

A Beautiful Mind: Applying psychology to international arbitration effectively

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Abstract

There is a disconnect between what scientists know about the way the mind functions and the practice of international arbitration – a field which necessarily depends on the operation of numerous human minds, including arbitrators, counsel, experts, witnesses and secretariats.

Much work has been done that applies findings from psychological research and other scientific advancements to criminal law, in order to enhance the administration of justice (e.g. research relating to the accuracy of eyewitness testimony, jury behaviour and DNA evidence). However, the law generally is unaware of scientific research on human cognition and behaviour and, to date, the application of rigorous scientific methods to the field of civil law, and international arbitration in particular, has been relatively neglected.

Without an understanding of the scientific background, it is easy to misconstrue experimental studies in this area, and there are risks in applying the wrong conclusions in practice. Using illustrative examples from research into decision-making and cognition, this paper calls for a novel approach to the fascinating field of legal psychology to enhance international arbitration as a form of dispute resolution, including educational initiatives, directions for future research and proposals for legal practice and procedure.

Introduction

1. There is a disconnect between science and law; in particular, what scientists know about the way the mind functions and the practice of international arbitration. The arbitration of disputes, whether commercial or investment treaty-related, necessarily requires the application of numerous human minds at every stage in the process, including arbitrators, counsel, experts, witnesses and secretariats. International arbitration should not develop in isolation from psychological research: scientific findings about human cognition and behaviour can inform real changes to practice and procedure to enhance its effectiveness as a means of dispute resolution.
2. Some progress has been made integrating findings from scientific research into the field of criminal law to enhance the administration of justice, e.g. police line-up procedures; judicial education and jury direction on the accuracy of eyewitness testimony; the use of DNA evidence. To date, however, the application of rigorous scientific testing and analysis to the field of civil law, including the practice of international arbitration, has been largely neglected.
3. Without an appreciation of relevant scientific principles (including methodological design and statistics), or the broader background against which the research has developed, it is easy to misconstrue scientific studies in this field and there are obvious risks in misapplying the results to legal practice. Taking illustrative examples from the fields of human cognition and decision-making, this paper discusses the potential role of cognitive biases in arbitral decision-making.

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Biases in arbitral decision-making

4. In one study, researchers examined patterns in decision-making among Israeli judges by plotting the outcome of various prisoners' parole applications over the course of the day and charting them against the judges' food breaks. Their paper showed that the likelihood of a favourable ruling (e.g. granting parole) was greatest immediately after a food break and then steadily declined to near zero immediately before the next food break.
5. Many legal practitioners have cited this study to illustrate that hunger may play a role in the quality of judicial or arbitral decision-making. However, there are certain distinctive features about the methodology and the data used in this study that limit the conclusions that can be drawn. For instance, the study cannot determine whether eating influenced the judges' decision-making, or whether it was simply rest, increase in glucose levels or improvement in mood. In addition, the effect may be limited to certain relatively narrow conditions, where individuals are called to make repeated rulings of the same nature over a period of time (the judges dealt with a series of parole-related requests over a day). More significantly, a later scientific paper has criticised the researchers' conclusions on the basis of certain flaws in the original data set and its analysis (e.g. cases were not presented in a random order and certain decisions were, they argue, inappropriately excluded).
6. This example illustrates the importance of understanding scientific methodology and design when drawing conclusions from psychological studies, and importing practices based upon those conclusions into international arbitration.

Conclusions

7. This paper concludes with three key proposals about this fascinating new area of international arbitration:
 - a. Education on cognitive biases and legal psychology more generally for arbitrators, practitioners and other stakeholders in international arbitration.
 - b. Changes to practice and procedure that address the findings of scientific research.
 - c. Future research to explore specific features of international arbitration (e.g. the effects of jet-lag on decision-making).