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Psychological Aspects of Dispute Resolution: Issues for International Arbitration

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To set the stage for talking about the psychology of dispute resolution as it actually occurs, consider first the *ideal* tribunal and setting for resolution of a legal dispute. The ideal litigants fully and honestly present all relevant and no irrelevant information to the tribunal. The ideal tribunal, learned in the applicable law, is strictly objective, without either incentives or inclinations to find the position of one side more persuasive than that of the other side. The applicable law is clear once the relevant facts have been decided. Civilized exchange is the rule and emotional outbursts do not occur. Proceedings are well-organized and efficient. The decision is correct and the litigants on both sides go away accepting that justice has been done. It is an attractive picture, but I do not know how many real proceedings in which you have participated match this ideal, or indeed if *anyone* has ever been lucky enough to have had such an experience. In my too-many years of watching how legal disputes are resolved in the United States, I would be hard-pressed to identify a single proceeding that would fully measure up to this standard. After all, in the real world we deal with human beings – litigants, witnesses, arbitrators and judges – who, even if they come to court or arbitration proceedings with good intentions, also come with human motivations, biases and weaknesses. Dispute resolution, whatever the tribunal, is always a perilous undertaking. Evidence in the abstract tends to look different from evidence in the concrete. Decision-makers filter evidence and arguments through different lenses. Those features may explain why a wise senior partner in the firm where I practiced law would counsel supremely confident clients considering litigation that no matter how strong they thought their case was on the merits, they could be certain of winning it no more than 75 percent of the time.

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My focus here is on two features of the psychology of dispute resolution that have particular implications for arbitration. The first is the psychology of dispute resolution procedures from the viewpoint of the litigants. That is, what is it that makes the procedure appear fair to the disputants? The second, not totally unrelated to the first, is how the psychology of the decision-maker can affect the actual outcome of the case. I'll close with a challenge for the international arbitration community, based on what we do not yet know about decision-making in the innovative and evolving world of international arbitration.

I. THE DISPUTE RESOLUTION PROCESS

The parties on the opposite sides of any dispute – whether it is a drainage dispute between neighbors or a multi-million Euro loss allegedly caused by a breach of contract – engage in dispute resolution for vindication, that is, to win. At the simplest level, no matter what a judge or panel of arbitrators decides, one of the parties must go away with less than they wanted. But, as I will suggest to you here, that simple picture of dispute resolution is misleading – and the *process* by which a trial or arbitration is conducted can have a powerful effect on the psychology and reactions of the prevailing party. Perhaps more importantly, it will also affect the reactions of the *losing* party and the willingness of that party to accept the decision of the tribunal without requiring further enforcement efforts – which of course can be a concern in international arbitration.

In stressing the psychological dimensions of dispute resolution, I do not mean to ignore the powerful economic concerns of the parties. Indeed, I should disclose that in one of my two identities as a research psychologist and as an attorney, I was trained at what has been referred to in the United States as the center for law and economics, the University of Chicago. I have a healthy respect for the power of economics in explaining human behavior. What I mean to stress here, however, is that the economic story is an incomplete one when it comes to understanding dispute resolution and, in particular, to understanding how parties react to their experiences in arbitration and litigation.

1. *How Does Procedure Matter?*

One view that a decision-making tribunal might take is that its exclusive responsibility in dispute resolution is to arrive at a correct decision. A more sophisticated way to describe this obligation is to characterize it as the responsibility to arrive at a decision that is consistent with the evidence and appropriately guided by the relevant law. Both descriptions, I suggest to you, are too limited from both a psychological and a practical view. If the goals of dispute resolution include legitimacy for the tribunal, the willingness of the parties to accept the decision of the tribunal without coercion or need for further enforcement efforts, and the likelihood that the parties will be willing to submit to arbitration in the future, then it is clear that other critical features of the tribunal's activities are crucial as well.

In making the case for the importance of these other features, I will draw heavily on the work of many scholars who, particularly in the past twenty-five years, have studied the process of dispute resolution and its consequences – John Thibaut, Laurens Walker

and more recently Tom Tyler, E. Allan Lind and Yuen J. Huo, among others. Before much of this work on procedural justice began, the dominant thrust of research on dispute resolution focused on distributive justice.¹ Distributive justice occurs when parties competing for scarce resources receive fair allocations as the outcome. Under what circumstances would various outcomes be viewed as fair? Researchers had discovered, for example, that people in work settings were strongly affected by equity² concerns in judging the fairness of pay and promotion decisions – that is, they perceived differential outcomes as fair when those different outcomes could be attributed to differences in contributions – for example, if one party put in more time, or contributed greater expertise. The research has only limited value for our concerns here, however, because it also found that people tend to exaggerate the value of their own contributions, much as the parties to a contract dispute tend to overvalue their own efforts to fulfill contract terms and to undervalue the efforts of the opposing party. Thus, in practical terms, it is hard to provide opposing parties with the level of compensation they believe reflects the value of their own contribution – creating the seemingly intractable problem of making people satisfied with outcomes in what game theorists call a zero-sum game: what one party wins, the other must lose.

Against this backdrop, Thibaut and Walker³ began a new set of investigations, focusing on the *procedures* used to reach allocation decisions. Their early studies showed that the level of satisfaction people felt with the decision of a third party was strongly influenced by their perceptions of the fairness of the procedures used by the third party to reach that decision. That is, even when actual outcomes were held constant and even when those outcomes were negative, the perceived fairness of the procedures strongly influenced the party's satisfaction with the verdict and willingness to accept the legitimacy of the decision.⁴ Perhaps most important for its application to international arbitration, these and more recent studies of procedural justice show that people are more willing to accept decisions⁵ and to adhere to agreements over time⁶ when they perceive those decisions as having been produced by fair procedures. Moreover, the authority and perceived legitimacy of the institutions that produce the decisions are

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1. See, e.g., J. Stacy ADAMS, "Inequity in Social Exchange", 2 *Advances in Experimental Social Psychology* (1965) p. 267.
 2. Equity was defined as the apportionment of outcomes in proportion to each individual's contributions to those outcomes.
 3. John THIBAUT and Laurens WALKER, *Procedural Justice: A Psychological Analysis* (1975).
 4. For a description, see Tom R. TYLER, "Social Justice: Outcome and Procedure", 35 *International Journal of Psychology* (2000) p. 117.
 5. For recent examples, see E. Allan LIND, Carol T. KULIK, Maureen AMBROSE and Maria V. de VERA PARK, "Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic", 38 *Administrative Science Quarterly* (1993) p. 224; Roselle L. WISSLER, "Mediation and Adjudication in Small Claims Court", 29 *Law & Society Review* (1995) p. 323.
 6. See, e.g., D.G. PRUITT, R.S. PEIRCE, J.M. ZUBEK, G.L. WELTON and T.H. NOCHAJSKI, "Goal Achievement, Procedural Justice, and the Success of Mediation", 1 *The International Journal of Conflict Management* (1990) p. 33; D. PRUITT, R.S. PEIRCE, N.B. MCGILLICUDDY, G.L. WELTON and L.M. CASTRIANNO, "Long-term Success in Mediation", 17 *Law and Human Behavior* (1993) p. 17.

enhanced when the procedures used to produce the decisions are viewed as fair – again, even when those decisions involved unfavorable outcomes. The value of enhanced authority and legitimacy for international arbitration is clear: contracting parties will be more willing to include an arbitration clause in their agreements if they recognize the fairness and legitimacy of the institution that will resolve any disputes that arise.

What then are the procedural characteristics that cause disputants to perceive the process of reaching a decision on their dispute as fair? Distilling twenty-five years of research, psychologists have identified several features that consistently emerge as powerful components of perceptions about the fairness of procedures for dispute resolution.⁷ They include: (1) *neutrality*, that is, did the decision-maker treat the disputants in an evenhanded, nondiscriminatory way? (2) *trust*, that is, did the decision-maker fully consider the views and needs of the disputants? and (3) *treatment with respect and dignity*, that is, was the decision-maker appropriately polite and respectful in dealing with the disputants and the dispute? All three of these features can be influenced, if not controlled, through a combination of the choice of the decision-maker and how the decision-maker behaves in the course of conducting the proceeding and arriving at a decision. The choice of an arbitrator, not surprisingly, can be significant and contested terrain, because it will affect the expectations of the parties to the arbitration proceedings and can thereby affect their reactions. The choice of senior judges, professional notables and leading continental academics as the principal arbitrators⁸ in the early days of international arbitration reflects the value of the social capital that they brought to arbitration through their prestige and reputation. As international arbitration has become more common, procedure should play a larger role in affecting how disputants evaluate their arbitration experience.

It is instructive to look at both the overlap and the difference between the set of questions that disputants are likely to consider about procedural justice and the list of criteria for the choice of an arbitrator identified by Mauro Rubino-Sammartano.⁹ He lists eight criteria (p. 320). Three of them relate to the nuts and bolts of conducting an arbitration proceeding: skills in the appropriate language, time availability and availability to travel, if required. One, the experience of the arbitrator, relates to the important issue of expertise, although the experience of the arbitrator can be a double-edged sword when perceptions of fairness are at issue: a positive feature if the expertise arises in a neutral way, for example, from judicial experience, but a potential liability if, for example, the potential arbitrator's experience and expertise arose from long employment in one sector of an industry or in the country of one party to a dispute. The remaining characteristics, that is, the nationality of the arbitrator, the possession of a

7. See E. Allan LIND, "Procedural Justice, Disputing, and Reactions to Legal Authorities" in A. SARAT, M. CONSTABLE, D. ENGEL, V. HANS and S. LAWRENCE, eds., *Everyday Practices and Trouble Cases* (1996) p. 177; Tom R. TYLER and E. Allan LIND, "A Relational Model of Authority in Groups", 25 *Advances in Experimental Social Psychology* (1992) p. 115; see also Tom R. TYLER, *op. cit.* fn. 4.

8. Yves DEZALAY and Bryant GARTH, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996).

9. *International Arbitration: Law and Practice* (2001).

balanced mind, independence and impartiality more directly implicate the three features that promote a sense of procedural justice.

2. *Perceived Trust*

Trust has a surprisingly powerful effect on all interactions, including negotiations and other forms of dispute resolution. In today's age of E-mails and electronic information exchange, researchers have been investigating the effects of trust on the negotiation of conflicts and formation of contracts between strangers. In a series of intriguing experiments,¹⁰ they have shown that a brief non-substantive get-acquainted telephone conversation with a stranger before a negotiation conducted by E-mail can affect both the likelihood of an impasse in the negotiations and the joint profitability of the agreements that the parties reach if they do reach an agreement. Half of the pairs of participants in the study were given some biographical information about one another and were instructed to have a five-minute social conversation on the telephone in which they could discuss anything but business or the negotiation. The other half had no pre-negotiation conversation with their partner. All of the pairs then conducted a negotiation by E-mail over the course of the next week. The rapport stimulated by the telephone conversation led to greater trust and lower rates of impasse in the negotiations for those who had spoken before the E-mail negotiation began. The results of this study and others like it not only emphasize the importance of trust, but also should give pause to some of the enthusiasm recently expressed about the ability of new technology to eliminate in-person proceedings in the name of efficiency.

Just as trust leads negotiators to be more willing to work at reaching a jointly acceptable resolution, if parties perceive an arbitrator or other third party decision-maker as motivated to consider fully the concerns and needs of the parties, that perception instills confidence that the parties are being treated fairly. In arbitrations or court hearings, trust that the third-party decision-maker will consider fully the disputant's views and needs thus can have a substantial effect on perceptions of procedural justice. When parties turn to a tribunal to reach a decision on their dispute, it means that they have failed to settle their differences themselves and that they are choosing or being forced to bring in a stranger to resolve the dispute. This loss of control is threatening, and one way in which the threat can be addressed is to ensure that the party retains some crucial input in the process. Thus, the opportunity for what has been called "voice" plays an important role in the perceived fairness of the hearing. "Voice" may be expressed orally or in a written form, but constraints placed on what the party has an opportunity to present can influence the party's sense of fairness. For example, a party may want to show the tribunal a document that has not been authenticated, or provide testimony that amounts to inadmissible hearsay or opinion evidence. When rules of evidence prevent this material from being presented, those

10. Michael MORRIS, Janice NADLER, Terri KURTZBERG and Leigh THOMPSON, "Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations", 6 *Group Dynamics* (2002) p. 89; Janice NADLER, "Electronically-Mediated Dispute Resolution and E-commerce", 17 *Negotiation Journal* (2001) p. 333.

exclusions are often a source of frustration to parties who want to share what they see as relevant information. One of the attractions of some alternative dispute resolution procedures, such as mediation, is that those procedures generally do not limit the parties from expressing themselves fully and on their own terms, even if some of what they say is not directly on point or does not carry the standard indicators of reliability.

There is some ambiguity about why voice is so important. One possibility is that the opportunity to tell one's side of the story fully is in itself a crucial element in dispute resolution – that expression is an end in itself. Alternatively, the importance of voice may arise only from its perceived instrumental character, that is, that the party feels that if he is given the opportunity to speak on the issue, the decision-maker will use what has been said in arriving at a decision. The best evidence suggests that both expressive and instrumental motivations give voice its importance. Researchers find that people value the opportunity to speak in the course of a proceeding even when they believe that what they are saying is having little or no impact on the decisions being made. For example, in a study by Lind, Kanfer and Earley,¹¹ participants who were given an opportunity to express their views either before or after a decision was imposed on them both rated the decision process as fairer than participants who were never given an opportunity to voice their positions. Those who voiced their positions before the decision was reached, however, rated the procedure as fairer than those who had the opportunity to speak only after the decision was reached. Participation effects on the judged fairness of procedures are enhanced when people believe that what they are saying is affecting the outcome of the dispute.¹² Moreover, people tend to overestimate the amount of control they do have,¹³ so to the extent that opportunity for voice bolsters a sense of control, it is likely to enhance impressions of fairness even when the views expressed do not actually influence the decisions that are made.

From an arbitrator's perspective, building feelings of trust by maximizing the opportunity for the parties to have voice has some disadvantages in terms of efficiency – it may require substantial patience and may even argue for permitting some material to be presented that the arbitrators anticipate that they will not rely on in reaching their decision. Nonetheless, a more permissive approach than one that, for example, might be permitted under the strict rules of evidence in an American jury trial, may have the advantage of bolstering the parties' sense of fairness with the proceedings. Of course, an arbitrator can go too far in permitting the parties to generate evidence that the tribunal will not consider. In their ground-breaking study of international commercial arbitration, Dezalay and Garth¹⁴ report on the fascinating interview research in which

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11. "Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments", 59 *Journal of Personality and Social Psychology* (1990) p. 952.
 12. See, e.g., D.L. SHAPIRO and J. BRETT, "Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration", 65 *Journal of Personality and Social Psychology* (1993) p. 1167.
 13. See, e.g., P.C. EARLEY and E.A. LIND, "Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Justice Judgments", 52 *Journal of Personality and Social Psychology* (1987) p. 1148; A. PEPITONE, "Motivational Effects in Social Perception", 3 *Human Relations* (1950) p. 57.
 14. Yves DEZALAY and Bryant G. GARTH, *op. cit.*, fn. 8.

no doubt many of you participated. In one interview, the respondent reported the following story (with identities appropriately protected) about an arbitration in which he had participated: the chairman of the panel permitted the parties to hold witness hearings, although the norm was not to do so.¹⁵ The parties arranged to have most of the hearings transcribed by a court reporter and had the transcripts delivered to the arbitration panel. The last volume was unavailable in time to submit it. When the attorney explained that he could not argue a particular point because of the absence of the transcript, the chairman expressed surprise and revealed that the transcripts were for the parties rather than for the panel and that the panel would not ever read them. The disappointed attorneys for both sides had anticipated that the panel would appreciate their efforts. The attorney who Dezalay and Garth interviewed characterized the miscommunication about the value of what the parties had done as a disaster, presumably because of the unnecessary expense that had resulted and the assumptions that the parties had made about what the panel would consider in reaching its decision. Although the tribunal had permitted an extra opportunity for voice, confronted with the evidence that the additional material they provided was destined to fall on deaf ears, the opportunity was identified as an empty – and costly – one. The key is maximum, but not an unduly expensive or deceptive, opportunity for the parties to present their case.

3. *Perceived Neutrality*

A second and powerful element in procedural justice is the perception of *neutrality* on the part of the decision-maker – that is, the belief that one is being accorded evenhanded treatment, that the playing field for dispute resolution is level. Respect for the fact-finding ability and legal expertise of the decision-maker is not sufficient. Honesty, unbiased treatment and consistency are also requirements if an authority is to be perceived as neutral. Most legal systems recognize the importance of apparent neutrality in their proceedings. Judges in the United States, for example, are required to recuse themselves from cases in which they have a conflict of interest, for example, in the form of stock ownership in one of the parties. Disqualification is mandatory for conduct that calls a judge's impartiality into question.¹⁶ Nonetheless, a variety of features undermine the appearance, if not the fact, of neutrality. Perhaps the most common example that exists in the United States is where state court judges are elected to their judicial positions either at the trial or appellate level. In thirty-eight of the fifty states, judges must raise funds to support their election campaigns from the very attorneys who appear in their courts. Other sources that undermine the appearance of neutrality may arise when a judge breaks the normal pattern of silence¹⁷ and makes statements about a case

15. *Ibid.*, p. 108.

16. See 28 U.S.C. Sect. 455(a); *In re School Asbestos Litig.*, 977 F.2d 764, 783 (3d Cir. 1992).

17. A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned". 28 U.S.C. Sect. 455(a). The standard for disqualification under Sect. 455(a) is an objective one. The question is whether a reasonable and informed observer would question the judge's impartiality. See *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991); see also *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001); Richard E. FLAMM, *Judicial Disqualification*, Sect. 24.2.1

before hearing all of the evidence or during a pending appeal, as Judge Jackson did last year in the Microsoft antitrust litigation. In that instance, the Court of Appeals found that most of Judge Jackson's findings had been correct, but remanded the case to another judge for re-hearing on the remaining issues because of the inappropriate statements Judge Jackson had made in interviews with reporters in the course of the trial, and publicly while the case was on appeal.

Another factor involving the appearance of partiality may arise if the judge formerly practiced law with one of the law firms or lawyers appearing in the judge's courtroom. The legal system operates on the presumption that the judge can put aside any natural affinity for her former colleagues as long as she no longer has a financial relationship with the firm. Standard practice requires a disclosure of the prior affiliation, but not a disqualification of the judge from hearing the case.

The make-up of the typical three-arbitrator panel implicitly acknowledges the dangers of partiality by permitting each of the parties to nominate one of the arbitrators. While each arbitrator is formally expected to play a judicial role that answers to the neutral goal of legal accuracy, the structure of the tribunal recognizes that legal accuracy may be open to multiple interpretations. The party-nominated members of the panel increase the likelihood that the arguments and vote of at least one member of the tribunal will be informed by what each party believes is the correct way to view the dispute. Thus, the mixed structure of the arbitration panel both provides some measure of neutrality through balance and incorporates opportunity for voice within the tribunal. Two difficult problems remain, however. The party-selected members of the panel must balance dual demands on their loyalty: to the party that selected them and to the law as represented by the panel as a whole and the evidence presented in the case. Second, a third member of the panel must be selected who has no marked association with or evident inclination to favor one of the parties. The party-selected members can control the choice of the chair only if they can agree. It is unclear how well this system provides the balance it is intended to create. What is missing is research on the frequency and choice of chairpersons in arbitration panels, and a study of how their selection affects process and outcomes, and how it affects the ultimate satisfaction of the parties with the proceedings.

If the system of arbitration is increasingly to attract cases, it is crucial that it be perceived as both efficient and impartial. Moreover, a presumption of impartiality must be maintained within the community of international arbitrators whose colleagues may appear before them as counsel on one day, and may sit beside them on the same panel of arbitrators on another occasion. Yet the arbitration context presents an unusually complicated set of interlocking loyalties and incentives. As a result, there is ample room for loyalties to influence judgments, whether consciously or unconsciously, and for parties or their representatives who are not part of this network of colleagues to be concerned about the neutrality of the tribunal. The controversial¹⁸ approach taken by the ICC, the "declaration of independence" requiring the disclosure of any significant relationship between the proposed arbitrators and counsel for the parties to the

(1996).

18. DEZALAY and GARTH, *op. cit.*, fn. 8, p. 48.

arbitration, implicitly acknowledges the potential costs that partiality or the appearance of partiality can have for the health of the process. Indeed, the evidence from studies of procedural justice suggests that the attention to how parties will perceive the neutrality of the arbitration panel is warranted.

It is, as Dezalay and Garth have pointed out,¹⁹ no accident that much international commercial arbitration takes place in locations that are not local to either party. Despite the extra costs and inconvenience that a distant location can impose, a detached location suggests an image and perhaps a reality of independence for the tribunal that would be more difficult to project on the home turf of one or the other of the parties.

4. *Treatment with Dignity and Respect*

The third key component of procedural justice judgments from the point of view of a disputant is *treatment with dignity and respect*. Such treatment conveys to disputants not only that they are valued participants in the proceeding but also that the proceeding itself is being treated as important. Politeness and respect are ways to impress on participants the seriousness with which the occasion is being treated. In one study, Lind and his colleagues²⁰ interviewed litigants whose cases had been subjected to arbitration, trial or settlement conferences. They found that litigants perceived arbitration as very fair because it was viewed as dignified, while they viewed settlement conferences as unfair because they were seen as undignified. While formality can promote a feeling of dignity, formality is not the key. Both arbitrations and trials were viewed as dignified, although arbitrations tend to be less formal than trials. The sources of perceived dignity are politeness and respect.

5. *Process and Outcomes*

My discussion thus far has focused on the nature of proceedings that can instill confidence in the parties. The comfort and positive reactions of litigants are of course important in and of themselves. To the extent that litigants are satisfied with their treatment, they will have good words to say about both arbitration and the arbitrators! But building perceptions of procedural justice has an additional important pay-off: it increases the likelihood that the parties will accept and comply with the findings of the tribunal. In a study of litigants whose cases were subjected to mandatory non-binding arbitration in eight US courts, Lind, Kulik, Ambrose and de Vera Park²¹ measured the rate at which litigants (both corporate and individual) exercised their right to a trial at the conclusion of the arbitration. Not surprisingly, litigants with more positive *outcomes* were more likely to accept the arbitration decision and less likely to opt for a trial. But

19. *Ibid.*, p. 69.

20. E. Allan LIND, Robert J. MacCOUN, Patricia A. EBENSER, William L.F. FELSTINER, Deborah R. HENSLER, Judith RESNIK and Tom R. TYLER, "In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System", 24 *Law & Society Review* (1990) p. 953.

21. *Op. cit.*, fn. 5, p. 224.

importantly, there was a separate and independent predictor of whether the arbitration award was rejected – namely, a litigant's perception of the procedural fairness of the arbitration proceeding.

Up to this point, I have not referred to the actual quality of decision-making. Does that mean that I am suggesting a focus on mere window dressing by stressing factors that influence perceptions of procedural justice – a kind of soporific for the disputants that lacks substance? Avoid the appearance of bias, but not actual bias? Not at all. Party concerns about fairness are serious. One reason that we cannot assume fairness is because many forces operate to undermine evenhanded treatment of litigants, even given the best of intentions by the decision-makers responsible for producing fair and just outcomes. I turn now to this prickly subject: the psychology of the decision-maker.

II. THE PSYCHOLOGY OF THE DECISION-MAKER

What affects the ultimate decision in a legal dispute? In general, the strongest predictors of decisions are the weight of the evidence and the applicable law, but they are not the only influences. The judgments of even highly-educated professionals are influenced by psychological factors that affect how they view evidence and how they reach decisions. As a result, in a close case, these factors can influence outcomes, albeit quite unconsciously and without any intentional distortion. Three common psychological sources of influence include: (1) *affinity effects*, which arise from the tendency to share the perspective of those who come from a similar background and have had a similar set of prior experiences; (2) *self-serving or egocentric bias*, the tendency for decision-makers to resolve ambiguity and interpret facts in the direction that is most favorable to themselves; and (3) *expectancy effects*, the tendency to arrive at interpretations that are consistent with expectations.

Affinity effects occur when decision-makers are influenced by their cultural backgrounds, their prior experiences, and their personal associations in formulating their understanding of and judging the behavior they must consider in reaching their decisions. A classic study of decision-making in commercial arbitration demonstrated this influence.²² Haggard and Mentschikoff had twenty different panels of arbitrators listen to a tape of the same contract dispute. The panel members were American Arbitration Association arbitrators, and half of them were brokers, while the remaining half were manufacturers. The case involved a contract dispute in which the plaintiff, a distributor who had agreed to purchase goods from the defendant, claimed that the defendant, a broker with the sole right to import the goods, had not been entitled to cancel the contract between the two parties. Each of the arbitrators indicated whether he would have decided the case in favor of the plaintiff or the defendant. A comparison between the manufacturer arbitrators and the broker arbitrators indicated that the

22. Ernest A. HAGGARD and Soia MENTSCHIKOFF (1977a) "Responsible Decision Making in Dispute Settlement" in J.L. TAPP and F.J. LEVINE, eds., *Law, Justice, and the Individual in Society: Psychological and Legal Issues*, p. 277; Soia MENTSCHIKOFF and Ernest A. HAGGARD (1977b), "Decision Making and Decision Consensus in Commercial Arbitration" in *ibid.*, p. 295.

brokers were far more likely to favor a decision for the broker defendant than were the manufacturers. The difference in the pattern of responses was not attributable to nefarious motives, or even to any form of personal loyalty to a particular party, but rather emerged from the natural alignment of interests based on shared experience. It is important to recognize that what we are often inclined to characterize as bias may reflect this shared perspective that emerges naturally from shared experiences. Thus, whether or not we call it bias, a shared cultural background can foster an unconscious shared perspective that would be perceived as bias by an observer from a different cultural background. Whatever the label, however, the result is an advantaging of one party over another or a tendency to see a witness with a particular background as more or less credible than a witness who has a different background.

A second psychological influence on decision-makers is the *self-serving or egocentric bias*, the tendency for people to reach judgments that are biased in a self-serving direction.²³ Although the most prominent example of the dangers of this bias occurred recently in the troubles of the accounting and auditing firm of Arthur Anderson in the American ENRON scandal, the bias is ubiquitous – people “tend to conflate what is personally beneficial with what is fair or moral.”²⁴ Studies of highly educated professionals, such as physicians and accountants, reveal that despite codes of ethics, in the face of good intentions, and without conscious awareness, judgments tend to move in the direction of self-interest. Thus, physicians tend to order more tests and longer treatments when they receive additional income as a result.²⁵ Similarly, when accountants were asked to evaluate the dollar amount of inventory loss that an insured suffered in a fire, the amount of loss they set was dramatically higher when they were told that their client was the insured than when they were told it was the insurance company.²⁶

Finally, *expectations* alone, without affinity or self-interest, influence how evidence is viewed. Whatever their source, beliefs about the world and preconceived notions about the likely credibility of particular types of witnesses affect how decision-makers evaluate evidence. Decision-makers in all settings ordinarily scrutinize more carefully and are more likely to reject information that is inconsistent with their beliefs and

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23. See David M. MESSICK and Keith SENTIS, “Fairness, Preference, and Fairness Biases” in D.M. MESSICK and K.S. COOK, eds., *Equity Theory: Psychological and Sociological Perspectives* (1983) p. 69.
 24. George LOEWENSTEIN, “Behavioral Decision Theory and Business Ethics: Skewed Trade-Offs between Self and Others” in David M. MESSICK and Ann E. TENBREUSEL, eds., *Codes of Conduct* (1996) p. 214 at p. 221; Max H. BAZERMAN and George LOEWENSTEIN, “Taking the Bias Out of Bean Counting”, 79 *Harvard Business Review* (2001) p. 28.
 25. George J. ANNAS and Frances H. MILLER, “The Empire of Death: How Culture and Economics Affect Informed Consent in the U.S., the U.K., and Japan”, 20 *American Journal of Law & Medicine* (1994) p. 357.
 26. Lawrence A. PONEMON, “The Objectivity of Accountants’ Litigation Support Judgments”, 70 *Acct. Rev.* (1995) p. 467.

expectations.²⁷ It is generally easier for people to remember information that is consistent with their other beliefs than information that is inconsistent with it,²⁸ and ambiguous information tends to be interpreted as consistent with already held beliefs.²⁹ Professionals are not immune from this tendency. Indeed, the expectations that arise from their experience are part of their expertise. Nonetheless, expectations can also distort what the professional sees, introducing a confirmatory bias. Thus, when scientists were asked to evaluate a piece of research, their judgments about the quality of the research were influenced by whether the outcome supported the scientist's prior beliefs.³⁰

Of course, physicians, auditors and scientists are typically not attorneys, and the arbitrators in the study I described earlier were not attorneys or judges or legal scholars. One might therefore be tempted to conclude that legal training can eliminate or at least reduce some of these distortions in judgment. Although we have some evidence to suggest that similar distortions arise even when decision-makers are legally trained, the most systematic source of evidence comes from the extensive literature on judicial decision-making by American judges. This work is particularly interesting in revealing the influence of the background of the decision-maker on decision-making because much of the research has been done on federal appellate court judges who are appointed for life. Their lifetime tenure means that these judges are not subject to concerns about re-appointment that may lurk in the back of the consciousness of judges selected for a term of years or arbitrators who are appointed on a case-by-case basis. Because they generally sit in panels of three and, unlike some tribunals,³¹ are free to reach non-unanimous verdicts, it is possible to study the nature and extent to which differences among judges deciding the same case reach different decisions. Political scientists and recently, some legal scholars, have examined the pattern of decision-making by these federal judges for evidence that background characteristics of the judges can explain some portion of the variation in their decisions. In a recent example of this genre of research, Brodney, Schiavoni and Merritt³² (1999) looked at appellate cases reviewing unfair labor practice

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27. C.G. LORD, L. ROSS and M.R. LEPPER, "Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence", 37 *Journal of Personality and Social Psychology* (1979) p. 2098.
28. A. LOCKSELY, C. STANGOR, C. HEPBURN, E. GROSOVSKY and M. HOCHSTRASSER "The Ambiguity of Recognition Memory Tests of Schema Theories", 16 *Cognitive Psychology* (1984) p. 421.
29. R.P. VALLONE, L. ROSS and M.R. LEPPER, "The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias Coverage of the Beirut Massacre", 49 *Journal of Personality & Social Psychology* (1985) p. 577.
30. Jonathan J. KOEHLER, "The Influence of Prior Beliefs on Scientific Judgments of Evidence Quality", 56 *Organizational Behavior and Human Decision Processes* (1993) p. 28.
31. In the Dutch legal system, for example, public dissent is not permitted. That is, majority decisions are announced publicly as if they were unanimous. Peter VAN KOPPEN and Jan TEN KATE, "Individual Differences in Judicial Behavior: Personal Characteristics and Private Law Decision-making", 18 *Law & Society Review* (1984) p. 225 at p. 227, fn. 1.
32. James J. BRUDNEY, Sara SCHIAVONI and Deborah J. MERRITT, "Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern", 60 *Ohio State Law Journal* (1999) p. 1675.

claims issued by the federal courts of appeals over a seven-year period. According to a strictly legal model of how cases are decided, attributes of a judge's background should provide no information that will help to predict judicial decisions. In contrast, a social background perspective, while acknowledging the influence of case-specific facts and legal precedent, posits that biographical factors, such as personal traits, educational background and pre-judicial activities also help to explain judicial decisions.³³ Brodneyn and his co-authors found, as have others, empirical support for the social background perspective. For example, whether the judge attended an elite college and whether the judge had experience as a practicing attorney representing management in labor matters were significant predictors of the positions that the judge took toward labor union claims about unfair labor practices.³⁴ A purely doctrinal explanation of appellate court decisions cannot account for these results.

The influence of social background as well as the research showing that judges are subject to cognitive biases in the evaluation of evidence³⁵ explain only a part of judicial decision-making. There is little doubt that the primary influence on judicial decisions is the evidence and applicable law. Nonetheless, the research reveals that when the evidence or law is somewhat ambiguous, there is ample room for non-evidentiary and extra-legal considerations to influence outcomes. The variety of perspectives that naturally arises across individuals with differing backgrounds is one rationale for the American jury. To reach a verdict, multiple citizens must pool their diverse experiences and perceptions.

The best judges try hard to provide both sides to a dispute with an equal opportunity to persuade the court of the virtue of their positions, but it would be naive to assume that they always succeed. The same struggle occurs in the attempt to ensure that arbitrators have the attributes identified by Mauro Rubino-Sammartano that include "possession of a balanced mind", "independence" and "impartiality".³⁶ The choice in international arbitration to avoid selecting a chairman from the same country as one of the parties is a further reflection of the effort to produce, and convey the appearance of producing, a fair and balanced tribunal.

It would be unrealistic, however, to ignore the possibility that structural features of arbitrator selection can influence the perspective of a party-appointed arbitrator, and it is here that I want to take up Neil Kaplan's invitation to be somewhat obstreperous. Let me suggest that there is a parallel to international arbitration panels that you may not, at first glance, recognize: to the party-appointed expert in litigation that is a standard feature of the adversary system in the United States. The party-appointed

33. See, e.g., Jilda M. ALIOTTA, "Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking", 71 *Judicature* (1988) p. 277; see generally Lawrence BAUM, *The Puzzle of Judicial Behavior* (1997).

34. The surprising result was that judges who had prior experience representing management clients were more likely to support labor union claims than were judges who lacked that prior experience.

35. Cognitive biases affect both judicial and lay judgments, although judges appear to be less affected by some biases than are laypersons. See, e.g., Chris GUTHRIE, Jeffrey J. RACHLINSKI and Andrew J. WISTRICH, "Inside the Judicial Mind", 86 *Cornell L. Rev.* (2001) p. 777.

36. *Op. cit.*, fn. 9, p. 320.

arbitrator is expected to understand the perspective of the party that appointed him, and to make certain that the chairperson and the other party-appointed arbitrator are fully informed as well. At the same time, the party-appointed arbitrator cannot display partiality. To do so not only would be inconsistent with the duty of the arbitrator to exercise independent judgment, but also would have consequences for the arbitrator's reputation and would undermine his ability to influence his fellow panel members. Of course, in light of the affinities discussed earlier and the ability of a party to "shop" for arbitrators with specific backgrounds and experience³⁷ in order to identify an arbitrator likely to be receptive to the party's perspective, the party-appointed arbitrator is likely to be more sympathetic to the position of the appointing party, even if the ultimate weight of the evidence favors the opposing party and the panel reaches a unanimous decision on the appropriate verdict.

How similar is this picture to the position of the party-appointed expert? The expert testifies under oath at trial, with an obligation to provide truthful answers to the questions he is asked. Moreover, this expert has a professional reputation to protect, and not only that reputation but the nature of his testimony will follow him in future cases. In fact, what the party-appointed expert says, unlike the questions or deliberation behavior of the party-appointed arbitrator, will become part of a public record. Parties, of course, can search for experts who have taken, or are likely to take, positions that favor the view that the party wants to advance. For example, recently a spate of cases has been making their way through American courts in which the plaintiffs allege that they have been stroke victims as a result of taking the drug Parlodel to suppress lactation after giving birth. Medical experts testifying for the plaintiffs in these cases are on record for having taken the position that Parlodel can cause strokes; experts for the defendants, not surprisingly, have reached the opposite conclusion. Each is more likely to find evidence persuasive that the plaintiff in the specific case did or did not experience a stroke due to her Parlodel exposure to the extent that it is consistent with the earlier views they have expressed.³⁸

American party-appointed experts are currently the subject of much critical comment in the United States,³⁹ as they have been in England,⁴⁰ and some efforts have been made to reduce their role and their influence by substituting or at least supplementing them with court-appointed experts. Parties and the attorneys who represent them are generally opposed to court-appointed experts. I suspect that the reason is very close to those that have encouraged the system of party-appointed arbitrators and the values of procedural justice. Some degree of party control encourages a sense of fairness that a tribunal, even one that decides against you, has received and considered all of the

37. See James H. CARTER, "Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for 'Nonneutrals'", 11 *The American Review of International Arbitration* (2001) p. 295 at p. 296.

38. See, e.g., *Siharath v. Sandoz*, 131 F.Supp. 2d 1347 (N.D. Ga. 2001); *Brasher v. Sandoz*, 160 F.Supp. 2d 1291 (N.D. Ala. 2001)

39. Joe S. CECIL and Thomas E. WILLGING, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence* (Federal Judicial Center 1993) p.706.

40. Lord WOOLF, *Access to Justice* (1996).

information you think should be part of its deliberations. The value of party control may be particularly crucial for the legitimacy of international arbitration in which parties may come to the table from not only different legal systems, but also with cultural differences that affect their perspectives (e.g., on what behaviors are appropriate).⁴¹

One intriguing feature of the three-member international arbitration panel that may act as an important constraint on partiality does not exist for a party-appointed expert. While the prospect of repeat business is a potential incentive in both situations, the reputation of an arbitrator as fair and unbiased should increase the likelihood that he or she will receive appointments as the third member of the arbitration panel. If that incentive does affect behavior, there may be important differences in the behavior of arbitrators who frequently occupy the chairman's seat and those who do not. Unfortunately, there is no study that has tested either that hypothesis or indeed many hypotheses about patterns in arbitration. Thus, although we can draw from the general literature on dispute resolution to point to the influence of perceptions of procedural justice on parties' reactions to arbitration, there is no clear analog we can draw on to examine the effects of the structure of international arbitration on the behavior of arbitrators.

III. CONCLUDING REMARKS

This examination of the psychology of dispute resolution and its application to international arbitration reveals how procedures can have a crucial effect on the reactions of litigants and on their willingness to accept decisions even when those decisions do not favor them. It also shows why it is unrealistic to expect even highly trained and well-motivated arbitrators to be unaffected by their own prior experiences and backgrounds in the way they evaluate evidence. As a result, procedures loom large in ensuring that the methods of dispute resolution maximize both the appearance and the reality of procedural and substantive justice.

The discussion to this point leaves many questions unanswered about the operation of international arbitration that can be addressed only by examining the actual behavior of international arbitration panels as they decide cases. For example, does the chairperson behave differently when selected by the parties or by the party-selected arbitrators than when the ICC or another arbitral institution appoints the chair? Does adversarial behavior by one of the party-appointed arbitrators invariably stimulate adversarial behavior in the other party-appointed arbitrator? With what effect? When the arbitrators are all from the same country (or from a particular country), are they more likely to agree on procedures? On outcomes? If one of the advocates is an English barrister who is a member of the same chambers as one of the arbitrators, does that connection affect the judgment of the panel? If so, in what way? Answers to these and other questions can contribute to the health of international arbitration by correcting misimpressions that are based on anecdotes or unusual cases, and can signal where

41. See, e.g., Joseph SANDERS and V. Lee HAMILTON, "Legal Cultures and Punishment Repertoires in Japan, Russia, and the United States", 26 *Law & Society Review* (1992) p. 117.

reforms may be appropriate. Although the exciting, but relatively young, world of international arbitration has spawned a large body of scholarship and commentary, most of the writing on the subject has been limited by the requirements of confidentiality that are a distinctive feature of international arbitration. There has been no study of international arbitration in which researchers have systematically observed and analyzed the actual behavior and decision-making process. Lest you think that such a research agenda for international arbitration merely represents another unrealistic professorial pipe dream, I want to close with an example to show that such apparently sensitive research can be carried out.

The jury in the United States is a constitutionally protected cultural icon, although it is frequently the subject of criticism. Its deliberations are confidential, and researchers interested in studying the jury have, for the past fifty years, set up mock cases and juries to study and interviewed jurors in real cases after their jury service was completed⁴² because they were not permitted to observe actual jury deliberations. Recently, with the permission of the Arizona Supreme Court, we were able, with the consent of the litigants and their attorneys, to videotape jury deliberations in fifty trials. The research was done with the understanding that only the researchers would have access to the tapes, and that any published results would not disclose the identity of the parties or their attorneys. Although the work is still in progress, my expectation – and that of those who have supported the research – is that this close study of a series of trials can provide insights and suggestions that could not be assembled through less direct means of study. Indeed, the project already has had that result⁴³ – but that is a subject for another occasion. I mention it here only to provide an example of research carried out on what would appear on the surface to be an impossible institution to study directly, and to invite you to consider new ways, consistent with the demands of confidentiality, to examine the psychology of dispute resolution in the exciting forum you have created.

42. Post-trial interviews with jurors are not permitted in some countries (e.g., England).

43. Shari Seidman DIAMOND, Neil VIDMAR, Mary ROSE, Leslie ELLIS and Beth MURPHY, "Juror Discussions During Civil Trials: Studying an Arizona Innovation", 45 *Az. L. Rev.* (2003) p. 1; Shari Seidman DIAMOND and Neil VIDMAR, "Jury Room Ruminations on Forbidden Topics", 87 *Va. L. Rev.* (2001) p. 1857.