LUNCHEON PRESENTATION: THE QUALITY OF ARBITRAL DECISION-MAKING AND JUSTIFICATION

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The theme of this year's workshop, borrowing from a theatrical expression, is the final curtain in the arbitration, that is, the closing stages—the deliberations, the award, and the enforcement of that award. I chose my topic with the idea that it would be consistent with the theme of this year's program, to complement it, but at the same time not to duplicate it. So, the topic I have chosen is the quality of arbitral decision-making and justification. It is not a topic that is discussed at every international arbitration forum, and I am hoping it will make a modest contribution to our discipline.

Let me begin with what many might consider an unusual statement, at least for international arbitration today. This is advice that Lord Mansfield is supposed to have given to the judges of the King's Court Bench about 200 years ago, and here is what he said: "Consider what justice requires and decide accordingly, but never give reasons, for your judgment will probably be right, but your reasons will certainly be wrong." Please note the distinction he is making between the decision and the justification of that decision because that is part of the theme of my topic, and I will return to that point a little later.

I want to be clear at the beginning about what I am <u>not</u> addressing today. Gary Born, in one of his books, said that the requirement for a reasoned award is <u>not</u> the same as a requirement for a well-reasoned award. What I am <u>not</u> discussing today are the minimal requirements for what constitutes a reasoned award. Other people have addressed that issue many times, and I won't repeat those discussions. I am much more intrigued by that second concept: what constitutes a well-reasoned award. I would suggest that it is not a matter of formalisms; it is not a matter simply of whether the award is drafted in the form of logical syllogisms, or for that matter in any particular form. I believe it is deeper than that, and it is in trying

to understand that concept that my research and thinking has taken me in this direction. So, let me begin with the premises for this presentation, which may be surprising to some.

First, most decision-making occurs at a subconscious level, what we think of as intuition. The psychological literature and the neuroscience literature very strongly, if not overwhelmingly, support that conclusion. Second, decision-making is subject to something called "heuristics," which may result in systematic errors and biases. And third, the point I started with, that decision-making and the written justification of the decision are separate and distinct processes, although certainly interrelated.

The study of heuristics was pioneered by Daniel Kahneman, through his many psychological experiments over the past 35 years. Although he is a psychologist, in 2002, he was awarded the Nobel Prize for Economics for developing the field of behavioral economics, and his work has gained substantial attention in the past year with the publication of his book, *Thinking Fast and Slow.* Much of what I am going to address today is premised on the concepts in that book.

Let us begin with the question, "what are heuristics?" Some of you may know the term; many of you may not. Heuristics are the mental shortcuts or rules of thumb that the brain automatically and subconsciously uses to make decisions. These are implemented at a level at which we are not consciously involved; we don't consciously know that this process is taking place. One example of these mental shortcuts is that the brain, often subconsciously, substitutes an easier question for a more complex one. This helps the brain to quickly and efficiently solve whatever problem is the focus of attention at the time.

I don't intend to get us bogged down in the psychological literature. I am going to bring this discussion back to practical arbitration issues momentarily, but let me briefly provide some important background.

Kahneman distinguishes two systems in the brain for decision-making, and this terminology seems to have become standard in the psychological literature. System One is the subconscious part of the brain operating quickly and efficiently.

System Two is our conscious and directed thought, which operates slowly, inefficiently, and requires a lot of energy. As a result, according to Kahneman, System Two is lazy. System One, he says, originates the impressions and feelings that are the main sources for the beliefs and choices that we ultimately articulate in our System Two thinking. In other words, our subconscious intuition is at the heart of our conscious decision-making.

I want to relate this directly to our subject, so let us focus now on five of the heuristics that are clearly relevant to our field. The first is the "anchoring effect." I suspect that most of you are aware of this concept. Toby Landau talked about it in his presentation at this same luncheon last year. Anchoring postulates that we evaluate a problem by starting from an initial reference point, often one that is suggested to us, such as by advocates, but then we tend to make insufficient adjustments from that initial starting point in coming to our final evaluation of a problem. This is currently being taught by psychologists who specialize in persuasion and advise advocates.

The second is the "framing effect," which says that differences in the way a question are framed can lead to very different answers, even diametrically opposed results. This concept obviously has implications for advocacy. This technique is used virtually every day in U.S. courts by appellate lawyers, for example, who fight over how to frame the initial question which must ultimately be answered by the appellate court.

The third is the "availability" heuristic. This postulates that decision-making is often based on what is most easily remembered, that is, what we can most easily bring to mind at a given moment. So from the standpoint of advocacy or from the perspective of the arbitrator, what makes the strongest impression—or what we have heard or read most recently—may have a disproportionate effect on our decision-making.

The fourth is the "halo effect." Once we have developed a good or bad impression of a person in one area, we tend to extend that impression more generally to the person and even exaggerate it. This has implications for the way we judge the credibility of witnesses.

And the last heuristic that I will mention is the so-called "narrative fallacy." This term comes from the book, *The Black Swan*, by Nassim Taleb, but he bases it upon the work of Prof. Kahneman. Because this is so important, I want to quote from Kahneman's book. He says that "System One excels at constructing the best possible story that incorporates ideas currently activated, but it does not (and cannot) allow for information it does not have. The measure of success for System One is the coherence of the story it manages to create. The amount and quality of the data on which it is based are largely irrelevant." He concludes that "the combination of a coherence-seeking System One, with a lazy System Two implies that System Two will endorse many intuitive beliefs which closely reflect the impressions generated by System One." In other words, our brain, in dealing with substantial volumes of information, has to develop a factual narrative, a coherent story, from that information. We do that at a subconscious level, and once we have done it, we feel that we understand the situation. After that it can be difficult to change our minds, because it requires us to start over from scratch and rewrite the story.

Now with that background, let us pose a key practical question: do heuristics really matter for arbitration? There are a few studies on the heuristics of judicial decision-making, and even one or two that focus on arbitral decision-making. All of the studies that I have seen suggest that heuristics are, in fact, involved in any kind of legal decision-making, and in my very quick research, I found 35 recent articles that discussed the heuristics of decision-making by judges, and six that apply it to arbitral decision-making. But what is, I think, even more telling, is that the psychologists who advise advocates in litigation and arbitration have incorporated the lessons of heuristics into their practical models and recommendations for advocacy, including their recommendations for advocacy in arbitration. That tells us that psychologists who specialize in persuasion consider heuristics to be important, and that a model of heuristics is being employed in advocacy today.

Now, I anticipate that someone may be a skeptic. One of you may say: "wait a minute, that's not the way *we* think. That may be the way lay people think, and it may be the way doctors think, but we're lawyers, we're judges, we're arbitrators. *We* think logically.

We use logical syllogisms and think systematically in making our decisions." This is, of course, the theory of legal rationalism.

Well, let me refer you to a Fifth Circuit Judge's discussion of his decision-making process in hard cases. Joseph Hutchison was a very prominent Fifth Circuit judge, but he described his decision-making process in a 1929 article this way: "I, after canvasing all of the available material at my command and duly cogitating upon it, give my imagination play and brooding over the cause, wait for the feeling, the hunch, that intuitive flash of understanding, which makes the jump spark connection between question and decision." And then he goes on to say, "I speak now of the judgment or decision as opposed to the *apologia* for the decision. The judgment pronounced as opposed to the rationalization by the judge."

You will notice, again, the distinction being made between the decision and the justification of that decision, which echoes Lord Mansfield's point two centuries ago. Now, lest you think that Judge Hutchison is alone in his views, here is a list of three other U.S. Federal Court judges who have written on this topic and taken much the same position as Judge Hutchison: US Supreme Court Justice Oliver Wendell Holmes, Jr., 2nd Circuit Judge Jerome Frank, and 7th Circuit Judge Richard Posner, all judges who embraced the theories of legal realism or pragmatism. The application of heuristics to judicial and arbitral decision-making could be viewed as a resurrection of at least one aspect of legal realism.

With that background, let us turn to something directly related to arbitration—something we all know and can get our arms around: the common complaints about arbitral awards. Every one of us has heard complaints about awards, and probably even made some of these same complaints. Awards, of course, come in different packages. There are really good awards, there are mediocre awards, and there are bad awards. Every complaint obviously does not apply to every award. But let us focus on what we in the arbitral community sometimes say about awards, because this may shed some light on whether heuristics are at play in arbitration.

Concerning fact findings, there are three main complaints that I hear from time to time. First, that the award made glaring and obvious mistakes in the recitation or summary of the facts. Second, that the award did not contain clear fact findings, that is, that the fact findings were implicit. You may find a section entitled background facts, or facts alleged by the parties, or the facts may be scattered throughout the award, but in many awards you don't find clear fact findings. Third, the award was intellectually dishonest. I have heard that statement from time to time, and struggled to understand the precise complaint. I think what is meant is that the award did not discuss certain facts that one party considered important to the outcome of the case. Those facts didn't fit into the tribunal's factual narrative. The first and the third of these complaints are quite important because they touch on fundamental party perceptions of what is fair in the process.

With respect to the legal analysis, I again suggest there are three common complaints. First, that the legal analysis was short and conclusory in areas in which counsel spent substantial time. Second, the award omitted necessary parts of the legal analysis, and third, that the tribunal didn't deal with all of the arguments raised by counsel, or the corollary that the tribunal went beyond the party's submissions on the law. I would again suggest that the first and the third of these are matters of real import because they relate to how the parties perceive the system, and whether the arbitrators have dealt fairly with the party's own arguments.

And finally, with respect to the reasoning, again, there are three points, but I am only going to mention the second one, which is that the reasoning became shorter and less robust later in the award, creating an impression that the panel spent less time and effort on the later issues. You may note that those later issues often involve such minor topics as causation and damages, and you may remember that a few years ago, at this same luncheon, Lucy Reed addressed the important topic of damages in arbitration.

Now with those complaints in mind, and remembering the study of heuristics we just surveyed, I would like to make three suggestions that may enhance the quality of awards. These suggestions are rather modest and should be non-controversial, but if arbitrators implement them systematically, I believe they can improve the quality of both the decision-making process and

awards. The first relates to fact findings, and addresses the narrative heuristic. The second involves a suggestion that checklists be systematically used, which addresses the availability heuristic, and finally I suggest that we test the draft award before it is sent out, which addresses the common use of intuition in our decision-making.

It is common knowledge that arbitral fact findings receive very little judicial review. At the stage of enforcement of the award, courts generally have no (or certainly, very little) authority to review the fact findings, and it is precisely for this reason that a tribunal should ensure that the award is clear as to which facts are being found and relied upon by the tribunal.

Fact findings can take one of two forms. They can be drafted in story form or they can be drafted as discrete and numbered fact findings. In that respect, I call your attention to two statements. The first was made by Lord Justice Donaldson who said, "Much of the art of giving a judgment lies in telling a story logically, coherently, and accurately. This is something that requires skill, but not legal skill." Now contrast that with the statement we saw earlier from Prof. Kahneman that "the measure of success for System One, our subconscious, is the coherence of the story it manages to create. The amount and quality of the data are largely irrelevant. You build the best possible story from the information available to you and if it is a good story, you believe it."

Reducing the evidence to a coherent story makes us feel that we understand and can explain the facts, which is absolutely necessary for decision-making. This is the way we naturally think. But if it comes at the expense of disregarding evidence that doesn't fit the factual narrative that we have created, or if it means that we subconsciously assume facts to fill in the blanks, then it may mean we have neglected the real complexity of the story, or worse yet, that we have distorted the facts. So, subconsciously forcing the evidence into a story that is too simple, in my view, may be the genesis of the complaint about awards being intellectually dishonest.

I am clearly not the first to have thought about this issue, by the way. Lord Bingham was one of the great judges in English history, and he had this to say: "The judge must try and create a

coherent and intelligible narrative, but he must ensure that his summaries do not distort. He must not avoid mention of events of which any party reasonably attaches significance, even if that significance is not in his view very great and he should definitely not slant the facts to suit his eventual conclusion. Nothing more quickly undermines confidence in a judgment than a sloppy, incoherent, inaccurate and partial account of events."

This doesn't mean, though, that we have to change our way of thinking. We can't change it. What we can do, however, is to be aware of it, and take it into account in the way we go about the business of judging cases. There are at least two possible ways to address the narrative fallacy. One is to write the facts not as a story, but as separate fact findings. You may consider that somewhat dissatisfying, like reading the dictionary. You may remember that Mark Twain said that he tried to read the dictionary once, but he couldn't understand the plot. Well, this form of fact findings may give the same impression, but at least in the first draft, writing the facts as separate fact findings may be a useful way to differentiate the discrete facts from the larger story. And the second suggestion is to footnote a source for each factual statement. We have all read many awards that didn't reference where the facts can be found in the record. I have always found that somewhat troubling. But in whatever form the tribunal chooses, the facts that are found and relied on by the tribunal should be clearly noted.

The second suggestion relates to the use of checklists, and again, this comes from Prof. Kahneman. He says that studies of experts' opinions show that they often fail to take account of all relevant factors, and are frequently inconsistent in their judgments, even directly contradicting themselves about 20% of the time. He says that that number, 20%, keeps popping up over and over in different studies. So, he suggests that in decision-making, we should use formulas, algorithms, and checklists, which can improve the performance of experts because they systematize the relevant factors, and they are consistent.

But you may voice an objection here and say: "wait a minute. Aren't we already doing this in the law? Hasn't the law already adopted algorithms and formulas in the form of legal standards?"

I believe the answer is "yes." To a certain extent, the law has already implicitly taken heuristics into account in this way. We have developed legal standards, for example, for the burden of proof, the elements of claims and defenses, and the interpretative rules, among many others. We did this in order to restrain judicial discretion and make decision-making more systematic and consistent. So, we have developed and incorporated algorithms in the law, in some sense of that term.

As for checklists, certainly the memorials and briefs should contain much of the relevant information for the arbitrators to use. But the problem is that the memorials, particularly ones that are very long, often make it difficult to locate and extract all the relevant information. They can also make it difficult when the briefs don't match up in organization or they don't directly respond to one another's arguments. Also, many of the briefs omit important elements of the legal standards. But most importantly, the briefs and memorials are not written from the perspective of the arbitrators; they don't display the same process that the arbitrators use in their decision-making. They are written from the standpoint of the advocate arguing the case, but they don't directly correspond to the legal methodology that the arbitrators use in arriving at decisions in the case. For that reason, I think checklists can be particularly helpful in decision-making.

Now, a few institutions (and particular people) have developed unpublished, generic checklists for awards to ensure that important elements are not omitted, for example, elements that are legally required. But what I have in mind goes beyond the generic checklist, and involves case-specific checklists that the tribunal itself can request from counsel or can create for itself. I have seen tribunals make their own outlines or checklists, but on some occasions I have seen them specifically ask counsel for them. Examples of such checklists can include a list of the issues to be decided, a chronology of the key facts with footnotes for each source, or charts of the facts by issue, and even a flow chart of the arguments and counter-arguments by issue, something like a Redfern Chart for the arguments. These suggestions may seem very simple, and they are, but if adopted systematically I believe they can be very helpful to a tribunal in avoiding errors.

And the last suggestion goes to testing the draft award. Robert Burton, in his book on *Being Certain, Believing You're Right When You're Not*, says that any idea that either hasn't been or can't be independently tested should be considered a personal vision, and we all know that the law takes a rather dim view of personal visions in legal decision-making. Prof. Kahneman concludes with respect to our expert intuition that it is a very valuable resource. It is very good at recognizing repetitive historical patterns and making decisions that fall within those patterns, even when we can't consciously articulate the reasons for those decisions. And this goes back to my original theme of the difference between the decisions themselves and the reasons for those decisions.

Some of you may have read Malcolm Gladwell's book, *Blink*, in which he begins by discussing a financial catastrophe that occurred to the Getty Museum in Los Angeles. They spent $20 million purchasing an ancient Greek statue. They waited months for it to be verified as authentic by various experts. Then, just as they were completing the purchase, an expert on this particular type of art came in, looked at it, and after two seconds said, "It's a fake." Well they started interrogating her. "What do you mean it's a fake? How can you tell?" But she couldn't articulate why she believed that. So they brought in another expert and repeated the same exercise. He looked at it, two seconds later said, "It's a fake." Why? He didn't know. Many months—and many experts—later, the Museum finally concluded they were right— the statue was a fake.

The point is that all of us as lawyers and arbitrators have developed our legal intuition over years of experience. It is an important part of how we make decisions. It can make certain types of decisions very well, but it also has real limitations. It is not good, Kahneman says, for non-repetitive situations or novel issues.

With that background, my suggestion is that we *test* our awards before releasing them to the parties, and that we do so with an eight-point test. The first is rather obvious and absolutely required: the reasoned award itself is the first test of the arbitrator's expert intuition. It forces us to articulate our assumptions and provide reasons to support each point.

The process of writing—and revising— the award should not be treated as a formalism. It should be considered an integral part of the decision-making process itself, refining decisions, and sometimes even completely reversing them. Chief Justice Roberts of the U.S. Supreme Court has spoken at times of decisions that "just won't write." By that, he means the judges deliberated, reached a decision, but when they tried to write the opinion, they couldn't make it work. It just couldn't be rationally justified, and it required them to go back and re-think the decision. It is my impression that some tribunals seem to treat the writing of the award more as a formalism, discouraging comments, while others treat it as a very serious part of the decision-making process itself, which is what it should be.

The second test is that once you have written the draft award, reverse test it against your expert intuition. That is read it, review it, think about it, and if there is something that just doesn't seem right, if you have certain misgivings, even if you can't articulate them—nagging doubts—then you need to work through that issue until you can articulate what it is that's bothering you and solve it. I have been involved in issuing a couple of awards about which I had second thoughts. Both involved issues where I had nagging doubts about a particular way a decision was justified, but I couldn't consciously articulate my concerns. What I'm suggesting with this test is that we should use our expert intuition to test a draft award by spending the time to work through any nagging doubts until we can consciously articulate and solve them. I believe this is an important part of the process of decision-making and justification.

In the interest of time, I will mention the other tests only very briefly. Have all significant arguments of the parties been addressed? Are all steps of the required legal methodology shown? Is the legal analysis as robust as it can be? Have all sources been double checked? Is the award as long as it *needs* to be and as short as it *can* be? And finally, does the applicable law—like CAFTA—allow the tribunal to send the parties a draft award for comment before the final award goes out? This last suggestion is obviously not typical and it has real issues associated with it, but it does have the one advantage of potentially allowing the tribunal to find problems and solve them before the final award is issued.

In conclusion, I would note that the quality of arbitral awards is a seldom discussed topic in arbitral seminars, perhaps because we have no clear model of what is a well-reasoned award, and perhaps we don't even have a cross-cultural consensus of what a well-reasoned award should be. Those are topics that could be addressed in more detail in a future program. But, nevertheless, the parties to arbitrations do have expectations for awards, and the quality of awards can influence the perceptions of the parties as to both the fairness and the desirability of the arbitral process itself. And finally, I will end on this note: for both institutions and arbitrators, perhaps the best guarantee of the continuing vitality of arbitration—and for arbitrators of future arbitral appointments—is a reputation for achieving three goals in the arbitral process: procedural fairness, efficiency, and well-reasoned awards. These should rank among our highest aspirations as arbitrators. Thank you very much.