RULES AND RELIABILITY: HOW ARBITRATORS DECIDE CASES

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William W. Park
Boston University School of Law

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William W. Park*

Abstract

Any robust account of how arbitrators decide cases must grapple with the roe of rules on several levels. Not just the "hard law" of treaties, statutes and cases, but also the "soft law" of professional guidelines elaborated by stake-holders in the arbitral community, addressing matters like witness examination and document production. With an aim to explore the interaction of law and arbitral decision-making, this essay takes several real life scenarios as prisms through which to separate themes about how rules affect arbitrator fidelity to the parties' shared ex ante expectations.

I. Problematic Distinctions

A former President of the American Arbitration Association once mused that most studies of arbitration were devoted to discussion about applicable law or procedural rules. He then suggested that it was "far more important to try to analyze how and why arbitrators make up their minds."[1]

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* Professor of Law, Boston University. President, London Court of International Arbitration. General Editor, Arbitration International. Portions of this chapter have been adapted from an earlier address to the College of Commercial Arbitrators.

[1] Robert Coulsson, *The Decision-making Process in Arbitration*, 45(3) ARB. J. 37 at 37 (1990): "Most studies of arbitration are devoted to discussion about the applicable law or the various procedural rules. It seems far more important to try to analyze how and why arbitrators make up their minds." For an elaboration on this theme, see Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 AM. REV. INT'L ARB. 487 (2013).

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This distinction bears a nice rhetorical ring. On the one hand, rules and laws. On the other hand, the real world of "how and why" arbitrators decide, a theme whose sex appeal derives in large measure from its clear focus on one of humankind's favorite topics: ourselves.

On reflection, however, the juxtaposition of rules and reality melts into insignificance for most business arbitration. On at least three levels, rules affect how arbitrators decide cases: (i) the law applicable to the merits of a dispute, such as whether New York allows liability insurers to withhold reimbursement for a reasonable settlements; (ii) the grounds for award annulment and recognition applied by reviewing courts; and (iii) the so-called "procedural soft law" of arbitration found in guidelines elaborated by professional associations and arbitral institutions, affecting matters like witness examination, conflicts of interest, and document production. The last of these, the procedural soft law of arbitration, provides a starting point in exploring how arbitrators make up their minds.

II. "Soft Law" Influences on Decision-Making

A. The Nature of Soft law

People talking about law normally contemplate norms imposed by governments, in particular treaties, statutes and judicial decisions. Increasingly, however, the field of international arbitration bears witness to the influence of a "soft law" of non-governmental instruments, particularly professional guidelines to address procedural questions.[2] These non-governmental instruments include arbitration rules[3] and guidelines of the International Bar Association (IBA) on subjects that

[2] *See* Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, J. INT'L DISP. SETTL'T 283, 289 (2010)(2) ("Soft law norms are generally understood to be those that cannot be enforced through public force." She continues that soft law possesses a "normativity [that] exercises a certain influence and is regarded with deference without being perceived as mandatory in the classic sense of the word.") See also Paula Hodges, *The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line?* in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2015 ("Over the last 15 years, numerous guidelines and rules have been published within the arbitration sphere at a local, institutional and international level."); HANNEKE VAN SCHOOTEN & JONATHAN VERSCHUUREN, INTERNATIONAL GOVERNANCE AND LAW STATE REGULATION AND NON-STATE LAW 19 (2008) (addressing the growing phenomena of non-state law in the globalization era); Thomas Stipanowich, *Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings* (2014, SSRN Legal Research Papers). Compare George A. Bermann, *International Standards as a Choice of Law Option in International Commercial Arbitration*, LIBER AMICORUM EN L'HONNEUR DE WILLIAM LAURENCE CRAIG 17 (2016), listing topics that includes joinder of non-signatories and the waiver of a right to arbitrate.

[3] An obvious example of how institutional rules affect the arbitral decision-making process lies in the differences between domestic and the international rules. For example, the international (but

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include arbitrator conflicts of interest, taking of evidence, and party Representation in international arbitration. One might also point to rules of professional conduct set forth in the Arbitration Rules of the London Court of International Arbitration,[4] or recommendations of the International Law Association (ILA) on res judicata and on applicable law.[5]

These norms govern the nitty gritty conduct of proceedings in matters like evidence and discovery. In proceedings between adversaries from different countries, such transnational standards often find expression in rules, guidelines and canons of professional associations which serve to supplement the "hard law" of national statutes and court decisions. Memorializing the experience of those who sit as arbitrators or serve as counsel, such standards contain a degree of circularity, in that relevant norms both derive from and apply to cross-border arbitration.

When a key procedural question eludes the parties' agreement, either expressly or by reference to rules, arbitrators called to decide the quarrel often look to international standards as one analytic tool to balance efficiency and fairness. On many topics a reasonable consensus indicates shared pre-dispute expectations. Written witness statements stand as evidence in chief, with oral hearings devoted to cross-examination. Pre-trial discovery restricts itself to narrow and specific categories of documents. And the deontology of modern arbitration normally precludes *ex parte* communication about the case between arbitrator and counsel. By contrast, a common culture eludes other

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not the domestic) rules of the American Arbitration Association impose express limits on when arbitrators can consider punitive damages. Article 31(5) of the ICDR Rules on International Arbitration provide unless agreed otherwise, "the parties expressly waive and forego any right to punitive, exemplary, or similar damages" absent a requirement in applicable law to increase compensatory damages in a specified manner.

[4] Annex to the 2014 LCIA Rules, General Guidelines for the Parties' Legal Representatives and accompanying provisions in Articles 18.5 and 18.6 of the LCIA Rules. See generally William W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30 ARB. INT. 409 (2014), in Agora on Codes of Conduct for Cross-Border Dispute Resolution, 30 ARB. INT. 409-551(2014).

[5] *See generally* Filip de Ly & Audley Sheppard, *ILA Final Report on Res Judicata in Arbitration*, 25 ARB. INT'L 63 (2009); *International Law Association International Commercial Arbitration Committee's Report and Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, 26 ARB. INT'L 193 (2010).

questions, such as when and why the loser should pay legal costs of the prevailing party, a mater that has long divided British and American legal traditions.[6]

Some scholars object to the term "soft law". My friends Michael Reisman at Yale, and Thomas Schultz at King's College London, seem to view law as having a binary character. Either something is law or it is not, switched on or switched off without a dimmer to make the norms brighter or softer.[7]

In practical terms, "soft law" certainly carries risks. Its malleable character might in some instances serve as a juridical fig leaf to cover an arbitrator's personal preference, excusing derogation from the duty to apply relevant legal norms. We have the skeptics to thank for waning against an invocation of non-governmental instruments to facilitate an arrogation of power to decide *ex aequo et bono*, or in *amiable composition*, contrary to the parties' *ex ante* expectations.

Indeed, the risk of lawlessness in arbitration underscores the utility of transnational norms properly applied, which serve as a tool to enhance predictability by filling procedural gaps in matters such as document production, witness statements, conflict disclosures and organization of hearings.[8] Arbitration's procedural soft law represents the product of concerted and careful analysis

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[6] Similar uncertainty exists concerning how arbitrators apply doctrines of *res judicata* and abuse of process, determining when and how earlier judgments or awards bind decision in a later arbitration. Although most legal systems impose some finality for prior decisions, differences remain on many questions, including preclusive effect of reasoning (as opposed to holding) and the right to relief on a theory that could have been, but was not, asserted in the earlier action. Dilemmas present themselves with special acuity when the litigants' agreement fail to designate legal standards on controverted questions whose answers fall beyond common practice. See generally, *Soft Law and the Challenge of Res Judicata*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION (2015 Fordham Papers, Arthur Rovine, ed. forthcoming 2016).

[7] W. Michael Reisman, *Soft Law and Law Jobs*, 2 J. INT'L DISP. SET. 26 (2001); THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION 18-19 (2014).

[8] See William W. Park, *The Procedural Soft Law of International Arbitration*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141 (L. Mistelis & J. Lew, eds. 2006); William W. Park, Procedural Default Rules Revisited, in ARBITRATION INSIGHTS: TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION (Julian D.M. Lew & Loukas A. Mistelis, eds. 2007); Lawrence W. Newman & David Zaslowsky, *Soft Law Guides Parties on Procedures in International Arbitration*, 24 March 2011 New York Law Journal NYLJ p.3, col.1 Volume 245; Issue 56 (2011). Kaufman-Koehler, *supra*: "It is clear from these developments that soft law enjoys some degree of normativity, which could be called soft normativity. This normativity may be considered soft because soft law exercises a certain influence and is regarded with deference without being perceived as mandatory in the classic sense of the word."

by thoughtful practitioners and scholars, playing a significant role in adjudication of cross-border disputes.[9]

To some extent, the current controversy over "soft law" represents a dispute about taxonomy, recalling the proverbial debate over whether public international is really "law" in the same way as national law. Clearly, differences exist. Section 93A of the Massachusetts Consumer Protection Act obviously diverges in its genesis, and in enforcement mechanisms, from the customary "law of nations" on maritime boundaries or diplomatic protection as elaborated through state practice. Likewise, the American Arbitration Association guidelines on document production carry a qualitatively different cast from the Internal Revenue Code.

Yet each type of law serves much the same purpose, representing an authoritative dispute resolution process including rules and principles to provide information on decision-making about substantive as well as procedural differences.[10] In this respect, soft law often dovetails into had law, finding its way into national court cases to fill interstices, as has happened more than once in connection with judicial pronouncements on what constitutes "evident partiality" for purposes of section 10 of the Federal Arbitration Act.[11]

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[9] Discussions about whether or not one favors "soft law" bring to mind the story of an elderly farmer who met his pastor while walking by the village church one Sunday. Disappointed that the old man had skipped divine services that morning, the clergyman decided to engage his parishioner in an uplifting dominical conversation. "Enoch," asked the pastor, "Do you believe in infant baptism?" In a heartbeat, the good farmer replied, "Believe in it? Reverend, I've seen it done!"

[10] To argue about whether the divergent categories might each be called "law" might be a bit like arguing whether chess is really a "game" or the card players who enjoy bridge participate in a "sport". Certainly chess (like other board games) differs dramatically from baseball and football, involving neither vigorous physical exercise, nor any spheres to be thrown, hit or kicked. Likewise, bridge teams perform differently from badminton or cricket teams. Yet chess and bridge, like baseball and football, represents activity engaged in for diversion or amusement, and in that sense constitutes a game. And bridge players tell me they experience much of the same competitive thrill as those engaging in sports requiring greater bodily movement.

[11] See Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., No. 05 CV 10540(RPP), 2006 WL 1816383, at *1 (S.D.N.Y. June 28, 2006) *aff'd sub nom.* Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007). In vacating an award for arbitrator failure to investigate relevant business contacts with an affiliate of one party, the federal district court made reference to the IBA Guidelines on Conflict of Interest as well as the American Arbitration Association Code of Ethics of Arbitrators. See also *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007), where the Court observed that although [the IBA Guidelines on Conflict of Interest are not binding authority, "when considered along with an attorney's traditional duty to avoid conflicts of interest, they reinforce

Of course, each type law remains authoritative in its own special way. Hard law generally emanates from states with power to make us do things we might not otherwise want to do, regardless of whether we agree.[12] By contrast, soft law commands obedience in large measure because the arbitration community sees a measure of merit in principles elaborated by those of its members with experience in the cost and benefits of different alternatives. The difference should not be surprising. Notions of law vary precisely because they represent artifacts of the human condition, rather than an element of mathematics or the mineral world, such as the number "3" or the zircon found in the Jack Hills of Western Australia.

With this background, let us consider three specific examples: (i) rules on tribunal composition and reasoned awards; (ii) standards for document production; and (iii) procedures for witness examination.

B. Three Illustrations

1. Tribunal Composition and Reasoned Award

a. One or Three?

Arbitral tribunals will usually be composed of either one or three members, depending on the relevant rules and the particular contract.[13] A single arbitrator normally proves cheaper and makes scheduling easier. However, that does not mean the decision-making will be better.

We all sound pretty good talking to ourselves in intimate conversations conducted in our own heads. This is precisely the problem, of course. Analytic clarity often suffers in the absence of an honest exchange with colleagues who bring different perspectives.[14]

About fifteen years ago a panel of arbitrators, known as the Claims Resolution Tribunal, was convened in Zürich to decide the so-called "Holocaust Account" disputes related to Swiss bank

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[holding] that a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it."

[12] See e.g., FREDERICK SCHAUER, THE FORCE OF LAW (2015).

[13] See e.g., 2014 LCIA Arbitration Rules, Article 5.8: "A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or the LCIA Court determines that in the circumstances a three-member tribunal is appropriate."

[14] Of course, for someone absolutely convinced of his or her own rectitude, collegial discussion may mean only irritation. Even then, however, dialogue can enhance the rigor of a dissent, assuming a separate opinion would be warranted.

deposits dormant since the end of the Second World War.[15] Multiple claimants often asked for the same pot of money. On the basis of a sometimes slim record in the bank documents, the arbitrators had to decide which individuals were related to the account holder and, if several claimants came from the same family, who had the better title to the funds, whether the cousin in New Jersey or the uncle in Australia.

In cases with a smaller monetary value, the arbitrators worked alone. With larger amounts at stake, the tribunal comprised three members. The difference was striking, at least in my experience as one of the arbitrators. When working as a team, each of us was able to test his or her impressions in dialogue with others who had read the same file, but sometimes were drawn to different facets of the narrative.

In more commonplace commercial arbitrations, a dialogue among arbitrators also enhances prospects of sound positions being reached, particularly when the applicable rules require that any consensus be memorialized in a written reasoned award.[16] In more than one instance, the experience of writing an award has pushed even partisan arbitrators toward more sensible positions.[17]

Of course, a price attaches to the enhanced analytic rigor that can derive from a troika of arbitrators debating the text of a written award. Greater time (and often money) will inevitably be spent, requiring a careful evaluation of the costs and benefits of enhanced adjudicatory accuracy, a

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[15] See references cited in William W. Park, *Jurisdictional Issues in Financial Arbitration*, in FESTSCHRIFT FÜR OTTO SANDROCK ZUM 70. GEBURTSTAG 745 (Klaus Peter Berger, Werner F. Ebke, Siegfried Elsing, Bernhard Grossfeld & Gunther Kühne, eds. 2000)

[16] Reasoned awards have become the rule in international arbitration. See e.g., 2014 LCIA Arbitration Rules, Article 26.2 ("The Arbitrational Tribunal shall . . . state the reasons upon which such award is based."); ICC Arbitration Rules, Article 31 ("The award shall state the reasons upon which it is based.") 2014 AAA (ICDR) International Arbitration Rules, Article 30 ("The tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given."); 2010 UNCITRAL Arbitration Rules, Article 34 (requiring that "the arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.") Compare AAA domestic commercial rules, providing in Rules R-46 that "the arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."

[17] Likewise, writing an award may assist a sole arbitrator to understand better the relevant arguments, as he or she must grapple with the need to connect sentences and authorities in a way that often reveals inconsistencies in prior views.

matter to be explored briefly below. And sometimes the group activity of writing awards (or deciding cases) may in fact lead to compromise which, for one or the other tribunal members, appears less than optimum.

b. Time and Truth

The passage of time often finds itself portrayed as an enemy of efficient arbitration. Conference speakers understandably portray delay as an enemy, in the sense that good arbitrations should be quick and cheap. And few of us would argue that proceedings should be any longer or most costly than necessary.

Yet arbitration implicates values and goals other than speed, particularly when the economic stakes are significant. One goal is to get it right. Not in the sense of an endless search for absolute truth such as might exist in the mind of God. Rather, getting it right by reaching a reasonable view of what happened, what the contract says, and what the law provides. Common sense suggests that for complex questions of fact and law, reaching the correct answer usually means careful consideration of evidence and argument, which can take time.[18] Indeed, research suggests that decisions in foreign languages differ from those reached in one's native tongue, presumably because effort and engagement of the reasoning process will be greater.[19]

In this connection, almost every week several calls come my way to ask in confidence whether a particular individual would be suitable as an arbitrator. The queries usually focus on whether the candidate will read the file and listen with a view to reaching a reasonable result.

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[18] See generally, DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011). Compare MALCOLM GLADWELL, BLINK (2005).

[19] In the so-called "Trolley and Fat Man Problem," a train will strike five people unless switched to a different path, where only one person will die. In addition, disaster can be averted by pushing a fat man onto the track, so his bulk will stop the train. When polled, more people agree to pull the switch than to push the fat man, although the arithmetic (one life for five) remains the same. Reluctance to push the fat man appears as a visceral reaction, contrasted to an impersonal flip of a lever. In a study at the Spanish University of Pompeu Fabra, willingness to push the fat man increased when the question was asked in a foreign language. Larger numbers of people endorse rational sacrifice when the moral dilemma is posed in a foreign language requiring greater time to think. See *Language and morality: Gained in translation*, ECONOMIST, 17 May 2014, Science and Technology Section.

Questions about speed figure less significantly than concerns about the quality of the decision-making.[20]

This does not mean that speed and cost should not be prized in good arbitration, but rather that sound decision-making requires consideration of other aspirations. With a few keystrokes of the computer, contract drafters could adopt some simple adjustments to the standard arbitration clause that would substantially reduce the duration of proceedings and the money spent on legal fees. These changes might (i) provide for one rather than three arbitrators; (ii) ban document production; (iii) limit the size and number of briefs; and (iv) stipulate awards without detailed reasoning.[21] Or, the arbitration community might lobby for legislation to eliminate annulment of awards at the arbitral seat, leaving the only judicial recourse at the place of enforcement itself.[22]

Each innovation, however, would carry its own cost, drawing understandable resistance from large segments of the arbitration community. Resistance to these measures, entirely understandable, demonstrates the value that participants in the arbitral process place on reaching a correct and fair result, not simply in going forward by the quickest and cheapest path.[23]

Of course, on-line chat rooms and list-serves often present a different emphasis, perhaps because timing remains a relatively easy target, requiring no knowledge of the substantive merits of a dispute, or of its procedural complexity. An eloquent academic opines that he could decide some

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[20] Only once did a lawyer stress rapidity as *the* top priority. He did so in a moment of admirable candor, admitting his wish for a presiding arbitrator who would move so rapidly as not to notice the smoke and mirrors used to hide what the attorney described as a hopeless case.

[21] See generally, Joerg Risse, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings* 29 ARB. INT'L 453 (2013).

[22] The late Professor Fouchard (among others) proposed such legislation two decades ago. *See generally* Philippe Fouchard, *La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, 1997 REV. ARB. 329.

[23] Sometimes procedural measures aimed at efficiency lead to unintended consequences that augment time and cost. Applications for summary judgment may lengthen proceedings if they fail, and result in judicial challenges if they succeed. More than one arbitral tribunal has seen routine invocation of ICSID Rule 41(5) (providing for preliminary objections that claims are "manifestly without legal merit") pressed into service to slow down proceedings, even though the provision was initially introduced as a tool to enhance efficiency.

controversial case in fifteen minutes, without much worry about competing arguments on tough questions related to document production, bifurcation, dispositive motions, ambiguous contract terms or conflicting testimony – not to speak of questions about discounting for his own cognitive bias.[24]

2. Document Production

Document production, also called discovery or disclosure, provides a second example of how decision-making varies according to the rules contained in the procedural framework of an arbitration. In essence, the very existence of document production requests will push an arbitral tribunal to give certain questions its preliminary attention earlier in the proceedings than might otherwise be the case.

A few years ago, the American Arbitration Association elaborated its Information Exchange Guidelines, which in some respects follow Articles 3 and 9 of the International Bar Association Rules on Evidence.[25] These rules constitute a compromise (or perhaps an amalgam to use a less charitable word) among the ways things are done in the United States, Britain and Continental Europe. The authors of those Guidelines agonized long and hard about how to articulate the right balance between specific and broad requests. For some of us, the exercise triggered a better understanding of why arbitrators often feel ill-at-ease with rulings on document production.

Particularly in proceedings driven by counsel from the United States, motions to compel documents often arrive before the arbitrator knows the case that well. Only in hindsight might the arbitrator understand adequately the documents' relevance to the dispute or their materiality to the outcome.

This dilemma, like many procedural difficulties, often proves to be a cloud with a silver lining. In some instances, early document production can stimulate an arbitrator's mental juices in a way that allows issues to marinate over the course of the proceedings. For some arbitrators the reflection period makes it easier to comprehend what remains at stake when pleadings arrive later.

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[24] See generally *Arbitrators and Accuracy*, 1 J. INT'L DISPUTE SETTLEMENT 25 (2010); reprinted with Epilogue as *Truth-Seeking in International Arbitration*, in THE SEARCH FOR "TRUTH" IN ARBITRATION 1(M. Wirth, C. Rouvinez & J. Knoll, eds., 2011), Association Suisse de l'Arbitrage Special Series No. 35; adapted as *Truth and Efficiency* in LOOKING TO THE FUTURE, ESSAYS IN HONOR OF MICHAEL REISMAN 753 (M. Arsanjani, J. Katz Cogan, R. Sloane & S. Wiessner, eds. 2011).

[25] ICDR Guidelines for Arbitrators Concerning Exchanges of Information, which by their terms govern all international cases administered by the ICDR commenced after 31 May 2008.

3. Who Asks the Questions?

The process for questioning witnesses and experts can also affect how arbitrators decide. The Anglo-American approach to testimony tends to put the arbitrator in a relatively passive role, with lawyers doing the heavy lifting in interrogating witnesses. By contrast, arbitrators in Continental Europe, like their judicial counterparts, often take the lead in a way sometimes deemed "inquisitorial" in nature.

Most commercial arbitration rules provide considerable latitude to arbitrators in respect of finding the facts and establishing the content of relevant legal principles.[26] The procedures adopted in complex international disputes usually combine the two approaches, although the Anglo-American style seems to dominate. In part this may be because an arbitrator who interrogates witnesses too energetically may risk seeming partisan or badgering, with an accusation that he or she has prejudged the case. Or the arbitrator might embarrass himself by probing matters that were already answered in a written statement or exhibit.

The passive approach, however, comes with its own drawbacks, by reducing the active give-and-take between arbitrator and witness, which for some of us helps to connect the dots that link different parts of the case. Even if the questions might have been answered in an exhibit, the arbitrator often enhances comprehension by a direct exchange with the witness. The same holds true for exchanges with counsel during oral argument. As with most things, the optimum approach to intervention remains a question of balance and judgment.[27]

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[26] See e.g., 2014 LCIA Arbitration Rules, Article 22.1(iii) ("The Arbitral Tribunal shall have the power … to conduct such enquiries as may appear to the Arbitral to be necessary or expedient, including … identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute."); 2012 ICC Rules of Arbitration, Article 25 ("The arbitral tribunal shall proceed …to establish the facts of the case by all appropriate means."); 2014 AAA (ICDR) International (Rule of Arbitration, Article 20(1) ("The arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."); 2010 UNCITRAL Arbitration Rules, Article 27 ("The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.")

[27] The extent to which some lawyers resist the active arbitrator was impressed on me a few years ago when chairing a case in which all three arbitrators asked the same question during closing argument. The matter related to the availability of punitive damages under the applicable law. Almost any answer might have been of assistance to us in wrestling with the thorny conflict among the hierarchies of sources for arbitrator authority. After having ignored us several times, the lawyer looked up from his notes and said with obvious pique, "Professor Park, you are interrupting my speech." The tribunal remained unenlightened.

It is not clear, at least not to me, why direct exchanges often advance understanding. Yet they do. Those who teach often notice how a student's engagement with the teacher can boost comprehension. When a student orally articulates a source of puzzlement, the exchange can help dramatically even if the answer varies only slightly from what was said earlier in class.

Of course, the relevant procedures may work themselves out differently depending on the legal culture surrounding the type of dispute, such as construction, insurance, patent licenses, or energy. [28] Arbitration remains just as chameleon-like as other human artifacts, with a diversity of form linked to a common core derived from waiver of recourse to otherwise competent courts. The application of rules will also shift from domestic to international cases, and even within the international realm, as between commercial cases and treaty-based investor-state claims.

In this connection, arbitration has become more complicated as new frontiers create fresh challenges. Disputes decided by arbitration run far beyond traditional stomping grounds of shipping, insurance, and merchant-to-merchant sales. Arbitrators address patent validity, Olympic events[29] and income tax allocations.[30] In the United States, with its distinctive legislative tradition,[31] arbitration can involve class actions,[32] sports doping,[33] beauty pageants,[34] and trade unions grievances, the last being an outgrowth of labor's distrust of judges.[35]

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[28] See William W. Park, *Arbitration's Discontents*, in MÉLANGES EN L'HONNEUR DU PROFESSEUR BERNARD AUDIT (2014). One recent book carries a dedication page, "For the Millions of Americans Unjustly Bound by an Arbitration Agreement." See IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013), which started with a story about arbitration over rape in Baghdad. Compare a less sensationalized treatment of the subject in IAN R. MACNEIL, AMERICAN ARBITRATION LAW (1992).

[29] ANTONIO RIGOZZI, L'ARBITRAGE INTERNATIONAL EN MATIÈRE DE SPORT (Bâle, Helbing & Lichtenhahn 2005); ARBITRATION AT THE OLYMPICS (Kluwer 2001).

[30] WILLIAM W. PARK & DAVID R. TILLINGHAST, INCOME TAX TREATY ARBITRATION (2004); William W. Park, *Arbitrability and Tax*, in ARBITRABILITY 179 (L. Mistelis & S. Brekoulakis, eds., 2008); Marcus Desax & Marc Veit, *Arbitration of Tax Treaty Disputes: The OECD Proposal*, 23 ARB. INT'L 405 (2007).

[31] See Christopher Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002).

[32] See e.g., Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (U.S. 2013); LAURENCE TRIBE & JOSHUA MATZ, THE ROBERTS COURT AND THE CONSTITUTION 291-299 (2014); William W. Park, *La jurisprudence américaine en matière de Class Arbitration: Entre débat politique et technique juridique*, 2012 REV. DE L'ARBITRAGE 507.

Notwithstanding its diversity and chameleon-like character, in all its forms the core of arbitration involves renunciation of otherwise competent courts in favor of a binding private adjudication. Such renunciation may be explained by a multitude of narratives.[36] In international disputes, arbitration enhances more level playing fields. In construction and insurance, the goal might be expertise. In the United States, arbitration removes disputes from the perceived vagaries of civil juries.

Conclusions about why people arbitrate will bear on how arbitration law develops. In a case involving consumer cellphone contracts, the U.S. Supreme Court struck down, as inconsistent with the purposes of arbitration, a California rule that had invalidated waivers of class arbitration. The rule was deemed to run afoul of the goals of arbitration, a conflict summarized as follows: "class arbitration sacrifices the principal advantage of arbitration —its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." [37]

Careful thinkers may scratch their heads at the assertion that informality constitutes arbitration's "principal advantage" in an era when arbitration routinely serves to decide complex international investment cases which often unfold like judicial proceedings. A more sensible summary might be taken from language in an earlier Supreme Court case, which spoke of

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[33] On 5 August 2013 Major League baseball announced the 211 game suspension of New York Yankees player Alex Rodriguez for use of steroids. The Uniform Player's Contract signed by major league players contains a grievance procedure which includes an agreement to arbitrate.

[34] Miss Universe L.P. v. Monnin, 952 F. Supp. 2d 591 (S.D.N.Y. 2013). A disappointed Miss Pennsylvania, failing to reach the finals and losing to Miss Rhode Island, charged the pageant was rigged.

[35] Concern about judicial hostility to trade unions led to arbitration of collective bargaining agreements in the United States, albeit on a statutory foundation separate from that of the Federal Arbitration Act. See Taft-Hartley Labor-Management Relations Act, § 301, 29 U.S.C. § 185 (2003).

[36] Even within a single field, such as investor state arbitration, conflicting models present themselves. See Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L LAW 45 (2013); Joost Pauwelyn, *At the Edge of Chaos*: *Foreign Investment Law as a Complex Adaptive System*, 29 ICSID REVIEW 372 (2014); CHARLES N. BROWER, INVESTOMERCIAL ARBITRATION, 80 ARB'N 179 (2014). Compare Gus van Harten, *Investment Arbitrators' Evident Lack of Restraint*, 5 J. INT'L DISP. SETTLEMENT 1 (2014).

[37] *AT &T Mobility v. Concepcion*, 131 S. Ct. at 1751-53 (2011), with majority opinion by Justice Scalia.

arbitration as a process to avoid "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." [38]

III. "Hard Law" Constraints

A. Contract Interpretation

In addition to such "soft law" influences, the hard law of statute and judicial precedent will play a role in limiting or expanding options available in arbitral decision-making. Even though the strict laws of evidence do not normally apply in arbitration, the applicable legal framework of a case will affect the testimony or documents an arbitrator may consider in construing an agreement. The point should be easily apparently in respect of procedural matters like privilege, affecting the otherwise pertinent exhibits that might remain hidden from the arbitrator. Another illustration lies in the parole evidence rules and its analogues in other legal cultures, requiring a finding of contract ambiguity in order to trigger consideration of testimony.[39] Ways around these principles may exist. However, they often affect what arbitrators take into consideration, which in turn affects how the case will be decided, at least for conscientious arbitrators.[40]

Substantive commercial codes may also play such a role. A short while ago it fell to me to chair a case in London concerning a sales contract that called for repeated deliveries. At issue was whether one side had been delivering the products in a timely manner. For reasons lost in the mists

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[38] Scherk v. Alberto-Culver, 417 U.S. 506 (U.S. 1974), echoed in a later case deciding that the New York Arbitration Convention trumped the U.S. Bankruptcy Code's automatic stay of arbitration. See Sonatrach v. Distrigas Corp., 80 B.R. 606 (D. Mass. 1987), where Judge Young concluded, "It is important and necessary for the United States to hold its domiciliaries to their bargains and not allow them to escape their commercial obligations by ducking into statutory safe harbors."

[39] See e.g., *In re Lehman Brothers Inc.*, 478 B.R. 570, 589 (S.D.N.Y. 2012) (quoting *Lockheed Martin Corp. v. Retail Holdings, N.V.*, 639 F.3d 63, 69 (2d Cir. 2011) to the effect that contractual language is ambiguous when it "is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement."

[40] If English law applies to interpret a contract, one side sometimes invokes a line of cases decided the British House of Lords (now called the UK Supreme Court) precluding evidence of the parties' intentions predating an agreement. See *Investors Compensation Scheme v. West Bromwich Building Society,* [1998] 1 All ER 98, [1998] 1 WLR 896, [1997] UKHL 28, [1998] WLR 896; *Chartbrook v. Persimmon Homes* [2009] UKHL 38, paragraphs 41-42 as per Lord Hoffmann. If French law applies, there will be instances in which a party invokes Article 1341 of the French *Code civil* which prohibits witness testimony that might be interpreted to modify terms of a property conveyance made by notarial deed. See Article 1341 of the French *Code civil* which prohibits witness testimony to modify clear terms of a contract in the event of property conveyances made by notarial deed.

of time, the contract had been subjected to New York law even though neither side was American and each party was represented by British barristers. In line with what was apparently the English approach, both legal teams assumed that they were precluded from providing evidence of post-contract behavior to assist the tribunal in its interpretation of the contract.

One night the arbitrators discussed the matter at dinner. From distant law school days, one of us remembered something about the Uniform Commercial Code permitting post-contract performance to inform understanding of sales contract terms. We checked the UCC and found that sure enough Article 2-208 provides that repeated performance, accepted without objection, will be relevant to determine the meaning of the agreement.[41]

The next day the Tribunal brought this to the lawyers' attention. (And herein lies another subject for discussion, related to when and how a tribunal raises legal arguments on its own motion.) After a flurry of activity with each barrister consulting his New York correspondent, an application was made to introduce new testimony for tribunal consideration. And this is all you will hear from me about that case, except that the decision-making options open to the tribunal expanded considerably under New York law.

B. Allocation of Costs

The allocation of costs in arbitration often prove fertile breeding grounds for conflicts between contract terms and applicable law, as well as legal culture. England restricts attempts to avoid the "loser pays" principle (sometimes termed "fee shifting") common in Europe for legal expenses and arbitrator fees.[42] In advance of the dispute, parties may not tell an arbitrator to allocate such costs in disregard of who wins and who loses, for example by applying the so-called

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[41] UCC Section 2-208(1) as enacted in New York says that when a sales contract involves repeated occasions for performance, with opportunity for objections, any such course of performance "accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement."

[42] Section 60, Arbitration Act of 1996: "An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen." Section 61 goes on to set forth the general principle that "costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs." This standard, however, is made subject to the parties' agreement otherwise, which in context with Section 60 would be an agreement after the dispute has arisen. The rule's most understandable application lies in an anti-abuse mechanism to prevent clauses that would require weaker parties to pay all costs, thus discouraging otherwise legitimate claims. To be clear, the statute does not impose the English "costs follow the event" rule in all cases, but rather invalidates pre-dispute attempts to eliminate arbitral discretion in the matter.

"American rule" which has each side paying its own legal costs regardless of the litigation outcome.[43]

The provision casts a wide net, often catching unawares even reasonable arrangements among sophisticated business managers who wish for something other than the English rule. Imagine, for example, that an international contract provides for arbitration in London as a convenient venue, but with New York law applicable to interpretation of the agreement.[44] The agreement also stipulates that arbitrator compensation should be split on a 50/50 basis, along with each side bearing its own legal expenses.

In such an instance, a conscientious arbitrator falls between Scylla and Charybdis, faced with inconsistent mandates from the *lex loci arbitri* (English Arbitration Act) and the contract's applicable law (that of New York). Aiming at fidelity to the parties' agreement, the might let the costs lie where they fall, as provided by the contract. To do so, however, might risk award annulment in set-aside proceedings before English courts. Yet the contrary course, to allocate fees and expenses in disregard of the parties' agreement, might appear as an excess of authority to a New York court asked to enforce an award which on costs runs counter to a freely accepted contract provision which remains entirely consistent with the parties' chosen substantive law.

IV. Splitting the Baby and Social Engineering

The legal process looks both backwards and forwards. A regard toward the past predominates with respect to resolution of the particular dispute which generated the litigation. A glance at the future enters the decision-maker's field of vision in considering effects of a judgment or award on conduct in similar subsequent cases.

In considering how arbitrators decide cases, this duality in the law presents two persistent questions. The first asks whether arbitrators apply law with the same rigor one might expect in court litigation. The second inquires after the extent to which arbitrators demonstrate fidelity to the

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[43] See generally, John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 J. LAW & CONTEMPORARY PROBLEMS 9 (1984); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1576 (1993); Arthur L. Goodhart, *Costs*, 38 YALE L. J. 849

[44] Such would often be the case in "Bermuda Form" policies between European insurers and American policyholders, which provide for London arbitration subject to New York substantive law. See e.g., RICHARD JACOBS, LORELIE S. MASTERS & PAUL STANLEY, LIABILITY INSURANCE IN INTERNATIONAL ARBITRATION (2004; 2d Ed 2011); DAVID SCOREY, RICHARD GEDDES, & CHRIS HARRIS, THE BERMUDA FORM: INTERPRETATION AND DISPUTE RESOLUTION OF EXCESS LIABILITY INSURANCE (2011).

parties' shared pre-dispute expectations.

A. Urban Legends

In stating that rules and laws do and should constrain how arbitrators decide, one only gives expression to the obvious. Yet sometimes things which go without saying will also go well being said, expressly and even repeatedly.

Persistence narratives suggest that arbitrators disregard applicable legal principles, with a "split the baby" account of arbitration often advanced by public interest groups that distrust non-judicial dispute resolution.[45] One side-effect will lie in the reduced inclination of legislators and judges to accord deference to arbitrators' decisions.[46]

In searching for origins of the urban legend about the scofflaw arbitrator, one comes across the writing of the well-known Federal Appellate judge Richard Posner, in a book titled *How Judges Think*. At one point the work asserts baldly and boldly that courts and juries are "more likely to adhere to the law … than arbitrators." [47] As authority for this proposition the author cites a California case on employment termination, with an opinion by the great Stanley Mosk, which essentially said the same thing although added the qualifier "perceived" in describing advantages of the judicial forum. For support, the California case cites a PLI handbook and a Wisconsin Law Review article which contend that arbitrators exhibit a pro-business bias.[48]

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[45] The imagery of baby-splitting seems to originate in the Biblical child custody dispute decided in ancient Jerusalem by King Solomon. When one woman accused another of stealing her baby, the King called for a sword so the child might be divided in two, with one half for each woman. Of course, the metaphor hides the character of Solomon's decision as an interim award, followed by grant of custody to the real mother whose compassion led to abandonment of her claim in hopes of saving her son. 1 Kings 3:23–28.

[46] At least in some contexts, such a view was explicitly rejected by the U.S. Supreme court in 1985, when Justice Blackmun allowed arbitration of Sherman Act claims by reasoning that the court would "decline to indulge the presumption" that the arbitrators would not be "competent, conscientious, and impartial," Mitsubishi v. Soler, 473 U.S. 614, at 634 (1985).

[47] RICHARD A. POSNER, HOW JUDGES THINK (2008), at 127–128, stating that courts and juries are "more likely to adhere to the law and less likely than arbitrators to 'split the difference' between the two sides thereby lowering damages."

[48] See Armendariz v. Foundation Health Psychare Services, 6 P.3d 669, 693 (Cal. 2000), stating "The perceived advantages of the judicial forum for plaintiffs include the availability of discovery and the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to "split the difference" between the two sides, thereby lowering damages awards for plaintiffs." The case held an arbitration agreement unenforceable in an employee termination case. Judge Mosk quotes a PLI course handbook and a Wisconsin law Review article which each said that corporate defendants like arbitration. The law review article cited the *American Safety* doctrine

In fact, no empirical data supports the "lawless arbitrator" narrative,[49] certainly not based on variations in "win rates" or size of damages in arbitration as opposed to court litigation,[50] whether for commercial transaction, employment contracts,[51] or consumer credit.[52] What studies do exist, comparing similar cases in arbitration and in court, actually found win rates for debtors higher in arbitration than in court litigation.[53]

Analogous studies of international investment arbitration found no evidence that arbitrators tend to act in a biased way to please appointers, or render decisions giving each party a partial victory to increase user satisfaction.[54] Doubtless some arbitrators (like some judges) make mistakes or deviate from duty, with decisions lacking in rigor.[55] For many, however, the incentive to

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that was discredited in the *Mitsubhsihi* case mentioned *supra*. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60–61; American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968).

[49] A different issue arises with respect to arbitrations conducted by professionals such as engineers or accountants, where the matters to be adjudicated relate to capitalization standards or the quantity of a material used at the building site, and the questions to be adjudicated relate to technical matters rather than the application of law.

[50] A comparison of courts and arbitrators raises another set of questions about the dysfunction in the legal system, with jury verdicts sometimes portrayed as resulting from a bias toward the non-corporate claimant rather than aiming at the "right" result in terms of law and mutual pre-dispute expectations.

[51] See Theodore Eisenberg & Elizabeth Hill, *Arbitration & Litigation of Employment Claims: An Empirical Comparison,* 58 DISP. RES. J. 44 (ABA, Nov 2003-Jan 2004), looking at state and federal court trials as compared with AAA arbitrations.

[52] See Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L. J. 77 at 80 (2011); Christopher R. Drahozal, *Arbitration Innumeracy*, in 4 YEARBOOK ON ARBITRATION & MEDIATION 89 (2012).

[53] In a study examining thousands of debtor-creditor small claims administered by the American Arbitration Association, win rates for creditors in arbitration varied between 85.2 % and 97.1 (depending on the type of program), as contrasted with 98.4% to 100% of the debt collection cases in court. Comparing amounts awarded to creditors (as contrasted with any relief obtained) the figures reach vary from 92.9 % to 99.2 % for arbitration, as contrasted with 96.2 % to 99.5 % of the amount sought in debt collection cases in court. Christopher Drahozal, *Arbitration Innumeracy*, *supra*, at 93-94.

[54] See e.g., Daphna Kapeliuk, *The Repeat Appointment Factor*, 96 CORNELL LAW REV. 47 (2010), analyzing 131 ICSID cases implicating almost two hundred arbitrators.

[55] It will not escape the thoughtful observer that assertions of incorrect decision-making can (and are) also made about judges. In the highest court in the United States, splits of 5-4 remain common, with each camp denouncing the lawlessness of the other.

maintain a reputation for independent judgment trumps any temptation to inappropriate behavior. Indeed, a strong incentives to good conduct derives from the shame of appearing (in the eyes of colleagues) as biased, lazy or incompetent.

B. Fidelity to the Parties' Expectations

What is correct, of course, is that judges and arbitrators often take different starting points for their authority: the state (for the judiciary), as contrasted with the contract (for arbitrators). One starting point might yield a different calculus of duty from the other, which in turn can affect decision-making. Some judges may be more inclined to implement societal values that sometimes trump private agreements, whereas no similar social engineering function might fall to arbitrators, who as creatures of the parties' consent would be more sensitive to the norms agreed when the litigants planned their transaction. And unlike juries, arbitrators in commercial cases often must explain themselves in a reasoned award which circulates within the community, which engenders a high level of respect for their duty of fidelity to the parties' shared initial expectations.

Of course, the relevant question must be *not* whether arbitrators decide differently from judges in the abstract, but how *a particular* arbitrator will rule compared to *a particular* judge. A Texas court might be expected to decide according to Texas statute whose application has been mandated by the state legislature. The judge can hardly disregard the otherwise legitimate directives of those who pay his or her salary. By contrast, a judge sitting in London, or an arbitrator sitting in Bermuda, might decide the very same dispute according to general choice-of-law principles which, because of the factual contours of the case, call for New York or English law to govern the dispute.

On occasion, it may be the courts rather than the arbitrators which deviate from the terms of the contract or prior precedent. The nature of the judicial office may include a perceived institutional duty to embrace public interests of the forum, or a political inclination to develop the law in light of evolving national concerns of a social or economic nature. In a dispute over the price of oil, a judge in a fuel-importing jurisdiction like Massachusetts could be expected to consider payments by local residents during the bitter cold New England winters. By contrast, arguments for lower fuel costs might be received with greater skepticism by judges from oil producing countries like Venezuela.

Even if personal sympathies can play a role for arbitrators as well as judges, the disciplined arbitrator, whether from Boston or from Caracas, will normally see a starting point for his authority in the parties' agreement, which calls for a heightened fidelity to the parties' shared *ex ante*

expectations, and thus predictable vindication of contract rights. Such variations in the approaches of arbitrator and judge tend to be linked to their respective sources of authority. The genesis of judicial power normally lies in the political collectivity that appoints the judge and pays his or her salary. By contrast, the arbitrator's legitimacy starts with an agreement to waive recourse to otherwise competent national courts.

Of course, not all arbitrators follow the same mold. A while back one of my tribunals included an eminent scholar from an American law school who was sitting in his first arbitration. The question was whether the buyer of a company could ask for damages that effectively reduced the price of the purchased corporation by asserting fraud. The applicable law said that a buyer arguing fraud had only one remedy, which was rescission. The professor had never liked that rule, and felt that his prerogative was to launch out with new law. The other two members of the tribunal took a different view, which ultimately prevailed.

In the end, any intelligent comparison must consider which judges and which arbitrators have been taken as baselines for comparison. Similar insurance disputes might be decided by a London judge, a court in Dallas, and an arbitrator from Bermuda. It would not be surprising if the Englishman viewed his case through juridical lenses more like those worn by the arbitrator than by the Texas judge. Professional identity derived from receiving a government salary might prove less significant than affinities of legal training and culture.

Before leaving the subject of fidelity and reliability, one might take note of an increasingly common criticism of commercial arbitration: the fashion to question the reliability of witness testimony.[56] Doubtless, any thoughtful and experienced observer of litigation or arbitration must approach witness testimony with humility. Memories (like perception itself) remain fallible and flexible. Confidence and emotion in recollection do not always equate with accuracy.

That being said, it is not clear why evidentiary testimony, however imperfect, should be excluded as a tool in seeking a reasonably reliable account of what happened. One can only wonder how Auschwitz survivors would react to the suggestion that their memories of the concentration camp were illusory. It would be highly problematic to extend the truism that recollections are imperfect to a general distrust of all memory.

Most forms of evidence will carry their own potential fallibility. Documentary exhibits can be forged or altered, just as memory can play tricks. Yet few would suggest a return to consultation of

[56] See e.g., Jennifer Kirby, *Witness Preparation: Memory and Storytelling*, 28 JOURNAL OF INTERNATIONAL ARBITRATION 401 (2011).

oracles, or the type of "spectral evidence" relied on during the 1692 Salem Witch Trials when members of a New England farming community were charged with witchcraft and sorcery based on accounts of things done by the accused out-of-body spirit.[57]

Of course, the question of how much testimony will assist dispute resolution remains separate from the matter of what sort of testimony should be admissible, either because of concerns about reliability or due to competing goals such as protecting attorney-client privilege. For international arbitration, significant divisions exist in the very notion of "witness" as from one legal culture to another.[58]

V. Why Reliability Matters

More than a half century ago, a Hungarian psychoanalyst suggested terms to distinguish between thrill seekers and those who cling to the predictable: the "philobat" who enjoys departing from the safe and predictable, and the "ocnophile" who clings to stability.[59] The latter category includes the risk averse (or just plain prudent) individuals who accept the prospect of being up only

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[57] Among others, John Alden, son of the famous Plymouth settler of the same name, was charged with sorcery on return from Québec, where he had gone to ransom Englishmen imprisoned by the French. After girls collapsed in torment from his "specter" Alden asked rhetorically why his spirit did not so affect the judges. Doubts later caused Increase Mather, President of Harvard, to suggest that ten suspected witches should escape rather than one innocent person be condemned on spectral evidence. See RICHARD FRANCIS, JUDGE SEWALL'S APOLOGY (2005) at 181-182; EVE LAPLANTE, SALEM WITCH JUDGE (2007) at 136-142 & 192; SALEM WITCH TRIALS READER (F. Hill, ed. 2000), at xxii and 74, with excerpt from Robert Calef, *More Wonders of the Invisible World* (1706).

[58] In some instances, the procedural framework of an arbitration relies heavily on the way litigation tools have been conceptualized, notwithstanding relatively good cognates from one language to another. Juxtaposing two ways to say "language" in French ("langue" and "langage"), Yves Derains makes this point forcefully in Langue et langages de l'arbitrage, Mélanges en l'Honneur de Pierre Tercier 789 (P. Guach, F. Werro, & P. Pichonnaz, eds., 2008). French might be the tongue (la langue) for communication in an arbitration built on procedural concepts (les langages) drawn from American practice, such as a trial with testimony by "witnesses" in the Anglo-American sense. Words such as "witness" and "témoin" may prove false friends if evidence is presented by a party's employee, who might well be a "witness" for Americans but lack the capacity to testify under French notions of a "témoin". See generally Pierre Mayer, Le poids des témoignages dans l'arbitral international, in Mélanges en l'honneur du Professeur Bernard Audit 525 (2014).

[59] MICHAEL BALINT, THRILLS AND REGRESSIONS (1959). Balint coined the first term as a variant of acrobat, one who walks away from the safe earth, and the second from the Greek root *ocno* in the verb "to cling" or "to hesitate". *Id*. at 25. Popularized explorations of the thesis appeared in Daniel Goleman, *Saying Goodbye Speaks Volumes*, NEW YORK TIMES (3 April 1984); Daniel Goleman, *Leaving*, INTERNATIONAL HERALD TRIBUNE [now International New York Times], 7-8 April 1984, at 18.

one dollar (rather than two) in order to attenuate the possibility of having nothing at all.[60]

For international investors and business managers, the "ocnophile" element of the decision-making calculus, inclining toward certainty and reliability, might also work itself out in greater confidence in how arbitrators, as contrasted with judges, interpret contracts and apply law.[61] Indeed, as explored above, much of the impulse to arbitrate international disputes explains itself as a response to the political and procedural uncertainty derived from the proverbial hometown justice of the other side's judicial system.

Understanding such risk aversion helps to provide linkage between the "how" of arbitral decision-making and the "why" of arbitration itself. Arbitration is serious business. Its ultimate stakes lie in promoting the type of economic cooperation enhanced by reliable vindication of legitimate expectations. For difficult questions, common sense will sometimes pay more dividends than ideology. When clearly right answers fall few and far between, arbitrators must push forward to do their best, in finding facts and applying law, without the luxury of abandoning their mission by a plea that the case is too hard.

As people to whom others entrust their treasure and their welfare, arbitrators play a significant role in bolstering confidence in cross-border economic cooperation. In a world lacking any neutral supranational courts of mandatory jurisdiction, the absence of such private dispute resolution would leave many business transactions either unconsummated or to be concluded at higher costs to reflect the absence of adequate mechanisms to vindicate contract rights. To break faith with the duty to aim at reliable decision-making will leave the world a poorer place.

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[60] To illustrate the point, students in my class are asked if they wish to work as research assistants in return for a fixed stipend. A majority usually raise hands to signify interest. Different responses obtain from a "double or nothing" proposal of payment which is higher but dependent on a coin toss. The bulk of students, sensibly risk averse, prefer being up only one dollar (foregoing the possibility of two) in order to reduce chances of ending up with nothing at all. Some students can be enticed back in the game by raising the compensation rate substantially, but not many.

[61] For a general overview of how arbitrators' interpretation of contract overlaps with their construction of applicable law, see Laurent Lévy & Fabrice Robert-Tissot, *L'interprétation arbitrale*, 2013 (no. 4) REV. DE L'ARBITRAGE 861. The authors compare commercial, sport and investor-state arbitration. Their conclusions suggest, *inter alia*, that for international commercial transactions, arbitrators tend to put more emphasis on the terms of the contract itself than on applicable law.