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Summary of Young-OGEMID Symposium No. 5: "Alt-Facts and the Post-Truth Society Through an Arbitral Lens (March 2017)" by A. López

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TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Summary of Young-OGEMID Symposium No. 5: “Alt-Facts and the Post-Truth Society Through an Arbitral Lens (20 March – 29 March 2017)”

by Aracelly López*

Executive Summary

Young-OGEMID’s fifth virtual symposium advised junior practitioners, academics and law students on how to deal with misconceptions considering that, as opposed to the general belief, lawyers are often dealing with perceptions -of either facts, people or events-. As YO moderator Professor S.I. Strong stated when introducing the event, “[l]awyers often think that they’re dealing in facts, but the reality is that they are dealing with perceptions (...). What happens when those perceptions are wrong?” To answer this question, the symposium provided an interdisciplinary analysis focused on the practice of international dispute resolution. The event featured:

- 1) *Jason Reifler – Professor of Political Science, University of Exeter, United Kingdom;*¹
- 2) *S.I. Strong – Professor of Law, University of Missouri, United States;*²
- 3) *Chulyoung Kim – Assistant Professor of Economics, Yonsei University, Korea;*³
- 4) *Victoria Ergolavou – Associate Director at APCO Worldwide.*⁴

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¹ Jason Reifler is currently a Professor of Political Science at the University of Exeter in the United Kingdom. He studies political behavior, primarily with respect to misperceptions and fact-checking, public opinion about foreign policy, and attitudes about vaccines. Prior to joining Exeter, Professor Reifler was on the faculty at Georgia State University (2007-2013) and Loyola University Chicago (2005-2007) and spent four years in Washington, DC, working for the polling firm Bennett, Petts, and Blumenthal. Prof. Reifler received a BA from Colby College and a PhD from Duke University.

² Professor S.I. Strong has taught at various universities in Europe (Cambridge, Oxford, Geneva) and the United States (Missouri, Georgetown), following a successful career as a dual-qualified (U.S. attorney and English solicitor) in major international law firms in New York, London and Chicago. Professor Strong, who holds a Ph.D. in law from the University of Cambridge, a D.Phil. from the University of Oxford, a J.D. from Duke University, an M.P.W. from the University of Southern California and a B.A. from the University of California, Davis, has published over 100 award-winning books and articles in Europe, Asia and the Americas and sits as an arbitrator on a variety of national and international commercial matters.

³ Chulyoung Kim studies various legal institutions using economic models, focusing on issues in liability and litigation including adversarial vs. inquisitorial debates, adversarial bias, among others. Mr. Kim completed his PhD in Economics at University of California San Diego and is currently an Assistant Professor of Economics at Yonsei University in Seoul, Korea.

⁴ Victoria Ergolavou is an associate director at APCO Worldwide, an international communications agency. A trained lawyer, she joined APCO in 2014 following a position at Weber Shandwick where she focused on international corporate communications and public affairs. She specialises in litigation communications and issue and reputation management, helping corporations, political leaders and high profile individuals, successfully navigate geopolitical and reputational challenges. Previously, she worked as a competition associate at Howrey LLP in Brussels. She has also been a Senior Research Assistant with London-based think tank Respublica focusing on UK and EU antitrust policy and the reform of UK competition law. Ms. Ergolavou holds an LLM in International Commercial Law from City University London.

Speaker 1: Misperceptions and directionally motivated reasoning

Speaking first, **Jason Reifler**, Professor of Political Science at the University of Exeter, United Kingdom, pointed out that directionally motivated reasoning leads people to accept evidence that confirms their beliefs, thus rejecting the evidence that contradicts those pre-conceived beliefs. Therefore, he explained that directionally motivated reasoning is one of the most fundamental challenges to fact-based discourse. He gave, as an example, a study performed by Yale Law Professor Dan Kahan and his colleagues, in which people were presented with two scenarios: i) the success or failure of a new skin treatment; and ii) the decrease or increase of crime rates due to a new gun control. The study showed that people could provide an opinion on whether the skin treatment is effective or not based on the facts that were provided but, when it came to gun control, most people based their opinions according to their own political beliefs.⁵

Professor Reifler provided, as a second example, a study by Lord, Ross and Lepper⁶ in which people were presented with both pro- and counter-attitudinal information from fictional academic studies about the effects of the death penalty on crime rates. The study concluded that people were critical and disdainful of the quality of counter-attitudinal studies and any little mistake was enough for disregarding its conclusions. On the contrary, the pro-attitudinal studies were easily accepted despite the flaws that the information had. Professor Reifler concluded that these studies prove how difficult it is to correct misperceptions. He stated that “attempts to correct misperceptions can backfire and even make things worse.”

Misconceptions usually come from public figures. If a public figure, whom his/her audience respect and admire, state “facts”, the audience will adopt those facts as true and will have a pre-conceived opinion on specific issues. When attempting to correct misleading beliefs, people who feel more positively towards a public figure tend to backfire, making misperceptions worse.

When it comes to politics, it becomes even more difficult to change people’s pre-conceived beliefs, and the more people are involved and have knowledge on the topic, the easier it becomes to generate counter-arguments and reject others’ position. “Elites and public figures are effective sources of transmission of misperceptions, and it is their popularity that may make it especially difficult to correct misperceptions.”

Q&A Session

During the Q&A session that followed, **Professor S.I. Strong** mentioned a metric created by Edward Glaeser and Cass Sunstein⁷ which seeks to evaluate the situations in which attempting to correct political misperceptions “does more harm than good”. The metric states that the best way to correct misperceptions is through both the individuals and institutions that are credible to the people with a specific misperception. These individuals and institutions are called “surprising validators”, and the metric determines that “the inherent authority of the sources counterbalances the negative perception of the content of the message, thereby allowing the

⁵ A summary of the study can be found at www.culturalcognition.net/storage/monash_rmit_8_14_14.pptx

⁶ Lord, C.G., Ross, L. and Lepper, M.R., 1979. Biased assimilation and attitude polarization: The effects of prior theories on subsequently considered evidence. *Journal of personality and social psychology*, 37(11), p. 2098.

⁷ Glaeser, E. and Sunstein, C. 2014. Does More Speech Correct Falsehoods?, 43 *Journal Legal Studies*, 65.

error to be corrected.” Professor Strong asked Professor Reifler whether his studies had reached the same conclusion and if the “surprising validators” could be used in arbitral proceedings.

Professor Reifler analyzed these questions from a social science perspective and determined that it was difficult to define how much persuasion comes from the source itself, and how much the source is promoting an open-minded processing of information. If there is no understanding as to what is going on inside a person’s head, it is very unlikely to create a fact-based discourse.

Chulyoung Kim joined the discussion early and stated that this is widely studied in Economics as “confirmation bias”. He said that this kind of behavior is seen in even the most “rational” individual, thus considering those thoughts as “bias” might not be correct. He gave as an example a study performed by Gentzkow and Shapiro, titled “Media Bias and Reputation” and published in the Journal of Political Economy 2006, where a rational individual with prior information about an issue is exposed to information from a news article from a news media. It is important to consider that the individual strongly believes that there are two types of news media: high quality and low quality. The study shows that if the article contradicts the individual’s prior beliefs, the individual will update his information by little and consider that the news media is of low quality. If the news media confirms his prior information, this information will be updated by a larger degree.

Mark Kantor, Independent Arbitrator, also weighed in and picked up the concept of witnesses who are managers of one of the parties in a dispute. Those witnesses, just like some expert witnesses, are expert in the subject in dispute and motivated to testify on behalf of that enterprise in an arbitration or court. “An arbitrator,” pointed out Mr. Kantor, “might treat that testimony as one-sided evidence from an emotionally-invested witness, rather than “lying”. But another arbitrator might believe the witness is actually lying. That difference in how arbitrators perceive a witness,” he argued, “goes directly to the credibility judgments that arbitrators make about those witnesses.”

Based on Mr. Kim’s comments, **Professor Strong** asked whether confirmation bias could work with witnesses in arbitration. She asked, specifically, if the provisions of one type of information, that is counter to the existing beliefs of the listener, could lead this listener to discount information given by the speaker, since it will be considered as coming from an unreliable source. She stated that this issue is particularly important for advocates because it could affect the order of the questions asked during a testimony to take advantage of a higher degree of credibility. She explained that her trial instructor at Duke used to say "don't shoot the alligator until after you've crossed the river!", which means that you should not diminish the credibility of the witness until after that witness has said the things that you need him/her to say before the judge, jury or arbitrator.

Velimir Zivkovic, Graduate Teaching Assistant at London School of Economics, asked Professor Reifler if being appointed by a party in a proceeding influences counter-attitudinal behaviors towards the facts of the opposing party. He stated that parties generally appoint people disposed towards their legal arguments anyways, but inquires whether this appointment could influence that person to the extent that he/she will label the opposing party’s facts as not true since the beginning.

Developing on Mr. Kantor’s comments, **Michael McIlwrath**, Global Chief Litigation Counsel at GE Oil & Gas division in Florence, talked about the seminar sponsored by the Milan Chamber of Arbitration on cognitive biases in international arbitration. In this seminar,

Professor Jeffrey Rachlinski from Cornell Law School presented his findings from research conducted on US judges. Mr. McIlwrath stated that it was not surprising to find that even the most experienced judges were “swayed by factors unrelated to the matter they are assessing.” However, he did find surprising the absence of a similar empirical research in international arbitration. He criticized that “arbitrators operate under the assumption that they do not suffer from cognitive biases” and that they “are capable of assessing, for example, the credibility of a witness from a culture with which they have no experience.”

Professor Strong replied to Mr. McIlwrath and stated that the “bias blind spot” was the reason why arbitrators failed to see their own biases. **Mr. Kantor** also contributed to this part of the discussion, speaking from his own experience as arbitrator. He said that arbitrators often slip easily into expectations about process, witness conduct, and counsel conduct based on their preconceptions rather than considering the issue from the perspective of others participating in the arbitration. However, he also commented that a significant attraction of international arbitration lies in comparisons with the realistic alternative dispute resolution forum, national courts. He asked whether, in comparison to national courts, international arbitration might not be as bad? Recognizing the subjective nature of his opinions on this issue, Mr. Kantor asked Professor Reifler and any others in the field if they could point to behavioral science studies that address comparisons between different pools of population, such as judges v. arbitrators.

Following on what had been discussed, **Mr. Kim** mentioned that a good strategy for attorneys is, first, to build a reputation as a reliable source by providing information that the audience positively accepts. He also stated that believing in having no biases, could be related to overconfidence or positive self-image.

Mr. McIlwrath presented an interesting hypothesis to Mr. Kantor which stated that arbitrators might suffer from bias blindness since they are chosen by the parties and counsel. This role that is invested in arbitrators might give them an “undeserved sense of confidence in their abilities to manage or decide a case.” **Professor Reifler** commented that there are a lot of different kinds of influences in our behavior and cited the study performed at an Israeli court, that suggested that people sentenced before lunch received harsher sentences than those who were judged when the judges were not hungry. However, he added that being aware of the bias could help limit its effect. Regarding Mr. Kantor’s comments, Professor Reifler stated that there are works that compare different populations. He explained that, although the psych models are built on the opinions of American college students between the ages of 18 to 22, whenever there is a comparison these models tend to generalize reasonably well.

Mr. Kantor shared a speech given by Bruce Wharton, the Acting Secretary for Public Diplomacy and Public Affairs at the US State Department, at a workshop in Stanford University, which referred to “Public Diplomacy in a Post-Truth World”. In his speech, Mr. Wharton stated the Oxford Dictionary had made “post-truth” its Word of the Year in 2016, and defined this term as “relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.” Mr. Wharton argued in his presentation that facts are not as important nor as compelling since the public policy debate is framed by what feels true, according to people’s pre-existing set of beliefs. According to him, this problem has grown larger due to social media, which rapidly spreads false stories, causing misinformation. “By the time a false story is out there, it is often too late to mount an effective rebuttal based on facts.”

Mr. Kantor summarized the lessons obtained from Mr. Wharton's speech for charting a new way forward in countering false narratives, as follows:

- Not imitating the enemy;
- Having a credible message based on facts and evidence that acknowledge underlying grievances;
- Partnering with credible, independent, trusted messengers;
- Using technology to identify the right audiences and the best approaches for reaching them;
- Employing analytics to evaluate effectiveness and feeding that information back into the process; and
- Securing political and bureaucratic support, including sufficient funding and personnel.

Christian Campbell, Assistant Director of the Center for International Legal Studies, congratulated all of the participants of the Q&A Session and shared a quote attributed to Jerome Frank: "Justice is what the judge ate for breakfast", referencing the study performed in Israel, and explained by Professor Reifler. **Damien Charlotin** commented on Mr. McIlwrath's observation that there were no relevant studies regarding the bias of international arbitrators, and provided a study called "Inside the Arbitrator's mind", performed by Susan Frank, Jeffrey Rachlinski et al. in which it is demonstrated that arbitrators are influenced.

This discussion was concluded by **Orlando Cabrera**, who drew the audience's attention to an article by Michael Waibel and Yanhui Wu called "Are Arbitrators Political? Evidence from International Investment Arbitration"⁸. This article analyzed some of the arbitrators that have been appointed in ICSID arbitrations and it concluded that the tribunal's decisions are extremely related to policy preferences. If one of the party-appointed arbitrators has the same policy preference as the presiding arbitrator, it is very likely that the tribunal will rule in favor of said party.

Speaker 2: Unconscious bias in international arbitration, according to a psychological perspective⁹

Speaking next, **S.I. Strong**, Professor of Law at the University of Missouri, United States, stated that, according to Justice Brandeis, falsehoods and political misperceptions could be attacked through more speech. However, she also pointed out that this might not be the answer, since we are constantly surrounded by "alternative facts". Professor Strong used as an example for pervasive misconceptions, the legitimacy of international arbitration, whether commercial or investment arbitration. It has been proven that arbitration is a "fair and unbiased means of resolving complex, high-value legal disputes through sophisticated, highly formal procedures", thus, it does not make sense that critics continue to question the validity of the procedure.

Professor Strong mentioned that studies have demonstrated how three phenomenon (sticky defaults, status quo bias, and sovereign prerogative) work together to create false perceptions about the legitimacy of arbitration. It has been mentioned before in this discussion that we all

⁸ The article can be found at <http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf>.

⁹ Comments by the speaker are based on the following article: Strong, S.I., 2017. Alternative Facts and the Post-Truth Society: Meeting the Challenge. 165 University of Pennsylvania Law Review Online 137.

suffer from unconscious bias¹⁰, and empirical studies have proved it. Although in a psychological sense ‘bias’ refers to a way of thinking based on pre-existing beliefs, most perceive that the term has a pejorative connotation. “Most of us are not only unaware of our own biases, we actively work to avoid recognizing them in ourselves, leading to a phenomenon known as the ‘bias blind spot’.”¹¹

Out of the three phenomenon stated in the paragraph above, Professor Strong analyzed the status quo bias and how it affects international arbitration. Status quo bias “arises when an individual or institution prefers the established course of action over any available alternatives, even if those alternatives would increase the welfare of the decision maker.” Status quo bias can be focused in both substantive law issues and procedural issues and it comes partly from a mental illusion and partly from a psychological inclination.¹² The effect of status quo bias is that people do not want to deal with the social, reputational and financial costs of changing it. Therefore, Professor Strong mentioned that, one of the reasons why there is still criticism over international arbitration proceedings, despite being demonstrated that disputes subject to arbitration are fair and of good quality, is because people do not want to defy the status quo, which is solving disputes through national courts. Additionally, some jurisdictions only include litigation in their constitutions, making the rest of the alternative dispute resolution means unconceivable.

Professor Strong prompted those who believe that in the modern world it does not exist a bias in favor of litigation, to perform the Reversal Test.¹³ This test was created to determine whether the status quo bias affects a particular decision. It states that, if a proposal to change a certain parameter is deemed to have bad consequences, and the same parameter in the opposite direction results in the same conclusion, then it is very likely that there is a status quo bias.

Applying the Reversal Test to international arbitration results in an unconscious bias in favor of litigation. Considering litigation as the status quo, changes to increase party autonomy through international arbitration (*change the parameter*), are considered to have negative consequences, especially among non-specialists in the field. Nonetheless, if the proposal is to eliminate all autonomy in the resolution of international disputes and require all matters to be heard in court (*the same parameter in the opposite direction*), it would be considered disastrous, therefore having the same negative consequences as the first scenario and resulting in a status quo bias in favor of litigation when discussing international commercial and investment matters.

¹⁰ To determine whether you are influenced by unconscious bias you can perform electronic self-tests on the Project Implicit website at <https://implicit.harvard.edu/implicit/takeatest.html>.

¹¹ Solan, L., 2013. Four Reasons to Teach Psychology to Legal Writing Students. 22 *Journal of Law and Policy* 7, p. 10.

¹² Samuelson, W. and Zeckhauser, R., 1988. Status Quo Bias in Decision Making. 1 *Journal of Risk & Uncertainty* 7, p.10.

¹³ Bostrom, N. and Ord, T., 2006. The Reversal Test: Eliminating Status Quo Bias in Applied Ethics. 116 *Ethics* 656, p. 664-665.

Speaker 3: Adversarial bias

Third speaker, **Chulyoung Kim**, Assistant Professor of Economics at Yonsei University, Korea, talked about his research on adversarial bias. He started by pointing out that adversarial bias is defined as “witness bias that arises because a party to an adversarial proceeding retains experts to advance its cause.” Therefore, courts have considered experts as partial witnesses towards the party that paid its fees, issuing only favorable statements on behalf of said party.¹⁴

Nowadays, it is assumed that a party-expert relationship is biased in favor of said party, questioning the admissibility of expert testimony. To avoid this, courtrooms have applied the so-called Daubert test, which sets a strict standard for the admissibility of the expert, test which has been supported by Supreme Court’s decisions.¹⁵ With this test, attorneys have the opportunity to challenge whether the other party’s expert witness is reliable, dismissing low-quality testimonies and solving the adversarial bias problem. Although Mr. Kim agrees that adversarial bias is an issue, he believes that it is not present in every courtroom and that it will be related to the kind of relationship the party has established with the expert witness.

Mr. Kim prompted the readers to review his article “Adversarial Bias, Litigation and the Daubert Test: An Economic Approach”, published in the International Review of Law and Economics (2016), where he analyzed this issue thoroughly using mathematical models to investigate how the degree of adversarial bias is influenced by variables in litigation. He stated, as an example that, in equilibrium, one of the parties is always assigned the burden of proof. If that party wants to prevail in litigation, it has to file hard evidence which favors its cause. Therefore, if the attorney appoints a biased expert, this expert will only reveal favorable evidence, thus suppressing those which are unfavorable. Although this might seem like a great choice to win the case, Mr. Kim pointed out that this strategy will not benefit the party because, as long as evidence is verifiable, the expert will not be able to fabricate favorable evidence. Hence, “the frequency with which a biased expert presents favorable evidence at trial is equal to that with which an unbiased expert presents favorable evidence.” Consequently, whoever bears the burden of proof will likely choose an unbiased expert since the result will likely be the same as having a biased one.

Q&A Session

During the Q&A session that followed, **Sebastian Kneisel**, Partner at Borris Hennecke Kneisel, asked whether tribunal-appointed experts could help avoid adversarial bias and, if so, whether tribunals should propose the parties a tribunal-appointed expert to foster a more efficient proceeding and avoid the usual party-appointed expert battles.

Mr. Kim addressed both commentaries and stated that there were two important issues in them. The first one is related to whoever takes the initiative in collecting the expert information and proposed two views: the adversarial systems -used in the United Kingdom and the United States- and the inquisitorial systems -used in European countries-. In the adversarial systems, the parties take the initiative and present the evidence for the judge, thus, it is likely that we

¹⁴ Olympia Equip. Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370 (7th Cir. 1986).

¹⁵ Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997) and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

will find adversarial bias distorting evidence, which affects the verdict rendered by the judge. In contrast, in inquisitorial systems, the judge takes the initiative.

Although some critics have stated that the system in both the UK and the USA should become more inquisitorial, Mr. Kim explained that his research has concluded that, if this happened, court decision in these regions will be less accurate. Despite having the risk of an adversarial bias in adversarial systems, since the parties propose the evidence, information collection activities are more intense, thus, the judge will probably obtain more information from all the evidence as a whole, making adversarial bias and evidence distortion a minor concern for the judge who is accustomed to this system.

In both the UK and the USA, clients and experts are matched in the market making this a great opportunity for adversarial bias since the expert will advocate for the party's cause. Mr. Kim stated that there are authors who believe that these regions should use a blind system, in which there is a pool of potential experts and, whenever a litigant requires an expert, applies to the system and it randomly selects the expert.¹⁶

Professor S.I. Strong inquired whether hot tubbing had been analyzed through an economic perspective. She stated that this technique, used in international arbitration, has tried to get past both the adversarial bias and the battle of the experts, by bringing all experts in at the same time to discuss their findings in the presence of the arbitrators. **Mr. Kim** stated that, although he has not heard of studies regarding this technique, he believes it is beneficial to confront the two expert witnesses through debate. Nonetheless, he also believes that this technique has a disadvantage if the parties decide to bring a good debater instead of a good expert, which could cause the Tribunal to believe that both sides have merits even when it is not accurate. "If, out of one hundred experts, ninety-nine agree on a proposition, one side may call the outlier, and the other may call one of the heartland experts. This will make a real-world ratio of 99:1 appear, in the courtroom, closer to 1:1."¹⁷

Michael McIlwrath stated that he has experience with both common law and civil law systems proceedings and provided three main observations related to the differences between both:

- An antiquated (and inappropriate) metaphor: He stated that the terms adversarial and inquisitorial do not strictly describe each of the systems, since in civil law, the approach to an expert witness is as adversarial as in common law. Even if the court or tribunal appoints the expert witness, each party will also attempt to convince the tribunal-appointed expert through their own appointed private expert and will also seek to influence the tribunal-appointed expert's report. Thus, instead of thinking in adversarial v. inquisitorial, the discussion should focus on the level of independence expected from the experts.
- Quality issues: Mr. McIlwrath stated that he has had so many bad experiences with incompetent tribunal-appointed experts that, in international arbitration, it is customary and applauded to favor the use of independent party-appointed experts.

¹⁶ Robertson, C.T., 2010. Blind Expertise. *New York University Law Review*, 85, p. 174-357.

¹⁷ Haw, R., 2012. Adversarial economics in antitrust litigation: losing academic consensus in the battle of the experts. *Northwestern University Law Review*, 106, p. 1261-1305.

- Lack of appeal option: Mr. McIlwrath mentioned you cannot appeal the report of an incompetent expert, as opposed to a tribunal's decision which you can appeal if it does not favor your interests.

Arran Dowling Hussey, Barrister and arbitrator, pointed out that, in common law countries judges normally hear from an expert that each side tenders. This approach is perhaps more common than a judge appointing an expert. Thus, the judge in such a scenario, can often prefer the more established witness they have had in a different case- even if they have maybe passed their peak of technical knowledge.

Mr. Kim referred to both Mr. McIlwrath and Mr. Dowling's comments and acknowledged that, in the real world, the systems have a mix of adversarial and inquisitorial. Nonetheless, he explained that the separation made to refer to each one of the systems, comes from the necessity to study those two systems separately. Additionally, he proposed a centralization to improve the parties' experience with experts in courtrooms. This centralization means a system in which, whenever a party or the judge requires an expert witness, they log into this system and it randomly appoints a completely impartial expert. If an expert witness turns out to be incompetent, the expert would end up getting removed from the system.

In response, **Mr. McIlwrath** stated that the adversarial/inquisitorial dichotomy used for judicial systems does not tell you relevant information about the presentation of the expert witnesses, such as whether the judges are trained professional or former lawyers, whether parties will suffer cost consequences for unfounded arguments, among others. Additionally, the assumption behind this dichotomy is usually inaccurate. Regarding the centralization, Mr. McIlwrath pointed out that, in France, there is a rough model for it, where the judges appoint experts with national reputation. Nonetheless, Mr. McIlwrath criticized that this model promotes less independence in the expert witnesses, which ultimately tend to favor those parties which more frequently appear in court proceedings, for example insurance companies acting under a right of subrogation. He concluded his remarks by affirming that, as of today, the best method are party-appointed experts, and the most effective tool that he has seen in international arbitration was a "teaching session". This takes place, off the record, when the experts (and even technical witnesses) may freely discuss and demonstrate the technical issues to the arbitral tribunal, thus causing them to be in a better position to understand the evidence when presented.

Professor Strong commented that social scientists often create pure systems to further analyze one variable at a time. She pointed out that it is very hard to find an environment in which you can "test drive" each of the variables without creating catastrophic effects, since there is no such thing as a clear environment in dispute resolution. Nonetheless, arbitration has become some sort of real-world laboratory, where you can test different formulas and determine whether they work or not.

Mr. Kim referred to Mr. McIlwrath's comments on France's centralization by stating that the random match between a party and an expert could solve partially the adversarial bias issue. Regarding Professor Strong's remarks, Mr. Kim provided his own view and understanding of international arbitration reaching to interesting observations. Mr. Kim commented that, as he understands it, "international arbitration adopts a quite flexible process that enables arbitrators to try different techniques on a case by case basis." Therefore, those techniques which prove efficient, are the ones that survive over time, improving the quality of international arbitration. However, this flexibility poses a problem since arbitral tribunals can reach to two completely

different conclusions in similar cases, depending on the arbitrators' choice of techniques used during the arbitration.

Speaker 4: Transformative power of the internet and social media in the construction of public belief

Ms. Victoria Ergolavou, Associate Director at APCO Worldwide, addressed one of the most important issues nowadays, how does the internet influence public belief, the impact of this influence in legal processes, the role of communication regarding misconceptions and protecting one's reputation during and after the processing of a legal proceeding. Ms. Ergolavou began by stating that "winning in the courtroom is only half the battle and that being well-positioned in the court of public opinion can be just as critical." She pointed out that, lately, seeking approval from the court of public opinion has become increasingly important for both individuals and companies. However, this need for approval goes way back and sets the OJ Simpson trial as an example of playing a case out in the media before discussing it in a courtroom.

Ms. Ergolavou stated that the use of internet and social media has directly impacted litigation proceedings, giving importance to cases that would have otherwise stayed out of the public eye and encouraging both plaintiffs and defendants to rely on the internet as a litigation communication program, while third parties advocate their own agendas on high profile cases. This has opened the gate for a great amount of risks that could threaten traditional legal systems.

Social media lacks fact filters and no standards of accuracy are required to post one's opinion on issues that might not even exist. Spreading misinformation is simple, and it is easier to reach the court of public opinion and have them state their views on the matter. People's fates are decided everyday through social media, and cases are so openly discussed in this forum that judges and jurors find it impossible to not shape their opinions according to the popular belief and this can affect directly into trial and the judges and jurors view of the real situation.

Therefore, Ms. Ergolavou focused on communication. She explained that the "notion of communication strategy around a legal dispute is often met with skepticism by legal professionals who prefer and are used to discretion." Nonetheless, she stated that adopting a policy of disclosure is the best way to correct the inaccuracies circulating within the public. An effective communication plan must be aligned with a legal strategy pursuant to challenging misconceptions disseminated by journalists and social media influencers and engaging these individuals to convey with the client's side of the story and share the correct information.

Q&A Session

During the Q&A session that followed, **Professor S.I. Strong** asked which techniques work for curing misconceptions once they have been spread out and how to avoid overlooking evidence that is contrary to previously held opinions. When responding to these questions, **Ms. Ergolavou** first stated that she believed most of the time evidence is not overlooked but willfully ignored and rejected. She also stated that facts are not enough anymore to influence key audiences and that, instead, using a narrative evoking emotion will have a major impact on tackling misconceptions. Additionally, searching and identifying where does the misconception comes from, makes it easier to find the counter-argument and change the people's perceptions on the matter.

Mark Kantor pointed out that “[c]ommunications strategies can also backfire.” He illustrated this statement by referring to the film “Crude”, a documentary regarding the environmental consequences of oil production in the Chevron/Lago Agrio/Ecuador dispute. Mr. Kantor said that counsel for the Lago Agrio plaintiffs had cooperated with the film’s producer in the hope that the film would benefit their case. Instead, the film inadvertently documented abuses by plaintiff’s counsel, its experts and the court-appointed expert, making it difficult to enforce the US \$9 billion judgment against Chevron anywhere in the world. Additionally, both plaintiffs and their counsel are currently subject to injunctions in the US, where they have been required to turn over any proceeds that they may receive in collection of this claim.

Ms. Ergolavou stated that any strategy can backfire, hence, it is important to perform a due diligence and a holistic risk management plan to mitigate exposure. Due to this comments, **Professor Strong** asked about the specific factors that go into a risk management analysis and about the tactics that are most likely to backfire. Therefore, **Ms. Ergolavou** stated that one of the first things one should do is analyze the audience to create an effective communication plan and convey the right person to deliver said message. When it comes to dispute resolution, Ms. Ergolavou concluded the discussion by stating that communication is a “support function”, since it should be directed to complement the legal objectives and people should avoid unnecessary tactics like press conferences since they might have an effect completely opposite to the one desired.

Moderator **Professor S.I. Strong** closed the symposium by thanking the speakers for sharing both their time and expertise with the audience.

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