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Summary of Young-OGEMID Symposium No. 15: "Effective Oral Advocacy in International Arbitration" (July 18 - July 27 2022)

by P. Cipolla Moguilevsky

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Summary of Young-OGEMID Symposium No. 15: "Effective Oral Advocacy in International Arbitration" (July 18 – July 27 2022)

By Paloma Cipolla Moguilevsky [*]

Executive Summary

*Young-OGEMID's Fifteenth Virtual Symposium ("**Symposium**") focused on Effective Oral Advocacy in International Arbitration. It is well-established in the arbitral community that international arbitration lawyers must be sophisticated oral advocates, but achieving effective oral advocacy in international arbitration is not easy. It requires an understanding of the difference between the applicable norms in arbitration and in national courts, skill, training, and a deep knowledge of cross-cultural norms.*

The Symposium brought together experts from around the world who addressed a wide variety of matters within the broader topic of oral advocacy in international arbitration. Speakers provided their insights on (1) Remote Hearings, (2) Tips on Second-Chairing Hearings, (3) Cross-Cultural Differences in English-Speaking Africa, and (4) the Psychology of Decision-Making. Professor S.I. Strong moderated the Symposium during the 10-day virtual discussion.

The Symposium featured the following panelists:

1) *Mino Han – Partner, Peter & Kim;*[1]
2) *Mallory Silberman – Partner, Arnold & Porter;*[2]
3) *Stanley Nweke-Eze – Senior Associate, Templars;*[3]

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[*] **Paloma Cipolla Moguilevsky** is a dual-qualified international dispute resolution attorney who practices international commercial and investment treaty arbitration. She has experience advising and representing clients in high-profile arbitrations in civil and common law jurisdictions and across a variety of industries. Paloma started her career in Argentina as a civil and commercial litigator and then moved to the United States to practice at the International Arbitration group of a renowned international law firm in Washington DC. She holds an LL.B. and an *Abogada* degree from the University of Buenos Aires, where she graduated top of her class. She also obtained an LL.M. in International Business and Economic Law and a Certificate in International Arbitration from Georgetown University Law Center, where she graduated with distinction and in the Dean's list.

[1] **Mino Han** is an International Arbitration Partner in the Seoul office of Peter & Kim, where he specializes in construction and engineering disputes. He is qualified as both a Korean lawyer and a solicitor in England and Wales. Mino has acted as counsel in international arbitrations conducted under the ICC, SIAC, HKIAC, KCAB or JCAA Rules and has been recommended in Who's Who Legal as "one of the few elite international dispute lawyers in Korea."

[2] **Mallory Silberman** is a Partner at Arnold & Porter's International Arbitration practice. She is an internationally recognized and Chambers-listed advocate with nearly a decade of first-chair experience in high-stakes disputes before international institutions. At age 37, "[she] is among the world's most experienced young practitioners of investment arbitration" (Who's Who Legal 2021). To date, Mallory has been counsel in more than 40 investor-State arbitrations, representing not only well-known corporations, but also approximately eight percent of the world's countries. She is a fellow of the Chartered Institute of Arbitrators; participated as a delegate in the ICSID Rules amendment process; and has served as an adjunct professor at the Georgetown University Law Center since 2012, co-teaching a course on advocacy in international arbitration.

[3] **Stanley Nweke-Eze** is a Senior Associate at TEMPLARS and is admitted to practice law in Nigeria and the State of New York. He is recognized as 'one of Africa's 50 Most Promising Young Arbitration Practitioners' by the Association of Young Arbitrators and has experience in arbitration and litigation proceedings across different industry sectors, including construction, energy and natural resources, technology and telecommunications, and general commercial law issues. Stanley is currently a co-chair of the Lagos Court of Arbitration – Young Arbitrators Network, a Young ICCA regional representative for Africa, and a member of the Africa Users Council of the Singapore International Arbitration Centre. He holds a Master of Law degree in International Economic

4) Sabina Sacco – Independent Arbitrator, Sabina Sacco Arbitration.[4]

1. Oral Advocacy and Remote Hearings

Mr. Han contributed to the discussion on "***Oral Advocacy and Remote Hearings***." During his initial post, he relied on his experience to share six tips for effective oral advocacy in virtual hearings:

- *The first tip* was "*do not dwell on a PPT slide for too long*." Mr. Han reminded the participants of the Symposium that Arbitral Tribunals have a limited amount of patience and attention span during virtual settings. In this context, he emphasized that rehearsing presentations is key for lawyers who want to pace themselves well while advocating before Tribunals.
- The *second tip* revolved around Tribunals' short attention span during virtual hearings and strategies to defeat distractions caused by *Zoom* fatigue. Mr. Han's recommended strategies included: (1) beginning the presentation with your conclusion, which should also be repeated at the end of the presentation; (2) showing your face in between a PPT presentation; (3) using the right number of visual aids to catch the Tribunal's attention; and (4) sharing oral advocacy with other members of your team so that different voices are being used in an oral presentation.
- The *third tip* was on technology and the importance of doing a technical dry rehearsal of both video and audio in advance. Mr. Han emphasized that experiencing technical issues while presenting before an Arbitral Tribunal might make you lose credibility.
- The *fourth tip* addressed the behavior of counsel team who is "outside of the screen." Mr. Han explained that team members who are supporting the first chair from the backstage should be careful not to say anything that could be caught by a microphone. Along these lines, he suggested that second or third chairs should avoid whispering and think about how to pass notes to the main speaker.
- The *fifth tip* focused on cross-examination. Mr. Han recommended to keep questions short and concise during virtual cross-examinations. He explained that witnesses might be irritated with long and complex questions in circumstances where they have to look at multiple screens (one for the camera, and one for the exhibit.)

Law from Harvard Law School and a second Master of Law degree in Commercial Law from the University of Cambridge. He also graduated with a First-Class Degree from Nnamdi Azikiwe University and won several top academic prizes during his academic training.

[4] **Sabina Sacco** is an independent arbitrator based in Geneva, Switzerland. A Chilean, Italian and Salvadoran national, she acts as arbitrator in commercial and investment arbitrations, particularly in Latin America and the Spanish-speaking world. With 20 years of experience in international arbitration, she has acted as president, co-arbitrator and sole arbitrator in ICC, ICSID and LCIA arbitrations involving a variety of industries, including oil and gas, renewable energy, mining, construction, utilities, food, retail, real estate and international sales. Sabina is an active member of arbitral institutions and associations. Between 2018 and 2020, she was a team leader in the task force that revised the 2021 IBA Rules on the Taking of Evidence, and a member of the ICC Commission's task force on witness evidence. Sabina holds a law degree from the Pontifical Catholic University of Chile and an LLM from Harvard Law School. She is admitted to the Chile and New York Bars. She speaks Spanish, English, Italian and French.

- The *sixth tip* was an invitation to international arbitration lawyers to think outside the box and keep their oral advocacy interesting. Mr. Han suggested that the use of quick animations or re-constructive videos work well to keep Tribunals engaged.

Q&A Session

Mr. Christian Campbell from the Center for International Legal Studies thanked Mr. Han for his very helpful tips. He added that counsel who participate in virtual hearings do not always adjust their body language and facial expressions to the frame they are in. **Mr. Han** agreed with Mr. Campbell and stressed the importance of developing a different demeanor and body language for virtual hearings. He recommended speaking at webinars as a great place to practice.

Following the discussion on body language, **Ms. Victoria Barausova** raised the point that non-verbal cues from the Arbitral Tribunal can be very useful to counsel during in-person hearings. Considering that the use of body language is much more limited in virtual hearings, she wondered how lawyers may gauge the Arbitral Tribunals' perception in a remote setting.

Mr. Han concurred with Ms. Barausova that catching non-verbal cues from Arbitral Tribunals has become more difficult than before. To address this issue, he suggested that "*counsel intentionally build in a 1-or-2-second pause after covering one block of narrative or section of, for example, an opening statement.*" This would function as a silent "*invitation to the Tribunal to raise questions to counsel*."

Ms. Barausova also raised the point that there have been discussions about the use of asynchronous hearings. She helpfully provided a link to these discussions[5] and asked Mr. Han whether he had any tips regarding pre-recorded oral submissions.

Mr. Han responded by saying he does not think that "*pre-recorded oral submissions that are longer than fifteen minutes will become a wide-spread method of doing advocacy*;" and added that a 2-or-3-hour pre-recorded video with one person giving a speech could be tough and boring to watch. Along these lines, he mentioned that he would not be surprised if a pre-recorded oral submission would follow a more "entertaining" format (*e.g.,* "talk shows") where there are various people chatting, instead of one person giving a solo speech.

Dr. Eva Litina from the Hellenic Consumers' Ombudsman widened the discussion on virtual hearings by asking Mr. Han whether he thinks that the physical experience of a hearing can be transposed entirely to the virtual setting. Additionally, she wondered whether oral advocacy in a virtual hearing may be more efficient for some types of cases and more problematic for others.

Mr. Han responded that, in his opinion, virtual hearings will not disappear entirely. He said that the type or size of the case will not matter so much to determine whether to have an in-person or virtual hearing. Instead, he implied that Arbitral Tribunals will focus on the procedural moment of the case to decide what steps will be carried out virtually. For instance, he mentioned that Tribunal members "*will likely encourage parties to do procedural*

[5] Maxi Scherer, *Asynchronous Hearings: The Next New Normal?*, KLUWER ARBITRATION BLOG (Sept. 9, 2020) available at http://arbitrationblog.kluwerarbitration.com/2020/09/09/asynchronous-hearings-the-next-new-normal/ (last visited Sept. 13, 2022).

conferences, procedural hearings, and oral closings virtually, and evidentiary hearings in hybrid."

Mr. Joseph Matthews took the discussion forward by highlighting his view as an Arbitrator on good virtual etiquette in remote hearings. Mr. Matthews expressed the importance of describing to parties and advocates his monitor and *Zoom* settings at the beginning of proceedings. He said that this practice allows parties and advocates to have a better understanding of what he is experiencing during the hearing so that presentations can be adjusted accordingly and speakers can tell whether he is looking at them, an exhibit, or a demonstrative. Mr. Matthews suggested that these issues can be discussed at a preliminary hearing, or they can be incorporated by agreement of counsel in Orders Setting Procedures for Virtual Hearings.

Prof. Strong agreed with Mr. Matthews on the various points he raised. She expressed that creating good virtual etiquette is as important as creating good in-person etiquette and that discussing these issues at a preliminary hearing could be useful.

Mr. Juan David Arciniegas Parra inquired about the use of illustrative tools while participating in remote hearings.

Mr. Han stated that using PPT slides or other illustrative documents can be very helpful, but that counsel should be mindful of the amount of time to be spent on each slide. In this regard, he explained that slides should not be "over-packed" with information to prevent Tribunal Members from flicking through the next slides and lose attention. Lastly, Mr. Han recommended providing hard copies of the PPT slides to the Arbitral Tribunal in advance. This will allow Tribunal Members to have something tangible where they can take notes.

Prof. Strong concluded the first discussion of the Symposium by thanking Mr. Han for his contribution.

2. Oral Advocacy and Tips on Second-Chairing Hearings

Ms. Silberman contributed to the discussion on "***Oral Advocacy and Tips on Second-Chairing Hearings***." Her participation in the Symposium consisted of a series of general truths, reminders, practical tips and discussion questions on oral advocacy and second-chairing hearings in international arbitration.

Ms. Silberman introduced her posts with some preliminary remarks that included <u>two general truths about oral advocacy</u>:

- ***First, oral advocacy is a bit like an iceberg***.[6] Ms. Silberman explained that every good oral advocate "*stands atop a great mountain of behind-the-scenes legwork, preparation, and work product*," just like the visible portion of an iceberg stands atop a much larger mass that is hidden below water.
- ***Second, advocacy in international arbitration is very much a team sport***. Ms. Silberman stressed that this is how advocacy *needs* to be. She explained that it is not possible to have it any other way, as it is impossible for just one person in the

[6] Ms. Silberman explained during her post that she borrowed this general truth, with permission, from Jean Kalicki and Mark Kantor, who co-taught with Ms. Silberman at Georgetown University Law Center.

hearing room "*to simultaneously speak, take notes, maintain eye contact, consult documents, check the transcripts, watch the tribunal for reactions, search the record, track time, answer questions, improvise, and ensure that the interpretation is accurate*."

Ms. Silberman continued the discussion on oral advocacy and second-chairing by providing five important reminders about second-chairing:

- ***Second-chairing is exciting***. Ms. Silberman reminded Young-OGEMID that attending a hearing means that your work can help shape the arbitrators' view of the case because you are now part of the action. And, while she acknowledged that on some occasions second-chairing can be stressful, she also highlighted that "*it is a fun role to play*."
- ***Second-chairing tends to begin before the hearing commences***. Ms. Silberman explained that although the term "second-chair" is technically a reference to a specific seat in the hearing room, in practice the role of a second-chair commences outside of the hearing room (and far in advance of the hearing), with preparation. The objective of a second-chair is *to assist the first-chair*. Thus, the second-chair *"may help draft an opening, think up questions for cross-examination, or prepare a chronology of key evidence for the first chair*." The precise contours of the role will depend on the hearing, the budget for the case, and the needs of the first-chair.
- ***Second-chairing is a personalized service***. Ms. Silberman noted again that the goal of second-chairing is to assist the first-chair. In order to do so effectively, she suggested that second-chairs should get to know the first-chair by posing questions to her early on. Some of these questions may be: "*what specifically does she need from you and by when does she need it? Does she prefer to do her own drafting? Is she adept with technology? What's her style of advocacy?*"
- ***Second-chairing is a great learning opportunity***. By being a second-chair, you have a front-row seat to the action. Ms. Silberman recommended taking advantage of this position and using it as a learning opportunity – "*Watch how the first-chair responds to the twists and turns of the hearing. Take note of all of the little phrases that she uses to transition between points; to bring a witness examination back on track; and when responding to questions. Try to set up a time (after the hearing) when you can request practice tips. All of this will come in handy when it is your turn to first-chair*."
- ***Second-chairing is not just reserved for the juniors***. Ms. Silberman brought to the attention of those following the Symposium that second-chairing is also a good exercise for the seniors. She talked about her personal experience sitting as a second-chair for a junior team member and how those moments were some of the proudest she has had as counsel. She also emphasized the importance of playing this role periodically as a senior as it may help to improve the instructions that seniors give to their second-chairs.

Ms. Silberman then provided a series of helpful practical tips to become an effective second-chair:

- ***Prepare yourself substantively.*** Ms. Silberman stated that in order to be an effective second-chair, you have to become "*an expert in the issues at hand*." This will require a substantial preparation, which may include re-reading the relevant parts of the record; thinking critically about the issues in play; synthesizing the core

points; assessing strengths and weaknesses; identifying gaps in the other side's evidence; and preparing for potential questions that the Arbitral Tribunal might have for counsel.

- ***Prepare your "battle station."*** Considering that during hearings there is a tight turnaround time to resolve all sorts of questions, Ms. Silberman encouraged second-chairs to set up a system that will allow them to quickly locate information about the case. Some of the steps a second-chair can take include "*saving documents to your computer's desktop; preparing charts and chronologies of the evidence; and/or preparing summaries of the most important jurisprudence*."
- ***"Stress test" arguments for your first-chair***. Ms. Silberman highlighted the importance of respectfully communicating to the first-chair any problem you may spot with the arguments that she is going to present during the hearing.
- ***Think about the logistics***. Time is precious at a hearing so logistics need to be thought about and resolved in advance of the hearing. Ms. Silberman listed some of the aspects that second-chairs should bear in mind: "*Who will be clicking through the PowerPoint slides? When specifically during cross-examination should a document be shown on the screen? How should you communicate with the first-chair while she's speaking? You should have both a plan and a back-up in place*."
- ***Remember that everyone is "on stage" in a hearing***. This practical tip applies not only to second chairs, but also to all members of the hearing team. Ms. Silberman reminded Young-OGEMID that body language during a hearing is important and that you should try to convey focus, engagement, and team solidarity. *"If you cringe at a comment, arbitrators will see it; if you are scrambling to find documents, arbitrators will be distracted from the first-chair's remarks; and if you send audible instant messages to a first-chair, it may signal to arbitrators that the counsel team believes that the first-chair is in trouble.*" Therefore, you should always be mindful of your body language.

To conclude her posts, Ms. Silberman proceeded to raise two questions to take the discussion forward:

- For any other "seniors" on Young OGEMID: When does good (or bad) second-chairing make a difference, either to the first-chair or to arbitrators?
- For the Young OGEMIDers: Have virtual hearings made second-chairing more difficult? Is there anything that you wish first-chairs or arbitrators would bear in mind about second-chairing?

Q&A Session

Ms. Anne-Marie Doernenburg, a lawyer practicing in Tokyo, was the first Young-OGEMID participant to pose questions to Ms. Silberman. Ms. Doernenburg stated that advocates and arbitrators often have diverse backgrounds, so she wondered what are the key regional/cultural differences in advocacy, and how can a young practitioner best find the right balance between developing his/her own advocacy style and adapting to the style a particular Tribunal might be most likely used to. She then inquired who in a counsel team would make a good second chair advocate and whether it would be helpful if the second-chair also assisted the first-chair with oral advocacy, at least partly.

Ms. Silberman addressed the question on developing a personal advocacy style by giving some suggestions. *First*, she recommended observing as many first-chairs as possible to adopt

the practices that you like, and think about what you wish you might do differently. In terms of observing, she encouraged to pay attention to not only first-chairs on your team, but also opposing counsel in hearings. *Second*, she proposed practicing your advocacy whenever and however you can. She explained that there are all sorts of micro-opportunities to do so – "*for example, if you believe that an opening statement would benefit from an animated diagram, but are concerned that the first-chair would be reluctant to use one, ask the first-chair if you can do a quick run-through of the draft presentation for her, so that she can assess how it would play out for the arbitrators*."

Regarding Ms. Doernenburg's second question, Ms. Silberman stressed that speaking roles at a hearing do not need to be limited to lead counsel. She also reminded Young-OGEMID that: "*in every team, there is only one person who will be the most senior, but in principle there can be co-lead counsel*." She reiterated the idea that advocacy is a team sport, and expressed that many arbitrators appreciate hearing from multiple speakers, particularly when senior practitioners cede the microphone to more junior members of the team.

Mr. Timothy Foden, a Partner in Boies Schiller Flexner LLP, joined the discussion on second-chairing with a reminder and some encouraging words for young practitioners. He reminded Young-OGEMID that the goal of the second-chair should always be to become the first-chair, and that big-name advocates are now becoming arbitrators. In this context, he encouraged the next generation of advocates to get out of the second chair and become the lead advocates.

Mr. Mark Kantor, an Independent Arbitrator in Washington DC, stressed the idea that arbitrators note approvingly when a team allows a young team member to lead a witness examination or argument on a disputed issue during the hearings. He highlighted that giving young advocates these opportunities speaks well of the leadership and teaching skills of the team's leader and that arbitrators will likely comment on it when making concluding remarks at the end of hearings.

Ms. Shreya Jain, Principal Associate at Shardul Amarchand Mangaldas & Co., Mumbai, was interested in hearing more about transitioning from second-chair to first-chair roles. She wondered how could this transition be addressed in jurisdictions where (1) organized firm training exercises are not easily available; and (2) where international arbitration hearings are few and fair in between, thus reducing the opportunities to practice in real life settings.

In response, **Ms. Silberman** recommended young practitioners to be on the lookout for opportunities to watch live-streamed hearings. She mentioned ICSID and the PCA as institutions that usually circulate press releases about live-streamed hearings. Further, she shared a non-exhaustive list of programs that include advocacy-training exercises, including: (1) the Foundation for International Arbitration Advocacy (FIAA); (2) the ABA International Arbitration Skills Masterclass; (3) Delos' Remote Oral Advocacy Program (ROAP); and (4) the workshops put on by Young ICCA.

Prof. Strong continued the discussion by agreeing with Ms. Silberman that being a second chair means putting oneself in the shoes of the first-chair and thinking about what they would like in terms of support, then taking appropriate initiative and leadership to provide that support. She highlighted the importance of filling and anticipating the needs of the first-chair not only to make her happier and more effective, but also to show that you understand what is involved with that next level up, *meaning that you are in a position to be promoted to that position.*

Prof. Strong then used the recently televised hearing in *Depp v. Heard* as a good example of what great second-chairing looks like. She compared how the Heard team acted during the hearing with how the Depp team did – "*When one lawyer was speaking on the Heard team and some kind of question arose about the law or the facts, the rest of the team was just sitting and watching. They were highly reactive and had to scramble to find what was needed, often eating up the time of the court. In contrast, when one lawyer was speaking on the Depp team and a question about the law or the facts arose, the person second-chairing (often sitting next to the podium) immediately handed that lawyer a copy of a document or a post-it with a note. There was virtually no delay. The second chair wasn't just passively listening - they were following along, anticipating questions from the judge or objections from the other side, and were ready with the backup materials*." Prof. Strong concluded her post by stating that the effectiveness of Mr. Depp's team in assisting the first-chair came from practice and preparation, and the fact that all the lawyers were acting as a team.

Mr. Earvin Delgado, an arbitration practitioner from the Philippines, widened the discussion by asking Ms. Silberman (1) what is the most important part of being a second-chair given the range of responsibilities that it requires; and (2) what are some common second-chair mishaps that could easily be avoided.

Ms. Silberman responded to the first question by stating that, in her opinion, the most important part of being a second-chair comes down to attributes such as *empathy*. She is of the view that second-chairs should put themselves in the shoes of several people participating in the hearing, including first-chairs; junior team members (in order to ensure that "fire drills" and breakdowns in communications are minimal); stenographers, interpreters, and witnesses (in order to help ease the strain on them); and adversaries and arbitrators (in order to consider matters from their perspectives).

Ms. Silberman addressed Mr. Delgado's second question on the most common second-chair mishaps from her experience observing other second-chairs. She mentioned that one of the things she sees frequently is a second chair who has the best intentions, but ends up distracting the Tribunal by passing notes wildly/trying to converse with the first-chair mid-speech or mid-examination. Her recommendations to avoid creating these distractions vary slightly depending on the type of hearing. During in-person hearings, Ms. Silberman suggests passing notes calmly, and if you are whispering to the first-chair you have to make sure that the microphone is turned off. During virtual hearings, she recommends finding a way to send messages that will not distract the Tribunal. Further, she stressed that additional caution should be taken during virtual hearings with respect to whispering and turned-on microphones, since the microphone will pick up your comment *and* the camera might switch to you, which can be even more distracting for the Tribunal.

Mr. Kantor expanded on Ms. Silberman's recommendation that "*second-chairs should also strive to consider matters from the perspectives of their adversaries and the arbitrators*." He stated that counsel should not press weak arguments since the Tribunal "*may react by becoming frustrated with a side that pursues positions that do not pass the 'red face' test or the Tribunal has already signaled are unpersuasive*." Further, this would invite the opposing side to effectively attack your side's credibility, which can infect your side's other positions as well, not just the weak position.

Prof. Strong commended Ms. Silberman's post for raising the point that a second-chair need not only worry about attending to people up the chain of command, but also helping more

junior members of the team. Prof. Strong is of the opinion that this does not mean micromanaging and/or doing the job for them, but it does mean giving junior team members everything they need to succeed. Therefore, clear instructions to junior team members are critical, as is creating an environment in which they feel comfortable going to more senior members if they have made a mistake.

To conclude, **Prof. Strong** thanked Ms. Silberman for her contribution to the debate on second-chairing, and introduced the third speaker of the Symposium.

3. Oral Advocacy and Cross-Cultural Differences in English-Speaking Africa

Mr. Nweke-Eze contributed to the discussion on "***Oral Advocacy and Cross-Cultural Differences in English-Speaking Africa***." He focused on a series of cultural considerations that arbitration practitioners should show some deference to while advocating in the English-speaking African region. He divided these considerations into five main points:

- ***The influence of cultural differences and values***. Mr. Nweke-Eze started the discussion on cultural differences by establishing that cultural neutrality in international arbitration is key, and that arbitration practitioners must avoid assuming that their practices are "*universal or superior*." He highlighted the importance of taking note of any "*behavioral expectations, methods/tone of communication, and other cultural sensitivities, in order to tailor your advocacy style accordingly*." Arbitral Tribunals are made up of human beings who are often influenced by these human elements and concepts extraneous to the subject of the proceedings. Mr. Nweke-Eze's takeaway on this subject was that "*an effective approach towards advocacy depends on a variety of factors, including the legal traditions, attitudes, and beliefs of the arbitrators, counsel, and other participants in the process*."
- ***The relevance of legal tradition.*** Mr. Nweke-Eze explained that the legal landscape of English-speaking African countries comprises the common law system, civil law system, or a combination of both. Thus, arbitration practitioners should take into consideration the legal background of the Members of the Tribunal to adjust their approach towards the examination of witnesses/experts and disclosure/discovery of documents, among others. Mr. Nweke-Eze gave a practical example to show how an arbitrator's legal background may affect the effectiveness of a practitioner's oral advocacy – "*Arbitrators from the civil law background are usually in the driving seat and like to take full control of the conduct of the proceedings, like requesting certain information or appointing experts. The opposite is typically the case for arbitrators from the common law background. Also, an arbitrator from the civil law background may be irritated by frequent objections during the examination of witnesses, except when absolutely necessary, but it is not a surprising style in the common law context*."
- ***The African conciliatory spirit***. Mr. Nweke-Eze described conciliation as one of the values that are commonly emphasized in many African communities, even during arbitral proceedings that are adversarial in nature. Therefore, he stressed that an excessively adversarial stance in relation to insignificant procedural issues, for example, could be frowned upon by some arbitrators of African descent.

- ***The sanctity of cultural and religious events***. Mr. Nweke-Eze talked about the need to be familiar with the social, cultural, and religious backgrounds of the arbitrators (and other participants in the arbitral process). He suggested not to insist on timelines that are close to Christian and Muslim holidays, prayer times, fasting periods, or other cultural events.
- ***The shift towards virtual hearings***. Mr. Nweke-Eze brought to the attention of Young-OGEMID that logistical issues during virtual hearings, such as disruptions due to power outages and internet connection, could affect practitioners based in some African countries. He added that that time-zone differences should also be considered, and long virtual sessions may be inimical to their cause.

Mr. Nweke-Eze finalized his initial post by concluding that "*a good international arbitration practitioner must go beyond the substantive elements of the case and try to understand the cultural context of the approaches adopted by parties, their counsel, witnesses/experts, and the arbitrators*."

Q&A Session

Participant **Mr. Alexander Stonyer-Dubinovsky** initiated the Q&A Session by thanking Mr. Nweke-Eze for sharing his perspective with Young-OGEMID. Mr. Stonyer-Dubinovsky expressed he was interested in learning more about the African conciliatory spirit. He questioned how does an arbitrator rendering an award in an African-based arbitration balance this spirit of conciliation, with the desire to achieve justice under the law.

In his response, **Mr. Nweke-Eze** expanded on the concept of the African conciliatory spirit. He explained that "*the 'spirit of conciliation' is an unconscious disposition that is imbibed in some African arbitrators because they are usually emphatic about the importance of (initial) conciliatory attempts in the settlement of disputes*." He then continued by providing the historical background of the conciliatory spirit by stating that it "*emanated from the African indigenous dispute settlement system where huge emphasis is placed on preserving existing relationships to the extent possible. Hence, such arbitrators would prefer to see that parties have attempted to achieve an amicable resolution of the dispute in good faith, particularly where the issues in contention are not thorny*." Drawing on these ideas, Mr. Nweke-Eze presented to readers the impression that although a lack of conciliation spirit from one party may not affect the justice of the substantive case, it constitutes a human element that could unconsciously influence an arbitrator's view and decision, particularly in relation to issues where the tribunal has discretion.

Prof. Strong then proceeded to raise certain questions to take the discussion forward. She asked Mr. Nweke-Eze what are some of the precise differences between advocacy practices in English-speaking Africa; and how do those compare to some of the approaches to advocacy that he saw when he practiced in London and the United States. Prof. Strong recalled her experience working in New York, London, and Chicago and described how she saw considerable differences in advocacy in those jurisdictions. She thought that in New York "*cross-examination was brutal, and hyperbole in submissions to the court was not uncommon*." With respect to London, she found it to be the "*polar opposite*" of New York. She found that "*advocacy in general was much more genteel and understated*" and that "*international arbitration practice is very much like English domestic practice in commercial courts*." Regarding Chicago, she saw that it "*fell in the middle*" between London and New York, since

"*the style of cross examination was typical of the US, but lawyers were just not as in-your-face as in New York*."

Mr. Nweke-Eze thanked Prof. Strong for her questions and for sharing her experience. He then proceeded to explain that "*the advocacy practices adopted in English-speaking African countries are influenced by colonial origins and not particularly different from the approaches adopted in their respective courts*." Mr. Nweke-Eze divided his answer in two, referring first to countries that adopted the common law legal tradition, and then to those that follow the civil law legal tradition. He stated that *"[c]ountries that adopt the common law legal tradition often adopt the English style of advocacy, particularly during cross-examination (which constitutes a significant part of the proceedings), and do not adopt the same level of aggressiveness as often seen in New York. Advocates are often firm and brutal but in a largely respectful and refined manner. Specifically, an overly aggressive approach in the examination of witnesses or experts (such as harsh tone and insulting comments) may be shut down by the tribunal. Also, advocates are keen to stand while addressing the tribunal, and would not typically leave the counsel's table.*" Differently, *"[i]n the civil law context, there is generally a minimal emphasis on oral advocacy, particularly when compared to their common law counterparts. Instead, more emphasis is placed on documentary evidence and submissions. So, it is not uncommon to see that some tribunals impose limits on the length of cross-examination as well as the scope of questions asked. And in terms of the style adopted, it is even less intense than the approach adopted in English-speaking African countries that are rooted in the common law system.*"

Dr. Piotr Wilinski, a lawyer practicing in Rotterdam, asked Mr. Nweke-Eze if he could develop his point on the influence of cultural differences and values. He expressed that in a cross-cultural context, some parties may encounter that what is considered a "neutral tone" in one setting, will be offensive or disrespectful in another. Therefore, he wondered whether Mr. Nweke-Eze could share any practical tips for non-African counsels when advocating in front of an arbitrator of African descent.

Mr. Nweke-Eze started his response by stating that it is tough to give general tips that will apply to all English-speaking African countries because of the divergence of cultures and legal traditions. However, he listed some "dos" and "don'ts" that could be useful. *First*, he agreed with Dr. Wilinski that adopting a conciliatory approach would be something applicable to all English-speaking African countries. *Second*, he mentioned that counsel should be aware of the way she behaves and communicates, in terms of body language and demeanor. For example, "*an African arbitrator may consider it disrespectful and informal if addressed while sitting, unless it is because of physical pain or related reason, or is addressed by first name during the proceedings.*" *Third*, he suggested adopting a "*measured and neutral tone*" in communications with everyone participating in the case (opposing counsel, witnesses, and experts.) *Fourth*, he warned that careful consideration should be given to how logic, humor, or legal argument could be perceived by the tribunal. *Fifth*, he recommended showing some deference to culture (by, for instance, using a parable or poem to drive home your point) and religion (by, for example, being considerate towards religious holidays and timelines). Mr. Nweke-Eze concluded his response by stating some general truths – "*every arbitration has its own culture. And given that arbitrators will often rely on their perspective of how things ought to be done, which is often shaped by their cultural and social backgrounds, I usually ask for tips from local counsel that know the arbitrator(s) regarding 'dos' and 'don'ts' beforehand*."

Prof. Strong responded to Mr. Nweke-Eze's last post and picked up on his point that using a parable may show some deference to culture. She talked about her personal experience being

a coach on the Vienna International Commercial Mediation Moot and how she saw that several teams used parables to open their negotiations. She expressed that while she would find "off-putting" that a foreign team used a parable related to her home country, she understands that some people might take it as a welcome conciliatory gesture. She opened the floor for other participants in the Symposium to share their thoughts on this issue.

Mr. Campbell responded to Prof. Strong's post and continued the discussions on parables. He is of the opinion that "*culturally-laden parables are always risky, and especially if the audience might perceive it as pandering or as 'cultural appropriation*.'" He thinks that global figures/events may be safer terrain. Mr. Campbell also expressed that there is a similar issue with the use of idioms and colloquialisms, since they may be completely lost on the audience or understood not quite as intended.

Mr. Nweke-Eze concluded the discussion on parables by stating that the cautious approach may be to avoid them altogether, even when there are people that could be swayed positively by them. His takeaway on the issue was that counsel should take the time to understand the Arbitral Tribunal beforehand to determine whether to use parables and if at all, to what extent.

Prof. Strong thanked Mr. Nweke-Eze for his contribution to the debate on cross-cultural issues and introduced the fourth and last speaker of the Symposium.

4. Oral Advocacy and the Psychology of Decision-Making

Ms. Sabina Sacco contributed to the discussion on "***Oral Advocacy and the Psychology of Decision-Making***." During her initial post, she explained that her comments in the Symposium are the fruit of a combination of research and personal experience as arbitrator, tribunal secretary, and counsel over the last twenty years.

Ms. Sacco started off the discussion by stating that oral advocacy can impact the psychology of decision making, and that there is science and practice that tell us about the impact of non-legal factors in decision-making. That is why she divided her discussion into four broad topics: (a) How the Human Brain Works: the Impact of Cognitive Biases in Decision-Making; (b) The Importance of Cultural and Personal Sensibilities; (c) Other Advocacy Strategies: Storytelling and Appealing to the Senses; and (d) Tribunal Dynamics.

(a) How the Human Brain Works: the Impact of Cognitive Biases in Decision-Making

To understand how arbitrators and judges make up their minds, Ms. Sacco explained that we must first understand how the human brain works. To kick off the debate, she cited to Nobel Prize winner Daniel Kahneman, who has shown that the human brain operates with two systems: (1) an intuitive, automatic, fast thinking system ("**System 1**"); and (2) a deliberate, deductive, slow thinking system ("**System 2**").

Ms. Sacco explained that both systems are necessary to survive. Most of the time, System 1 permits humans to make *"extremely accurate judgments. Because it is fast and automatic, it allows us to save valuable time and energy. But intuition is not always correct, or appropriate*." Although most people assume that judges or arbitrators decide a case in a logical, mechanical and deliberative way, *"[r]esearch conducted on judges and more recently on arbitrators suggests that System 1 has a much greater impact on decision-making than we would like to believe.*" In fact, some authors believe that judges reach intuitive conclusions that they later

rationalize with deliberative reasoning – also known as the "*judicial hunch*". However, other authors, such as Professors Guthrie and Rachlinski, believe that "*judges generally make intuitive decisions, but sometimes override their intuition with deliberation*." Ms. Sacco clarified that this is not the same as rationalizing intuition; it implies that judges can decide against their intuition by applying deliberative processes.

After explaining the two ways in which our brains work, Ms. Sacco addressed the impact of cognitive biases in decision-making processes. She defined cognitive biases as "*systematic errors of judgment [that] are caused by heuristics, which are cognitive shortcuts or intuitive, automatic rules of thumb*." This means that "*[w]hen arbitrators or judges encounter certain stimuli, the intuitive part of their brain reacts in a certain way, even if they are unaware of this*." She warned Young-OGEMID that the word "bias" may be misleading, since it is not about unconscious preferences or discrimination, but rather about how the brain works.

After making these clarifications, she moved the focus to three types of cognitive biases that have a particular impact on decision-making: (i) framing; (ii) anchoring; and (iii) confirmation bias.

(i) Framing Bias

Ms. Sacco explained that "*[f]raming refers to the impact of how the story is presented. Empirical studies show that framing has a significant impact on how subjects characterize people or events*." There are two aspects of framing:

> "*The first aspect of framing is linguistic. The words you use and the order you use them can have a dramatic impact on how an arbitrator perceives your case. Research shows that you can use the same set of words to describe a person, but the order in which you use them makes a difference on how the person is perceived. The nuances of the words used can also make an impact (for instance, if you describe a car as having smashed, rather than hit, into another). Words can also be used to trigger certain word associations that can influence a decision-maker's reaction.*
>
> *The second aspect of framing relates to subject-matter: when you argue your case, you are placing it into a specific legal or moral framework. Your choice of framework will evoke different associations in the tribunal's brains, and will have an impact on how they decide the case.*"

Ms. Sacco highlighted that counsel should be aware of the impact of framing, and how important it can become in international arbitration. She said that arbitration records are full of information, but arbitrators can only focus on a few things at a time – "*The brain tends to focus on: 1) information called to its attention by salient external stimuli (bottom-up attention), and 2) information that the brain deliberatively chooses to focus on (top-down attention)*." Thus, she encouraged counsel to make sense of a large record, tell a story, and shine the floodlight on the aspects of the case that they want the arbitrators to focus on, and present them in the light that is most convenient to their case. Further, she reminded the Symposium audience that framing needs to be based in reality, meaning that overstatements, exaggeration, hyperbole and accusations of bad faith (unless they are well founded) are discouraged.

(ii) Confirmation Bias

Confirmation bias is "*the tendency to favor information that confirms prior beliefs*." Ms. Sacco brought to the discussion interesting data that suggests that arbitrators and judges tend to focus on evidence and arguments that confirm their initial position, and disregard the evidence that opposes it. Specifically, a survey conducted by Edna Sussman in 2012, showed that *"arbitrators tend to make a preliminary assessment of the merits, and tend not to change their preliminary views after the hearing. Only 8% of the arbitrators she interviewed stated that they changed their minds over 50% of the time*."

Ms. Sacco shared with Young-OGEMID a series of strategies that counsel can use to convince an Arbitral Tribunal that their intuitive reaction is wrong:

- *Do a skillful use of framing, both linguistic and subject-matter*.
- *Make your case as simple as possible*. This will hopefully lead to the intuitive response you want, which will then be more difficult to change.
- *If the case is complex, provide a roadma*p. Burying the tribunal in too much information and evidence without guidance can be counterproductive.
- *Use the resource of storytelling*. Telling a story through the facts is a powerful tool that tends to work better than merely making an argument.
- *If you believe your case is counterintuitive, present your argument as a series of questions*, rather than answers, that a tribunal has to work through.
- *Point out to the tribunal where the other party is trying to play to their intuition rather than deliberation*.

(iii) Anchoring Bias

Anchoring occurs in the context of making numeric estimates and is "*the tendency to rely on the initial value available*." Ms. Sacco referred to research that shows that people tend to make estimates that remain close to the initial values provided, which provide a starting point that "anchors" the subsequent estimation process. This is of critical importance in international arbitration, particularly in the quantification of damages. Indeed some studies have shown that decision-makers may have the tendency to grant higher damages when the claimant's claim is higher. This does not mean that the damages awarded will be the amount claimed, but the initial claimed value may anchor the decision-makers' minds. Further, research conducted by Susan Franck suggests that "*decision-makers could be influenced by figures provided to them even if they had nothing to do with the question being asked*."

Ms. Sacco provided a series of recommendations for counsel to diffuse the impact of anchoring, or use it to their benefit:

- *Attempt to anchor the tribunal early in the case*. This is especially true for claimants, but also for respondents, who must try to move the anchor the other way.
- *Respondents trying to prove that there might be no damages at all should focus on causation*. Tribunals who are convinced that the breach did not cause the damage alleged might be less affected by a high anchor.
- *Beware of exaggeration*. A high anchor that has no relation to reality might annoy the tribunal. Likewise, alleging that the damages are zero when it is clear that they are not will make a respondent lose credibility. Anchors must be based on the evidence.

- *Denounce the other party's use of anchoring to attempt to diffuse the tribunal's automatic response*.

(b) The Importance of Cultural and Personal Sensibilities

Ms. Sacco continued the discussion on the psychology of decision-making by touching briefly on cultural and personal sensibilities in international arbitration. She started her post by agreeing with Mr. Nweke-Eze's comments on being aware of cultural differences and values when advocating. She reminded those following the Symposium that it is important to bear in mind that Arbitration Tribunals are frequently made up of arbitrators of different cultures and legal traditions, who may respond differently to different advocacy styles. Therefore, *"[f]rom a psychological perspective, these diverse advocacy styles might generate different reactions in tribunal members, causing them resist the message of a party that advocates in a style that it finds inappropriate*."

Ms. Sacco referred to her experience to conclude that arbitrators tend to react more positively to an advocacy style that is neutral or respectful. She provided a series of suggestions as to how achieve that sense of neutrality:

- *Do not be overly dramatic*. Quiet confidence speaks louder than theatrical antics.
- *Be respectful to opposing counsel, to the witnesses, to the tribunal and to junior members of your team*. Tribunals notice these things.
- *Do not be overly aggressive when cross-examining witnesses or experts*. In addition to being respectful, this implies allowing the witness to (briefly) answer the question, even if it goes beyond yes or no. The tribunal wants to hear the witness's answers, and wants the witness's sincere testimony. Badgering the witness to obtain an answer, or cutting him or her off before he or she can provide context, might not achieve the intended effect on the tribunal.
- *This is especially true when examining experts*. Tribunals want to understand what an expert is saying, and might get frustrated if counsel do not allow experts to explain their positions during cross-examination. From a Tribunal's perspective, going back to a question in redirect examination may not be as efficient, because you need to lose time to get back on the subject, and by then you might have lost your train of thought.
- *Do not overdo procedural objections*. If you rely on them too much, a tribunal might think that your case on the merits is weak. If you must use them, do it respectfully.
- *Collaborate with opposing counsel as much as possible on procedural matters*. This makes the tribunal's life easier and allows them to focus on the merits of the case, rather than procedural squabbles. Tribunals appreciate this effort.

(c) Other Advocacy Strategies: Storytelling and Appealing to the Senses

Ms. Sacco furthered the debate on the psychology of decision-making process by providing counsel certain techniques that will help them get their message through to arbitrators.

The first technique is *storytelling.* Ms. Sacco stressed how powerful is to convey a message through a story – "*[i]n oral advocacy, what you are trying to do is to portray the facts of your case as a story. The key is to present them not only as a series of events (chronologies are rarely riveting), but to convey also the legal and factual impact of those events on your case*." The benefit of storytelling is that people tend to react more openly to stories than to abstract

messages, and the mind will oppose less resistance to the message, because the message is not explicit.

The second technique is *appealing to the senses of the Arbitral Tribunal*. Ms. Sacco explained that, considering that an important part of our brain is devoted to visual processing, using visual elements (images or videos) can be very effective.

The third technique is *presenting messages that are easy to process*. Research shows that these types of messages are more memorable and persuasive. Therefore, counsel should start and end with their conclusion, keep messages simple, and lead the tribunal seamlessly from point A to point B in their reasoning.

(d) Tribunal Dynamics

Ms. Sacco continued the debate by explaining how tribunal dynamics may impact decision-making. She started her post by restating that Arbitral Tribunals are often diverse and made up of three persons, many times from different legal and cultural backgrounds, who might have very different reactions to the parties' arguments and advocacy styles, and might reach different conclusions. She made clear that this is not necessarily a bad thing: "*diversity can actually serve to diffuse cognitive biases, as different perspectives serve to challenge previously held beliefs. The key factor is collaboration and respect: ideally a tribunal will work collaboratively to see if it can reach unanimity, with all arbitrators being able to express their views in an atmosphere of respect*." Thus, personalities can play an important role in the decision-making process. An arbitrator that is too pushy or aggressive might antagonize the others; if an arbitrator feels he or she is not being heard, he or she might react negatively or refuse to collaborate.

She finalized this post by recognizing that although there is not much that counsel can do once the Arbitral Tribunal is constituted, they should consider these issues when appointing arbitrators.

Q&A Session

Ms. Marjan Fazeli initiated the Q&A session by thanking Ms. Sacco for her posts. Ms. Fazeli expressed her opinion that "*fighting cognitive errors in arbitral decision-making should not be the sole responsibility of counsel*" and suggested introducing the role of artificial intelligence ("**AI**") in international arbitration to overcome "*psychological errors*" in the decision-making process. She stated that AI can address issues related to confirmation bias "*by programming AI [in a way] that [it] understands underlying assumptions (that are not necessarily consistent with one's existing beliefs).*" Regarding framing bias, she proposed using AI to "*analyze the data more objectively so that the way the information is presented has no impact on the decision maker.*"

Ms. Sacco agreed with Ms. Fazeli that fighting cognitive errors is not the role of counsel; Rather she asserted that fighting cognitive errors is principally the role of the Tribunal itself. In her view, "*[r]aising awareness in tribunals as to the existence of these biases is the first step. Tribunals should then implement rigorous deliberative processes to make sure that any intuitive decisions are either confirmed by the evidence and deliberation, or overridden by deliberation. What is crucial is for tribunals to be aware that intuition might be wrong, and be*

open enough to reject their initial intuitive conclusions in favor of those arrived through deliberation."

While Ms. Sacco had not considered the role of AI in diffusing cognitive biases, she noted that the possibilities mentioned by Ms. Fazeli seemed interesting. She expressed that, personally, she did not believe that AI can fully replace the place of the human mind, but that the AI tools can certainly serve to raise a Tribunal's awareness to their biases and potential mistakes.

Mr. Kantor continued the discussion on AI and advocacy and shared with the Symposium a study published by the Daily Mail and the South China Morning Post about the use in Chinese courts of AI in decision-making:

> ***Daily Mail***
>
> *China uses AI to 'improve' courts - with computers 'correcting perceived human errors in a verdict' and JUDGES forced to submit a written explanation to the MACHINE if they disagree*[7]
>
> - China has been developing a 'smart court' system since at least 2016, aiming to increase 'fairness, efficiency, and credibility' of its judges
>
> - Artificial intelligence is now helping run courts, supreme justices said this week
>
> - AI suggests new law, drafts legal documents, and alters 'perceived human error'
>
> - Judges must consult the AI on every case, and if they reject the machine's recommendation then they must submit a written explanation
>
> ***South China Morning Post***
>
> *China's court AI reaches every corner of justice system, advising judges and streamlining punishment*[8]
>
> - Smart court's electronic reach allows the system to access police, prosecutor and government databases and integrate with China's social credit system
>
> - Chinese law professor warns, 'We must be alert to the erosion of judicial power by technology companies and capital'
>
> "The smart court SoS (system of systems) now connects to the desk of every working judge across the country," said Xu Jianfeng, director of the supreme court's information

[7] Chris Pleasance, *China uses AI to 'improve' courts - with computers 'correcting perceived human errors in a verdict' and JUDGES forced to submit a written explanation to the MACHINE if they disagree*, THE DAILY MAIL (Jul. 13, 2022), available at https://www.dailymail.co.uk/news/article-11010077/Chinese-courts-allow-AI-make-rulings-charge-people-carry-punishments.html (last visited Sept. 26, 2022).

[8] Stephen Chen, *China's court AI reaches every corner of justice system, advising judges and streamlining punishment,* SOUTH CHINA MORNING POST (Jul. 13 2022), available at https://www.scmp.com/news/china/science/article/3185140/chinas-court-ai-reaches-every-corner-justice-system-advising (last visited Sept. 26, 2022).

centre in a report published on Tuesday in Strategic Study of CAE, an official journal run by the Chinese Academy of Engineering.

JOURNAL Article

A New Pattern Framework and Innovative Practices in the Smart Court System-of-Systems Engineering Project of China[9]

Abstract

Developing large-scale complex information systems, such as the Smart Court system-of-systems (SoSs) of China, is a worldwide engineering challenge. This paper, from a methodological perspective, aims to expound the theoretical construction and practical progress of Smart Court system-of-systems engineering (SoSE) of China. The concept and key task requirements of SoSE are explored, technical difficulties faced by the Smart Court SoSE are analyzed, and a "two-track parallel, six-ring linkage" pattern framework is proposed for the progressive collaboration SoSE of large-scale autonomous information systems. Based on the theories including a universal information model, information metric system, and dynamic configurations of information systems, a key evaluation indicator system for an information SoSs is proposed. To satisfy the SoSE design requirements, an overall design method based on information relationships and its enabling tool are proposed, and a reference model of the Smart Court SoSs is designed to provide a top-level reference for the system development and integration of the Smart Court. Moreover, the development and collaborative integration of the autonomous and backbone systems in the Smart Court SoSE are presented in a comprehensive manner. The nationwide application and promotion of the Smart Court SoSs support the upgrade and transformation of the conventional judicial operation pattern of people's courts in China. Through continuous analyses of the quality and effectiveness of the Smart Court based on the key evaluation indicators, targeted improvement can be conducted to further enhance the SoSs capabilities, thereby contributing to the progress of judicial civilization in the information age.

Mr. Daniel Pakpahan, a researcher based in the Hague, expressed his gratitude to Ms. Sacco for her contribution and expressed how fascinating it is to see how international arbitration greatly benefits from cross-fertilization between different disciplines. He then proceeded to pose two questions for Ms. Sacco. *First*, he wondered whether arbitrators who have spent much time being counsel would be less prone to fall victim to their own cognitive biases. Or, in the contrary, whether arbitrators would rely on intuitive conclusions because they have little time to process a lot of information.

Second, he referred to the strategies that Ms. Sacco provided in her first post to diffuse the impact of anchoring and convince the tribunal that their intuitive reaction is wrong. He specifically mentioned the strategies of "*[p]oint[ing] out to the tribunal where the other party is trying to play to their intuition rather than deliberation*" and "*[d]enounc[ing] the other*

[9] Xu Jianfeng et. al., *A New Pattern Framework and Innovative Practices in the Smart Court System-of-Systems Engineering Project of China*, 24 STRATEGIC STUDY OF CHINESE ACADEMY OF ENGINEERING ISSUE 4 (Jul. 11, 2022), available at https://www.engineering.org.cn/en/10.15302/J-SSCAE-2022.04.005 (last visited Sept. 26, 2022).

party's use of anchoring to attempt to diffuse the tribunal's automatic response." Mr. Pakpahan then questioned whether the aforementioned strategies should be seen as a last resort due to the fact that they may be perceived as too outright by some arbitrators. Further, he asked if it is common during tribunal deliberations to discuss the use of advocacy tactics used by counsel to raise awareness of cognitive biases within co-arbitrators.

Ms. Sacco addressed Mr. Pakpahan's first question by stating that, in her opinion having been counsel in the past will not necessarily impact how an arbitrator responds to his or her own cognitive biases. She explained that the key issue is awareness of them: "*if the arbitrator knows that biases exist (whether because he or she has studied them, or has used them in the past as counsel), then he or she might be able to diffuse them. But there are many counsel out there that do not really know how biases work.*" Further, she noted that because cognitive biases result from automatic shortcuts in the brain, they are very difficult to detect with respect to yourself. She proposed a combination of three factors to overcome cognitive biases: "[1] *awareness that cognitive biases exist,* [2] *a personal sense of humility (being able to accept that you could be prone to them), and* [3] *the implementation of rigorous deliberative processes to diffuse them*."

With respect to the second question, Ms. Sacco responded that the answer would depend on the personality and background of the arbitrator in question – "*[i]f the arbitrator seems open to psychological arguments, calling out to the existence of cognitive biases might work. If, by contrast, the arbitrator seems reluctant to accept this kind of scientific research, then it might backfire*." Having said that, she expressed that she is personally in favor of making this kind of argument, since it is important to raise arbitrators' awareness of cognitive biases, even if they don't like it. "*A serious arbitrator should consider the argument, even if he or she rejects it, and that should already serve to raise awareness of – and potentially diffuse – the bias.*" She then noted that, in her experience, she has seen counsel openly call out to anchoring in damages, but she has never seen counsel explicitly refer to confirmation bias.

As to tribunal discussions, Ms. Sacco stated that arbitrators do discuss advocacy strategies, but that she has rarely seen an outright discussion of cognitive biases. However, she has seen arbitrators recognizing that their intuitive responses were wrong – they simply have not framed this issue as a question of cognitive bias. She expects that this will change as awareness of this topic continues to rise.

Mr. Joseph Matthews commended Ms. Sacco's contribution to the Symposium. He then expressed that he had never read or thought about creating a system where judges/arbitrators are provided the results of AI processes relating to decisions they must make, either before or after, and required/permitted to consider conflicts between the two results. But that he would volunteer to participate in that type of hybrid process as an arbitrator. He continued his post by noting that a polygraph test presents, in some ways, something similar to the proposed AI processes. Mr. Matthews explained that in certain very limited circumstances, the results of a polygraph test may be admissible in U.S. courts and the trier of fact, whether judge or jury, may accept or reject the results.

He then provided a humorous example from the movie Legal Eagles where an advocate confronted cognitive bias. Robert Redford played a defense lawyer and his opening statement goes like this:

Tom Logan: Ladies and gentlemen, Chelsea Deardon didn't kill Victor Taft. The prosecution has suggested a possible motive, but one based on hearsay, conjecture and circumstantial evidence. Evidence that appears to have some substance, but upon closer examination, will prove to have no relevance whatsoever to this case.

[stops and looks at the jury]

Tom Logan: You're not buying this, are you? You're not listening to a word I'm saying. Yeah? Guess what? I don't blame you. After listening to Mr. Blanchard lay out the prosecution's evidence, even I'M convinced my client murdered Victor Taft.

[murmurs of surprise in the courtroom]

Tom Logan: After all, if I had found Victor Taft, dead on the floor, and Chelsea Deardon's fingerprints on the weapon, there isn't much that would convince ME she isn't guilty. Look, let's save ourselves a lot of time. Let's be honest. There are better things we could be doing. Who thinks Chelsea Deardon's guilty?

Ms. Sacco thanked Mr. Matthews for his kind comment and great example. She then gave proper attribution to a list of sources that she also recommended to anyone interested in further reading:

- Daniel KAHNEMAN, Thinking Fast and Slow (Penguin, 2012).
- Amos TVERSKY & Daniel KAHNEMAN, Judgment Under Uncertainty: Heuristics and Biases, 185 Sci. 1124 (1974).
- Shane FREDERICK, Cognitive Reflection and Decision Making, 19 J. Econ. Persp. 25 (2005).
- Chris GUTHRIE, Jeffrey RACHLINSKI & Andrew WISTRICH, Blinking on the Bench: How Judges Decide Cases, 93 Cornell L. R. 101 (2007).
- Edna SUSSMAN, Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do About Them (24 Am. Rev. Int'l Arb. 487, 2013).
- Susan D. FRANCK, Anne VAN AAKEN, James FREDA, Chris GUTHRIE, and Jeffrey J. RACHLINSKI, "Inside the Arbitrator's Mind," (66 Emory Law Journal 1115, 2017).
- Susan D. FRANCK, '2. Cognitive Psychology and Empirical Insights for ITA', in Susan D. Franck, Arbitration Costs: Myths and Realities in Investment Treaty Arbitration, (© Oxford University Press; Oxford University Press 2019) pp. 25 – 66.
- Bruno GUANDALINI, "Chapter 7: The Limitation of the Rationality of Arbitrators", in Bruno Guandalini, Economic Analysis of the Arbitrator's Function, International Arbitration Law Library, Volume 55 (© Kluwer Law International; Kluwer Law International 2020) pp. 331- 36.
- Bruno GUANDALINI, 'Chapter 8: Freeing the Arbitrator from Limited Rationality: Some Proposed Solutions', in Bruno Guandalini, Economic Analysis of the Arbitrator's Function, International Arbitration Law Library, Volume 55 (© Kluwer Law International; Kluwer Law International 2020) pp. 367 – 398.
- Jose Maria FIGAREDO, 'Cognitive Biases: What Are They, Do They Affect Arbitrators, And if So, Can That Influence Be Avoided?', in Carlos González-Bueno

(ed), 40 under 40 International Arbitration (2018), (© Carlos González-Bueno Catalán de Ocón; Dykinson, S.L. 2018) pp. 73 – 85.

- Felipe SPERANDIO, 'Arbitrating Fast and Slow: Strategy Behind Damages Valuations?', Kluwer Arbitration Blog, February 28 2018, http://arbitrationblog.kluwerarbitration.com/2018/02/28/booked-2/
- Eyal PEER & Eyal GAMLIEL, Heuristics and biases in judicial decisions (49 Ct. Rev. 114, 2013).

Prof. Strong concluded the Symposium by inviting all those interested in following up with some late-breaking thoughts to raise them on or offline. She also thanked Mr. Han, Ms, Silberman, Mr. Nweke-Eze, and Ms. Sacco for their provocative, insightful and educational contributions.

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