

2015 ITA Workshop: SUBCONSCIOUS INFLUENCES IN INTERNATIONAL ARBITRATION

June 17-18, 2015
Westin Galleria Hotel
Dallas, Texas

Workshop Co-Chairs:

José I. Astigarraga, Astigarraga Davis, Miami
Prof. Margaret L. Moses, Loyola University Chicago School of Law, Chicago
Luke A. Sobota, Three Crowns LLP, Washington, D.C.

Introduction to the Workshop

What makes a human being decide something in one way or another?

Under most civilized conceptions, “justice” is based on an objective application of pre-set rules to the facts. Factors extraneous to the rules or the facts are considered to have no place in a fair determination. Hence, the blindfold on the image for the figure holding the scales of justice in her hand.

Most civilized systems of justice, at least on paper, agree that the consideration of some factors, such as race, religion, and gender cannot in fairness be considered when rendering an impartial decision. In some societies much attention has been paid to the need to exclude such factors from consideration and indeed some progress has been made.

Recent research has shown, though, that many other far, subtler extraneous factors affect human decision-making. As it turns out, the human reasoning process is subject to subconscious influences that can lead to decisions that are not the product of an “objective application of pre-set rules to the facts.”

In his groundbreaking work, Nobel Prize winner and Princeton Professor Daniel Kahneman has shown how cognitive biases such as anchoring, hindsight bias, confirmation bias, and other flaws derail logic and cause us to reach erroneous results. This phenomenon, then, must be a key concern to those involved in the administration of justice and the resolution of disputes. If we agree that a sound justice system for an orderly society depends on an objective application of pre-set rules to a set of facts, then these error-inducing factors should be extirpated from the system. Understanding the factors and how they affect our decision-making is a first step towards that end.

In this year’s annual program, the ITA will take on this important subject. Keynote speaker Cornell Law Professor Jeffrey Rachlinski will present specific evidence of how these factors affect even the most sophisticated and best decision-makers. The program will then dissect the arbitral process into stages, and see how factors such as the biases mentioned affect perception and decision-making. Beyond that, the program will look at the effect of different legal cultures such as a common law orientation and civil law orientation have on the process. Experts will discuss the impact of these issues upon the overall strategy of the case, selection of arbitrators, written advocacy, oral advocacy, and tribunal deliberations. The program brings together leading arbitration specialists from around the world, assuring

cross-cultural perspectives of these important issues. The audience will have an opportunity to ask questions of these experts.

WEDNESDAY, JUNE 17, 2015

3:00 Registration

3:30 Welcome to the Workshop – R. Doak Bishop, Chair, ITA Advisory Board
King & Spalding LLP, Houston

YOUNG ARBITRATORS DALLAS ROUNDTABLE
Presented by the
ITA YOUNG ARBITRATORS INITIATIVE COMMITTEE

Sponsored by

3:35 Welcome to the Roundtable – Valeria Galíndez, Chair, Young Arbitrators Initiative
Uría Menéndez, São Paulo

3:40 IS INTERNATIONAL ARBITRATION REALLY FLEXIBLE?

Although procedural flexibility is one of the most cited benefits of arbitration, some procedures have become widely accepted by international arbitration practitioners. Are these widely accepted procedures the natural product of years of arbitration experience or are they actually the result of unexamined habit and/or the preponderance of a given legal culture? As new players with different backgrounds enter to the international arbitration market, are the usages applied by these new-comers being truly assimilated by international arbitration?

Moderator: Julie Bédard, Skadden, Arps, Slate, Meagher & Flom LLP, New York

Panelists:

Fabiano Robalinho Cavalcanti, Sergio Bermudes Advogados, Rio de Janeiro
Noradèle Radjai, Lalive, Geneva

4:30 BREAK

4:40 IS INTERNATIONAL ARBITRATION REALLY OPEN TO NEW FACES?

Arbitral institutions are making a great effort in creating opportunities for new faces, by nominating younger professionals as arbitrators. However, are practitioners and parties prepared and willing to appoint new faces? What does it take to be nominated as arbitrator in international cases?

Moderator: Valeria Galíndez, Uría Menéndez, São Paulo

Panelists:

Erica Franzetti, Weil, Gotshal & Manges LLP, Washington, D.C.

Thomas W. Walsh, Sullivan & Cromwell LLP, New York

5:30 Closing Remarks

5:30-6:30

WORKSHOP WELCOME RECEPTION

Sponsored by

7:00-9:00

WORKSHOP DINNER (optional)

Sky Lobby

The Petroleum Club of Dallas

40th Floor, JP Morgan Chase Tower Building

Sponsored by

*Please indicate on the registration form if you wish to attend – ticket price: \$110 per person.
Buses will depart from the hotel lobby at 6:40 for the dinner and will return to the hotel at
the end of the evening.*

Thursday, June 18, 2015

9:00-9:10 am INTRODUCTION – R. Doak Bishop, Chair, ITA Advisory Board
King & Spalding LLP, Houston

9:10-10:20 SUBCONSCIOUS INFLUENCES IN ARBITRAL DECISION-MAKING

A number of studies by psychologists show that most decision-making actually occurs at a subconscious level. This panel will discuss how arbitrators, by recognizing the role of subconscious intuition, may arrive at better decisions. Conversely, the panel will consider how advocates who understand subconscious forces may more persuasively influence the decision-making process.

Introduction: Prof. Margaret L. Moses, Workshop Co-Chair

KEYNOTE: Prof. Jeffrey J. Rachlinski, Cornell University Law School, Ithaca, New York

COMMENTARY: Individual versus Group Decision-making in Arbitration
Prof. Shari Seidman Diamond, Northwestern University School of Law,
Chicago

COMMENTARY: Enhancing the Deliberative Overlay in Arbitrator Decision-Making
Edna Sussman, SussmanADR LLC, Scarsdale, New York

10:20-11:05 CROSS-CULTURAL APPROACHES TO ADVOCACY AND ARBITRAL DECISION-MAKING

A panel of advocates and arbitrators from unique legal and cultural traditions will provide a different perspective on subconscious influences by considering the impact of national and legal cultures on advocacy and judging. Panelists will explore areas of convergence between different groups in experiencing and addressing subconscious influences, reflecting the common threads of human cognition and decision-making. Panelists will also explore areas of divergence, including the impact of culture on perception and norms of legal process.

Introduction and Moderator: R. Doak Bishop, King & Spalding LLP, Houston

Panelists:

Andrés Jana, Bofill Mir & Alvarez Jana, Santiago

June Junghye Yeum, Lee & Ko, Seoul

David Brynmor Thomas, Thirty Nine Essex Street Chambers, London

Laurent Lévy, Lévy Kaufmann-Kohler, Geneva

11:05-11:25 Break

11:25-12:30 STRATEGIES FOR PERSUASION IN THE FACE OF SUBCONSCIOUS INFLUENCES AND CULTURAL DIFFERENCES: ARBITRATOR SELECTION AND OVERALL THEMES

The common, and indeed sound, wisdom is that the selection of the arbitrator is a, if not the, key decision made in the arbitral process. Much has been written about how to select arbitrator, his or her desired qualities, and the need to do due diligence before making a selection. While some steps such as looking at prior arbitral awards to glean helpful insights into the arbitrator's views and beliefs are basic to arbitrator selection, the selection process remains fairly unsophisticated. How is the process affected by the effect of biases and other extraneous affecting factors?

This session will focus on the interplay of cognitive biases and other issues such as legal culture on two key events in the arbitral process.

First, the setting of the overall strategy on a case, including the different approaches that lawyers from different legal cultures might take to the same case. Indeed, the setting of the overall strategy will determine the course that most subsequent decisions will take.

Second, the session will focus on the selection of the arbitrator. Teams from a common-law law orientation and a civil law orientation will each expound on the considerations that they would take into account when deciding what arbitrator would be ideal to decide the case at hand.

Introduction and Moderator: José I. Astigarraga, Workshop Co-Chair

Scene 1: Common Law Perspectives

Common Law In-House Counsel..... **Laura M. Robertson**,
Deputy General Counsel, Litigation and Arbitration, ConocoPhillips,
Houston
Common Law Advocate**Mark Friedman**, Debevoise & Plimpton LLP,
New York
Common Law Advocate**Jay Alexander**, Baker Botts, London

Scene 2: Civil Law Perspectives

Civil Law In-House Counsel..... **William Peter Hartert**, Head of Legal and
Corporate Affairs, Enel Ingegneria e Ricerca S.p.A., Rome
Civil Law Advocate**Benoit LeBars**, Lazareff Le Bars, Paris
Civil Law Advocate**Eduardo Gonçalves**, Mattos Filho, São Paulo

Panel Discussion and Audience Q&A

12:30-2:00	LUNCHEON
A NEW ERA OF INVESTOR-STATE ARBITRATION?	
Donald Francis Donovan Debevoise & Plimpton LLP New York	
Luncheon Sponsored by	
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2:00-2:40 WRITTEN ADVOCACY, SUBCONSCIOUS INFLUENCES, AND DIFFERING CULTURAL EXPECTATIONS

Written advocacy may in some circumstances have even more persuasive power than oral advocacy. This panel will consider how counsel can shape their written advocacy by using various heuristics to bend the arc of decision-making in favor of their client. Panel members will also discuss how different cultural expectations may impact the effectiveness of written advocacy.

Introduction and Moderator: Margaret Moses, Workshop Co-Chair

Panelists:

José Maria Alonso, Baker & McKenzie Madrid S.L.P., Madrid
Jennifer Kirby, Kirby, Paris
Maria Vicien-Milburn, Former General Counsel, United Nations Educational, Scientific and Cultural Organization (UNESCO), Paris

2:40-3:40 ORAL ADVOCACY, SUBCONSCIOUS INFLUENCES, AND DIFFERING CULTURAL EXPECTATIONS

Many of the most effective persuaders in history have been great orators. Oral advocacy is a vital part of the arbitral process today. This session will examine how subconscious influences, cultural and other factors such as “primacy,” “recency,” and repetition come into play when advocating orally. This session will feature oral arguments by a common law and a civil law lawyer and will culminate with a discussion of oral advocacy among the lawyers and renowned arbitrators.

Introduction and Moderator: José Astigarraga, Workshop Co-Chair

Scene 3: Presentation of Oral Argument:

Common Law Advocate **James L. Loftis**,
Vinson & Elkins RLLP, London and Houston

Civil Law Advocate **Anne Véronique Schlaepfer**,
Schellenberg Wittmer Ltd, Geneva

Arbitrator **Eduardo Zuleta**, Gómez-Pinzón Zuleta, Bogotá
Arbitrator **Yves Derains**, Derains & Gharavi, Paris
Arbitrator **John M. Townsend**, Hughes Hubbard & Reed LLP,
Washington, D.C.

Discussion

3:40-4:00 Break

4:00-4:30 ETHICS AND SUBCONSCIOUS INFLUENCES

Panelists will discuss the legal and ethical implications arising from a mock scenario in which counsel inadvertently copies the Tribunal president on internal correspondence regarding a privileged memorandum that addresses the merits of that party's case. Panelists will consider the scenario in light of the heuristics and biases identified earlier in the day, and then discuss the practical steps that arbitrators and counsel should take in response to the issues implicated.

Introduction and Moderator: Luke Sobota, Workshop Co-Chair

Panelists:

Rachael D. Kent, WilmerHale, Washington, D.C.
Claus von Wobeser, Von Wobeser Y Sierra, Mexico City

4:30-5:30 THE ARBITRATORS' PERSPECTIVE: JUDGING AND JUSTIFICATION IN THE FACE OF SUBCONSCIOUS INFLUENCES AND CULTURAL DIFFERENCES

Leading arbitrators from around the world engage in an informal roundtable discussion of the impact that subconscious influences and cultural differences have on arbitral decision-making. The discussion contextualizes the themes from the Workshop by examining them in light of dynamics between counsel and the Tribunal, and in intra-Tribunal deliberations. Arbitrators identify key concerns in arbitral advocacy, and share insights regarding the impact of subconscious influences.

Introduction and Moderator: **Susan D. Franck**, Washington & Lee University School of Law, Lexington, Virginia

Panelists:

Charles N. Brower, 20 Essex Street Chambers, London
Dominique Brown-Berset, Brown&Page, Geneva
Manuel Conthe, Of Counsel, Bird & Bird, Madrid
L. Yves Fortier CC, OQ, QC, Ad. E., Independent Arbitrator, Montréal

5:30 Concluding Remarks: Doak Bishop

6:30-9:00

ITA ADVISORY BOARD DINNER

(Advisory Board members, Academic Council, Board of Reporters, Board of Editors and Workshop faculty only)

Dallas Country Club

(Buses will depart from the hotel lobby at 6:10 and will return to the hotel at the end of the evening)

If you are not a member of the ITA Advisory Board, join now. Advisory Board members attend the Workshop, the Advisory Board Dinner and the ITA Forum for free.

Friday, June 19

9:00-12:00 NOON

ITA FORUM

(Advisory Board members, Academic Council, Board of Reporters, Board of Editors and Workshop Faculty only)

If you are not a member of the ITA Advisory Board, join now. Advisory Board members attend the Workshop, the Advisory Board Dinner and the ITA Forum for free.

2:30-8:30

DALLAS NETWORKING ADVENTURE

Optional – Ticket Price \$85

Dallas Arts District Museums:

Dallas Museum of Art
Nasher Sculpture Center
Perot Museum of Nature and Science

Dinner at Meso Maya Restaurant

(Mayan and Mexican cuisine in the Arts District)

Don't miss this unique networking opportunity.

Tickets are \$85 per person.*

Please register on your registration form.

A bus will depart from the Westin Galleria Hotel lobby at 2:30 pm and will return to the hotel at about 8:30. Then, for those who wish to continue, country and western dancing at

Cowboys Red River Dancehall.

**Price includes the museum(s), drinks and dinner,
and transportation to and from the hotel.*