

CHAPTER 10

THE ETHOS OF ARBITRATION

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Imagine two groups of people. The first group is composed of a colourful patchwork of individuals: some young, some old; some wild, some tame; some from the left, some from the right; some chagrined spirits, some solar souls; some cultivating friendship and warmth, some pursuing individuality and jealousy; some free, some revering Calvin, some fearing djinns; some machos and some tiptoeing angels; some male, some female, and some unclear; some enjoying this very text, some already hating it for its indecorousness in the legal academy. The second group is composed almost exclusively of white men aged 50 to 70, properly and somewhat strictly educated in European or North American universities, more possessive than generous, overworked and quite unhappy, rather disillusioned, all dark-suits-and-sober-ties, intellectually somewhat insecure, socially somewhat haughty.

Importantly, individuals in both groups have the same average legal proficiency.

Now imagine you are an individual. You have a dispute with another person. It bothers you greatly; it is the first thing that comes to mind when you wake up every day; it matters to you. One of the two groups – as a *group* – will decide on the outcome of your dispute. Which one do you choose? (Do pause to think.)

Switch hats. Now you are a society, a community. You know that within yourself there will inevitably be many people fighting over more or less anything. There will be disagreements; there will be disputes. These disputes, and how they are resolved, will very much structure what you are, as a society. Again the two groups from above present themselves to offer their services in taking care of these disputes. Which one do you choose?

Switch hats one last time. You have become a big, grey, soulless company. Churning out profits, grinding lives within. A rival company uses an idea close to yours and makes with it even more profit than you do. You see an opportunity to move in for the kill, invoking a patent infringement. Which group of decision-makers is for you?

Alright. If you are a normal human being, you probably have a preference between the two groups for each of your successive hat-wearing roles.

If, instead, you are a properly trained lawyer from a proper, upright law school, if you have performed well so far in what remains the dominant way of teaching law and thinking about law, then you should in fact not have a preference at all between the two groups. Remember: the members of the two groups have the same average level of legal proficiency. And as a 'good lawyer', you probably have been led to believe that the same level of interpretive proficiency and legal knowledge will lead them, will lead anyone, to the correct legal solutions with the same likelihood.

If, now, you are a social psychologist, it may well be that you would in fact choose the first group, for all three situations. You might do so regardless what your own values are, what your traditions and political orientations might be, even if you only care about yourself and care nothing about minorities and diversity and equality and representativeness for the sake of representativeness. You might choose the first group because it is likely, as a group, to make better, smarter, more innovative, more adaptive decisions. Diversity makes the group better 'cognitively' as it were.

If you are mostly anyone except the properly trained lawyer from above, you would also understand that choosing between these two groups amounts to choosing between two different universes of justice, two different axiological fields, two different worlds of references. Two groups governed by two different ethos. Two groups governing *through* two different ethos.

This chapter seeks to explain what just happened. And considers how it may play out in arbitration.¹

¹ This chapter builds on earlier work, some with colleagues, some without: Thomas Schultz and Robert Kovacs, 'The Law is What the Arbitrator Had For Breakfast: On the Determinants of Arbitrator Behavior' in J.C. Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016) 238; Thomas Schultz, 'Arbitral Decision-Making: Legal Realism and Law & Economics' (2015) 6 *Journal of International Dispute Settlement* 231; Thomas Schultz, 'The Three Pursuits of Dispute Settlement' (2014) 1 *Czech & Central European Yearbook of Arbitration* 227; Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth' (2012) 28 *Arbitration International* 161.

The discussion starts with the distinction of two well-known schools of thought regarding how legal decision-makers make decisions, how judges and arbitrators decide cases. The point is simply to anchor the discussion in a recognizable and hopefully helpful theoretical framework. I will be speaking, very briefly, of legal formalism and legal realism, of justification and decision-making, or rules and ethos. The rest of the discussion will then endeavour to itemize credible factors of arbitration decision-making, things that likely determine the decisions arbitrators make. I will group these factors in two categories, corresponding brutally to two approaches in law & economics, of which I will make an entirely rough rendering: rational choice theory and behavioural economics. That distinction, to be clear, is strictly not important for the contents of the discussion: it is just there to put it all into some sort of order, some sort of logical organisation.

In the end, the argument this chapter makes is a simple one: the ethos of arbitration plays a role in the decisions that arbitration produces, and this ethos is not necessarily one that is suited for all the different types of parties and disputes that arbitration has come to cover. It also may not be one that our political societies will necessarily condone now that they are becoming aware of it. And it probably is even damaging for the arbitration industry in the longer run.

I. LEGAL FORMALISM V. LEGAL REALISM

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The distinction between legal formalism and legal realism is not quite new in legal scholarship. But notice how, in just a few pages, it makes the argument to come rather obvious.

The core idea of legal formalism is simple: judges apply law to facts. This sounds good, straightforward, axiomatic even. But behind this simple statement is the idea that judges apply the law to the facts of the case and, if this is done competently, thus reach the correct answer. *The correct* answer. Generations of law students have been tortured with this idea that their job is to find the correct answer in a wide range of situation. But, indoctrination aside, when we think of it, the idea really is not entirely agreeable that there is one correct answer to a legal question, and that we need to search for it, as we search for something in nature with a magnifying glass; that it is already out there, and that we don't make it.² That this happens sometimes, yes, quite possibly, but that this is representative of how things work generally?

² Daniel Bodansky, 'Legal Realism and Its Discontents' (2015) 28 *Leiden Journal of International Law* 267, 271: in this approach, "[p]olicy considerations, morality, ideology, the personal sympathies and assumptions of the judge – none of these factors matter in [adjudicate decision-making], since judges do not make the law, they simply find it."

From this a further point follows: the point that legal decisions are correctly inferred from rules and facts through logical deduction, that logics is entirely enough to come to correct legal solutions, that law is all about logical, mechanical, deductions of answers from general rules applied to concrete facts. In this understanding, adjudicative decision-making is a rule-based activity with external factors having no bearing on the outcome of cases, having nothing to do in adjudicative decision-making.³ Judges apply the law deductively and get to the right answer. It's all about matter-of-factly deducing answers from rules applied to facts.⁴

This is the approach that Justice Brett Kavanaugh, appointed in 2018 to the US Supreme Court, raised as a shield when he was fighting off accusations of sexual misconduct, in his Opening Statement to the Senate Judiciary Committee:

‘A good judge must be an umpire—a neutral and impartial arbiter who favors no litigant or policy. As Justice Kennedy explained ... judges do not make decisions to reach a preferred result. Judges make decisions because “the law and the Constitution, as we see them, compel the result.” Over the past 12 years, I have ruled sometimes for the prosecution and sometimes for criminal defendants, sometimes for workers and sometimes for businesses, sometimes for environmentalists and sometimes for coal miners. In each case, I have followed the law. I don't decide cases based on personal or policy preferences. I am not a pro-plaintiff or pro-defendant judge. I am not a pro-prosecution or pro-defense judge. I am a pro-law judge.’⁵

In other words his argument was this: ‘Come on, what's all the fuss about my behaviour, the law and the constitution compel the result anyway, so let me do my job and tell you what it is that they compel; my personality is irrelevant; what I do or don't do with defenceless women in my free time is beside the point, has nothing to do with what the law and constitution say.’ Rarely, probably, has a star judge been so keen on portraying himself as a powerless, nearly robotic bureaucrat.

Another example: Justice Antonin Scalia, a US Supreme Court judge positively famous for his particularly conservative and nationalistic views,

³ Richard Posner, *How Judges Think* (Harvard University Press 2008) 41; Matthew C. Stephenson, ‘Legal Realism for Economists’ (2009) 23 *Journal of Economic Perspectives* 191, 193; Daniel Bodansky, ‘Legal Realism and Its Discontents’ (2015) 28 *Leiden Journal of International Law* 267, 271.

⁴ Richard Posner, ‘The Jurisprudence of Skepticism’ (1988) 86 *Michigan Law Review* 827 at 865; William M. Wiecek, *The Lost World of Classical Legal Thought* (OUP 2001) 7: judges have ‘no more discretion to invent a legal rule on instrumentalist grounds or policy preferences than a chemist ha[s] to dictate the outcome of an experiment’.

⁵ Brett Kavanaugh, Opening Statement to the Senate Judiciary Committee, 4 September 2018.

defended his approach to judging with the following statement: interpretation, he said, 'begins and ends with what the text says and fairly implies.'⁶ I'm not really conservative, the idea goes, I just read the text better than others.

Regardless of the credibility one accords to such statements, one has to stop: wait a minute, how about a judge's sense of justice? Surely judges try to do justice? Surely the function of judges is to render justice? Now do judges really only think about justice as being a good mechanic, a good logician?

If you start to think that way, you are quickly drawn to wondering whether judges really have no ideologies, no political preferences. Or rather that their ideologies and political preferences play out in real life – in how they vote, in the entertainments they pursue, in the people they socialise with, in the cars they drive, in the clothes they wear, in the drinks they drink – but not in the legal decisions they make. Really? Then you might ask, if it's all logical, can't a computer do it? Can't a computer do it better than a human being? You might also ask, if you embrace this approach, that there really is no reason for law students to learn about legal philosophy, about values, about history, about symbols in justice. Shakespeare's great plays, for instance, with all their quests for quasi-universal truths about justice, can't possibly tell us anything relevant to how judges take or should take decisions. You might even think that the fate of women in the US will not get worse because of Brett Kavanaugh's appointment.

You might even wonder, if you're both really eager and consequential in your thinking, why the curriculum of law studies doesn't involve a heavy dose of formal logics – if really it is all about mechanical, logical deduction.

The sort of discussion I've been conducting so far in this chapter is often disliked by lawyers.

The more candid ones explain that this is the only way they know how, that it is the only thing they were ever taught (at least in law school). In fact, if we don't think that way, we are told we are not good lawyers. Well, quite; it's true that most law schools deliver this sort of message. But what should be clear is that formalism is just one school of thought. Just one. There are other ways to think about how law works, how judges make decisions, what makes a good lawyer, what law is all about.

This implies that law teaching in most law schools, where it is focused on formalism only, makes these law schools akin to schools of divinity, as opposed to faculties of theology. (A faculty of theology, at least for the sake of the argument I'm trying to make here, is a place where you learn about religions, about religion itself, the idea of a religion, what the role of religion is. A school of divinity is a place where you are taught to think as the members of a given religion think, where you are taught a certain religion, a certain faith. You are not free to choose. You are not supposed to think by yourself. You are supposed

⁶ Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson West 2012) 16. The full quote is 'Textualism, in its purest form, begins and ends with what the text says and fairly implies.' Textualism was Scalia's favoured approach.

to learn, remember, and reproduce. Hey (former) law student, these last three verbs sound familiar?) Put yet differently, imposing the view that formalism is the only way to do things with law is a form of anti-intellectualism.

But enough deconstruction. Let me turn to reconstructing something else. This something else is legal realism. Which, of course, is only another school of thought. It is not 'the truth' either. Just another school of thought, which allows us to think differently and therefore see different things.

So the first thing legal realists say is this: formalists have forgotten a key thing about human beings. This key thing is the distinction between decision-making and justification, between how we make decisions and how we justify our decisions.⁷ The point is terribly simple. But here are two quick examples, just to make this more concrete. I might say I'm late in completing this chapter for the Handbook because I have too many ongoing academic projects, but in reality my private life took an interesting turn which I'm not supposed to talk about. Or I might say, as a judge, that I decided that the accused got 15 years in jail because I just applied the law, but in reality the victim reminded me of my own sister, who died very young.

So legal realists said yes, of course, the way judges *justify* how they make decisions is correctly described by the formalists; they got it right on this point. Legal realists and formalists agree that judges justify their decisions by pointing to mechanical deductions of decisions from general rules applied to concrete facts. But decision-making, legal realists continue, is different. Realists want to be... realistic. They consider judges to be human beings.⁸ And as human beings, there is no reason judges would not take the law into consideration when they make decisions, but equally there is no reason why they should not also be influenced by a whole variety of other factors. Such other factors could for instance be their own pursuit of justice, the fact that they want to appear in a positive light when they make a decision, that at least some of them hope for a promotion to a higher court somewhere, that they want to be able to come home and tell their husbands and girlfriends that they took the right decision, etc. And arbitrators, of course, are no different; they simply have different determinants, different constraints and incentives that influence their decision-making. They also make 'mistakes' in their decisions, as any human being from time to time does, and their 'mistakes' may be different from those of judges because other cognitive biases and heuristics colour their thinking.⁹

⁷ Joseph W. Singer, 'Legal Realism Now' (1988) 76 *California Law Review* 465, 472. See also Brian Z. Tamanaha, 'Understanding Legal Realism' (2009) 87 *Texas Law Review* 731, 752; Frederick Schauer, 'Legal Realism Untamed' (2013) 91 *Texas Law Review* 749, 755-756.

⁸ Jerome Franck, 'Are Judges Human? Part II' (1931) 80 *University of Pennsylvania Law Review* 233.

⁹ This idea of arbitrators' cognitive biases and heuristics was first explored by Susan D. Franck, Anne van Aaken, James Freda, Chris Guthrie, and Jeffrey J. Rachlinski 'Inside the Arbitrator's Mind', 66 *Emory Law Journal* 1115 (2017). See further, in this volume, the excellent discussion in Anne van Aaken and Tomer Broude, 'Arbitration from a Law and Economics Perspective', in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of*

So what? Well, the point of this chapter will precisely be to show the what. But already now a simple observation might point the way. In his contribution to the Handbook, Moshe Hirsch writes that ‘notwithstanding numerous arguments raised by various parties, and few tribunals’ general statements regarding the superior status of peremptory human rights, no investment tribunal has discharged a party from its investment obligations or reduced the amount of compensation due to the injured party’.¹⁰ If we take a realist’s approach, we would have to acknowledge that the situation may be much better (or worse, depending on the axiological preference) than it looks: the only thing we do know is that no investment tribunal has yet been willing to justify its decision on these points by reference to peremptory human rights norms. Whether the changing ethos in investment arbitration, suggested by the first part of Hirsch’s quote, has indeed had an influence on investment obligations and compensation is unknown and would be extremely difficult to ascertain with certainty – but it just appears rather likely. This would further suggest that human rights ‘activists’ likely are making an impact through their work; they likely are changing the way investment arbitrators make decisions. The counter-argument ‘Well, then show me the change’, demanding as proof that this change figure in the text of arbitral awards – it misses the point entirely. It misses the point out of what one might be tempted to call ‘blinding formalism’.¹¹ That arbitrators are not yet willing to acknowledge any of this in how they justify their decisions is a different matter, determined by different factors.

Don’t get me wrong, though: yes, there clearly is a relationship between justification and decision-making, in the sense that when judges or arbitrators decide something, they most likely already think of how they will have to justify their decision. And when they justify their decision, they presumably normally try to take into consideration as much as possible of what led them to the decision in the first place. But different likely determinants guide decision-making (which I’ll discuss in the balance of this chapter) and justification (elements of socio-professional propriety come to mind, which plainly relate to questions of ethos too, but their difference from decision-making are arguably important enough to deserve a study, and a paper, of their own).

One important point to remember from this discussion is that it is really quite wrong to say that legal realists say that law has no role to play.¹² Many people

International Arbitration (OUP 2019 forthcoming) and Christopher Drahozal, ‘Empirical Findings on International Arbitration: An Overview’ in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP 2019 forthcoming).

¹⁰ Moshe Hirsch, ‘The Sociological Dimension of International Arbitration: The Investment Arbitration Culture’ in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP 2019).

¹¹ Jerome Franck, *Law and the Modern Mind* (Transaction Publishers 2009 [originally published 1930]) 53, 165: legal formalism is blind ‘legal fundamentalism’, blinker-wearing ‘rule-fetichism’.

¹² Jakob V.H. Holtermann and Mikael Rask Madsen, ‘European New Legal Realism and International Law: How to Make International Law Intelligible’ (2015) 28 *Leiden Journal of*

accuse realists of this, but this is clearly incorrect, a witless misunderstanding or a facile straw man. Legal realists simply say that if you want to understand how judges make decision, if you want to understand judicial decision-making, if you want to understand how law works in practice, if you want to understand the life of the law, you have to look beyond the codes and statutes and cases and all the law on the books. You have to look at people. And if we want to understand arbitral decision-making, we need to look beyond the black letter law rules of arbitration. We have to look at the people, at what credibly makes arbitrators decide the cases the way they do. (If this now sounds boringly obvious to you, do realise that what I'm saying here is still blasphemy in most legal circles.)

To close this discussion of formalism v. realism: as I said, formalists tend to argue that there is a (in principle one) correct answer to a legal question.¹³ Realists, on the other hand, would rather contend that there is more than one correct decision. Because, what is a correct decision? It is one that can be justified, in law, and typically there's more than one decision that can be justified in law, with justification being nothing more than a social construct of acceptability. There's typically a range of correct legal decisions for a given legal question. The question that is of interest, then, is which one of the many possibilities within this range will the judge, or the arbitrator, most likely choose? And the answer to this question is what the balance of this chapter ponders.

II. RATIONAL CHOICES

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As I said in the introduction to this chapter, I will sort the different likely factors that influence the decisions of arbitrators in two categories, which roughly correspond to two approaches in law & economics: rational choice theory and behavioural economics. But I need to enter this caveat: the chapter does not seek to contribute to the theory of law & economics, to the conceptualization of the different types of factors that influence decision-making. My categories may be sloppy. My arguments may not be fully congruent with law & economics theory. The terminology I use might make economists sigh in irritation. But it doesn't matter. I'm not trying to build a coherent system of thought.¹⁴ I'm merely trying

International Law 211: embracing legal realism does not imply to discard the epistemology of internal doctrinal approaches in order to inevitably turn to the empiricist methodologies of the social sciences, falling from one into the other as it were.

¹³ I do of course recognize that I am setting up a straw man myself here, but I do not wish to start a discussion of determinacy within the formalist tradition. My point is clearly not to suggest that the formalists are wrong on that particular argument.

¹⁴ For a conceptually cleaner and more sophisticated discussion of the same overall articulation, see Myriam Gicquello, 'The Reform of Investor-State Dispute Settlement: Bringing the Findings of Social Psychology into the Debate', forthcoming.

to point to some factors of decision-making. Factors which I believe to be critical if we want to understand how arbitrators are likely to take decisions, now and in the future, now and in reaction to the different changes in the arbitration regimes that inevitably will come, in particular in investment arbitration. This will lead me in the end to an insistence on how important it is to understand the ethos of this field of practice.

Let me start with rational choice theory, with the incentives and constraints that arbitrators should respond to if they were perfectly rational beings.¹⁵ A rational choice, in that sense, is one by which you get the best reward, by which you maximize your utility, your interests. Now, no one, of course, is perfectly rational. But few people are perfectly irrational either. Where exactly a given arbitrator in a given situation and an idealized average arbitrator in an idealized average situation are on this continuum of sorts between rationality and irrationality isn't a possible task for this chapter. My point here is simply to suggest what rational determinants of behaviour arbitrators are likely to respond to; sometimes this will check out in practice, sometimes it won't: my hope is merely that this perspective clarifies more than it muddles our understanding. I aim at nothing close to a computational, algorithmic representation of arbitrator decision-making, at no model offering great predictive accuracy in actual cases.¹⁶

Over the next pages, I will first briefly elaborate on what rational choice theory means in the current context. Then I will apply this theory to arbitrators' decisions on the merits, to procedural decisions, to 'extreme' arbitration decisions, and finally to decisions which in fact have little to do with the case at hand.

So, the general idea is very simple: it is to consider that every person tends to maximise her self-interest. This is, roughly, the idea of rationality in this context. In theory every person tends to do this, and this includes every decision-maker, and arbitrators too. This means that when arbitrators make decisions, they would have their own interests in mind. Or not actually consciously in mind, but in its translated form of a self-serving bias, in the sense of 'a simple psychological mechanism [leading to] conflate what is fair and what benefits oneself.' (In plain language: I only do what is fair, but what I find fair is unconsciously shaped by what serves my interests.¹⁷) And why would they not?

To be clear, when I say that arbitrator pursue their own interests, that they maximise their own interests, by 'interests' I mean both what economists call self-regarding interests (such as making yourself richer, even if just a bit), something that benefits only yourself or at least that directly benefits yourself,

¹⁵ A discussion of rationality can be found in van Aaken and Broude, 'Arbitration from a Law and Economics Perspective'.

¹⁶ For a discussion of the methodological objectives of law & economics, see the discussion in van Aaken and Broude, *ibid.*

¹⁷ George Loewenstein, *Exotic Preferences: Behavioral Economics and Human Motivation* (OUP 2007), 219.

and I also mean what economists call other-regarding interests: here the idea is that if I like someone and make that someone happy, that makes me happy too. These are interests that benefit me indirectly, by directly benefiting someone else.¹⁸

Now, what does the idea that arbitrators pursue their own interests tell us about how they are likely to make decisions on the merits?

I will start with the least controversial bit. Arbitrators have a rational interest in applying the law applicable to the merits in a way that corresponds to the parties' expectations: this implies, for instance, to transnationalize the law applicable to the merits.¹⁹ What this concretely means is that if, say, Turkish law is applicable to the merits of a case, arbitrators are likely to apply it differently than the Turkish courts would. The arbitrators would apply it in a way that better fits the transnational environment of arbitration. Turkish law is made less idiosyncratic, less locally particular, coloured by what would be done elsewhere.²⁰ (To be clear, my argument does not imply that Turkish law is more idiosyncratic than any other national law.) If, for instance, you have a certain clause in Turkish law about when the risk passes from the seller to the buyer which is a bit unusual, it will be reinterpreted in a way that is closer to, say, the UNIDROIT principles. Nothing contentious here. But do notice that we are not in the realm of mechanical inference of decisions from rules.

Let me turn to something more controversial, from which more pungent points follow for our understanding of arbitration as a socio-legal phenomenon and its overall ethos. As an arbitrator, your interests are not advanced much by making good decisions on the merits. By good decisions, I mean decisions whose justifications in law are reasonable, understandable, well-articulated, sophisticated where sophistication is required, thorough in their analysis,

¹⁸ On self-regarding and other-regarding interests, I am stealing the citations from Aaken and Broude, *ibid*, who discuss these conceptual points far more elegantly than I do: Ernst Fehr and Klaus Schmidt, 'The Economics of Fairness, Reciprocity and Altruism – Experimental Evidence and New Theories' in Serge Kolm and Jean Mercier Ythier (eds), *Handbook of the Economics of Giving, Altruism and Reciprocity* (Elsevier 2006), Vol I, s. 2 and Werner Güth, Rolf Schmittberger and Bernd Schwarze, 'An Experimental Analysis of Ultimatum Bargaining', (1982) 3 *Journal of Economic Behavior and Organization* 367. Technically, in economic theory, this inclusion of both self-regarding and other-regarding interests is a departure from classic rational choice theory and embraces elements of more recent behavioural economics. But as I said, let's not go there, it doesn't make a difference to my argument.

¹⁹ Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity, or Excuse?' 23:3 *Arbitration International* 357 (2007) 364; Gabrielle Kaufmann-Kohler, 'Le contrat et son droit devant l'arbitre international' in François Bellanger et al. (eds), *Le contrat dans tous ses états* (Geneva, 2004) 361. I have discussed this at greater length than I can do here in Thomas Schultz, 'Some Critical Comments on the Jurisdiction of Lex Mercatoria' 10 *Yearbook of Private International Law* 667. See also the discussions of the implications of this practice in Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration. Judicialization, Governance, Legitimacy* (OUP 2017) 125 and Dolores Bentolila, *Arbitrators as Lawmakers* (Kluwer 2017) 164.

²⁰ This can be likened to the so-called 'globalist' mindset of certain judge, which relates to the degree to which they take foreign law into account when interpreting national law: see for instance Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart 2013), 102-106.

precise in their reasoning. Rationally, if you are an arbitrator, you shouldn't care much about decisions on the merits and shouldn't put much effort into them. If your time and energy are limited, rationally you should rather do something else.

Why is this?

First of all, there is almost no direct sanction for arbitrators releasing a bad decision on the merits: the award is simply very unlikely to be set aside on this ground. Bad award on the merits? Well, too bad. Nothing much happens, at least formally. From a legal, black letter law perspective, the system of arbitration is built in such a way as to allow the production of arbitrary or nearly arbitrary decisions on the merits with no formal consequence. Why would anyone issue a nearly arbitrary decision? Because it takes less effort. Why would anyone favour what takes less effort over what takes more? Well, that is precisely the point of rationality. 'The system' says that you have done your job as an arbitrator if you render anything but the craziest decision on the merits, one that can actually be set aside on a point of merits.

Very little happens on the informal front too: there's little reputation sanction for poor merits decisions because most awards are confidential. Almost no one beyond the parties will know that an arbitrator messed up on the merits. As an arbitrator you are unlikely to lose future mandates, future appointments, because of bad decisions on the merits, because almost no-one will know you did.

Yes, but eventually word of mouth will catch up with you, right? Surely people will know, progressively, that you are reckless on the merits and you will get a kick?

Well, it appears you won't.

A few years ago, a colleague and I conducted a survey of the grounds on which counsel choose arbitrators.²¹ 'Does it matter to you, and to your client, that the arbitrator you intend to appoint is a good and committed lawyer on points of substance?', we essentially asked. 'No', in effect, was their answer. Legal proficiency for merits decisions was not, they said, a criterion for appointment. So even if you build a reputation for bad decisions on the merits, it would appear not to damage your attractiveness as an arbitrator.

This makes perfect sense. One way to understand arbitration is to see it as a business thing for business people. And business people, one may assume, want to win more than anything else; they want an award in their favour, not (to go into extremes for the sake of the argument) a demonstration of scholarly erudition. If they lose, they are unlikely to be terribly interested in whether it was due to a reasonable, understandable, well-articulated, sophisticated, thorough, and precise decision or just because of tough luck. And if they win, why care if the decision made good legal sense? From that perspective, the criterion for selecting an arbitrator would simply be this: how likely will I win

²¹ Schultz and Kovacs, 'Third Generation of Arbitrators'.

with this person? It wouldn't be: 'does this arbitrator drafts good awards on the merits?' From that perspective, choosing an arbitrator is not about justice; it is about chances of winning.

Surely, then, things are different for investment arbitration? Because there, many if not most awards are published, and the legal quality of the reasoning is dissected ad libitum by scholars and practitioners alike. So if it becomes widely known that an arbitrator's reasoning in investment awards is, say, manifestly contradictory, inconsistent or practically non-existent, then this person's appointments as arbitrator quickly dwindle, right?

No, it appears they don't. In a paper published a few years ago, Federico Ortino identified a number of investment arbitral decisions based on 'egregious failures', produced by arbitral legal reasoning that precisely was 'manifestly contradictory, inconsistent or practically non-existent'.²² And these people's appointments did... nothing special. Their attractiveness as arbitrator seemed unaffected. (A caveat must be entered: I didn't actually run statistical regressions on these arbitrators' appointments to exclude the significance for appointments of criticism on reasoning, so I have no reliable statistical proof for my argument. But from an insider's informal view, demand for these individuals has not been altered.)

Think for a moment about what's involved here. If there is little incentive to make efforts to produce good decisions on the merits, if the objective of crafting well-articulated, thorough, etc., awards on merits is not an important factor of arbitrator decision-making (technically it would be a meta-factor, but never mind), then one can expect overall lower quality merits decisions from arbitrators than from judges. Whether this is indeed the case is extremely hard to assess reliably. Then again, if you compare the decisions of, say, the International Court of Justice and the Swiss Supreme Court and the French Cour de Cassation and the UK Supreme Court to the awards of some of the leading investment arbitrators, a noticeable difference does emerge. Few people have seriously argued that decisions of the ICJ and the other courts just mentioned are based on reasoning that is manifestly contradictory, inconsistent or practically non-existent. It would seem, then, that in the ethos of arbitration, great lawyering on points of substance is not particularly a virtue – and rationally so. To arbitration insiders, this is boringly commonplace. To outsiders, it may well be somewhat unsettling.

A further point follows: if it doesn't matter to make good decisions on the merits or not, why not let someone else do it for you? If you are an arbitrator, why not let, say, you first-year junior associate make the decision for you? Which in practice may for instance mean that the arbitrator decides who wins and perhaps how much, but then the reasoning justifying this conclusion, the crafting of the decision as it were, is left to someone else – just like any other task

²² Federico Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 *Journal of International Dispute Settlement* 31, 31.

which is rationally not really important because it has little impact if done wrong, is thus not really part of the core of one's job, and should be left to some deuteragonist, should be delegated. All this, I insist, would be rational behaviour.

Now does this actually happen? To be sure, an empirical study would be ideal. (Not of course the sweet sort, as do exist, which ask arbitrators if they themselves do it.) But in the meantime, if a particular practice has a particular name, it is probably fair to assume it is somewhat widespread. The name here is 'the fourth arbitrator'.²³ Some arbitrators do have a clear reputation for using 'fourth arbitrators' – for delegating the actual legal reasoning in part or in whole, if not the decision itself, to the secretary to the tribunal. Again, why not after all: if rendering bad decisions on the merits doesn't really count in the game? And again, our survey of the grounds on which counsel choose arbitrators showed that reputation for delegation does not decrease an arbitrator's allure for appointment.²⁴ So: taking and reasoning the decisions for which you have been appointed does not seem to be a virtue in the current arbitration ethos – quite rationally so. And again: a dull, if somewhat indecorous point to insiders, but a possibly peculiar one to outsiders.

The story is different for procedural decisions. Arbitrators have much greater rational interest in their decisions on points of procedure.

This is so, first, because of how the system is built. The award may be set aside if it results from defective procedural decisions – the grounds for annulment are normally procedural. As an arbitrator, if you mess up the conduct of a procedure, you may well be formally considered not to have done your job properly, which is the meaning of having your decision annulled. So there are greater direct sanctions for decisions on procedure, which increase their rational importance, their value for arbitrators.

There are also more powerful reputation sanctions at play here: procedural mistakes are more easily discernible by the community, 'derailed' arbitrations easier to identify. When something is wrong procedurally, it is more obvious than when something is off on the merits. Messed up procedures lead to all sorts of moves by the aggrieved party. A bad decision on the merits provokes little reaction.

It would follow that, if procedural decisions are valuable to arbitrators, this creates an incentive to produce good decisions, and thus overall one can expect fairly high-quality procedures in arbitration. Based on experience, this would

²³ Simon Maynard, 'Laying the Fourth Arbitrator to Rest: Re-valuating the Regulation of Arbitral Secretaries' 34 *Arbitration International* 173 (2018); Andrew Williams, 'Tribunal Secretaries: The LCIA Seek to Rein in the 'Fourth Arbitrator'', Holman Fenwick Willan Briefings, November 2017, www.hfw.com/Tribunal-Secretaries-the-LCIA-look-to-rein-in-the-Fourth-Arbitrator-November-2017; Lawrence W. Newman and David Zaslowsk, 'The Yukos Case: More on the Fourth Arbitrator' *New York Law Journal* 28 May 2015; Constantine Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' 18 *Arbitration International* 147 (2002).

²⁴ Schultz and Kovacs, 'Third Generation of Arbitrators'.

seem to be true. A proper study would require reliable markers of procedural quality with sound comparators for other dispute settlement mechanisms – this seems barely feasible.

It would also follow that arbitrators would have much less reason to delegate the procedural handling of a case to someone (unless the someone is more competent than they themselves are, but that is a different scenario altogether).

Now notice the irony of what this implies – the sort of irony that only real life can imagine: when you choose an arbitrator, you can expect to get a real ‘day in court’ with her, to have a good procedure during which you can really make your case and everything is handled well. But this does not necessarily have much of an impact on the substantive outcome.

But let me change tack and look at the goodness of good procedural decisions from a different angle. Arbitrators can make, and have a rational interest in making, procedural decisions which aren’t only good for the parties, but good for themselves too (or good for themselves instead).

The point is again terribly simple. The size of the overall arbitration pie is in part defined by procedural decisions that arbitrators themselves make. Some procedural decisions create jobs for arbitration. If an arbitrator asserts jurisdiction over a given dispute, or considers a given claim admissible, he creates a job for himself. If she does that for an entire array of disputes, by contributing to the shape of certain legal doctrines (questions of non-signatories, arbitrability, or thresholds of validity for arbitration agreements come to mind), she creates an entire array of jobs. This aspect of arbitration is in fact at the very heart of what allowed it to become such an industry.

Let’s pause for a moment to consider the power, and the temptation, that are involved. Imagine someone offers you a job. You really want the job, for some reason or other, otherwise you wouldn’t be in the trade to begin with. You can always take the job, because even if you have too many of them you can delegate much. The only thing required for you to actually get it is a legal condition which needs to be fulfilled. And you are the one who decides whether the condition is fulfilled or not. If you find that, no, the condition is not fulfilled, the job is gone. If you find that, yes, the condition is fulfilled but later a court says you shouldn’t have found that, then... nothing, really, happens to you. True, your award may get annulled, but essentially you get to keep the money.

And so, over time, the obstacles to the occurrence of individual arbitrations have progressively decreased, the arbitration industry has grown, the ethos in the community has consolidated. A great number of arbitrations have taken place which wouldn’t have but for these mechanisms. This may be for better or worse, but certainly it is for the better of arbitrators and the arbitration community at large. If it weren’t for this, the whole field would have been smaller, less significant legally, economically, socially; I wouldn’t be here writing this; you wouldn’t be there reading it; there wouldn’t even have been an Oxford Handbook of International Arbitration at all – you get the point.

Oscar Wilde points the way to the next observation about arbitrators' rational interest in their own decisions: 'The only thing worse than being talked about is not being talked about.' It is worse not to have a reputation than to have a bad reputation. It is worse not to be known than to be known for making bad decisions.

For what are 'bad' decisions really? For instance, biased decisions on the merits, systematically favouring one type of party, are in fact entirely valuable in stimulating party appointments of wing arbitrators. After all, it is widely believed (rightly or wrongly²⁵) that the choice of partisan wing arbitrators by each party is their best option. (Of course, this works only for those types of arbitrations, such as investment arbitration, in which there are discernibly different types of parties; this is not the case of many commercial arbitrations between corporations.) More surprisingly perhaps, even a reputation for making nominally 'bad' procedural decisions may help attract appointments: a tendency to make procedural decision which derail arbitrations may be precisely what certain parties want, in principle respondents. Think of it this way: if a decision needs to be taken on something, on some point of office politics for instance, but you don't want the decision to be taken at all, what better than to entrust the decision to a committee you know will be paralyzed by infights? I'm not making this up. If you'll allow an anecdote: a few years ago, someone asked me what I thought of a given person as a possible arbitrator on a three-member panel. I winced. And politely explained, my face probably marked by furrows of worry, that the risk of endless complications would be real. My interlocutor gracefully smiled. And said nothing. I suppose partly because it confirmed the hopes and partly because of how naïve I had been in not understanding the strategy. Two years later, the arbitration was making as much progress as a sports car in the sand. (Sadly enough, the arbitrator in question was socially beaming with pride at having been chosen for such an important case.)

Finally, a quick point needs to be made about arbitrators' incentive to source non-arbitrator work. The point, simple as it is, helps understand both the rational determinants of arbitrator decision-making and the overall arbitration ethos. For many arbitrators, interesting as arbitrator work might be, it shouldn't come at the expense of better paying counsel work, for the arbitrator herself or for her law firm. So long as arbitrators also have revenues, directly or indirectly, from non-arbitrator work for a certain community of clients, the interests of these clients are likely to rationally incentivize or constrain their decision-making. Here's a simple example: if you, an arbitrator, are part of a law firm which advises, say, pharmaceutical companies, then it would be unwelcome for you to support arbitration decisions against the general interests of the pharmaceutical industry. We all effectively represent the interests that are at

²⁵ Todd Tucker, 'Inside the Black Box: Collegial Patterns on Investment Tribunals' 7 *Journal of International Dispute Settlement* 183 (2016), suggesting that too partisan arbitrators may in fact lose persuasive power and thus end up isolated on arbitral tribunals, in the minority.

stake for us when we participate in collective decisions. For law firms, the most interesting clients are not normally consumers, developing states, NGOs, human rights groups, etc. The most interesting clients are normally corporations; the bigger the better. This issue, generally called the problem of ‘double-hatting’ of individuals as arbitrators and as counsel, is well known.²⁶ It simply bore repeating here, in order to offer a more complete picture of the arbitration ethos, which is based in part on the rational choices offered to arbitrators.

III. BEHAVIOURAL ECONOMICS

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As fits my profession (I’m an academic), my perspective is more categorical, more critical, more eerie too, and above all more irritating and unseemly than the representation people typically have of arbitration. But as fits my profession, I’m offering it anyway. I can already hear the reaction: ‘It isn’t as bad as his discussion suggests. Arbitrators aren’t single-mindedly focused on their own interests! Pffft, academics...’

Quite. But wait.

The reality is indeed not exactly like what I’ve described above.

One reason is that our actual rationality, so to speak, is imperfect. We, arbitrators or not, don’t always make decisions which are good for ourselves, or at least not as good they ideally, theoretically could be. We are not always rational and rarely entirely rational. We don’t always maximise our self-interest, our utility. We are usually rational within limits. Economists might say that our rationality is bounded by information limitation (we don’t know everything and make uninformed decisions), by cognitive limitation (we don’t understand everything), and by time limitations (we can’t wait, essentially).²⁷ Psychologists, sometimes on a different tack than economists, might suggest that we also make decisions based in part on emotional and identity-based factors, guided as we

²⁶ See for instance Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’ 20 *Journal of International Economic Law* 301 (2017).

²⁷ Herbert Simon, *Models of Man, Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting* (Wiley 1957), 198: ‘The alternative approach employed in these papers is based on what I shall call the principle of bounded rationality: The capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behavior in the real world — or even for a reasonable approximation to such objective rationality. Herbert Simon, ‘Rational Decision Making in Business Organizations’ [Nobel Memorial Lecture], 69 *American Economic Review*, 493, 502: ‘bounded rationality is largely characterized as a residual category — rationality is bounded when it falls short of omniscience. And the failures of omniscience are largely failures of knowing all the alternatives, uncertainty about relevant exogenous events, and inability to calculate consequences.’

often are by what we feel in the moment and by how we perceive ourselves, by how we construct our own identity.²⁸ (Whether emotionally best decisions are, after all, part of our self-interest, and their pursuit thus rational, is a discussion we don't need to have because it makes no difference to the points I'm trying to make.) All of these are, in essence, the factors that behavioural economics focus on.²⁹

The point here, brutally simplified, is this: 'All sorts of extraneous factors – emotions, biases, and preferences – can intervene, most of which you can do absolutely nothing about'.³⁰ (That, by the way, is how Justice Antonin Scalia conceded that his way of thinking doesn't, in fact, entirely begin and end with the text.)

So, what are the extraneous factors likely to influence the decision-making of arbitrators? These are, then, factors beyond the mechanical application of law to facts and beyond the rational responses to interest-maximization discussed above.

More precisely, what are the factors that are specific to arbitrators, as opposed to judges for instance, or the factors that play out specifically in arbitration? This precision is important because an entire array of factors beyond law and beyond what can be explained by rationality play a role in the decision-making of any legal authority: so it was for instance shown that judges are influenced by inadmissible evidence (for example a privileged document, which is displayed in court in breach of the rules of procedure and which a judge cannot, legally, take into account, nevertheless likely influences the judge's decision); by confirmation bias (once an initial idea of guilt or liability takes hold, all subsequent elements of the trial are interpreted in favour of that initial idea); by hindsight bias (for example, when determining liability, behaviour that is obviously reasonable after a fact is considered to have been clearly reasonable before the fact as well); by anchoring (simply mentioning a figure, with regard to liability for instance, in the relevant context tends to 'anchor' representations of what is an appropriate figure); and even by blood glucose levels (hypoglycaemia leading to decisions more likely to uphold the status quo).³¹

²⁸ See for instance Roberta Muramatsu and Yaniv Hanoach, 'Emotions as a Mechanism for Boundedly Rational Agents: The Fast and Frugal Way', 16 *Journal of Economic Psychology* 201 (2005); Gerd Gigerenzer and Peter M. Todd, *Simple Heuristics That Make Us Smart* (OUP 2000); Carlos Andres Trujillo, 'The Complementary Role of Affect-Based and Cognitive Heuristics to Make Decisions Under Conditions of Ambivalence and Complexity' 13(11) *PLoS ONE* (2018).

²⁹ See, e.g., Christine Jolls, Cass Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics', 50 *Stanford Law Review* 1471 (1998), and, in the current book, van Aaken and Broude, 'Arbitration from a Law and Economics Perspective'. Interesting discussions also take place in Tomer Broude, 'Behavioural International Law' 163 *University of Pennsylvania Law Review* 1099 (2015) and Lauge N.S. Poulsen, *Bounded Rationality and Economic Diplomacy, The Politics of Investment Treaties in Developing Countries* (CUP 2017).

³⁰ Antonin Scalia, Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (Thomson 2008), Introduction.

³¹ For a short summary, see Charles D. Ehrlich, 'The Ungoverned Brain: A Wild Card in Arbitral Decision-Making' 2016-1 *ARIAS-US Quarterly* 7. For longer discussions, see David Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision Making* (OUP 2010).

There is no reason why factors like these don't also play out in arbitration, in just the same way as they do elsewhere; there is no reason for arbitrators not to be subject to the same cognitive biases and heuristics as everyone else. Yes, arbitrators are human beings too. They also experience bouts of anger, have love affairs, trust their own people more than they do others, are seduced by unusually attractive counsel or parties or witnesses, hold all sorts of unconscious prejudices against all sorts of people, have back pain and tooth ache, cut hearings short because they want to drive up to their chalets in the mountains, are swayed by the advice their friends gave them and the worldviews their parents taught them. But what does this tell us about arbitration as a socio-legal phenomenon? Not very much. Precisely because these factors play out in more or less all socio-legal phenomena in which there are decision-makers. (Obviously, the limited relevance of these factors for the understanding of arbitration as a socio-legal phenomenon has nothing to say about their importance for the practice of arbitration or for needs of reform to de-bias arbitrators – but these are separate discussions.³²)

Now then, what is there that is specific to arbitration in this context of non-legal, non-rational factors of decision-making? Arguably there is a specific ethos, broadly speaking, in arbitration. A spirit of the arbitration community. A set of attitudes and aspirations. An ethos that is different from the likely ethos of most courts and judiciaries. Joost Pauwelyn pointed the same way when he said that investment arbitrators are from Mars and WTO panellists from Venus.³³ He meant, brutally simplified here to mark the difference, that investment arbitrators are conceited high-profile experts where trade adjudicators are selfless technocrats from diplomatic circles. A different ethos prevails in each group: for the WTO panellists, 'team play and policy, rather than individualism and honed legal skills, are valued', whereas '[investment] arbitrators generally come from more egocentric, star-driven professions – private law practice, legal academia – where individual performance, reputation, and legal craftsmanship

³² On this front, see for instance van Aaken and Broude, 'Arbitration from a Law and Economics Perspective'; Drahozal, 'Empirical Findings on International Arbitration'; Tony Cole (ed), *The Roles of Psychology in International Arbitration* (Kluwer Law International 2017); Jan-Philip Elm, 'Behavioural Insights into International Arbitration: An Analysis on How to De-Bias Arbitrators', 27 *American Review of International Arbitration* 75 (2016); Edna Sussman, 'Arbitrator Decision Making' 24 *American Review of International Arbitration* 502 (2013), arguing, precisely, that the purpose of her study is to 'offer[] suggestions to foster a more robust deliberative overlay and improve the quality of decisions by arbitrators. It also provides suggestions for counsel's consideration to aid them in capitalizing on these unconscious influences'; Susan Franck, 'The ICSID Effect? Considering Potential Variations in Arbitration Awards', 51 *Virginia Journal of International Law* 825 (2011); Susan Franck, 'Empiricism and International Law, Insights for Investment Treaty Dispute Resolution', 48 *Virginia Journal of International Law* 767 (2008); Christopher Drahozal, 'A Behavioral Analysis of Private Judging', 67 *Law & Contemp. Probs.* 105 (2004).

³³ Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus' 109 *American Journal of International Law* 761 (2017).

are key factors in advancement'.³⁴ Arguably the WTO panellists incarnate the rule of law while the investment arbitrators embody the rule of lawyers.³⁵ Yet more than that follows from the general point. The specific ethos of arbitration creates a range of specific extra-legal factors of decision-making, specific emotions, axiological and ideological references, all manner of non-rational determinants of arbitrator decision-making.

But let me roll back my explanation a little bit. Let me start with who you are.

Suppose I asked you 'Who are you?' Most likely, in telling me who you are, who your 'self' is, you will describe a set of social roles. For instance, you might say, 'I'm a Singaporean citizen, from Pulau Ujong; I'm a Buddhist, a lawyer, I'm middle-class, daughter of so and so, sister of so and so', and so on. 'You' will be that unique nexus amongst these social roles. In other words, who you are is defined by your class, ethnicity, religion and membership in a tradition and community. Some philosophers call this the 'encumberedness of the self', which essentially means that the 'self' is always encumbered by its social roles, that social roles are constitutive – they constitute, they shape, the self.³⁶ From a slightly different angle, social psychology might say that people have both a personal and a social identity,³⁷ and that they tend to 'incorporate their group membership into their concept of themselves'.³⁸

All individuals, then, including judges and arbitrators, are bound up with their various communities, their social class, gender, ethnicity, their family background, their religion if they have one and the norms and values that go with it, and all their other conditions of life. Judges' and arbitrators' selves are encumbered, including in their decision-making, by their multiple social roles and social identities. As Myriam Gicquello explains, it is simply plainly to think of arbitrators as individuals making decisions in strict isolation of their social environment.³⁹

The point is simple: conceptions of the self affect behaviour, including decision-making, and conceptions of the self are in turn partly group-based.⁴⁰

³⁴ Ibid, 781.

³⁵ Ibid, 763: 'The WTO manages to have (something of a) rule of law without the rule of lawyers' while 'the world investment regime seems, at present, to have too much rule of lawyers and not enough rule of law'.

³⁶ Michael J Sandel, 'The Procedural Republic and the Unencumbered Self' 12 *Political Theory* 81 (1984).

³⁷ Henry Tajfel and John C. Turner, 'The Social Identity Theory of Intergroup Behaviour' in S. Worchel, W.G. Austin (eds), *Psychology of Intergroup Relations* (Nelson-Hall 1986).

³⁸ Wendy L. Martinek, 'Judges as Members of Small Groups' in David E. Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision Making* (OUP 2010), 77.

³⁹ Gicquello, 'The Reform of Investor-State Dispute Settlement: Bringing the Findings of Social Psychology into the Debate'.

⁴⁰ Roy F. Baumeister, 'The Self' in Daniel T. Gilbert, Susan T. Fiske, and Gardner Lindzey, *The Handbook of Social Psychology*, vol. 1 (4th edn, McGraw-Hill 1998); Henri Tajfel, *Differentiation between Social Groups: Studies in the Social Psychology of Intergroup Relations* (Academic Press 1978).

Judges and arbitrators aren't really free then, not in the Kantian ideal of the autonomous individual who truly decides for herself, a pure reflective character whose decisions are based only on what philosophers call practical reason⁴¹ – which is 'the general human capacity for resolving, through reflection, the question of what one is to do'.⁴² When legal adjudicators decide cases, their identity also diffusely comes in to bear on the outcome, without reflection, and through their identity it is all of their social roles which play a role in determining how and what they decide.⁴³

One impact of these social roles on decision-makers is that they tend to favour, often unconsciously, their own group, their own community, their own social class, their own gender, etc., and the perceived norms and values to go with them. The same essential argument has been made throughout the ages (from at least the 5th century BC to today) and across disciplines (philosophy, ethology, biology, literature, psychology, ...): there is a difference in sentiments of justice for those near and like us and for those far and different from us.⁴⁴ This is arguable also caused, beyond considerations of social identity as identity, by a 'desire to promote and maintain positive relationships within the group'.⁴⁵

Considerations like these have for instance led to feminist legal theory – a movement in legal scholarship based on the idea that, embedded in legal institutions are instruments to maximize the power of men and to minimize the power of women.⁴⁶ Men, the idea goes, naturally will tend to favour men, and what represents masculinity in the dominant discourse; women will tend to favour women, and what represents the feminine in the dominant discourse. And so if male judges tend to favour men and values considered 'male', mostly unconsciously, more women are needed in the judiciary to better reflect the overall spread of values in society.

Applied to arbitration, this suggests that arbitrators, as a group, make decisions coloured by the particular characteristics present in the 'group' of arbitrators, in the arbitration community. Arbitrators, simply put, are influenced by the arbitration ethos.

So what is the arbitration community like?

At arbitration conferences 20 years ago, one would hear, occasionally, a lone voice timidly suggesting that the arbitration world was mostly inhabited by the

⁴¹ Thomas Hill, 'The Kantian Conception of Autonomy' in John Christman (ed.), *The Inner Citadel: Essays on Individual Autonomy* (OUP 1989).

⁴² R. Jay Wallace, 'Practical Reason', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), <<https://plato.stanford.edu/archives/spr2018/entries/practical-reason/>>.

⁴³ See for instance Jeffrey Budziak, 'Promotion, Social Identity, and Decision Making in the United States Courts of Appeal' 4 *Journal of Law and Courts* 267 (2016).

⁴⁴ See the review in Stephen C. Neff, *Justice Among Nations* (Harvard University Press 2014), 1-13.

⁴⁵ Marilyn B. Brewer, 'The Psychology of Prejudice: Ingroup Love or Outgroup Hate' 55 *Journal of Social Issues* 429 (1999), 441-442.

⁴⁶ See for example Nancy Levit, Robert R.M. Verchick and Martha Minow, *Feminist Legal Theory: A Primer* (2nd edn, NYU Press 2016).

second group I imagined at the beginning of this chapter (not, then, the colourful patchwork of individuals). Or, more precisely, that the arbitration establishment, those who shape the ethos of the community, was made up of white old men, dark suits in appearance, grey and conservative in spirits. Back then, addresses of that nature would typically be followed by awkward and embarrassed silence, sideway glances, polite applause, and hurried passage to the next speaker.

Since then the discourse has changed. Passage to the next speaker is slower, the applause more conventional. The actual state of things, however, has changed in ways that still require statistical analysis to be noticed.⁴⁷ That the arbitration community is 'pale, male, and stale' has progressively become its standard, nearly official description.⁴⁸

'Pale': the idea is that most arbitrators, and certainly those who set the tone, the 'powerbrokers' as they are sometimes called, are of white ethnic background.⁴⁹ More specifically they hail from Western, developed states, from Europe and North America mostly. Even arbitrators formally from other geographical backgrounds, for instance from developing countries, were typically educated in Western universities.

One reason why this matters is that arbitrators are likely to have a certain ideology of justice, a certain idea of what dispute settlement is all about;⁵⁰ and there are noticeable differences between ideal dispute resolution in, to take just one example using extremely broad notions, Asian culture as opposed to Western culture.⁵¹ The Western culture or ideology of dispute settlement is for instance understood to be more confrontational than the Asian ideology. (As I said, extremely broad notions, but probably illustrative enough to make my point.) Arbitrators, in particular in investment arbitration, are also often blamed for favouring parties from developed states, and the latest statistics seem to support the claim.⁵²

And as I've said above, decision-makers tend to favour, often unconsciously, their own. A simple story comes to mind to make us see the concern: When Jay-Z, the rap musician, had a dispute with a company to which he had sold his clothing brand, he had to choose an arbitrator from a roster of the American Arbitration Association. None of the people on the roster were black (Jay-Z, of

⁴⁷ See for instance Fan Yang, 'Opportunities for Young Practitioners in International Arbitration' 83 *Arbitration* 394 (2017).

⁴⁸ See the discussion in Susan D. Franck, 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' 53 *Columbia Journal of Transnational Law* 429 (2015).

⁴⁹ Sergio Puig, 'Social Capital in the Arbitration Market' 25 *European Journal of International Law* 387 (2014).

⁵⁰ I have suggested a rough typology, just to help structure ideas, in Thomas Schultz, 'The Three Pursuits of Dispute Settlement' 1 *Czech & Central European Yearbook of Arbitration* 227 (2011).

⁵¹ Simon Roberts and Robert Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (2nd ed, CUP 2012).

⁵² Weijia Rao, 'Development Status and Decision-Making in Investment Treaty Arbitration' 59 *International Review of Law and Economics* 1 (2019).

course, is). An expanded list of 200 names was suggested. But even there only three of the potential arbitrators were black, and one of them had a conflict of interest which ruled him out. A choice of only two possible arbitrators out of several hundred, Jay-Z argued, already showed bias against him; he felt cornered, facing a system of justice that didn't, as he put it, 'reflect his background and life experience'.⁵³ He turned to the New York Supreme Court. The court had some initial scepticism typical of lawyers: 'what exactly is the legal basis for the discontent?', it effectively first asked, before engaging in a slippery slope fallacy, reflecting that if the need for representativeness is recognized in arbitration, eventually every party with minority traits could halt their arbitration – as if requiring some representativeness would necessarily end up with a requirement for perfect representativeness.⁵⁴ But eventually the court recognized the merits of Jay-Z's claim and stayed the arbitration.⁵⁵ (The reactions within the arbitration community to the case were noteworthy too: 'it has never been shown that arbitrators discriminate against people different from them!' was the typical remark. As if what is true for decision-makers other than arbitrators didn't apply to arbitrators. As if lawyers could be content with keeping their knowledge limited to law and legal studies, in this case even more specifically to arbitration studies.⁵⁶ Or, as Stavros Brekoulakis put it, if the arbitration community continues to use the legal standard of bias to understand and assess the legal phenomenon of arbitration, dark times are ahead for the profession.⁵⁷)

'Male': the vast majority of arbitrators are men, probably close to 85% overall and even more among those with the greatest influence on the community's ethos.⁵⁸ This would lead, based on what I said above, to a tendency to favour men and values typically considered to represent masculinity. What these values exactly are is not something I could comfortably or usefully pinpoint in passing in this chapter; and if it is unhelpful it will be quickly put away. But let me put

⁵³ Ben Beaumont-Thomas, 'Jay-Z Logo Lawsuit Halted Over Racial Bias in Arbitration Hearing', *The Guardian*, 29 November 2018

<www.theguardian.com/music/2018/nov/29/jay-z-logo-lawsuit-racial-bias>.

⁵⁴ See the public transcript of the hearing in *Carter v. Iconix*, available at <iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=FdpFn27QhD1AZa4bYamQrw==&system=prod>

⁵⁵ Beaumont-Thomas, 'Jay-Z Logo Lawsuit Halted'.

⁵⁶ On the fallacy of the thought that legal phenomena can be explained with legal concepts alone, see Bastien François, 'Une théorie des contraintes juridiques peut-elle n'être que juridique?', in M. Troper, V. Champeil-Desplats, C. Grzegorzczak (eds.), *Théorie des contraintes juridiques* (LGDJ 2005).

⁵⁷ Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' 4 *Journal of International Dispute Settlement* 553 (2013).

⁵⁸ The International Chamber of Commerce reported that 'In 2017, of all arbitrators ... 16.7% were women – that is a 1.9% increase compared to 2016': see '2017 ICC Dispute Resolution Statistics', 2018-2 *ICC Dispute Resolution Bulletin* 59, with a summary and comparison to 2016 available at <iccwbo.org/media-wall/news-speeches/icc-court-releases-full-statistical-report-for-2017>. See further discussions in Yang, 'Opportunities for Young Practitioners' and Puig, 'Social Capital'.

it this way: given that the dominance of men is stronger in arbitration than in courts generally – in OECD countries 54% of professional judges are women⁵⁹ and the worldwide average is a bit below 30% of women judges⁶⁰ – then by opting for arbitration the parties opt into the more patriarchal zones of society. (As Thomas Clay flippantly puts it, public justice seems to be for women, private justice for men.⁶¹) These patriarchal zones of society, at least in many Western states, tend to be backward zones, zones that we tend to fight against, to progressively get away from.

Notice the grim point that follows: by opting for arbitration, the parties opt into an axiologically backward domain of justice. Whether this is good or bad is of course a value judgment, depending on the values one individually holds. But the point, which hopefully becomes increasingly clear, is that arbitration forms a distinguishable domain of human activity, as sociologists Luc Boltanski and Laurent Thévenot put it, with its own ‘principles of judgment’ – in other words its own ethos, distinguishable from the rest of society.⁶²

And then ‘stale’: the adjective (whose overly derogatory character must be excused because of its brilliant rhetorical quality) is meant to suggest that arbitrators, on average, and in particular leading arbitrators, are dominantly over 50 years old and often over 60 – the average age of ICC arbitrators was for instance 56 in 2017.⁶³

So what, you might ask? The point is not ageism. Of course, arbitration practitioners acquire experience with age, and experience likely makes them better. And judges in many countries are not necessarily much younger – in England for instance 85% of magistrates are aged over 50 and 55% are over 60,⁶⁴ though in France the median age of magistrates is 46 for women and 51.5 for men, where women make up 66% of all magistrates in the country.⁶⁵ That proficiency in legal decision-making peaks at a much older age than it does in, say, the typical sport is of course a highly plausible hypothesis.

⁵⁹ OECD, ‘Women in the Judiciary: working towards a legal system reflective of society’, March 2017, <www.oecd.org/gender/data/women-in-the-judiciary-working-towards-a-legal-system-reflective-of-society.htm>.

⁶⁰ UN Women, ‘Progress of the World’s Women 2011-2012’, 2011 <www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice#view>, p. 60, table 2.5.

⁶¹ Thomas Clay, ‘L’arbitrage est-il un être normal?’, in *L’exigence de justice. Mélanges Robert Badinter* (Daloz 2016) 225, 228.

⁶² Luc Boltanski and Laurent Thévenot, *On Justification: Economies of Worth* (Princeton University Press 2006). See also the discussion in François Ost, ‘Arbitration and Literature’, in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP 2019 forthcoming).

⁶³ ‘2017 ICC Dispute Resolution Statistics’, 59.

⁶⁴ Lord Chief Justice of England and Wales and Senior President of Tribunals, ‘Judicial Diversity Statistics 2018’ <<https://www.judiciary.uk/publications/judicial-diversity-statistics-2018/>>, p. 14.

⁶⁵ Yoann Demoli and Laurent Willemez, ‘Les magistrats : un corps professionnel féminisé et mobile’, Ministry of Justice, Infostat Justice no 161 April 2018, <www.justice.gouv.fr/art_pix/stat_infostat_161.pdf>, p. 1.

The point is simply that older people are on average more conservative. (Although it is unclear whether it is specifically the current generation of the 'old' that is more conservative than the current generation of the 'young, or whether people generally become more conservative with age – think of the saying: 'if you're not a socialist at 20, you have no heart; if you are not a conservative at 60, you have no brains'. Or as politics scholar James Tilley puts it, 'It is very difficult to tell whether it is getting older, or being born at a certain time, that causes people to have different political preferences.'⁶⁶) At any rate, what's involved here is this: conservative, politically right-wing values are quite strong in the arbitration ethos be it only because of a question of age.

Let me brutally simplify this. The fact (if you'll allow the casual observations of an untrained sociologist of professions, untrained cultural anthropologist, untrained social psychologist to count as fact) is that the arbitration industry is a very conservative, macho community – more than masculine, it is really rather macho. And it is strongly enough so that even many of those who are not technically pale, male, or stale tend to behave as if they were; unsurprisingly: notions of habitual peer pressure come to mind.

Continuing at the same level of casual observation, combined with basic common-sense, it is rather obvious that there is a strong ideological attitude in arbitration that arbitration is good, legitimate. There's a clear pro-arbitration ideological stance in arbitration. This makes perfect sense. And recall what I said above: the ideological attitudes of decision-makers always play a role in decision-making. So, predictable as it is, this means that a number of arbitration concepts, or legal thresholds in arbitration, are interpreted in a pro-arbitration way.⁶⁷

Such a positive self-referential attitude may seem commonplace ('we all believe in what we do!'). But it isn't necessarily so: probably many judges believe that it is not in fact a good thing that everything ends up in court. A likely common experience of anyone who's ever set foot in court is that judges are not necessarily happy for you to be there.

A further aspect of the overall arbitration ethos is what one might call a strongly corporate culture, likely fuelled by the heavy involvement of big commercial law firms in the field. The credo of this culture is perhaps best described by this excerpt of the famous speech by Gordon Gecko in the 1987 movie *Wall Street*:

'The new law of evolution in corporate America seems to be survival of the unfittest. Well, in my book you either do it right

⁶⁶ James Tilley, 'Hard Evidence: Do We Become More Conservative with Age?', *The Conversation*, 4 October 2015 <theconversation.com/hard-evidence-do-we-become-more-conservative-with-age-47910>; James Tilley and Geoffrey Evans, 'Ageing and Generational Effects on Vote Choice: Combining Cross-Sectional and Panel Data to Estimate APC Effects' 33 *Electoral Studies* 19 (2014).

⁶⁷ See the discussion above on the size of the overall arbitration pie. For examples, see Schultz, 'Arbitral Decision-Making: Legal Realism and Law & Economics'.

or you get eliminated. In the last seven deals that I've been involved with, there were 2.5 million stockholders who have made a pretax profit of 12 billion dollars. Thank you. I am not a destroyer of companies. I am a liberator of them! The point is, ladies and gentleman, that greed, for lack of a better word, is good. Greed is right, greed works. Greed clarifies, cuts through, and captures the essence of the evolutionary spirit. Greed, in all of its forms; greed for life, for money, for love, knowledge has marked the upward surge of mankind. And greed, you mark my words, will not only save Teldar Paper, but that other malfunctioning corporation called the USA.'

Simply put, arbitration is on the political right. Its political ethos is one of right-wing laissez-faire politics, the sort where greed is good, where being poor is a failure and it's your fault and you are less meritorious.

Now why is that a problem, you might ask? It has always been like that, and there is nothing wrong in itself in being conservative – so what?

Well, the point is simply that as a consumer, as an employee, as a developing state, the dominant political attitude is against you. To illustrate the point by its mirror image, if you are, say, a large bank, would you be pleased to be judged by a system of justice dominated by an ethos of hardcore socialists?

What I've been describing so far isn't only a problem for some parties to arbitration (typically the sort of parties for which arbitration wasn't initially designed). It likely also is, and increasingly will be, a problem for arbitration itself. The problem is called groupthink. The problem is not that the values I've described abound in the arbitration ethos; the problem is that there aren't enough other values. The problem is that the arbitration community looks too much like the second group I've described on the first page of this chapter.

The idea of groupthink theory, drawn from social psychology, is that a group that is too homogeneous in its composition loses out in thinking quality. Heterogeneous groups think better collectively than homogeneous groups. A group whose members are too much alike produces, collectively, less good outputs, and is therefore less able to anticipate and react to problems and backlashes.

The idea, expressed in greater details, is that member homogeneity, combined with insulation of the group from outside and so-called provocative situational context (e.g. importance of high stress and low temporary self-esteem induced by a constantly stressful environment), creates an illusion of invulnerability, closed-mindedness, pressures towards uniformity, an illusion of unanimity, self-censorship, or more concretely incomplete survey of both objectives and alternatives, poor information search and selective bias in information processing. Put simply, following Irving Janis, 'a deterioration of

mental efficiency, reality testing, and moral judgment that results from in-group pressures'.⁶⁸ Put yet simpler, suboptimal collective intelligence.⁶⁹

The point is plain, if you think of it: if we all think alike, we'll never challenge one another's ideas, and if we just cling on to established ideas, we still wouldn't have invented the wheel and the iPhone, penicillin and the light bulb, the computer and the world wide web. As Gicquello explains clearly, groupthink is 'a *pathology* affecting group decision-making'.⁷⁰

And arbitration, as a community, probably is and certainly appears to be much more homogeneous than many if not most judicial communities.⁷¹ In most countries, judges are reasonably different one from another, and certainly across countries. Arbitration conferences, by contrast, are marked by a great level of stereotypicality. As Clay puts it, 'the field is conservative and originality, even imaginativeness, are often considered a flaw'.⁷²

What this means is that the arbitration community, as a community, probably doesn't think terribly well, certainly less well than what it would if there were more diversity, more women, younger people, people truly from non-Western cultures and who have not seriously been contaminated by Western cultures. This affects the arbitration community as a whole and thus the overall output of arbitration as a field, as a system of justice. It also affects individual arbitral tribunals if they are composed of more than a sole arbitrator, as Anne van Aaken and Tomer Broude argue: 'there is a problem with international arbitration: international arbitrators may be more prone to share the same mindset, since their diversity in terms of geography and gender is rather small, which in turn might lessen the de-biasing potential of group adjudication in comparison with courts'.⁷³

(Several young female students from India, from Greece, and from other non-habitual countries for arbitration recently came to me and to friends crying over the fact that they feel foreign in this community, that they can't seem to enter it. My response was 'Their loss. Our loss. Much more than yours.' I meant it. But most of us probably still don't understand why. We may well need 'them' to survive, as an industry, as a community.)

⁶⁸ Irving L. Janis, *Victims of Groupthink* (Houghton Mifflin 1972), 9.

⁶⁹ Irving L. Janis and Leon Mann, *Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment* (Free Press 1977). This was first applied to arbitration by Gicquello, 'The Reform of Investor-State Dispute Settlement: Bringing the Findings of Social Psychology into the Debate'.

⁷⁰ Gicquello, 'The Reform of Investor-State Dispute Settlement: Bringing the Findings of Social Psychology into the Debate'.

⁷¹ For a similar argument, that arbitrators are part of a 'close-knit community', see Sergio Puig and Anton Strezhnev, 'Affiliation Bias in Arbitration: An Experimental Approach' 46 *The Journal of Legal Studies* 371 (2017), 371.

⁷² Clay, 'L'arbitre est-il un être normal?', 230.

⁷³ Aaken and Broude, 'Arbitration from a Law and Economics Perspective'.

CONCLUSION

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At the centre of mostly any lesson about law should be an understanding of people. How people think. How people decide. How people live. Law ultimately is about people, more than it is about rules.

The idea that we can really understand arbitration, and form an opinion about it, merely by studying its rules and procedures and cases is one that should be resisted, firmly. The basic point this article elaborated on is that it matters very much who decides arbitration cases, what sort of people constitute the arbitration world and what they likely respond to, and how all of this forms the arbitration ethos.

To take just one example: if one or several international investment courts come to replace investment arbitration, but the judges on these courts are the same as the current investment arbitrators, have the same ethos, how much change can we really expect?⁷⁴

Some people from the arbitration community might read this text and not recognise themselves. They might be shocked that this is how I (and others like me) think of them. But we should remember that my account is a generalisation, as any account of an ethos would be. And generalisation of course simplify.

I can also hear, as I peck these last words before sending the manuscript off to the publisher, a different sort of reaction: contempt at my idealism, combined with a righteous claim that this is an entirely legitimate way to think, to decide, to live. Business is business. And indeed if arbitration didn't have ever widening societal consequences this would be quite alright.

⁷⁴ A more fine-grained approach is provided by Gicquello, 'The Reform of Investor-State Dispute Settlement: Bringing the Findings of Social Psychology into the Debate'.