structure of the judicial career and the heavy reliance placed on legal codes and treatise writers as sources of law, performance criteria that emphasized intellectual creativity and independence, political acumen, or even pragmatic insights into 'law in action' would be misplaced. A judge who excelled in such dimensions would be stepping out of his designated role.104

Further, Lucas Powe reviewed hundreds of US Supreme Court rulings issued from 1789 until 2008, relating to a wide range of issues, including race, property rights, religion, capital punishment, abortion, civil rights, gender and gay rights. Powe found that the US Supreme Court Justices have been crucially influenced in their decision-making by the dominant views of the American elite at the time.105 Despite the different political views and affiliations of the Justices, the US Supreme Court has been 'a part of a ruling regime doing its bit to implement the regime's policies'.106 As Powe has argued, Justices are 'subject to the same economic, social and intellectual currents as other upper-middle-class professional elites', and the Court 'identifies with and serves

103 ibid 328: ‘protectors and conservators of what has been, of the relationships and interests on which, in their view, our society is founded’ ‘this does not mean that no judges are capable of moving with the times, of adjusting to changed circumstances. But their function in our society is to do so belatedly’ (emphasis added).
104 Posner (n 48) 1264.
106 See Powe ibid, preface, ix.
ruling political coalitions. Before Powe, Dahl and McCloskey have also demonstrated that the decisions of the US Supreme Court have been carefully reflecting certain dominant interests over the course of the US history. Other scholars have shown the same for national judiciaries in other jurisdictions.

These observations do not mean to suggest that national judges deliberately or in bad faith make decisions in order to serve the interests of the government authority that has appointed them. The moral integrity of national or international judges is not questioned here, and it is readily accepted that judges decide on the basis of what they believe to be the most authentic interpretation and representation of law. What it is argued here is that what judges believe to be the most authentic interpretation and representation of law has been shaped and guided, perhaps latently, by the dominant values and culture of the institutional context within which they are embedded.

B. The Institution of International Arbitration

(i) Procedural design of international arbitration

The previous section argued that the judicial paradigm of national and international judiciaries is associated with systemic bias resulting from certain institutional structures and processes, such as the method for selection and appointment of judges, tenured posts, financial and professional dependency on the state, and stare decisis.

The highly structured and centrally controlled paradigm of national and international courts should be contrasted with the multilateral and fluid paradigm of international arbitral tribunals. As is well known, in international arbitration each party typically appoints one arbitrator, with the presiding arbitrator being appointed by the two party-appointed arbitrators and very often with the agreement of the parties. Typically, there is no central authority in international arbitration entrusted with the task to collectively select and appoint the members of international arbitral tribunals.
While in some arbitrations, an arbitral organization may be asked by the parties to appoint the members of a certain tribunal, in the vast majority of the cases, it is the parties that determine the synthesis of the tribunal on the basis of self-interested considerations. Statistics from the International Court of Arbitration of the International Chamber of Commerce (ICC), the most popular arbitral organization, show that from 1,301 arbitrators who were appointed in ICC arbitrations, 930 arbitrators were selected by the parties. Indeed, the right of the parties to participate in the constitution of arbitral tribunals is ‘the very essence of arbitration’.

The multilateral and fluid processes for selecting arbitrators, as well as the lack of tenured arbitrators and the lack of stare decisis underpin the pluralistic, diverse and democratic potential of international arbitration.

For a start, the party-driven method for selection of decision-makers provides the disputing parties with a unique opportunity to shape the judicial values of the tribunal. The pluralistic synthesis of tribunals is thus expected to represent the biases of both parties and lead to a more balanced and moderate decision. A number of studies have shown that decision-makers exhibit more partisan voting tendencies when sitting in panels with decision-makers of similar values. Either to avoid dissenting opinions (the whistleblowing or the dissent hypothesis), or as the result of careful deliberations or even dynamic bargaining among the decision-makers, pluralistic multimember panels exhibit more moderate judicial behaviour.

Moreover, while in their majority national judges tend to come from a similar social, education or class background, the manifold procedural design of arbitration allows for a wide range of legal, ideological cultural and class

113 In the course of 2012, for example, i 1,301.
115 Rau (n 34) 506: ‘In international practice, the tripartite model is in fact a norm which will be surrendered only with difficulty—to many, indeed, the right to choose one member of the panel is the very “essence of arbitration.” An arbitration clause that provided, for example, that “if a dispute arises, one party will appoint all members of the tribunal” would most likely be an invalid arbitration clause See here the Dutco v BKMI and Siemens, decision of the Cour de Cassation, 7 January 1991, J de Droit Int’l 707 (1992) with note Ch Jarrosson. In a consortium dispute Dutco brought a claim before an ICC tribunal against BKMI and Siemens. The two co-defendants requested the ICC Court to appoint one arbitrator each, claiming that they have divergent interests, but the ICC Court rejected their request and asked them to jointly appoint a single arbitrator; otherwise, the ICC Court threatened them to appoint a single arbitrator on their behalf. Eventually, the two co-defendants appointed a single arbitrator but they subsequently challenging the ensuing award before the French courts on the basis of violation of due process. The Cour de Cassation found that by threatening the two co-defendants to appoint a single arbitrator on their behalf when the claimant had already exercised its right to appoint its own arbitrator, the ICC Court had violated due process and ‘equality of the parties in the appointment of arbitrators [which] is a matter of public policy which can be waived only after the disputes has arisen’.
116 cf Esposito and Martire, ‘Arbitrating in a World of Communicative Reason’ (2012) 28 Arb Int’l 327: ‘International arbitration has to be considered neutral because it is de facto capable of neutralizing the cultural-clash so often present in international disputes.’ See also Rau, ‘Integrity in Private Judging’ (n 34) 495, who rightly observes that ‘arbitrators are likely to be valued at least in part precisely for the background and interests they share with the parties themselves… Where the parties bargain with their eyes open for such a process of dispute resolution, there is much in the way of ‘interests’ and ‘relationships’ that such a bargain can legitimize. The result is in any case likely to come closer to their original expectations and to their sense of justice than could any result mandated by the law of judicial disqualification’.
119 Segal and Spaeth (n 38).
120 Choi and Gulati (n 37) 739.
diversity in arbitration panels. In international arbitration, an English barrister, who has graduated from Oxbridge, a Greek lawyer from a middle class background and a South-American state officer can feature in the same arbitral panel. Even a maverick decision-maker can be appointed in an arbitral tribunal, if a party selects him or her as an arbitrator; no such individual may ever find his or her way into the ranks of a national judiciary. Relatedly, freed from the judicial constraints of *stare decisis*, an international tribunal could even adopt a legal position or legal interpretation which does not necessarily reflect the current dominant values in international commercial and investment law.

Finally, the right of the parties to participate in the constitution of the tribunal enhances the procedural justice and legitimacy of the process of international arbitration.121 As is rightly noted accounts of participation in political and legal fields share certain important similarities as elements of a democratic culture.... a person should be able to influence process in which their interests are at stake... [p]articipation brings together social and legal elements in allowing confidence in the accuracy of procedures that have made use of the ‘best’ sources of information. In this way, participation makes for the legitimacy of legal procedures.122

While participation in many judicial processes is usually limited to the opportunity of a party to present its case, give evidence and respond to questions relevant to the dispute,123 participation in arbitration goes much further, allowing the parties to engage in the constitution of the panel that will eventual decide their case.

(ii) *Implicit institutional structures of international arbitration: looking into future research*

The previous section suggested that certain procedural features of international arbitration underpin its pluralistic, diverse and democratic potential. But as was mentioned above, this is only one aspect of the examination of international arbitration as an institution. It is also necessary to look beyond the surface of procedural design and examine whether international arbitration actually operates as a pluralistic, diverse, open and democratic institution.

There are a number of crucial as well as complex questions relating to this inquiry: how, for example, certain ideological and legal values develop and dominate in international arbitration over the years, and how, perhaps implicitly, they may inform the judicial attitude of those individuals acting as arbitrators; whether international arbitration over time has developed informal processes that implicitly shape the legal concepts of those involved in the practice and teaching of arbitration; whether there are mechanisms in place that ensure that any individual, who aspires to enter the world of international

121 Park (n 52) 201: ‘party participation democratizes the process, serving to foster trust that at least one person on the tribunal (the party’s nominee) will monitor the procedural integrity of the arbitration’.
122 Gearey, Morrison, and Jago (n 91) 9. Tom Tyler a leading scholar on procedural justice has also emphasized the importance of participation in dispute resolution process as an enabling factor of procedural justice; see for example Tom Tyler and Steven Blader, *Cooperation in Groups: Procedural Justice, Social Identity and Behavioral Engagement* (Psychology Press, 2000).
123 Gearey, Morrison, and Jago, ibid.
arbitration, espouses certain legal values and ideological assumptions that conserve the status quo of international arbitration.

The subject of this inquiry differs from the inquiry about the procedural design of international arbitration. Here, the question is not whether an English barrister, who has graduated from Oxbridge, a Greek lawyer from a middle class background and a South-American state officer are appointed as arbitrators. Rather, the question is whether, by the time they are appointed as arbitrators, they have come to share a unifying judicial attitude and similar values, despite their different class, and their diverse legal and cultural background.

These questions remain unanswered in arbitration discourse, mainly because they have not been asked yet. As discussed above, most scholars have adopted an attitudinal model to study arbitral decision-making, focusing on voting patterns and award outcomes. Based on the attitudinal assumption that judicial behaviour is almost exclusively influenced by the personal traits and policy preferences of the individuals acting as arbitrators, the main question of all empirical studies on arbitral decision-making to date has been whether arbitrators decide politically or not. However, to unravel arbitral decision-making we need to shift the focus of our analysis from the individual decision-makers to the institution surrounding them.

While some studies have looked into some institutional aspects of international arbitration, suggesting for example that there is a limited pool of arbitrators as well as limited cultural diversity in international arbitration, many assumptions or indeed accusations about arbitration ‘mafia’ remain largely anecdotal and unsubstantiated.

A comprehensive examination of the main institutional structures, processes and actors of international arbitration, and how they all influence the judicial

124 There is the exception of J Karton here who has looked into the culture of international arbitration, albeit focusing on commercial arbitration and contract law (n 62).

125 There have been limited but helpful observations by some commentators about lack of diversity in international arbitration, but these observations are not linked to institutional structures and processes. For example, Kapeliuk (n 60) 78 has found in relation to arbitrators appointed in ICSID cases that:

within the elite group of arbitrators, one arbitrator was appointed 11 times, three were appointed 10 times, four arbitrators were appointed 9 times, one arbitrator was appointed 8 times, two were appointed 7 times, four arbitrators were appointed 6 times, three were appointed 5 times, and eight arbitrators were appointed 4 times. Bearing in mind that 80.2% of all concluded cases included at least one elite arbitrator, there is clearly a solid group of elite arbitrators who receive repeated appointments to ICSID tribunals. The claim that arbitrators form an exclusive club necessitates an examination of the major characteristics of its members. Of the 26 elite arbitrators, only 2 (7.7%) were women. However, on average these women have been repeatedly appointed to more tribunals (9.5) than male elite arbitrators (6.29). Elite arbitrators came from 16 countries. Their typical professional profile includes a combination of private practice and academic positions. Some elite arbitrators are highly respected practitioners or academics, others combine academic positions and private practice, and some are retired judges with academic credentials. While the majority of elite male arbitrators are leading private practitioners, interestingly, the two elite female arbitrators are leading law professors.

Costa José Augusto Fontoura Costa, ‘Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields’ (2011) 4(1) Oñati Socio-Legal Series 3, has also found that ‘a small group of elite arbitrators played a more central role, in ICSID Arbitration’.

126 For example, Schneiderman (n 54) 395, who observes the majority of investment arbitrations are male and senior lawyers with professional experience, although this observation is anecdotal. Schneiderman then proceeds claiming that most arbitrators believe that developing countries require private investment which requires substantial substantive protection in BIT’s, which however sounds unsubstantiated. Such observations would require empirical studies to test and verify.
behaviour of arbitrators is currently lacking. Such a comprehensive study will need to be interdisciplinary and employ a variety of empirical techniques. Equally, however, and this is an obvious omission in many of the current empirical studies on arbitral decision-making, a comprehensive study will need to be underpinned by institutional and structural theory. As Clayton and May, who have argued for the application of new institutional theories to the studying of national courts and decisions, note ‘the ability to say anything meaningful about judicial motivation, as opposed to judicial voting outcomes, requires rich, descriptive contextual data that positivist methods alone cannot provide’.

Indeed, before we empirically test the role of the institutional structures on arbitral decision-making, we need to develop a comprehensive concept and description of international arbitration as an institution, drawing heavily on social sciences, and in particular politics, sociology and systemic theories. Further, an institutional study of international arbitration needs to identify the main institutional structures and processes that shape the dominant values in arbitration law and determine which individuals may act as arbitrator and which cannot. These inquiries require the study of a wide range of arbitration actors and interest groups, such as the arbitration organizations that administer arbitration proceedings; the law firms that typically have a leading role in the selection of arbitrators; the arbitration associations and commissions that produce model arbitration laws, such as the UNCITRAL model law, and soft law such as the IBA rules; the academic institutions that are involved in the teaching and research of arbitration and in educational activities such as the Willem Vis Moot.

Developing a comprehensive account of the institution of international arbitration will be an extremely complex theoretical exercise. Unlike national judiciaries, international arbitration has a very dynamic character and transnational reach. Yet, if an institutional approach better explains arbitral decision-making, then we ought to be able to construct a clear concept of international arbitration as an institution, and then develop a method to empirically test this concept. Such an inquiry will certainly be assisted by the fact that new institutionalist theories accept that the concept of ‘institution’ is not exclusively or necessarily associated with formal structures such as state structures. The concept of institution can equally encompass political and legal formations with informal, transnational and dynamic structures, such as those of international arbitration.

The findings of an institutional study of international arbitration will be important not only to better explain arbitral decision-making, but also to inform policy decisions on the structural changes of international arbitration.

127 cf J Karton who has tried to identify norms arising from the institutional structure of international commercial arbitration (n 62).
128 Clayton and May (n 77) 250.
129 The works of sociologists Pierre Bourdieu and Antony Giddens, as well as socio-legal scholars such as Niklas Luhmann would provide the necessary theoretical background of an institutional study of international arbitration.
130 Such as the International Chamber of Commerce, or the London Court of International Arbitration, or the American Association of Arbitration.
131 Clayton and May (n 77) 249.
Recently, there have been proposals, advocated by very eminent and highly influential arbitration practitioners and scholars, arguing that the party-appointed system in arbitration should be abolished.\(^{132}\) Instead, it has been suggested that all members of an arbitral tribunal should be appointed by arbitral institutions. According to this view, a method of institutionally selected arbitrators would allow for more transparency in the appointing process and for more effective control of the quality of the appointed arbitrators.\(^{133}\) Other scholars have proposed that the model of multilateral selection of the investment treaty tribunals should be replaced by a new international investment court with tenured judges, who will be subject to the supervision of national courts or an appellate body.\(^{134}\)

However, from an institutional viewpoint, if such proposals are adopted, there is a danger that arbitration will emulate the institutional structures of national judiciaries, undermining the pluralistic, diverse and democratic potential of international arbitration. Adopting the procedural design of national and international judiciaries may turn individual biases into systemic biases in international arbitration. Any structural changes in arbitration will need to promote institutional changes that enhance ideological pluralism and prevent homogeneity. For example, we may consider increasing the number of arbitrators sitting in a case from one or three to five.\(^{135}\) More crucially, we should find ways to enlarge the pool and increase the cultural diversity of potential arbitrators. An increasing number of arbitration programmes are now offered by universities around the world, which should provide for a larger pool of lawyers from more countries who will be familiar with the necessary expert knowledge of the mechanics of arbitration proceedings.\(^{136}\) Still, costs involved in special arbitration courses can be prohibitive for many under-privileged students and lawyers, and therefore the arbitration community should further look into initiating capacity-building projects on arbitration in developing countries.\(^{137}\)


\(^{133}\) cf also Hans Smit, ‘The Pernicious Institution of the Party-Appointed Arbitrator’ Chapter 26 in K Sauvant and others (eds), FDI Perspectives: Issues in International Investment (Columbia, 2011) where he argues that ‘party-appointed arbitrators should be banned unless their role as advocates for the party that appointed them is fully disclosed and accepted. Until this is done, arbitration can never meet its aspiration of providing dispassionate adjudication by those with special skills and experience in a process designed to combine efficiency with expertise’ arguing that ‘arbitration should either fully adopt the US model of party-appointed arbitrator as an advocate on the arbitral panel, with full disclosure and acceptance of this role, or abandon the party-appointed method altogether.’

\(^{134}\) See for example, Van Harten (n 49); Van Harten (n 6) 175–84; Alec Stone Sweet and Florian Grisel, Transnational Investment Arbitration: From Delegation to Constitutionalization? in Piere-Marie Dupuy and others (eds), Human Rights in International Investment Law and Arbitration (OUP, 2009) 135, 118–36.

\(^{135}\) Toby Landau, ‘Saving Investment Arbitration from Itself’ (paper delivered at the 2011 School of International Arbitration & Freshfields Annual Lecture (forthcoming in Int’l Arb).

\(^{136}\) A good indication of the wide-range of education in arbitration is the fact that almost 300 universities from around the world participate in the Willem Vis Moot arbitration competition.

\(^{137}\) See for example the capacity-building project, including teach-in workshops, scholarships for LLM studies in arbitration, initiated by Professor Catherine Rogers and supported by a number of arbitration-related institutions and organizations, such as the ICG, the Penn State University, the Queen Mary University of London, which aims at the strengthening of the Palestinian legal profession, judiciary and business professionals in order to enable them to participate more effectively in international arbitration.
However, to design all these structural changes more efficiently, we first need to develop a clear understanding of how arbitration operates as an institution, and what are the structures and processes that shape the values and attitudes of arbitrators.

5. Conclusion

As international arbitration will keep expanding in scope and popularity, the traditional concept of public justice will be further challenged. At the same time, arbitral decision-making will inevitably come under closer scrutiny. People will keep raising legitimate questions, such as: who are these individuals who have the power to decide issues with important implications on national public policy and sovereignty? How do arbitrators decide? Do they tend to favour certain classes of parties?

This article has examined arbitral decision-making and has put forward three main propositions. First, that the legal concept of bias needs revisiting. More specifically it should widen and include both apparent and implicit bias. Currently, the focus of arbitration law and practice is on apparent bias associated with individual arbitrators. From that point of view, the integrity of arbitral decision-making is a matter primarily associated with the ethics of the individuals acting as arbitrators. This explains the fervour of regulation by arbitral institutions and bar associations aiming to set out what type of arbitrator’s conduct is appropriate and what type of relationship should arbitrators disclose. Similarly, national courts have focused on individual bias, arguing whether the appropriate test of apparent bias of an individual arbitrator should be that of ‘reasonable appearance of bias’ or ‘reasonable suspicion’ of bias or ‘real danger’ or ‘real possibility’ of bias. Overall, the main focus of arbitration practitioners, courts and professional associations has been on apparent bias and the individual conduct of arbitrators. By contrast, they have not been concerned with implicit bias associated with the system of arbitration.

The article argued, any type of bias matters, as long as it is the result of the institutional structures and procedural design of arbitration. For arbitration law and practice to effectively respond to criticism about the integrity of arbitration, the scope of their concern and perhaps regulation should include not only apparent bias associated with individual arbitrators, but also systemic bias, including cognitive and cultural ones.

Second, the article provided a critical assessment of a number of empirical studies on arbitral decision-making. It was argued that, although empirical studies have provided useful insight in arbitral judicial behaviour, they have clear theoretical and methodological limitations, as is evidenced by the fact that they have arrived at diverging, and often conflicting findings. Almost all of the current empirical surveys on arbitral decision-making take a behavioural or attitudinal approach, which is based on the theoretical assumption that decision-making is explained by the personal traits, policy preferences or financial incentives of individuals acting as arbitrators. However, as the article argued, an attitudinal concept of judicial behaviour reduces arbitral decision-making to a policy or financially driven exercise. Such a linear approach to
arbitral decision-making fails to provide a comprehensive description of how arbitrators decide, as it leaves important determinants outside the scope of its analysis. One of the most important determinants that the attitudinal theory fails to take into account is the influence of the broader institutional context within which decisions are taken.

The last observation brings us to the third thesis of the article: in order to understand how arbitrators decide we need to conduct a comprehensive examination of the main institutional structures, processes and actors of international arbitration. Despite the importance of institutional inquiries on judicial decision-making, such a study is currently lacking in arbitration scholarship. Taking an institutional approach, and drawing heavily on studies on national and international judiciaries, the article examined and assessed certain aspects of the procedural design of international arbitration. As was argued, the multilateral and fluid processes for selecting arbitrators, as well as the lack of tenured arbitrators and the lack of stare decisis underpin the pluralistic, diverse and democratic potential of international arbitration. This is particularly the case if international arbitral tribunals are compared with the highly structured and centrally controlled national and international courts.

However, an institutional assessment of the procedural design of international arbitration is only part of a comprehensive institutional study. A study of the institution of international arbitration will further need to examine a number of other complex questions, such as how certain ideological and legal values develop and dominate in international arbitration over the years, and how, perhaps implicitly, they may inform the judicial attitude of those individuals acting as arbitrators; whether international arbitration over time has developed informal processes that implicitly shape the legal concepts of those involved in the practice and teaching of arbitration; whether there are mechanisms in place that ensure that any individual, who aspires to enter the world of international arbitration, espouses certain legal values and ideological assumptions that conserve the status quo of international arbitration.

This type of inquiry goes beyond the scope and methodological reach of this article. It requires complex multi-methodological research, which combines both the conduct of empirical studies as well as the advance of a comprehensive structural theory of international arbitration. Nevertheless, the article offered some considerations about the appropriate approach and direction to such an inquiry as well as some central observations as the starting point for future research. More specifically, it was argued that a comprehensive institutional study of international arbitration would need to be interdisciplinary and employ a variety of empirical techniques. Equally, it would need to be underpinned by institutional and structural theory and the development of a comprehensive description of the institution of international arbitration, drawing heavily on social sciences, and in particular politics, sociology and systemic theories. Further, an institutional study of international arbitration would need to identify the main institutional structures and processes that shape the dominant values in arbitration law, and determine which individuals may act as arbitrators and which may not. These inquiries require the study of a wide range of arbitration actors and interest groups, such as the arbitration
organizations that administer arbitration proceedings, law firms that drive the selection of arbitrators, arbitration associations and commissions that produce soft law on arbitration, as well as academic institutions that are involved in the teaching and research of international arbitration.

An institutional assessment of international arbitration is important not only to better explain arbitral decision-making, but also to inform policy decisions on the structural changes of international arbitration. International arbitration is in the middle of an intense discussion concerning its systemic integrity and legitimacy, with many scholars suggesting radical changes in the procedural design, such as the substitution of the party-appointed system with a new international investment court with tenured judges, who will be subject to the supervision of national courts or an appellate body. The article argued against this type of changes. From an institutional viewpoint, if such proposals are adopted, there is a danger that arbitration will emulate the institutional structures of national judiciaries, undermining the pluralistic, diverse and democratic potential of international arbitration. Adopting the procedural design of national and international judiciaries may turn individual biases into systemic biases in international arbitration. Instead, the article argued that any structural changes in arbitration would need to enhance ideological pluralism and prevent homogeneity.

Overall, the article provided a critical examination of the current state of arbitration law and scholarship on arbitral decision-making and offered an alternative model for the analysis of arbitral decision-making, which takes into account the influence of the broader institutional context within which arbitrators are embedded. It is hoped that further, more comprehensive, institutional studies will follow in international arbitration.138

138 An interdisciplinary funded study of international arbitration is currently underway by the author at the School of International Arbitration and the Center on Ethics, Regulation and Rule of Law at Queen Mary University of London. The study is expected to complete by the end of 2015.