

## Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them\*

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*"Most studies of arbitration are devoted to discussions about the applicable law or the various procedural rules. It seems far more important to try to analyze how and why arbitrators make up their minds."*

Robert Coulson, President

American Arbitration Association, 1990<sup>1</sup>

**RESUMO:** Estudiosos exploraram o impacto do inconsciente no processo de tomada de decisões jurídicas. Pesquisas mostraram que, assim como acontece com todos os seres humanos, as reações intuitivas desempenham um papel significativo na tomada de decisão dos juízes. Embora não haja unanimidade quanto à suficiente extensão dos estudos para que se tire conclusões sobre o grau no qual as faculdades deliberativas de um juiz são invocadas para substituir a sua reação intuitiva, não há dúvida de que a intuição é operativa e que influencia o processo decisório do juiz, assim como o de todas as pessoas. Dada a semelhança das tarefas, pode-se concluir que a tomada de decisão dos árbitros também é afetada, de maneira semelhante. Este artigo examina a influência dos processos intuitivos inconscientes no processo arbitral e oferece sugestões para fomentar uma sobreposição deliberativa mais robusta e para melhorar a qualidade das decisões dos árbitros. Ele também fornece sugestões a serem consideradas pelo conselho, de modo a ajudá-lo a capitalizar essas influências inconscientes. A fim de fornecer um contexto que reflita a real tomada de decisão do árbitro, os resultados de uma pesquisa sobre árbitros é relatado, ilustrando e ampliando a influência psicológica discutida.

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1 Robert Coulson, *The Decisionmaking Process in Arbitration*, 45(3) ARB. J. 37, 37 (1990).

**ABSTRACT:** Scholars have explored the impact of the unconscious on legal decision-making. Research has shown that, as with all human beings, intuitive reactions play a significant role in judges' decision-making. While there is a lack of agreement as to whether there has been sufficient study of the subject to draw conclusions as to the extent to which a judge's deliberative faculties are invoked to override the intuitive reaction, there is no question that intuition is operative and impacts a judge's decision-making as it does for everyone. Given the similarity of the tasks, one must conclude that arbitrators' decision-making is similarly impacted. This article examines the unconscious intuitive processes in the arbitration process and offers 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. In order to provide a context that reflects actual arbitrator decision making, the results of a survey of arbitrators is reported where they illustrate and amplify the psychological influence discussed.

**SUMÁRIO:** I – Introduction; II – Unconscious Blinders; A) Informational Blinders – Inadmissible evidence; 1. The 2012 Arbitrators Survey; 2. The Empirical Studies; 3. Implications for Arbitration; B) Cognitive Blinders – Heuristics; 1. Hindsight Blinder; a) The empirical study; b) Implications for arbitration; 2. Anchoring Blinder; a) The 2012 arbitrator survey; b) The empirical studies; c) Implications for arbitration; 3. Framing Blinder; a) The empirical studies; b) Implications for arbitration; 4. Coherence and Ego-Centricity Blinders; a) The 2012 arbitrator survey; b) Empirical studies; c) Implications for arbitration; 5. Confirmation Blinder; a) 2012 arbitrator survey; b) Empirical studies; c) Implications for arbitration; III – Attitudinal Blinders – Background and Experience; A) Empirical Studies; B) Implications for Arbitration; IV – Improving Arbitrator Decision-Making; V – Advice for Arbitration Counsel; A) How Many Arbitrators; B) Tapping the Social Scientists; C) Enhanced Arbitrator Interviews; VI – Conclusion

## I – INTRODUCTION

Mr. Coulson's discussion of what was known at the time about psychological influences on arbitrator decision-making presaged the vigorous discussion of that subject which developed recently, some 20 years later. With the explosion of bestselling books on decision-making and the popularization of the psychological learning on the subject,<sup>2</sup> attention has turned to its applicability to arbitrators. Presentations at meetings of the International Bar Association,<sup>3</sup> the Swiss Arbitration Association and Brunel University<sup>4</sup> in 2013 and the upcoming

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2 Recent best-selling books on the subject include: DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2010); MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

3 For a report on this session, see Allison Ross, *What Goes on in Arbitrator Deliberations?*, 8(2) GLOBAL ARB. REV. (April 30, 2013).

4 Summaries of the presentations delivered at the Brunel conference are available at [http://www.brunel.ac.uk/law/research/events/bcsiabci-brunel-centre-for-the-study-of-international-arbitration-and-cross-border-investment/ne\\_283957](http://www.brunel.ac.uk/law/research/events/bcsiabci-brunel-centre-for-the-study-of-international-arbitration-and-cross-border-investment/ne_283957).

International Council for Commercial Arbitration (“ICCA”) Congress in 2014 have all focused on arbitral decision-making and the role of psychology.<sup>5</sup>

The field of psychology is immense and the number of biases, i.e. unconscious psychological influences, identified by those that study the subject is far beyond what can be discussed in a single article. This article focuses on a few of the more significant, and offers suggestions for both arbitrators and counsel to overcome them or at least lessen their influence.<sup>6</sup>

The literature which studies the psychological phenomena that are the subject of this article refers to them as “biases.” Because the word “bias” has such profound negative connotations in the field of arbitration and forms the basis for the extensive learning on arbitrator disclosures and challenges which are not the subject of this article, this article borrows the nomenclature used by Professor Guthrie, and refers to biases as “blinders.”<sup>7</sup> The biases/blinders discussed here are those that are simply human nature. While constraints imposed by the law to increase certainty and predictability, such as specifying elements for causes of action and establishing burdens of proof, are effective to some degree, ultimately decisions are made by judges and arbitrators who are human beings. Their minds function anatomically just as do the minds of others. Legal training cannot and does not alter that fundamental reality.

The human brain has both an intuitive and a deliberative component, a fact long known and now scientifically proven by the study of neuroscience.<sup>8</sup> Plato, in discussing what drives people’s actions, used the image of two horses, a good horse governed by reason and a bad horse who hurries along violently and without control.<sup>9</sup> Descartes wrote about “intuition and deduction” as the way

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5 In an earlier burst of interest, a series of papers on the subject were delivered at the ICCA Congress in 2002. See papers collected as *The Psychological Aspects of Dispute Resolution*, INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, ICCA Congress Series, No. 11, London 2002 (Albert Jan van den Berg ed., 2003). But only in the last few years has concerted attention been devoted to the interface of psychology and arbitration.

6 For other discussions of arbitrators and psychology, see Christopher Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMPORARY PROBLEMS 105 (2004) (reviewing the research as of 2004 on decision-making by arbitrators); Doak Bishop, *The Quality of Arbitral Decision Making and Justification*, 6(4) WORLD ARB. & MED. REV. 801 (2012) (discussing the anchoring effect, the framing effect, the availability heuristic, the halo effect, and the narrative fallacy); Lucy Reed, *Arbitral Decision-Making: Art, Science or Sport?* The Kaplan Lecture 2012, available at [http://www.arbitrationicca.org/media/1/13581569903770/reed\\_tribunal\\_decision-making.pdf](http://www.arbitrationicca.org/media/1/13581569903770/reed_tribunal_decision-making.pdf) (discussing the anchoring effect, hindsight bias, egocentric bias, cultural effects and extremeness aversion).

7 “Blinders” is the terminology used by Professor Guthrie in Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 420 (2007) [hereinafter *Misjudging*].

8 For a historical perspective on the concept of the dual mind, see Keith Frankish & Jonathan St. B. T. Evans, *The Duality of Mind: An Historical Perspective*, in TWO MINDS: DUAL PROCESSES AND BEYOND (Jonathan St. B. T. Evans & Keith Frankish eds., 2009).

9 PLATO, PHAEDRUS 34-36 (Christopher Rowe trans., 2005). In *The Republic*, Plato couched it differently and referred to three parts rather than two: reason, spirit and appetite, with reason seeking to control the other two. Thus, one could combine spirit and appetite to arrive at the dual model. PLATO, REPUBLIC (Robin Waterfield trans., Oxford University Press 1993).

to arrive at knowledge.<sup>10</sup> Recently Nobel Prize winner Kahneman popularized what he refers to as System 1 – our fast, automatic, high capacity, low effort, and intuitive mode, and System 2 – our slow, deliberate, limited capacity and high-effort mode.<sup>11</sup> His modern, research-based analysis essentially posits that we cannot function without both and that human decision-making operates with System 1 making intuitive judgments, which are sometimes modified by System 2's deliberative process. This dichotomy mirrors the two traditional models with which judging has traditionally been viewed: the "formalist" model pursuant to which it is believed that judges apply the law to the facts in a logical and deliberative way, and the "realist" model pursuant to which it is believed that judges follow their intuition to reach their judgment and later rationalize their judgment with reasoning.<sup>12</sup>

Scholars have explored systems 1 and 2 as they impact legal decision-making. Research has shown that, as with all human beings, the intuitive reactions of System 1 play a significant role in judges' decision-making.<sup>13</sup> While there is a lack of agreement as to whether there has been sufficient study of the subject to draw conclusions as to the extent to which a judge's deliberative faculties are invoked to override the intuitive reaction,<sup>14</sup> there is no question that System 1 is operative and impacts a judge's decision-making as it does for everyone. Given the similarity of the tasks, one must conclude that arbitrators' decision-making is similarly impacted.<sup>15</sup>

Jurists have long recognized the power of the unconscious. As Justice Cardozo wrote almost 100 years ago, "Deep below consciousness are other

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10 RENE DESCARTES, RULES FOR THE DIRECTION OF THE NATURAL INTELLIGENCE, Rule III, at 79 (George Heffernan ed. & trans., Rodopi 1998). See also *Rules for the Direction of the Native Intelligence*, in DESCARTES, SELECTED PHILOSOPHICAL WRITINGS (John Cottingham trans., Cambridge University Press 1988) (written 1626, published 1684).

11 KAHNEMAN, *supra* note 2, at 19-105.

12 Chris Guthrie, Jeffrey Rachlinski & Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. R. 101, 102-03 (2007) (The authors are two law professors and a U.S. magistrate). See also Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L. J. 1 (1998) (the author offers a comprehensive review of the prior thinking about judicial decision making).

13 *Blinking on the Bench*, *supra* note 12; Anna Ronkainen, *Dual-Process Cognition and Legal Reasoning*, in ARGUMENTATION 2011: INTERNATIONAL CONFERENCE ON ALTERNATIVE METHODS OF ARGUMENTATION IN LAW 1-32, (Michał Araszkiewicz et al. eds., 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2004336](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2004336); Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 COURT REVIEW

114 (2013), available at [http://www.andrew.cmu.edu/user/epeer/Eyal\\_Peer/Publications\\_files/Heuristics%20and%20biases%20in%20judicial%20decisions.pdf](http://www.andrew.cmu.edu/user/epeer/Eyal_Peer/Publications_files/Heuristics%20and%20biases%20in%20judicial%20decisions.pdf).

14 See Frederick Schauer, *Is There a Psychology of Judging?*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 103-20 (David Klein & Gregory Mitchell eds., 2010) (urging that more research be done to examine whether judges diverge in deep and cognitively significant ways from other human beings in judicial decision-making lacking their training and experience). See also Christopher Drahozal, *Behavior Analysis of Arbitral Decision Making*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION 319-37 (Christopher Drahozal & Richard Naimark eds., 2005).

15 Drahozal, *supra* note 6; see also Donald Wittman, *Arbitration in the Shadow of a Jury Trial: Comparing Arbitrator and Jury Verdicts*, DISPUTE RESOLUTION JOURNAL 59 (2003-2004) (finding that monetary outcomes did not differ significantly between arbitrators and juries in automobile accident cases).

forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”<sup>16</sup>

The English judges have also recognized the unconscious influence. As Lord Goff said, “[T]here is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias.”<sup>17</sup>

Similarly Judge Frank, an early proponent of the realist model of judicial decision-making, wrote, “Judges are not a distinct race ... And their judging must be substantially like that of other men.”<sup>18</sup> He cautioned jurists to take note and attempt to remedy the impact of the unconscious: “The conscientious judge will, as far as possible, make himself aware of his biases ... and by that very selfknowledge nullify their effect.”<sup>19</sup>

U.S. Supreme Court Justice Scalia, in his book on persuasive advocacy, advises counsel to address this aspect of the decision-making process if they wish to prevail: “While computers function solely on logic, human beings do not. All sorts of extraneous factors – emotions, biases, preferences – can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are).”<sup>20</sup>

A growing body of scholarship has developed suggesting that one needs to look at both the intuitive and the deductive models, suggesting that “judges rely on their intuitions, but sometimes override their intuitions with deliberative decisions.” They propose an “‘intuitive override’ model of judicial decision making that can best be characterized as realistic formalism... [which] recognizes the power of the judicial hunch and... recognizes the importance of rule-based deliberation as a means of constraining the inevitable, but oft-times undesirable influence of intuition.”<sup>21</sup>

It is the unconscious intuitive processes, the blinders, which are addressed in this article with suggestions to foster a more robust deliberative overlay and improve the quality of decisions by arbitrators. In order to provide a context that reflects actual arbitrator decision making, I conducted a survey of arbitrators in October of 2012 (the “2012 Arbitrators Survey”). The survey, which was distributed both in the U.S. and to colleagues around the world, drew 401

16 BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 107 (Quid Pro Books 2010), *original publication* (Yale University Press 1921).

17 *R v. Gough*, [1993] AC 646, 659, (HL).

18 JEROME FRANK, *LAW AND THE MODERN MIND* 105-106 (1930).

19 *In re J.P. Linahan*, 138 F. 2d 650, 652 (2d Cir. 1943).

20 Antonin Scalia, *Introduction*, in ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008).

21 Chris Guthrie, Andrew J. Wistrich & Jeffrey J. Rachlinski, *Judicial Intuition* 3, available at [http://law.vanderbilt.edu/files/archive/Judicial\\_Intuition.pdf](http://law.vanderbilt.edu/files/archive/Judicial_Intuition.pdf).

responses.<sup>22</sup> The relevant survey results are reported where they illustrate and amplify the psychological influence discussed.<sup>23</sup>

## II – UNCONSCIOUS BLINDERS

Guthrie, Wistrich and Rachlinski, in their leading works on the subject of judicial decision-making, addressed the question of why it can be difficult to get a decision in a case right. They constructed a series of scenarios and presented them to 265 trial court judges as part of their study.<sup>24</sup> They identified three sets of blinders that are the psychological influences that can lead to erroneous decisions: informational blinders, cognitive blinders and attitudinal blinders.<sup>25</sup> These categorizations are useful and are adopted here.

### A) INFORMATIONAL BLINDERS – INADMISSIBLE EVIDENCE

#### 1. The 2012 Arbitrators Survey

Question: Do you exclude evidence that is not admissible under the evidentiary standards you believe would be appropriate outside the arbitration forum rather than take the evidence and give it such weight as you deem appropriate?

Always	1%
Usually (i.e., around 75% of the time)	5.1%
Often (i.e., around 50% of the time)	4.8%
Sometimes (i.e., around 25% of the time)	55.2%
Never	33.9% <sup>26</sup>

22 The survey was disseminated by e-mail to several arbitration list serves. Of the 401 respondents, 79% were from the United States, 12% were from Europe, 5% were from North America outside the United States, and the remainder were from Asia, Latin America and Africa. Over 55% of the respondents had served as an arbitrator in over 50 cases while 20% had served as an arbitrator in between 21 and 50 cases. Seventy-eight percent of the respondents were male and 22% were female. Forty-two percent were born between 1941 and 1950, 20% were born in 1940 or before and the remainder were born after 1951. While this sample may not be completely representative of the overall population of arbitrators, this survey provides a useful benchmark.

23 For results of another survey conducted with arbitrators focusing on psychological aspects, see Sophie Nappert & Dieter Flader, *Psychological Factors in the Arbitral Process*, in *THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION* 121 (Doak Bishop & Edward G. Kehoe eds., 2010).

24 Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. Rev. 1251, 1279-81 (2005); See also Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAVIORAL SCIENCES AND THE LAW 113 (1994).

25 Misjudging, *supra* note 7, at 420.

26 For all questions, in order to give context to the numbers, the survey defined "Usually" as around 75% of the time; "Often" as around 50% of the time and "Sometimes" as around 25% of the time. The order of the possible responses was randomized where appropriate to avoid possible effects of presentation order.

## 2. The Empirical Studies

*Study 1:* To illustrate the impact of informational blinders several experiments were conducted with groups of judges in the United States to ascertain whether information that was inadmissible as evidence in court impacted decision-making. In the first experiment, half of the judges saw a document claimed to be protected by attorney-client privilege which was devastating to plaintiff's case. Seventy-five percent of those judges ruled that the communication was privileged and excluded it. Half of the judges, who constituted the control group, did not see the document. Of the judges who did not see the document, 55% found in favor of plaintiff, while of the judges who saw the document and ruled that it was privileged, 29% found for the plaintiff.<sup>27</sup>

*Study 2:* In the second experiment, subsequent remedial measures which are not admissible under the federal rules of evidence in the United States were in issue. The case study concerned a gasoline can which flared up and caused a bad burn. The corporate defendant responded by saying that such flare ups almost never happened. Half of the judges saw a warning and recall sent by the company two years later recalling the product and warning of the possibility of flashbacks in the gasoline storage containers. The company moved to exclude the evidence as a subsequent remedial measure and the evidence was excluded. Of the judges who were exposed to the excluded evidence, 75% ruled in favor of the defendant, while 100% of the judges in the control group who did not see the recall notice found no liability.<sup>28</sup>

*Study 3:* The third experiment concerned a prior criminal conviction. The plaintiff was injured by a piece of machinery in a products liability case. The defendant claimed that the plaintiff was exaggerating his injury and introduced evidence of the plaintiff's conviction for swindling old ladies in a scheme 12 years earlier. Eighty percent of the judges who saw this evidence suppressed it on the grounds that its prejudicial effect substantially outweighed its probative value. The judges who had seen the evidence of the prior criminal conviction awarded a median damages amount of \$400,000, while those who had not seen it awarded a median damages amount of \$500,000.<sup>29</sup>

## 3. Implications for Arbitration

It is not surprising that judges, and undoubtedly arbitrators, are not able to unring the bell, as these experiments demonstrate. The formal rules of evidence are generally not applied in arbitration. For example, the IBA Rules on the

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<sup>27</sup> Inadmissible Information, *supra* note 24 at 1294-98.

<sup>28</sup> Misjudging, *supra* note 7 at 422-24.

<sup>29</sup> Inadmissible Information, *supra* note 24, at 1304-1308.

Taking of Evidence<sup>30</sup> (the “IBA Rules”) provide some guidance, but in leaving it to the arbitrator to determine the “admissibility, relevance, materiality and weight of the evidence,”<sup>31</sup> they are a far cry from imposing standards of admissibility similar to formal rules of evidence.

Concerned principally about making sure that the parties have a full and fair opportunity to present their case and mindful of the time and cost that would be incurred if formal rules of evidence were to be applied, arbitrators tend to allow inadmissible evidence. The survey results revealed that 33% of the arbitrator respondents never excluded evidence and 55% excluded evidence only about 25% of the time. Thus 88% of arbitrators admit evidence even though it is inadmissible under evidentiary standards at least 75 % of the time. Only 1% of the arbitrators always exclude such evidence.

In light of these findings, should arbitrators be more willing to exclude evidence that does not meet evidentiary standards? Should arbitrators be more careful to ensure that they are not giving undue weight to unreliable evidence that enters the record? What does it mean when arbitrators say they will give evidence as to which an objection is lodged the “weight it deserves”? What can arbitrators do to try to overcome this blinder?

Concern about protecting the award and forestalling the creation of grounds for challenge, which even if without merit prolong resolution of the dispute and cause parties to incur significant expense, understandably cause arbitrators to act as the survey indicated. Moreover, studies have shown that parties are more likely to accept and honor a decision if they perceive the process to have been fair; the admission of evidence they offer and acceptance of their “voice” in the tribunal’s proceedings, enhances their perception of procedural justice, even if ultimately that evidence is not influential.<sup>32</sup> Given the increasing proclivity of parties to challenge awards, arbitrators’ practice of generally admitting evidence serves important objectives.

But arbitrators should take care to try to counter this blinder. First and foremost, arbitrators should really do what they say they will do and consciously weigh the reliability of evidence they have promised to assess as to weight. Reviewing preliminary conclusions of the case to see if the outcome would differ if unreliable evidence admitted on that basis had not been introduced may serve as a check by showing the arbitrators the extent to which such pieces of evidence have influenced their thinking.

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30 International Bar Association, RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010).

31 *Id.* At Art. 9(1).

32 Shari Seidman Diamond, *Psychological Aspects of Dispute Resolution: Issue for International Arbitration*, in INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, *supra* note 5, at 631-33.



A special situation presents itself when the tribunal is asked to review documents to determine a privilege objection. If the determination cannot be made without a review of the documents and a demand is made for such a review, should the tribunal perform that task itself knowing that it may be influenced by what it sees?<sup>33</sup> Article 3(8) of the IBA Rules, provides that in exceptional circumstances the tribunal may, after consultation with the parties, appoint an independent and impartial expert to conduct the review. While the appointment of such an independent expert may cost time and money, in light of the danger of prejudice, if a party asks for such an independent review, careful consideration should be given to all of the relevant factors before deciding on the tribunal's response.

A similar issue arises with respect to expert testimony. Arbitrators frequently accept experts who might not qualify to testify as to the subject of their testimony if they were presented in court and arbitrators often permit experts to stray from their area of expertise to offer additional opinions. Should arbitrators be so lax in admitting expert testimony? At the very least arbitrators should be aware of the psychological influence such testimony may have on their thinking and carefully assess the credentials of the experts in determining the weight to be given.

For their part, should counsel point out the inadmissibility and unreliability of evidence, if appropriate, more than is now common in order to highlight the matter for the tribunal? Or, as studies have shown with juries who remember the evidence that was excluded even more vividly than the evidence that was admitted,<sup>34</sup> do counsel risk exacerbating the problem by focusing the arbitrators on the problematic document or testimony? Should counsel do more to focus the tribunal's attention on the lack of expertise of a proffered expert?

Counsel should carefully weigh the pros and cons in considering their alternatives. While no one would argue for turning an arbitration into a courtroomstyle debate about the admissibility of every piece of evidence, a brief, one-word objection on critical pieces of evidence as to which a valid evidentiary objection can be lodged may be advisable in some circumstances. If there are many such pieces of evidence that are important, it may be advisable to offer evidentiary objections to the tribunal in a succinct filing. Such assistance by counsel may cause the tribunal to more carefully assess the reliability of such evidence.

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33 Courts recognize the prejudice that may result from an *in camera* review of documents as to which privilege is asserted because it "may be difficult to 'unring the bell.'" See, e.g., *National Labor Relations Board v Jackson Hospital Corp.*, 257 F.R.D. 302, 307 (D. Col. 2009).

34 Shari Siedman Diamond and Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857, 1865 (2001); Joel D. Lieberman and Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 703 (2000).

## B) COGNITIVE BLINDERS — HEURISTICS

Cognitive blinders are patterns of deviation in judgment which can lead to perceptual distortion, inaccurate judgment, or illogical interpretation. They include heuristics, mental short cuts that permit people to solve problems, make judgments and react to situations quickly and efficiently. These rule-of-thumb strategies shorten decision-making time and allow people to function without constantly stopping to think about the next course of action.

### 1. Hindsight Blinder

#### a) The empirical study

*Study 1:* The study required assessing the reasonableness of conduct in foresight and in hindsight. The case presented involved the question of whether a failure to take precautions against flooding was negligent. Liability was to be found if at the time of the alleged unlawful conduct it were found that there was more than a 10% likelihood of a flood. All of the judges received the same set of facts but half of the judges were told that no precaution was taken and that later a flood costing \$1 million occurred. The other half of the judges, the control group, were told that no precaution was taken, but were not told about the flood. Of the control group who were not informed about the flood, 24% found negligence and that the company should have taken precautions. Of the judges who were told about the flood, 57% found negligence and that precautions should have been taken, demonstrating the tendency to overestimate the predictability of past events based on later events.<sup>35</sup>

#### b) Implications for arbitration

The very nature of arbitration calls for an evaluation of events after the fact, thus making the process particularly vulnerable to the hindsight blinder. Hindsight has been described as the “most troublesome problem for judges.”<sup>36</sup> Arbitrators understand this difficulty and often speak of the need to avoid being influenced by hindsight, but do they adequately appreciate the difficulty of putting aside what ultimately occurred in deciding what happened or should have happened in the past? Judicial decisions such as those relating to stock values and predictions of the market have been laid by some scholars at the feet of hindsight.<sup>37</sup>

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35 Misjudging, *supra* note 7, at 432-33, citing Kim A. Kamin & Jeffrey Rachlinski, *Ex Post Ex Ante: Determining Liability in Hindsight*, 19 LAW AND HUMAN BEHAVIOR 89 (1995).

36 Chris Guthrie, Jeffrey Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 825 (2001); Mitu Gulati, Jeffrey Rachlinski & Donald Langevoort, *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 776 (2004) ([t]he influence of hindsight on judgment is notoriously difficult to avoid”).

37 *Id.*

The burden of proof may in some instances be of assistance in countering hindsight.<sup>38</sup> If one isolates and lists the facts that were proven as of the relevant time frame from later biasing events and apply the burden of proof just to the earlier facts, it might assist in minimizing the impact of hindsight. Counsel may wish to emphasize precisely which facts in the record are properly presented on an issue and stress that it is based on those facts alone that the tribunal must rule with reference to the burden of proof.

## 2. Anchoring Blinder

### a) The 2012 arbitrator survey

Which do you find more difficult to decide: liability or quantum of damages?

Liability	18.7%
Damages	43.7%
Both the same	37.6%

### b) The empirical studies

*Study 1:* The first case involved an auto accident which resulted in an amputated arm. The same facts were presented to all of the judges but some judges heard a demand of \$10 million in a settlement conference while the control group heard a demand for “a lot of money.” The judges who heard the \$10,000,000 demand awarded a mean of \$2,210,000 while the judges who only heard a large number awarded a mean of \$808,000.<sup>39</sup>

*Study 2:* The second dispute presented to the judges involved a pedestrian hit by a truck who was badly injured. He must now use a wheel chair and was seeking lost wages and damages for pain and suffering. The braking system on the truck was faulty. The defendant moved to dismiss for failure to meet the court’s \$75,000 jurisdictional minimum. All but two judges who heard that motion denied it. The judges in the control group did not hear the motion. The judges who did not hear the motion awarded a mean of \$1,200,000. The judges who heard the motion awarded a mean of \$880,000.<sup>40</sup>

*Study 3:* The subjects were asked to guess the average temperature of San Francisco. The anchor group was first asked whether the temperature was higher or lower than 558°F or 292°C. After answering this question, the anchor group was asked to give a number estimating San Francisco’s average temperature. The anchor group provided higher estimates of average temperature than the control

38 Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 615-16 (1998).

39 Inadmissible Information, *supra* note 24, at 1288-91.

40 Misjudging, *supra* note 7, at 43.

group. They had latched on to the initial high, although obviously irrelevant, figures they had heard before the final question was posed to them.<sup>41</sup>

### **c) Implications for arbitration**

Arbitrators may question whether the anchoring studies cited are of any significance to their practice since most of their cases involve commercial or financial disputes in which there is no element of damages as discretionary as a determination of the value of an amputated arm or of pain and suffering and considerable evidence of damages is offered. But there is often considerable room for differences of opinion in determining which damages calculation to believe, which expert is credible, and what aspects of the damages analysis should be adopted. Numbers are suggestive, and high or low numbers, even those that are presented at the start of the arbitration, can impact an arbitrator's thinking despite the careful damages analysis conducted based on the concrete evidence presented by the parties. Study after study has proven that people will be anchored in their response by numbers that bear no relationship to the question they are asked to answer and will adjust from it.

Where it appears that one arbitrator is leaning heavily in one direction and has in mind a damages figure that does not seem to comport with the evidence, the chair might want to consider being the first one to suggest a damages figure. Such an introduction of a number that the chair believes is appropriate may deflect the anchoring bias as the deliberations proceed.

As the survey results demonstrate, many arbitrators find that quantifying damages is often more difficult than determining liability. There is often no clear right answer, perhaps opening the door for the influence of the anchoring blinder. Being mindful of the anchoring blinder should assist arbitrators to avoid falling prey to it. Counsel should carefully weigh in each case, based on its particular circumstances, whether they are better served offering a number that is very high or very low in the hope that it will influence the arbitrator to unconsciously react with the anchoring bias, or whether in doing so they will lose all credibility and would be better served by presenting a number that is credible, and supporting it in such a convincing fashion that they will overcome any anchoring blinder.

## **3. Framing Blinder**

### **a) The empirical studies**

*Study 1:* In this experiment the same two sets of adjectives in a different order were used to describe two people.

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41 Inside the Judicial Mind, *supra* note 36, at 788-89.

Alan – intelligent-industrious-impulsive-critical-stubborn-envious

Ben – envious-stubborn-critical-impulsive-industrious-intelligent

The study found that the initial adjective colored the subjects' assessment of the later adjectives, leading the experiment subjects to view Alan as an able person with some shortcomings and Ben as a problem person whose abilities are hampered by serious difficulties.<sup>42</sup>

*Study 2:* The subjects were all shown the same film. Then they were asked how fast the cars were going using different words to describe the moment of contact. The responses varied depending on the word used.

Smashed	40 MPH
Collided	39 MPH
Bumped	38 MPH
Hit	34 MPH
Contacted	31 MPH <sup>43</sup>

## b) Implications for arbitration

Every arbitration counsel knows that how the story is presented is crucial to persuading the tribunal to accept their version of the case. The words that are chosen to express the story, the elements of the story that are emphasized, the order and manner in which parts of the story are presented are essential elements in persuasive advocacy. Arbitrators are conscious of the fact that differences in the quality of the lawyering can affect their decision. Without overstepping and assisting counsel in inappropriate ways, arbitrators do try to look beyond the manner and style of presentations to ascertain the true story. Again, recognition of the psychological influence that a well-crafted presentation can have should serve to heighten arbitrator's ability to improve his or her decision-making. Counsel, of course, should use their skills to the best of their ability and present their story in the most favorable light and in a manner most likely to have the psychological impact they desire.

## 4. Coherence and Ego-Centricity Blinders

### a) The 2012 arbitrator survey

On a scale of 1 to 10 with 10 being the most certain, how certain are you that you have reached the correct result by the time you sign the award?

<sup>42</sup> Inadmissible Information, *supra* note 24, at 1266.

<sup>43</sup> Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory*, 13 J. OF VERBAL LEARNING AND VERBAL BEHAVIOR 13, 385-86 (1974).

1	0.3%
2	0%
3	0.3%
4	0%
5	0.3%
6	0.3%
7	3.3%
8	16.4%
9	52.4%
10	27%

### **b) Empirical studies**

*Study 1:* Judges were asked to estimate their reversal rate on appeal by stating what quartile they would fall into as compared to other judges, with the top quartile being the one with the highest reversal rate. Fifty-six percent put themselves in the lowest quartile and 31% in the second lowest quartile. Thus, 87% of the judges thought at least half their peers had higher reversal records on appeal,<sup>44</sup> confirming that “the psychology of judging includes the belief that one is almost always (some judges think always) right.”<sup>45</sup>

### **c) Implications for arbitration**

The coherence blinder is the psychological model which examines the shift from conflict to closure. During the course of deciding a case the judge’s or arbitrator’s view of the dispute gradually moves towards a state of coherence so that the arguments that support one result are endorsed and the opposing arguments are rejected. By the end of this process one view of the case emerges as the winning position.<sup>46</sup>

Justice Cardozo explained the process most eloquently:

Then suddenly the fog has lifted. I have reached a stage of mental peace. I know in a vague way that there is doubt whether my conclusion is right. I must needs admit the doubt in view of the travail that I suffered before landing at the haven. I cannot quarrel with anyone who refuses to go along with me; and yet, for me, however it may be for others, the judgment reached with so much pain has become the only possible conclusion, the antecedent doubts merged, and finally extinguished, in the calmness of conviction.<sup>47</sup>

44 Misjudging, *supra* note 7, at 436-37.

45 RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 192 (1990).

46 Simon, *supra* note 12, at 20.

47 Benjamin N. Cardozo, *The Paradoxes of the Legal Science*, in THE SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 80-81 (Margaret E. Hall ed., 1947).

Once the state of coherence is reached, certainty, a state the mind strives for, takes hold. Jurists have long commented on the human inclination to reach a state of certainty which leads to conviction as to the accuracy of conclusions reached. As Judge Posner remarked, “People hate being in a state of doubt and will do whatever is necessary to move from doubt to belief.”<sup>48</sup> Justice Holmes similarly stated, “The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind.”<sup>49</sup> Robert Burton in his book on the subject discussed this phenomenon of reaching certainty in physical terms with reference to the brain’s mesolimbic dopamine system which provides feelings of pleasure.<sup>50</sup>

Judges have used the concept of the hunch to explain their arrival at a decision. Judge Hutcheson, who was undergoing Freudian psychoanalysis, originated the concept in an early work: “after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch – that intuitive flash of understanding which makes the jump-spark connection between question and decision, and ... sheds its light along the way.”<sup>51</sup> Judge Friendly spoke of the decisional conclusion as “flashes before the shaving mirror in the morning” which he attributes to trained intuition.<sup>52</sup>

But the question must be asked, does feeling certain upon reaching a state of coherence provide assurance that the result reached is correct or is this really just overconfidence leading to the “illusion of validity.”<sup>53</sup> Overconfidence may lead to premature conclusions and insufficient consideration of alternative possibilities, thus decreasing judgment accuracy.<sup>54</sup> Is the certainty with which a conclusion is reached also the natural result of yet another blinder, the confirmation blinder?

## 5. Confirmation Blinder

### a) 2012 arbitrator survey

Do you form a preliminary view of the merits of the case after receiving the prehearing submissions?

48 Richard Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

49 Oliver Wendall Holmes, Jr., *The Path of the Law*, 10 HARV. L. R. 457, 465 (1897).

50 Robert Burton, ON BEING CERTAIN: BELIEVING YOU ARE RIGHT EVEN IF YOU ARE NOT 86-101 (2008).

51 Judge Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decisions*, 14 CORNELL L. Q. 274, 288 (April 1929); quoted in Simon, *supra* note 12, at 119; see also Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L. J. 231 (1990).

52 Judge Henry J. Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 YALE L. J. 218, 230 (1961). See also R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUSTON L.R. 1381 (2006).

53 Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2(2) REV. OF GENERAL PSYCHOLOGY 175, 188 (1998).

54 Hal R. Arkes, et al., *Eliminating the Hindsight Bias*, 73(2) J. OF APPLIED PSYCHOLOGY 305, 307 (1988).

Always	3.5%
Usually	14.1%
Often	19.4%
Sometimes	50.5%
Never	12.4%

In what percentage of your cases have you changed your mind and rendered an award that is at variance with your prehearing preliminary view if formed?

0 – 10%	9.9%
11 – 20%	20.3%
21 – 30%	31.3%
31 – 40%	16.6%
41 – 50%	18.9%
Over 50%	8%

In Approximately what percentage of your cases have you changed your view of the case outcome while writing the award?

0 – 10%	55.4%
11 – 20%	28.4%
21 – 35%	10.1%
36 – 50%	5.8%
Over 50%	0.3%

Which of the following practices do believe is better?

Share views early in the process and discuss reactions to the merits throughout the proceeding.

63.4%.

Wait until all the evidence is in before discussions among the arbitrators about the merits of the case.

26.8%

No opinion

9.8%

**b) Empirical studies**

*Study 1:* When a mind reader gives an analysis of one’s character in essentially universally appropriate descriptive terms, people who want to believe that their minds are being read easily find substantiating evidence in what the



mind reader says as they focus on what fits and discount what does not. They do not consider the possibility that equally accurate descriptions can be given if their minds were not being read.<sup>55</sup>

*Study 2:* A series of studies demonstrated that when a person draws a conclusion on the basis of information acquired and integrated over time, the information acquired early in the process is likely to carry more weight than that acquired later, the so-called primacy effect. People often form an opinion early in the process and then evaluate subsequently acquired information in a way that is partial to that opinion.<sup>56</sup>

### c) Implications for arbitration

In the context of arbitral decision-making the confirmation blinder is a particularly pernicious blinder. All arbitrators say that they keep “an open mind” until the close of the hearing and surely arbitrators honestly believe that to be true. However, the psychological learning suggests this to be a blinder in and of itself. Francis Bacon stated hundreds of years ago, “The first conclusion colors and brings into conformity with itself all that comes after.”<sup>57</sup> A similar conclusion was reached by Waites and Lawrence, both lawyers and social psychologists known for their courtroom decision-making work, who concluded in their foremost article on the subject of psychology and arbitrators:

A typical arbitrator concludes the initial phase with a single dominant story in mind ... [A] sizeable percentage of arbitrators have established a clear leaning by the end of the opening statement (prior to any exposure to witnesses or evidence). This would mean that for most arbitrators, the actual arbitration presentation is a process of filtering through the evidence to test their individual hypothesis about the case – to either confirm or to alter their original notion of what the case story really is ... Arbitrators ... will make every effort to fit their perceptions of the facts and circumstances of the case into the story they have formed ... Once a narrative has become firmly visualized, arbitrators will rarely change their opinions about what happened although they will occasionally change their minds about how the events in the case should be legally classified.<sup>58</sup>

The 2012 Arbitrator Survey results are instructive. Eighty-eight percent of the arbitrators formed a preliminary view of the merits of the case at least 25% of the time after only receiving the prehearing submissions, while 37% formed such views at least 50% of the time. Sixty percent of the arbitrators changed their

<sup>55</sup> Nickerson, *supra* note 53, at 180.

<sup>56</sup> See studies discussed in Nickerson, *supra* note 53, at 187; see also Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37(11) J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 2098 (1979).

<sup>57</sup> Francis Bacon, *Novum organum*, XLVI, available at <http://intersci.ss.uci.edu/wiki/ebooks/BOOKS/Bacon/Novum%20Orgum%20Bacon.pdf> (1620).

<sup>58</sup> Richard C. Waites & James E. Lawrence, *Psychological Dynamics in International Arbitration Advocacy*, in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 69, 109-110, 114 (Doak Bishop & Edward G. Kehoe eds., 2010).

preliminary determination 30% or less of the time. And still, 28.4% changed their minds while writing the award 11 to 20% of the time while 10.1% did so 21 to 35% of the time.

These results suggest that arbitrators do review the case as it progresses and are not necessarily as locked into their preliminary view as the confirmation blinder would suggest. The deliberative functions do appear to be operating and the confirmation blinder may not be as strong an influence on arbitrators as some of the other blinders. But is enough being done by arbitrators to counter the confirmation blinder? Is it the case in too many arbitrations that a conclusion reached early tends to be substantiated by later evidence as conflicting evidence is filtered out by the unconscious?

The law has recognized the impact of confirmation bias in the context of jury trials in the United States. Jurors are admonished to keep an open mind during the presentation of evidence and to form no conclusions until all the evidence has been presented and they have been instructed by the judge. The jurors are instructed not to talk about the case with one another until the judge sends them to commence the deliberation process. Studies conducted with mock jurors suggest that such admonitions alone are insufficient to accomplish their purpose, and that jurors often come to favor a particular verdict early in the trial process and deliver final verdicts consistent with their tentative conclusions.<sup>59</sup>

It is likely that the 27% of arbitrators whom the survey showed follow a similar protocol and wait until the conclusion of the evidence before talking to their fellow arbitrators about their reactions likely do so for the same reasons as the instructions to the juries: to avoid reaching decisions too early. But it is also likely that, like the findings of juries, this practice does not achieve its goal of forestalling a premature conclusion. Thus the 63% of arbitrators who believe that it is a best practice to share views early in the process and discuss reactions to the testimony and the developing merits throughout the proceeding are likely not, in fact, prejudicing a fair result. And many arbitrators would feel that many of the benefits of having three decision-makers would be lost if views and reactions could not be exchanged and debated during the course of the proceeding.

However, how those conversations are conducted can have a significant impact on whether or not the confirmation bias that is human nature is ameliorated. There are practices that can be followed by the arbitrators in the course of their discussions in a conscious effort to truly keep an open mind and forestall the impact of the confirmation blinder and ensure that all aspects of the case are being fully considered throughout.

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59 Nickerson, *supra*, note 53, at 193-194.

Making sure that both “stories” are played for discussion throughout the proceeding would help. Many believe the role of the party-appointed arbitrator is to make sure the position asserted by his or her appointing party is understood. This can be viewed as a virtue as it may serve to forestall the confirmation blinder in that all arbitrators hear all sides throughout the process. But, it does pose the risk of the party-appointed arbitrator becoming increasingly convinced of his appointing party’s position as the confirmation blinder strengthens.

To defuse this blinder and perhaps even counter to some extent any unconscious predisposition towards the position of the appointing party, consider whether it would be useful, in particular cases where an arbitrator seems unduly wedded to one view, to have the party-appointed arbitrators sum up the evidence each day over lunch, but have them switch which side’s evidence they are marshaling from time to time. Any party-appointed arbitrator who does not perform this function in good faith and marshal the evidence competently will lose credibility in the tribunal.

If there are no party-appointed arbitrators, consider having the co-arbitrators develop the story from each party’s perspective and marshal the evidence that supports each party’s case continuously throughout the proceeding. It may also be helpful to have them switch sides from time to time so they don’t develop a confirmation blinder in favor of the side they are presenting.

As arbitrators question witnesses they should make sure questions are asked that elicit the full story and not just questions that will confirm or support a preliminary view. If questions might be viewed as partial if asked by a party-appointed arbitrator, the chair can be asked if he or she would be willing to pose those questions.

Whether such a process would lead to more dissents is a question that might be asked. The fact that there are very few dissents in commercial cases even where there are party-appointed arbitrators suggests that the risk is slim. In any case, it should be trumped by the importance of fairly hearing all sides of the case.

### **III – ATTITUDINAL BLINDERS – BACKGROUND AND EXPERIENCE**

#### **A) EMPIRICAL STUDIES**

*Study 1:* In a striking study, researchers worked with staunch supporters of candidates Bush and Kerry in the 2004 U.S. presidential elections. Statements by the candidates were played for them while they were connected to a magnetic imaging device that measured the location and level of brain activity. The study demonstrated that only the intuitive parts of the brain (System 1) were triggered;

the reasoning part (System 2) remained completely inactive as any negative information about their candidate was simply filtered out automatically. The same result was found when they played positive messages about the opposing candidates. The information never reached the deliberative part of the brain.<sup>60</sup>

*Study 2:* In an experiment conducted with arbitrators, twenty different panels of arbitrators listened to a tape of the same contract dispute. All were arbitrators, but half were brokers and half were manufacturers. The dispute concerned a sale of goods contract and the issue was whether or not the defendant broker had the right to cancel the contract. The comparison between the manufacturer arbitrators and broker arbitrators demonstrated that the brokers were far more likely to favor decisions for the broker defendant than were the manufacturers.<sup>61</sup>

## B) IMPLICATIONS FOR ARBITRATION

Arbitrators are people and like all people have their own frames of reference, experiences and societal inputs that guide their thinking and their decision-making processes. Each arbitrator is uniquely influenced by his or her lifetime experiences and cultural influences and like judges is influenced by that background. As Justice Holmes said, “The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”<sup>62</sup>

His comment was echoed by Justice Cardozo who said, “If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge, just as the legislator gets it, from experience and study and reflection; in brief, from life itself.”<sup>63</sup> The English judges similarly acknowledge that a judge’s individual circumstances can predispose him/her. As Lord Phillips noted, “Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical

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60 Drew Westen et al., *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints and Partisan Political Judgment in the 2004 U.S. Presidential Election*, 18(11) J. COGNITIVE SCIENCE 1947 (2006).

61 Diamond, *supra* note 32, citing Ernest A. Haggard & Soia Mentschikoff, *Responsible Decision-Making in Dispute Settlement*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES, 277 (June Louin Tapp and Felicia J. Levine eds., 1977).

62 OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover Publ'ns 1991) (originally published 1881); see also RICHARD A. POSNER, *HOW JUDGES THINK* (2008) (discussion of political and personal elements in judging).

63 CARDOZO, *supra* note 16, at 71.

reasons, predispose a judge toward a particular view of the evidence or issue before him.”<sup>64</sup>

The influence of life’s experience is best exemplified by Justice Stewart’s words in a landmark obscenity case. In deciding that the offending item was not obscene, Justice Stewart summed up the basis for his conclusion, “I know it when I see it.”<sup>65</sup>

Speaking of this aspect of human nature in the context of arbitrator decisionmaking, Shari Diamond referenced three psychological influences at the 2002 ICCA Congress. The “affinity effect” occurs 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.”<sup>66</sup> The “self-serving or egocentric bias” is the “tendency for people to reach judgments that are biased in a self-serving direction.”<sup>67</sup> And, finally, the “expectancy effect” causes “beliefs about the world and preconceived notions about the likely credibility of particular types of witnesses [to] affect how decision-makers evaluate evidence” and causes decision-makers to be more “likely to reject information that is inconsistent with their beliefs and expectations.”<sup>68</sup> Yet, people feel that they are free of prejudice or bias, the illusion of objectivity.<sup>69</sup>

#### IV – IMPROVING ARBITRATOR DECISION-MAKING

A great deal has been written about how a reasoned award should be written and what is required to satisfy the requirements of a reasoned award, but further attention should also be given to the process of reaching a decision on the merits and avoiding blinders in the process. Psychological studies conclude that simply understanding the need to avoid blinders and the desire to overcome one’s blinders and to correct them is not sufficient to cure the problem. Awareness of the mental contaminant and motivation to correct it has been found not to lead to control. Human nature and the workings of the brain are such that, even if people know they have blinders and understand that they have predispositions, they do not believe those blinders infect their judgment.<sup>70</sup> Indeed, they recognize that the judgment of others is affected by blinders, but

64 *Re Medicaments and Related Classes of Goods (No.2)*, [2001] 1 WLR 700, 711, ¶ 37.

65 *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

66 Diamond, *supra* note 32, at 336-37.

67 *Id.* at 337.

68 *Id.* at 337-38.

69 Mahzarin R. Banaji et al., *How (Un)ethical Are You?*, HARV. BUS. REV. 3 (Dec. 2003).

70 Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116(1) PSYCHOLOGICAL BULLETIN 125-26 (1994); Emily Pronin, Thomas Gilovich, & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111(3) PSYCHOLOGICAL REVIEW 781-82 (2004).

remain convinced that they themselves are unaffected. This has been labeled as the “bias blind spot.”<sup>71</sup>

While there is strong support in the psychological literature for the bias blind spot conclusion, other psychologists argue, based on a different set of studies, that people will view information more objectively and rely less on intuitive reactions if they are motivated. Speaking about judges, they describe this as “bottom-up” decision-making (matching the formalist perspective on judicial decision-making) and conclude that it can be motivated by a fear of invalidity, a feeling of accountability for decisions taken, and/or a desire to be accurate. They report that given sufficient time availability, such motivations will lead to a more deliberative process.<sup>72</sup> Surely all of these motivations are applicable to arbitrators who care deeply about making the right decision and feel a strong personal sense of responsibility to the parties and to the other members of the tribunal to whom they are accountable.

While humans cannot function without the operation of the intuitive part of the brain and it certainly has a role to play in all arbitrator functions, arbitrators owe it to the parties to take whatever steps they believe would be effective to counter their unconscious blinders and prompt the deliberative portion of the brain to engage fully in the assessment of all aspects of the case. The psychological research on debiasing techniques is far less advanced than the research that identifies biases.<sup>73</sup> However, some work has been done and the following suggestions are offered to arbitrators to assist in assuring the active engagement of the brain’s deliberative faculties and hopefully the reduction of the influence of unconscious blinders. Many arbitrators already take some of these steps, and the 2012 Arbitrator Survey suggests that many perform well in applying their deliberative functions to the decision-making process, but there is value in developing a list and reviewing it for applicability and action to further counter psychological blinders:

- As you consider your decision and as you write the award consider the opposite side, assuming each to be correct.<sup>74</sup>

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71 Emily Pronin, Daniel Y. Linn & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28(3) PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 369 (2002). The truth of this conclusion was confirmed in my own personal experience. I gave a talk on this subject at an arbitration conference and asked one of my esteemed colleagues during the break what he thought of the presentation. He said that the presentation was all about judges and we are arbitrators. The clear implication of his reaction was that somehow we arbitrators are different and not subject to the same biases and blinders as judges.

72 Brandon Bartels, *Top-Down and Bottom-Up Models of Judicial Reasoning*, in THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING, supra note 14, at 46, 48.

73 Scott O. Lilienfeld, Rachel Ammirati & Kristin Landfield, *Giving Debiasing Away, Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4(4) PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 390, 391 (2009).

74 Yves Derains, *The Arbitrator’s Deliberation*, 27 AM. U. INT’L L. REV. 911, 923 (2012); Charles G. Lord, Mark R. Lepper & Elizabeth Preston, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47(6) J. PERSONALITY AND SOCIAL PSYCHOLOGY 1231, 1231-32 (1984).

- Identify why you may be wrong, what are the important pieces of evidence that go the other way and why are they not reliable or credible.
- Consult your co-arbitrators and review all aspects of the facts and law and conclusions with them.<sup>75</sup>
- Make sure you elicit the independent thinking of each member of the tribunal.<sup>76</sup>
- Create a checklist with columns for each party and list the facts that favor that party.<sup>77</sup>
- Create a checklist listing the legal claims and the elements of each claim and review how and whether they have been met, looking at it from each side's perspective.<sup>78</sup>
- Reduce your reliance on memory; look for record citations for all of the important facts for both sides to ensure that you have recalled them correctly.<sup>79</sup>
- Replay how you reached your conclusion and think about what evidence you rejected and why, in reaching that conclusion.<sup>80</sup>
- Write down your reasoning, even if you are issuing a bare award at the request of the parties.<sup>81</sup>
- Estimate the odds of being wrong. If you conclude they are too high, rethink the case until you are more certain of your conclusion.<sup>82</sup>
- Try to identify any significant evidence that would be inadmissible or is unreliable that may have influenced you and consider the outcome without that evidence.<sup>83</sup>
- Focus especially on the blinders that have been shown to affect judicial decision-makers, such as the anchoring and hindsight blinders, and

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75 Ronkainen, *supra* note 13, at 12.

76 JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS* 109 (2012).

77 Bishop, *supra* note 6, at 808-809. Benjamin Franklin gave similar advice 250 years ago. *Benjamin Franklin's letter to Joseph Priestley* (Sept. 19, 1772), available at <http://www.procon.org/view.background-resource.php?resourceID=1474>. Checklists create a mental schema and a forcing function that promotes careful deliberative analysis by disrupting the automatic intuitive response.

78 *Blinking on the Bench*, *supra* note 12, at 138-140.

79 Hal R. Arkes, *Principles in Judgment/Decision Making Research Pertinent to Legal Proceedings*, 7(4) BEHAVIORAL SCIENCES & THE LAW 429, 451 (1989).

80 Baruch Fischhoff, *For Those Condemned to Study the Past: Reflections on Historical Judgment*, 4 NEW DIRECTIONS FOR METHODOLOGY OF SOCIAL AND BEHAVIORAL SCIENCE 79, 85 (1980).

81 Arkes, *supra* note 54, at 307; *Blinking on the Bench*, *supra* note 12, at 135-136.

82 Jason Zweig, *How to Ignore the Yes-Man In Your Head*, WALL STREET J., Nov. 19, 2009, available at <http://online.wsj.com/article/SB10001424052748703811604574533680037778184.html>.

83 See Lilienfeld et al., *supra* note 73, at 395.

affirmatively and consciously consider whether you may have been influenced by them.

- Don't take too many cases. Make sure you leave enough time to think through all of the issues, both factual and legal.<sup>84</sup>
- Leave time to sleep on the award so that you can continue to think about it and then go back and review it with fresh eyes.<sup>85</sup>
- Consider what evidence you would have needed presented to you in order to come to the opposite conclusion, and consider whether in fact such evidence was presented.
- Ask yourself what the losing party would feel that you overlooked in your analysis.
- Consider, if somebody were to have concluded the other way, how would he or she write the award and where and how would it differ.<sup>86</sup>
- Stay informed as the study of arbitral decision-making and psychology develops to learn more about blinders and improve your practices.<sup>87</sup>

The 2012 Arbitrator Survey results described in this article provide some perspectives on current practices with respect to a few of these steps. A follow-up survey could review whether the specific suggestions listed are in fact part of arbitrators' current practice.

Question: Do you review the evidentiary record before you prepare the award?

Response:

Always	69.9%
Usually	17.8%
Often	7.3%
Sometimes	5%
Never	0%

84 See Bartels, *supra* note 72, at 46; see also Steven L. Neuberg, T. Nicole Judice & Stephen G. West, *What the Need for Closure Scale Measures and What it Does Not: Toward Differentiating Among Related Epistemic Motives*, 72(6) J. PERSONALITY AND SOCIAL PSYCHOLOGY 1396, 1396-97 (1997) (citing studies that showed that when a person is motivated by a desire for closure activated by time pressures they are likely to exhibit the impact of the primacy effect (persuaded by what was presented first), make stereotypical judgments, assimilate new information to existing active beliefs and, in the presence of prior information, resist persuasion).

85 Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108:17 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 6889 (2011), available at <http://www.pnas.org/content/108/17/6889.full.pdf+html?sid=9a2ec5a6-0510-477a-bec3-c50c5a7c8950> (demonstrating that fatigue and lack of nourishment affect decision-making by judges).

86 Lord et al., *supra* note 74, at 1240.

87 Lilienfeld et al., *supra* note 73, at 393.



Question: When you deliberate as a panel, how often do you review the evidence in favor of what you have preliminarily assessed to be the losing side?

Always	31.4%
Usually	22.4%
Often	21.1%
Sometimes	19.3%
Never	5.8%

Based on these survey results, it appears arbitrators can do more to counter their blinders. As reported, 46% of arbitrators review the evidence that supported what was preliminarily viewed to be the losing side when deliberating 50% or less of the time. And it is not clear if the arbitrators' responses as to their own review of evidence referred to looking for citations to support a conclusion or a review of evidence that supports both sides. As arbitrators learn more about the blinders that affect their thinking, best practices to foster a more engaged deliberative process are likely to evolve to improve the quality of decision-making.

## V – ADVICE FOR ARBITRATION COUNSEL

It is common wisdom that one of the most important, if not the most important step, in the arbitration for a party is the selection of the arbitrator. Because arbitrators are not all the same and, as discussed above, their decisions may be greatly influenced by their background and experience, many have argued that the party-appointed system for arbitrator selection is a *sine qua non* if arbitration is to prosper. Parties wish to have one arbitrator with whom they feel comfortable and to whom they feel they can craft a presentation that will appeal. It has not been established that only the party-appointed system, which has been both severely criticized and roundly defended by leading scholars in recent years,<sup>88</sup> is the only way to identify arbitrators that the parties would trust. But, as the discussion above makes clear, arbitrator selection is a critical part of the arbitration from the party's perspective and will perhaps draw even more attention as the psychology of decision-making becomes better known.

Many sources offering guidance for effective advocacy have been published.<sup>89</sup> Such tips as reading everything a prospective arbitrator has written,

88 Edna Sussman, *The Debate: Unilateral Appointment of Arbitrators*, American Bar Association Section of International Law, I(1) ARBITRATION COMMITTEE NEWSLETTER 2 (July 2013) (discussing the subject and citing the leading articles on the debate: Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25(2) ICSID REV. 339 (Fall 2010) and Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 ARB. INT'L 7 (2013)).

89 See, e.g., discussions in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION, *supra* note 23.

developing an appealing “story,” tailoring the manner and substance of the presentation to appeal to the specific arbitrators, are all practices which are, in fact, designed to understand and/or play to the unconscious of the arbitrator.

To the wealth of literature on the subject, consider one additional thought and two additional approaches for counsel addressed specifically to uncovering and addressing or deflecting unconscious blinders.

### **A) HOW MANY ARBITRATORS**

If the size of the case warrants it and the accuracy of the decision is paramount, consideration should be given to having three arbitrators rather than one. There are many issues to consider in deciding how many arbitrators to suggest, time and cost among them.<sup>90</sup> But the suggestion in the literature that “group decision-makers might be better equipped to combat some of the more pernicious cognitive blinders like hindsight bias”<sup>91</sup> should not be ignored. Groups can remember more facts than individuals and in deliberating with one another can share remembered information leading to a more accurate determination. Beyond recollection and focus on different facts, three arbitrators bring different backgrounds and experiences to the arbitration and bring to the deliberations “differing insights and views of the events and motivations” which “provide the group with a more complete perspective out of which a better quality decision can be made.”<sup>92</sup>

### **B) TAPPING THE SOCIAL SCIENTISTS**

Jury consultants have long been employed in the United States as a response to the importance of selection and messaging in winning cases. Users of jury consultants find them useful<sup>93</sup> and their widespread use is a testament to their utility. The arbitration community is just beginning to explore the arbitrator’s psychology. In cases that warrant such an additional expenditure, utilizing the services of social scientists to assist with an understanding of the psychological dimensions may be useful.

Waites and Lawrence concluded in the foremost article on the subject of psychology and arbitrators that, like the mock jury used to prepare for a jury trial, “the most useful scientific tool we have in preparing for an arbitration

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90 Jennifer Kirby, *With Arbitrators, Less Can Be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May Be Overrated*, 26(3) J. INT’L ARB. 337 (2009) (questioning whether having three arbitrators, with two party-nominated co-arbitrators, generally improves quality and increases party confidence).

91 Misjudging, *supra* note 7, at 452-453.

92 Waites & Lawrence, *supra* note 58, at 115.

93 Dr. Philip K. Anthony & Les J. Weinstein, *The Social Science Edge in Arbitration and Mediation*, 5(2) NEW YORK DISPUTE RESOLUTION LAWYER 17 (2012).

hearing is a mock arbitration panel study ... Many, if not most, of the perceptions of the mock arbitrators will be close enough to those of the actual arbitration panel that the data will be valuable in developing recommendations for themes, case story, and other aspects of the actual presentation.”<sup>94</sup>

Social scientists can be helpful from the beginning of the process with the selection of the arbitrators, just as they currently vet jury prospects and assist in jury selection. They may bring an understanding of human nature and ability to discern likely reactions which can be a useful additional input into the process of considering prospective arbitrators. With the globalization of commerce and the increased participation of arbitrators from many different cultures, such input may be particularly useful.<sup>95</sup>

Social scientists can also assist in developing the presentation of the case, as they now do for both juries and judges.<sup>96</sup> Many practitioners test their arguments or presentations with colleagues at the firm or with an arbitrator hired as a consultant to advise on procedure or strategy. That is a very useful exercise, but mock arbitration is different and should elicit different but still important information.

First, the social science consultant will try to find an arbitrator or arbitrators that match as closely as possible the characteristics and background of the real arbitrators. This in and of itself, knowing what we know now about psychology, makes the exercise infinitely more useful. In addition, conducted with the assistance of a social scientist, the exercise will not suffer from what is known as the “good subject” response or from confirmation bias which reduces the ability of the colleague or retained specialist to view the presentation with truly unbiased eyes.<sup>97</sup> Rather, the independent mock arbitrators will evaluate themes and facts without knowing which party the counsel presenting before it is representing in real life, since ideally both sides will be presented by that firm with equal effort.

These mock arbitrators can provide a road map on such matters as how to refine or revise the theme developed to tell the story more sympathetically for the selected arbitrators, which legal theories to emphasize, whether particular kinds of graphics would be helpful and what kind of expert explanations would be most useful. Recalibration of the case based on these insights should result in a more persuasive presentation to the arbitrators actually sitting in the case.<sup>98</sup>

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<sup>94</sup> Waites & Lawrence, *supra* note 58, at 118-19.

<sup>95</sup> See also Peter L. Michaelson, *Enhancing Arbitrator Selection: Using Personality Screening to Supplement Conventional Selection Criteria for Tripartite Arbitration Tribunals*, 76 ARB. 98 (2010) (urging psychological personality screening in the selection of three arbitrators to maximize the likelihood of their compatibility and so as to contribute to an efficient and high quality arbitral process).

<sup>96</sup> Anthony & Weinstein, *supra* note 93.

<sup>97</sup> *Id.* at 18.

<sup>98</sup> STEPHEN TUHOLSKI, *MOCK ARBITRATIONS: GETTING THE MOST VALUE FOR YOUR PROJECT* 20 (providing guidance on how to structure a mock arbitration process); Edna Sussman, *Improving your*

### C) ENHANCED ARBITRATOR INTERVIEWS

There is general approval of interviews of prospective arbitrators in the arbitral community, with only 12% of the respondents to the 2012 Queen Mary and White & Case International Arbitration Survey considering them inappropriate.<sup>99</sup> However, there was lack of agreement as to precisely what kinds of questions were permissible.

To assure an independent and impartial tribunal it is generally agreed that areas of permissible inquiry should be restricted.<sup>100</sup> Guideline 7 of the IBA Guidelines on Party Representation in International Arbitration<sup>101</sup> provides the most recent guidance on this issue. It permits a party representative to communicate with a prospective party-nominated arbitrator to determine “his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.” The comments to Guideline 7 explicitly bar “seeking the views of the prospective arbitrator on the substance of the dispute,” but state that inquiries can be made as to “any activities ... that may raise justifiable doubts as to the prospective Arbitrator’s independence or impartiality” and with respect to “the general conduct of the proceedings.”

With what we know now about arbitrators and psychology, how should these permissible areas be construed? Can we and should we now ask questions tailored to the dispute to flush out psychological drivers?

In the 2012 Queen Mary/White & Case Survey, 84% of the respondents believed that asking questions about the candidate’s position on legal questions relevant to the case was not appropriate. However, only 64% felt that it was not appropriate to ask if the candidate was a strict constructionist or influenced by the equities; 59% felt it was inappropriate to ask for prior views expressed as an expert or arbitrator on a particular legal issue; 30% felt it was inappropriate to ask about attitudes towards particular procedures such as evidence by videoconference or bifurcation and only 10% believed it was inappropriate to ask about experience and knowledge of a particular legal topic, technical environment or industry.<sup>102</sup>

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*Arbitration Presentation with a Mock Arbitration: Two Case Studies* 15 (providing details of two actual mock arbitrations); Anthony & Weinstein, *supra* note 93 (providing background on the development of mock arbitrations and explaining the role of the consultant); all collected in 5(2) NEW YORK DISPUTE RESOLUTION LAWYER (2012).

99 Queen Mary University of London and White & Case, *2012 International Arbitration Survey: Current and Preferred Practices and the Arbitral Process*, available at <http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf>.

100 For a collection and discussion of sources on the subject, see Guigi Carmanati, *A Review of the Principles Governing Arbitrator Pre-Selection Interviews*, American Bar Association, 1(1) INTERNATIONAL ARBITRATION COMMITTEE NEWSLETTER, *supra* note 88, at 14 (guidelines and commentators have suggested strict limiting protocols for arbitrator interviews).

101 International Bar Association Guidelines on Party Representation in International Arbitration (2013).

102 Queen Mary University of London/White & Case Study, *supra* note 99, at 6-8.

Based on the Queen Mary/White & Case survey, it would appear that 70% of the arbitral community believes that questions related to matters of procedure, similar to the IBA guidelines permitting questions relating to the conduct of the proceedings, are appropriate. There are numerous questions that can be asked about procedure that could serve as an inquiry into, and in fact may likely prompt, the utilization of debiasing techniques. But is the danger too great that an expanded interview on procedural issues will be used to gain advantages that will influence the merits?

Little thought has been given to the nature of the questions about the candidate's personal history that might be appropriate. Ninety percent of the respondents believed that it is appropriate to ask about past experience and knowledge. While it has not been common to consider that question as relating to personal experiences as opposed to professional ones, should there be a difference? Would such questions be viewed as perfectly permissible, much as they would likely be if asked of a potential juror, or would they be viewed as subtly intimidating and inquiring into views on the merits?<sup>103</sup>

Should we be concerned that an expansion of the permissible scope of an arbitrator's interview would create precisely the prejudice that the strictures on such interviews were intended to prevent? It might be argued that allowing an expansion of permissible questions would open a Pandora's Box and counsel could easily find themselves, even inadvertently, contaminating the neutrality of the prospective arbitrator. However, in the wake of the new information about psychology and the arbitrator, a more detailed discussion of what should or should not be permissible in an arbitrator interview may be inevitable.<sup>104</sup>

In an administered arbitration, the interview can be conducted in a way that circumvents the potential problems. The American Arbitration Association and the International Centre for Dispute Resolution has a vehicle to enable such inquiries with its Enhanced Neutral Selection Process for Large Complex Cases.<sup>105</sup> Parties can develop questions, which after review and approval by the institution, are presented to prospective arbitrators for response to all parties either in writing or on a telephone conference. The arbitrator has the option of responding or declining the invitation to respond to any or all questions. The process works very well and can provide information that no amount of web research or calls to colleagues at other firms could uncover.

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103 Joe Matthews, *Identifying and Overcoming Arbitrator Bias – Advocacy in International Arbitration*, 5(4) TRANSNATIONAL DISPUTE MANAGEMENT 1, 15-16 (2008) (asking if expanded interviews "may be a proper and essential part of advocacy in international arbitration conducted in the 21st Century").

104 Jeffery P. Aiken, *Due Diligence in Arbitrator Selection: Using Interviews and Written "Voor Dire"*, 64 DISPUTE RES. J. 28 (May/June 2009) (urging more thorough interviews of arbitrators).

105 American Arbitration Association, *Enhanced Neutral Selection Process for Large Complex Cases*, available at [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_003909](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003909).

Consideration might also be given to a joint interview of a prospective chair with all parties participating to make the inquiries relevant to the case to assure the selection of a chair with the least prejudicial attitudinal blinders and a practice which strives to overcome informational and cognitive blinders.

## VI – CONCLUSION

While legal principles and precedents provide a constraint and impose some rigor on decision-making by arbitrators, subconscious factors that inevitably influence every person also play a significant role. Many arbitrators already take steps to assure a sound award but, with the current recognition of the psychological influences, a reexamination of best practices in arbitrator decision making is in order.

There are concrete debiasing steps that arbitrators can take to improve the quality of their decisions and to assure a more impartial result. Time and cost considerations must always be taken into account in deciding which additional steps to take. However, many of the steps that are suggested here for consideration do not take any more time or cost any more money.

A party's selection of an arbitrator most likely to come into the arbitration with unconscious predilections favorable to that party's position can be an important factor in maximizing the chances of winning. Similarly, counsel's framing of the dispute and the theme developed to tell the story to evoke a positive response from the arbitrators is known by all to be essential to a persuasive presentation. But more can be done to enhance the arbitrator selection process and to tailor the presentation to the particular arbitrators selected. Whether the additional steps suggested for consideration are cost justified in a particular case must be considered. With the significant dollar values now often seen in arbitration cases, additional effort to factor psychological influences into the selection of the arbitrator and into the case presentation may be desirable.