Arbitrator Bias - The "Human Aspect"
by D. Flader

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0. Pretext

As a non-lawyer, I am interested in the analysis of international disputes and dispute resolving procedures – not primarily in legal provisions and technical issues but in linguistic, psychological and sociological aspects. As far as the outcomes of my analysis are of value for a better understanding of such disputes and dispute resolving processes, is finally to be decided by the legal experts themselves.

In this article, I concentrate on some aspects of the concept of bias as it is used in regulations on (commercial) arbitration. My starting point is the English Legal Position on bias (1). The focus of my analysis here will be on an extreme form of bias – the irrational prejudice. How we can identify such a prejudice when it occurs will be explained by a model which is presented in (2). A racial discrimination case (3) will be used then to see how we can apply this model. I am discussing then the “test for bias” by the viewpoint of “a fair-minded, informed observer” (in the UK) respectively the test by the “viewpoint of a reasonable third party” (which is used in other legal systems) regarding the objectivity claim which is hold by this test (4). Finally I will bring some arguments which support the thesis that bias itself is something normal – in arbitration as well as in other types of legal discourse. It is the consequence which a bias may have which may cause a problem with regard to the arbitrator’s impartiality (5).

1. Some Remarks on the English Legal Position on Bias¹

I will start with a definition of bias – as it is represented in the statutes.

¹ Many thanks to Andy Moody for providing his article “Oh dear, it is not looking very good for…” - Arbitrators caught unaware of the law on apparent bias in English seat arbitrations”.
Under English law a distinction is made between “actual bias” and “apparent” bias. Lord Bingham of Cornhill has explained actual bias in the House of Lords’ decision in Davidson (AP) (Original Respondent and Cross-Appellant) v. Scottish Ministers (Original Appellants and Cross-Respondents)\(^2\) as follows:

“... a judge will be disqualified from hearing a case … if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgement to bear on the case in question. Where a feature of this kind is present, the case is usually categorized as one of actual bias.”

Whilst “actual bias” is seen to be given as a more or less straight forward situation – e.g. if there is obviously a personal interest in the case – “apparent bias” is seen to be something more complicated. Lord Phillips refers to it in “In Re Medicaments” in the following way:

“‘Apparent bias’ describes the situation where circumstances exist which give rise to a reasonable apprehension that the judge may have been, or may be, biased.”

For challenging a tribunal for bias in England, to allege and prove apparent bias will suffice. There is no need to allege and prove actual bias for that purpose.

However it is interesting to notice, that the explanation given by Lord Phillips concentrates on only one of the components of the concept of “apparent bias” – it concentrates on what is meant with “apparent”. It does not explain what kind of circumstances are relevant for giving raise to a reasonable apprehension that the judge may have been, or may be biased. What kind of circumstances are relevant and can be pointed out by a party in order to show that these circumstances give rise to doubts as to the impartiality or independence of the arbitrator?

Such doubts need to be justified. Although there is this need of justification, one of its components - the reference to and explanation of these “circumstances” - is missing in Lord Phillips above quoted statement on “apparent bias”.

\(^2\) UKHL 34 (2004)
We find an approach for the justification of doubts by explaining certain concepts which are required to identify apparent bias, most notably the concept of irrational prejudice.

We can get a first hint from a statement made by Lord Goff (in *R v. Gough*):

> “But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may be unconsciously affected by bias…”

And Lord Phillips’ comments in “In Re Medicaments”:

> “Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve... He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issue before him.”

What we are looking for is mentioned here as an “attitude of mind”- irrational prejudice being one form of it - respectively as an “insidious thing” insofar as bias can affect a Judge’s mind unconsciously. Unfortunately, we cannot observe such an attitude of mind. And we cannot observe an irrational prejudice. But we can make an inference on the likelihood of its existence.

Such an inference is based on certain features of speech or social behaviour (conduct), which are characteristic for what we call a prejudice. And such an inference would fit the requirements of the above mentioned explanation of apparent bias: circumstances that give rise to a reasonable apprehension that a judge may be biased. The phrase “reasonable apprehension” – as well as the “test for bias” which I will analyze later - clearly excludes the use of scientific methods like experiments or psychological tests. Instead, “reasoning” and “perception” (connected with the method of analysis) are the methods which should be employed.
A proper concept of prejudice should be capable of explaining how irrationality is represented by (and connected with) the relevant features of speech and/or social behaviour. I will also demonstrate by way of examples how reasoning and analysis are able, in the end, to justify doubt as to the impartiality of the arbitrator.

2. How to Identify an Irrational Prejudice when it Occurs?

For the following discussion I will clarify the concept of irrational prejudice, which we need in order to have a well-grounded method to identify a certain way of speech or social behaviour as a matter of prejudice – the phrase “as a matter” is used here in the sense of inference.

I distinguish three levels of analysis: the level of knowledge, the level of psychic conflicts, the level of language use.

a) The level of knowledge
Any prejudice is based on a specific structure of knowledge. “Knowledge” is defined here as a mental representation of reality. As an example consider the sentence “Blond women are stupid”. The knowledge structure in this example is of the same kind found in other sentences in which somebody refers to a collective: “The Germans are…”, “Black people are…”, etc. These sentences are called “All-sentences”.

We distinguish three elements of the knowledge structure which are represented here. The first element is the topic of this knowledge – a generalization “all X”. The second element is: what is known about the topic. In these examples we again find a generalization concerning what is attributed to the collective. In our example: Blond women are not only stupid in some situations, but they are seen to be stupid in any situation.

This type of knowledge is a so called inner picture, which is build up on the basis of generalization.

The third element of knowledge refers to the agent of this knowledge – this can be an individual or a social group.
It is important to recognize, that at this point of analysis we cannot distinguish between “normal” inner pictures, which entail a generalization about persons – e.g. “Americans are hard-working people”, “Italians are lazy”, which we call stereotypes - and forms of prejudice about other people. The structure of knowledge is the same in both cases. Besides the generalizations mentioned above there is also a ‘selection’ shown in the example: “Blond women are stupid”. Selection means: Among all possible characteristics of blond women, only the trait “being stupid” is selected here as something typical.

The procedures of generalization and of selection are known to be typical for stereotypes and for prejudices as well. Moreover, the feature of stability of an inner picture about persons also belongs to both cases. Once an inner picture about somebody or a social group is constructed, we are used to relying on this inner picture, despite the fact that contradictory information is known. Again, this feature doesn’t enable us to distinguish stereotypes from prejudice. This gives us some evidence, why it is rather difficult to identify some features of speech as a matter of an existing prejudice when it occurs.

I would like to lay the stress on the fact that, what I have called “knowledge” is a practical one. I.e. it belongs to the stock of knowledge which guides the social acting of an individual. This practical knowledge is a self-evident knowledge which regularly is not reflected, except in some circumstances of a crisis of social interaction. It belongs to the every-day knowledge on social reality which will be discussed (in chapter 5).

b) The level of psychic conflicts
On this level we find a way to distinguish stereotypes from prejudice. It is the triangle structure of knowledge by which we gain access to the inner dynamics of prejudice. With “inner dynamics”, I mean the level of psychic conflicts\textsuperscript{5}.

In the case of prejudice, such psychic conflicts are connected both with the topic of knowledge and with the knowledge element “what is known about the topic”.

\textsuperscript{5} \url{http://www.academyanalyticarts.org/flader.htm}
The reason for this connection is that these knowledge elements fulfil an important function for the existing conflict.

An example: “Homosexuality is an infection.” The psychic conflict of an individual, who is the agent of this prejudice, has got (at least) two conflicting constituents: his existing homoerotic desires and his self-concept of being a he-man. Whatever the cultural or educational reasons supporting his self-concept are, the psychic mechanism to cope with his psychic conflict (not to resolve it) is the so called psychic projection: That part of the individual’s personality which is not accepted by the individual himself, is attributed to a social group and connected with negative connotations. These connotations – in this example: a dangerous infection of homosexuality – represent the existing psychic danger for the individual regarding his own homoerotic desires. The individual itself it not aware of this: He is neither in the position to reflect on the existing conflict, nor to reflect on possible ways to cope with it.

In such a prejudice, “what is known about Y” seems to refer to social reality, but in fact it refers to an existing inner context – as a matter of the individual’s psychic reality – which determines the individual’s perception of that segment of social reality to which the prejudice refers. In other words: Agents of such a prejudice do not have a realistic knowledge about the reality of the persons – or the social groups – about which they are talking. In using such a prejudice, the speaker tells us something about himself.

I will shortly analyze another example: “Poles are basically lazy and they are all cheaters.” This sentence was uttered by a female Dutch manager. I was asking her to tell me her experiences in Poland in the context of my research on intercultural interaction problems between Western managers and Poles in Poland.6

This sentence could be a stereotype about Poles, including the procedures of generalization and selection. But the person who has used this sentence has

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been living and working in Poland for six years. And she told me, that she was so frustrated by her experiences in Poland that she had decided to quit the country.

According to the findings of my research in Poland, stereotypes are used quite often by those Westerners who came into the country not well prepared. In the course of intercultural learning, these Westerners have a chance to change stereotypes which, at the beginning, they have used to come along with what is called “culture shock”.

Exactly through this kind of social learning process the above quoted Dutch female manager did not go. When we consider that she was a member of the puritanical cultural tradition of her country, we have some good reasons to take her sentence as the verbalization of a prejudice. Being socialized in the tradition of the protestant ethics, she had internalized some rigid social norms which are known to be characteristic for this ethics, e.g. a strong work discipline and a strong preference to repulse any kind of cheating.

From the point of view of what we know about subjectiveness, an individual may react to these internalized social norms as if they were a burden of obedience. With this premises, we can analyze her above mentioned prejudice about Poles as an attempt to cope with an existing psychic conflict: In social contacts with some Poles she has made some observations at the workplace regarding examples of laziness. Furthermore she learned that some Poles have tried to cheat her in doing business. The psychic conflict, which had the constituents “following the internalized social norms” on one part and “an existing tendency to rebel against them” on the other part, was strengthened by her experiences in Poland. Polish behaviour at workplace could – unconsciously - inveigle her to rebel against her protestant morality.

Similar to the example of prejudice analyzed above, this example demonstrates how a segment of social reality represents an existing psychic danger for the individual: The danger to loose her psychic balance has forced her to inveigh the Poles who, in her perception, are representing a violation of that moral which she herself has internalized and tried to keep up to maintain her psychic balance. Her
fight against Polish lack of morality was first of all her personal fight against her own upcoming desires to violate a protestant moral.

This analysis may explain why she did not overcome the stereotypes about the Poles: She could not overcome them, because the psychic conflict, which she could not resolve, has blockaded the process of intercultural learning. Within such intercultural learning, she would have learned that Poles have a work moral indeed – but it differs from the Western one.

As a matter of fact, this kind of analysis needs an access to the inner context, i.e. to the psychic reality of an individual’s speech. Such an access could be available through psychotherapy or certain psychological tests. In court or arbitrations this access is not given.

Nevertheless, the connection of an existing – and not resolved - psychic conflict with the above mentioned knowledge structure gives us a hint to the features of speech and of social behaviour which can be analysed as a matter of prejudice insofar as they justify an inference on the likelihood of its existence.

The distance of “what is known about the topic” to social reality reflects the strength of the existing inner conflict. According to this analysis, any prejudice is an outcome of the attempt of an individual (or of a social group) to cope with an unresolved psychic conflict. The topic of knowledge helps to identify the field of psychic conflict. “What is known about the topic” gives us a hint to the unresolved inner conflict of individuals with regard to the existing distance of this knowledge to social reality.

It is this distance which, because it is uphold by speech and/or social behaviour, is represented by features of speech and/or social behaviour. This will become more evident on the level of language use.

c) The level of language use
The feature of irrationality of prejudice given, we cannot expect an individual to be aware of his/her prejudice. Nevertheless, language use is of relevance here. I will shortly explain why.

Some of the aforementioned knowledge elements can be verbalized. This means: What is in the mind of an individual can in some cases be understood by the listener with the help of language. E.g., a generalization, which belongs to the topic can be easily recognized by the use of “all”. But “what is known about the topic” as something which is “always” to be attributed to the topic, is often not verbalized as a form of generalization.

In the institutional context of legal discourse we rarely find such plain and direct verbalization of an existing prejudice like the example: “Blond women are stupid.” Judges, arbitrators and other actors in legal discourse know that they run the risk biased in the case that they use this sentence. That is why, normally, if an irrational prejudice nevertheless exists, it will be represented in much more complicated and subtle forms – which, nevertheless can be identified, if adequate categories are available.

With the above mentioned individual's distance to a certain segment of social reality, and the inner force to uphold this distance in the course of speech and/or social behaviour – nota bene: the individual is neither aware of this distance nor of this inner force- we have got a ground for these categories. Maintaining this distance can be done in various ways – in speech as well as in social behaving, e.g. by:
- Ignoring facts which are relevant for the case
- Misunderstanding a witness notoriously
- Avoiding to look for more information although it is relevant

Furthermore, such observable phenomena must have a systematic form – they must refer to one and the same topic of knowledge (see above) – a social group, an individual – as their point of reference.
I will show in the next chapter, with the example of a racial discrimination case, how this concept of prejudice can be applied.

3. A Racial Discrimination Case

As an example of a discrimination case which was appealed before the Employment Appeal Tribunal, I take Miss XH Diem v. Crystal Services Plc\(^7\). An exchange took place, during the case under appeal, between the Chairman of the Tribunal and Miss Diem, who was of Vietnamese origin. Miss Diem’s account of that exchange was as follows:

“...the Tribunal Chairman, Mr. S.M. Duncan, questioned me at some length as to why I was claiming to be non-white. In this context, he said that my skin colour was `as white as the English´. Whilst he made this statement, he looked at me and used his finger to point at the skin of his other hand to stress the point. In fact, my complaint was not based on any claim that I was `non-white´, but on the fact that I am Vietnamese.”

The Appeal against the original decision succeeded. This decision was based on the test for bias, which constructs a “fair-minded observer” – this test will be analysed below. What such an observer would conclude in this racial discrimination case under appeal was that the line of Chairman’s inquiry crossed the line, when there was:

“prolonged questioning as to how the Chairman viewed her own skin colour and the making comparisons with the Chairman’s own skin colour. We feel that the fair-minded observer would conclude that the remarks made were likely to cause the Claimant to feel unsettled, humiliated and embarrassed. We emphasised, that this, we think, would be the perception of that observer, whether or not the Claimant subjectively experienced those feelings.”

These are the available facts. I take them in order to make the following analysis. As a matter of fact, this kind of an explicit analysis was not done by the Appeal Tribunal.

\(^7\) appeal No. UKEAT/0398/05/DM(2005)
I understand that the Tribunal Chairman has made use of a concept of racial discrimi-
nation which obviously relies on an individual reaction towards skin colour, assuming that the fact that Miss Diem does not show such a colour difference in her skin excludes for the Tribunal Chairman that such a racial discrimination case has taken place. In other words: Because her skin colour is as white as the English, such a racial discrimination case cannot have taken place. The Appeal Tribunal, however, found that the prolonged questioning as to how the Claimant viewed her own skin colour reveals a racial discrimination case on the part of the Chairman. But why?

Is there any logical inference regarding the concept of racial discrimination which was used by the Chairman? Can one exclude the possibility that he was just not well-informed about how racial discrimination may occur in the context of employment?

The conclusion which is attributed to the construction of the “fair-minded and well informed observer” in this case is a plausible one. But the arguments - the reasoning – which are necessary for reaching this outcome, are not made clear. I will do this now, and I assume that the Appeal Tribunal has done something similar, albeit in an abbreviated manner. By using the “test for bias”, important elements of this reasoning have been used tacitly and in an abbreviated form for doing this test.

The fact that the Tribunal Chairman has questioned Miss Diem - according to her quotation “why I was claiming to be non-white” – is of interest here, because it gives us a hint as to what the Tribunal Chairman imputes: That Miss Diem is claiming to be non-white, which means: By doing this she makes use of racial discrimination laws as an instrument to gain advantages for herself.

The consequence of this imputation made by the Tribunal Chairman is necessarily a feeling on the side of Miss Diem that her experience of discrimination is not taken seriously by the Tribunal Chairman. And the next step of analysis of his inquiry is that it is likely to take his disinterest and disregard of this racial discrimination case as an example of “racially motivated comments”.

How can we make use of the above mentioned concept of knowledge structure as being connected with an existing psychic conflict in this case of “racially motivated comments”? What I have called the Tribunal Chairman’s disinterest in Miss Diem’s individual experiences of racial discrimination can be identified as a form of distance which is practised (upheld) by the Tribunal Chairman. We can analyse this form of distance as a consequence of the fact that the Tribunal Chairman has made use of a pre-build inner picture about foreigners who, in his mind, are using the English discrimination law as an instrument for gaining personal advantages. I have already stressed the fact that this inner picture is not necessarily a prejudice. It can be just a stereotype.

But we can make an inference on the likelihood of an existing connection of such an inner picture with a psychic conflict on the basis of the data we have got here, in connection with the category of “upholding distance”:

- The Tribunal Chairman was not interested in Miss Diem’s individual experiences of racial discrimination. (At least this is the inference based on the available data.)

- He was not aware of the emotional reactions by Miss Diem to his questioning. He should have noticed them, but he did not. (This was presupposed by the Appeal Tribunal’s statement).

We do not know exactly which kind of unresolved psychic conflict was responsible here and has motivated this behaviour. We can only make an inference that it is likely that such a psychic implication existed.

The fact that this kind of argumentation analysis (including the prejudice analysis) was obviously not made by the Appeal Tribunal but, instead, substituted by the use of the test of the “fair-minded observer” raises the question: How objective in fact is the objective approach, which this test is seen to be?

The test for bias (under English law) was invented, I think, to cope with a dilemma: The legal discourse accepts that the human factor is a relevant one, inso-
far as impartiality is a matter of reasonable apprehension. However, the relevance of this human factor and any decision that it had an impact on a legal judgement is seen to be a matter of the legal discourse itself. No external expert shall be asked for his expertise. This, I think, is one of the reasons why a test for bias was invented for the solution of this dilemma. This test has a claim of objectivity which, as I want to demonstrate, is not a realistic one. With the premises that no external expert shall be involved in the task to identify an arbitrator bias, it is up to the legal experts to make such an allegation, which is based on a communication analysis.

As a matter of fact, it is quite a rare situation that the arbitrator makes a decision on the basis of a prejudice rather than applying the facts, as found to the law. Nevertheless, the above made analysis of an irrational prejudice is useful because it helps us to see the difference between such a prejudice and the forms of normal bias. Before I bring some arguments why such biases in the arbitral process should be regarded as something “normal” (chapter 5), I will discuss the “test for bias”

4. The Test for Bias – how Objective its Results can be?

A “reasonable third party” is a common legal fiction in many areas of law. Used as a test it serves the purpose to avoid the subjective viewpoint of a participant which may have a personal interest. In then Uk, the viewpoint of “a fair-minded, informed observer” is quite similar.

Form the point of view of my analysis, the questions arises: Does this test really have gotten the power to avoid a subjective viewpoint?

I understand that this test for bias reflects a specific principle of English jurisdiction (at least for many years):

Having analyzed the Strasbourg case law – the Strasbourg Court has applied a test of “the reasonable apprehension of the objective onlooker” – the Court of Ap-
peal (Lord Phillips in *In Re Medicaments*) made a modest adjustment what is called the test for bias under English law:

“When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *Gough* is called for... The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.”

Moreover, a stress was laid on the role of public:

“...justice must not only be done but must also be seen to be done. In maintaining the confidence of the parties and the public in the integrity of the judicial process it is necessary that the judicial tribunals should be independent and impartial, and also that they should appear to be so.”

This “fair minded and informed observer” was meant to represent the public, and that the judicial tribunals, by using the observer as a kind of critical instance, gain the possibility of an objective approach against the real possibility, or the real danger, that the tribunal was biased.

Regarding the test’s objectivity claim, I understand, legal experts are aware of the fact that this test is not a scientific one. Nevertheless, it is interesting to see how objective this test can be.

Let us have a closer look at this test. How can one decide whether such an observer in fact comes to the conclusion that “there was a real possibility or a real danger (…]) that the tribunal was biased”? The reviewing Court has to put itself into the position of the “fair-minded and informed observer”; there is not an objective external observer who determines whether this real possibility or danger exists.

We must be aware of the fact that the Court of Appeal pretends to know the conclusion – this knowledge is just attributed to this mental construction of the observer, as if this observer himself or herself has drawn this conclusion. In fact

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8 pages 726f, paragraphs 83 to 86
9 Davidson (AP) v. Scottish Ministers, UKHL34 (2004)
however, it is the Court of Appeal itself which has put its pre-existing judgement into the conclusion of this constructed observer.

We can analyze the use of this test as a process of the following steps:
1. The Court of Appeal has already got an impression of an apparent bias.
2. With the mental construction of the “fair-minded and informed observer” the Court has the possibility to ascribe its impression to this observer.
3. The pre-formed impression is transformed into the conclusion, which is seen to be drawn by this observer.
4. As a result, the pre-formed impression of apparent bias is seen to be an objective judgement of the “fair-minded and informed observer”.

This test for bias may serve as a technique of a mental professional self-control. But regarding the objectivity claim – its purpose to avoid a subjective viewpoint – we come to the conclusion that this claim cannot strongly be made here. The test can be used, too, as an instrument to pretend objectivity of a judgement about an existing bias.

5. The Potential Bias on Arbitrator Bias

The above discussed aspects of bias were meant to prepare for the main thesis of my article: “Bias” – apart from extreme forms like irrational prejudice - should be understood as something which, in the arbitral process, is not a problem itself. It is a consequence which a bias may have regarding the impartiality of an arbitrator which may cause problems. An irrational prejudice, when triggered by the topic of race, creed, sex or national origin, would necessarily have some influence on the decision making of an arbitrator (like the prejudice of the Tribunal Chairman in the racial discrimination case analysed above). A bias itself does not necessarily cause such a problem. Disregarding that “bias” in the arbitral process is something normal may itself be a matter of bias.

My arguments will be processed on the following levels of analysis:

a) From a methodological point of view, “biases” are necessary means of arbitrators for understanding social facts.
b) From a psychological point of view, “bias” is a normal personal reaction of an individual arbitrator to the political, social and cultural implications on international disputes.

Finally I will make a comment on international bias standards regarding the concept of bias which they represent (c).

a)
Considering the arbitrator’s decision making process, the arbitrator relies on facts and on law. The “facts” not be given as such, but constructed (built up) by the arbitrator’s use of knowledge, it is evident how important interpretations in the fact finding process are.

The process of constructing fact as social facts often, I think, is not reflected by arbitrators – whilst other interpretations, like the application of law to some facts, are in the arbitrator’s focus. I will shortly explain the character of social facts as represented by stories.

After having listened to two competing stories of the parties, the arbitrator has to make a choice between them. Biases are a normal part of understanding social facts which are represented by stories. Let’s take the example: “The baby cried. The mommy picked it up.”\(^{10}\) Any listener to these two sentences will construct a short story, based on his/her every-day knowledge. And any listener will do this with the same outcome: The listener will understand that the mommy is the mother of the baby, although this relationship is not made explicit. The listener will understand further that the mother is doing this, because a mother should pick the baby up when it cries (what is not verbalized, too). And the listener will understand that the sequence of the two sentences represents the temporal sequence of two events, although this, again, is not said by the person who has told this story (i.e. the first sentence mentions an event which has happened first in reality).

This process of interpretation includes in fact biases because the existing every-
day knowledge is used as if it is a solid basis for attributing to these two sentences
a meaning as a matter of objective facts. But a listener cannot know for sure that
the mommy who is mentioned in this story is the baby´s mother – she could be
the mother of another baby. The listener is biased by the everyday knowledge
about social relationships by understanding this story as stated above.

What is evident in this short story always takes place when a listener attributes
meaning to utterances by which somebody tells a story. The listener can only un-
derstand such a story by using various methods of interpretation which belong to
the everyday knowledge about social reality. The biases which are included here
are not a problem because their consequences are not problematic ones. On the
contrary: They help us to find (and understand) social facts in the representations
of social reality.

Most of the methods of interpretation applied in this process remain implicit ones,
i.e. we do not find them in legal statutes and rules. These methods belong to the
every-day knowledge of social individuals, as described in qualitative sociology.
(For a further discussion on this issue see the article by Joe Mathews in this Spe-
cial Volume.)

Moreover, it may happen that only limited facts – or not facts – are available but a
decision is required. Biases then may give an arbitrator a direction to proceed in
the absence of reliable facts.

This important role of biases (as elements of interpretations) in any legal dis-
course may be a challenge when legal experts believe that jurisprudence should
be orientated to natural sciences, looking for hard facts and applying hard in-
struments of research.

b)
In any international dispute including political, social and cultural aspects, a “bias”
of an individual arbitrator is a normal personal reaction to these aspects because
we all have specific personal preferences, experiences, etc. Such individual bi-
ases can be controlled when they are well integrated into an individual´s person-
ality. They are forms of bias, too, but they simply belong to human beings – e.g. a bias by emotions (we feel more attracted by a person x than by a person y); a bias by our world view (it may be optimistic or pessimistic); a bias by neighbourhood (we may have the feeling of being well acquainted with somebody who is a neighbour, as well as the feeling, that we do not like him); a bias by our membership to a specific social class (we easier communicate with a member of the same social class then with a member of a different class); a bias by our membership to a national culture (we are irritated when we meet somebody from a different national culture who obviously has got a morality which differs from ours); and many other forms.

I give an example. When an individual arbitrator starts to study the facts of a dispute and he/she feels some sympathy with one of the parties because of political or cultural reasons, this is a bias because this sympathy may lead his/her attention, so he/she will find one group of facts to be more relevant for the case than another group of facts.

The crucial criterion here is not this bias itself but the individual arbitrator’s ability to control this reaction and to be open for learning.

In the case that such a bias is - in the individual arbitrator’s mind - open for a revision, I cannot see why there is a problem with it. But a personal reaction of sympathy can become a problem indeed - by endangering his/her impartiality - when the individual arbitrator believes that such a "bias" is something he/she should get rid of, a kind of "fault" per se, so that this personal reaction is suppressed.

As a consequence of this problematic attempt to cope with "bias", such personal reaction indeed my start to influence the individual arbitrator’s decision without him/ her being aware of this.

From the psychological point of view this dialectic of producing a problem by the very attempt to cope with it is quite simple. But, as I learned, it may be of importance for the community of arbitrators to know this dialectic as far as there is a tendency in this (international) community to act professionally according to an
idea (to an ideal model) of an arbitrator being "freed" completely from any bias-like a computer. The individual’s ability for a permanent learning - necessary in the complex world of modern business - would be hampered then.

Let us take the process of intercultural learning as an example of the challenges arbitrators have to face in international disputes. Cultural learning necessarily involves an arbitrator’s personality because he/she will be affected in the course of this process by irritations which are to be seen as being normal. The role of stereotypes in this learning process I have discussed above. An individual’s personality being involved in the national culture to which the arbitrator belongs to, irritations of this kind often occur. Any attempt to suppress such irritations as being a matter of problematic bias would make this intercultural learning process very difficult.

c)

Whilst the U.S. disclosure obligations are widely considered to be broader then in other jurisdictions, I have learnt that the two points in the arbitral process where the three possible viewpoints for testing “bias” in arbitration come into play, as well as the “bias standards”, in most jurisdictions are largely the same. 11

The two points in the arbitral process are disclosure and disqualification. When deciding if disqualification is warranted, the viewpoint of “a reasonable third party” comes into play. It is common (for most of the arbitration rules) to follow the viewpoint of the “parties” when deciding if disclosure should be made. The viewpoint of the “arbitrator” comes into play when he/she, according to the respective disclosure obligation, discloses “any interest or relationship likely to affect impartiality or which might create an appearance of partiality”. 12

The extensive proposed disclosure obligations in the draft ABA Guidelines have been criticised as unrealistic (see Mark Kantor’s article in this Special Volume). This Checklist of the ABA Discussion Draft is divided into the categories of Self, Relatives, Business Associates and Others. Social relationships belong to the

11 Many thanks to Mark Kantor who has given to me his article on “Arbitrator Disclosure: An Active but Unsettled Year”. Especially by the comments which he made on an early draft of my article I have got a chance to learn more about the technical rules of commercial arbitration.

category of Self. The social relationships which are asked for (possibly existing with a Party, a Lawyer for the Party etc., are “friends”, “acquaintance”, “neighbour” and others.

I do not intend to criticize this ABA Guidelines from a legal point of view. I take it in order to exemplify what I mean with the bias on arbitrator bias: Such extensive disclosure checklist may have been made on different reasons. One of these reasons may be the assumption which I have mentioned at the beginning of this chapter: the assumption that a bias – here: bias connected with social relationships - is a problem per se. The different categories of social relationship can be analyzed then as a kind of transformation of the various forms of normal bias belonging to social relationships into categories of social relationship. Any attempt to make this checklist a comprehensive one would be useless, I think. This list would not come to an end.

I understand that all disclosure check lists and bias standards throughout the world focus on objective criteria. And there are good reasons to do this. But we cannot ignore the fact that “bias” is belonging to the internal world of the individual arbitrator. Does the focus of objectivity means that the attempt is made to identify bias as if it is a matter of the external world?

I take as an example US “bias” standards. As already mentioned, the “bias” standards in most jurisdictions are largely the same.

The Second Circuit “bias” standard: “a reasonable person would have to conclude that an arbitrator was partial to one party”,

The Fifth Circuit “bias” standard: vacatur of awards if the nondisclosure “creates a concrete, not speculative impression of bias” and “is only warranted upon nondisclosure that involves a significant compromising relationship”

The Ninth Circuit “bias” standard: “evidence of an arbitrator’s actual knowledge of undisclosed facts not always necessary to establish partiality” and “the type of situation when an arbitrator has reason to believe that a nontrivial conflict of inter-
est might exist and should investigate to determine the existence of potential conflicts."

What is missing – according to my analysis – is a formulation referring to the consequences of an existing bias for the decision making process. Such consequences are mostly, from the point of view of an individual arbitrator, his/her individual intentions in the arbitral process. All these above quoted US “bias” standards (which are not settled) have in common, that they do not explain how one could observe/identify this special (presumed) occurrence of a bias.

But we find some hints in them where to look at: A “nontrivial conflict of interest” which might exist and which should be investigated to determine the existence of potential conflicts – the Ninth Circuit “bias” standard – uses the concept of potential conflicts as if such conflicts themselves were already the problem. In fact, there are various possibilities to handle such conflicts without any consequence for the impartiality of an arbitrator. But the concept of a “nondisclosure that involves a significant compromising relationship” makes the implication that such a non disclosure may be a matter of an individual’s communication strategy.

The formulation of “a preferred outcome” implies the concept of an individual’s intention, too.

How to identify, with an objectivity claim, such intentions? How to demonstrate them?

I think this is regularly done by arbitrators, albeit in an implicit and perhaps abbreviated way, by the same means by which a “concrete, non speculative impression of bias”, the conclusion of “a reasonable third party/person” is reached at: by some methods of analysis which includes, if one would make them explicit ones, methods of communication analysis. And they are used as well from the “point of view of the parties”, conducting interviews with prospective arbitrators, studying an arbitrator’s disclosure in order to decide if his/her appointed should be accepted.
These methods of analysis, if one would make them explicit, include concepts of an individual action plan, categories of a story’s coherence, categories of emotional authenticity in speech, concepts of tactics of deceiving, and others. The outcomes of this kind of explicitly made communication analysis would fulfil a claim of objectivity – but it is a special one, not comparable with the outcomes of (natural) scientific research.