The Psychological/Communicative Preconditions for the International Arbitral Process: Initial Findings of a Research Project and its Methodology[1]

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Abstract

The authors begin with an introduction to the world of international arbitration, first by contrasting this process with the traditional legal process used in courts and secondly by distinguishing between two types of international arbitration: international commercial arbitration and investment treaty arbitration. The authors emphasize the growing political and economic importance of investment treaty arbitration in particular as a procedure for the resolution of disputes between private companies as investors and the States in which they invest. In the process of economic globalization, over the last 50 years States have entered into over 2,800 bilateral investment treaties (BITs) under which States have agree to provide international standards of treatment to foreign investors and to resolve disputes as to that treatment through international arbitration. Although international arbitration is already of such global importance, the psychological/communicative aspects of this process have yet to be scientifically investigated. This paper addresses the authors' on-going research to fill this scientific gap.

After providing a background sketch of the international arbitral process and its use in the global economy, the authors then describe two pilot studies which they have conducted and which utilize qualitative research methods as opposed to traditional quantitative methods. The first pilot study consisted of a questionnaire referring to core features of the arbitral process: the requirement of impartiality; the complexity of the cases; the choice of decision-makers; the lack of appeal; and global aspects, including cultural differences, not only of legal systems, but also of the communication styles of the arbitrators and legal counsel. A second pilot study was done by conducting interviews with international arbitrators. These transcribed interviews are being analysed on four different levels, starting with the arbitrator's practical understanding of key words and statements and ending with a reconstruction of the mostly implicit evaluations of their methods of addressing the core features of the arbitral process. The authors conclude by describing future research designed to focus on international investment arbitration.

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ANALYSIS

I. Introduction

International arbitration has been described as "*the principal method of resolving disputes between States, individuals and corporations in almost every aspect of international trade, commerce, and investment*."[2] It is the process whereby parties agree to submit their dispute to a tribunal composed of private individuals, independent and impartial and chosen by the parties, by whose decision the parties agree to be bound without appeal.

Today, international arbitration is the main means of dispute resolution in international business.[3] In contrast to proceedings before a court, arbitration allows parties to keep their disputes private and confidential and to choose the procedures that will be followed by the tribunal. This control and flexibility is better suited for the multi-legal and multi-cultural context of cross-border business relationships. Moreover, arbitration is a more effective means of resolving international commercial disputes than domestic court litigation. Unlike the judgments of domestic courts, arbitral awards are enforceable internationally pursuant to the streamlined process set out in the widely successful New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, to which over 140 States are parties.

International arbitration has also come to play a central role in the resolution of another kind of international dispute – disputes between foreign investors and the States in which they invest (the "host State"). Over the last fifty years, States have entered into an estimated 2,800 bilateral investment treaties (BITs) under which States have agreed to provide certain standards of protection to foreign investors – e.g., from uncompensated

[2] N. Blackaby and C. Partasides, with A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, 5th ed. (2009), p 1.
[3] *See* PricewaterhouseCoopers and Queen Mary University of London, *International Arbitration: Corporate Attitudes and Practices* (2008).

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expropriation, discriminatory treatment[4] (Germany has over 125 such treaties in force.). These BITs allow foreign investors to bring claims for violations of those standards before international arbitral tribunals. The arbitral awards in these cases are final, binding and enforceable, just as in the commercial arbitration setting. This type of arbitration is referred to as "investment treaty" or "investor-State" arbitration.

Claims under investment treaties often raise politically sensitive issues. In essence the investor's claim is a challenge to the host State's exercise of its sovereign power: has the host State's domestic regulation violated the foreign investor's internationally protected rights? Given the pervasive web of investment treaties in effect globally, an enormous amount of economic activity is covered by such treaties. In 2011, for example, global flows of foreign investment approached 1.5 trillion USD, the vast majority of which will have been covered by an investment treaty and subject to its provisions for arbitration in the event of a dispute.[5] Already there have been at least 450 investment treaty arbitrations commenced by investors against States around the world, including sixty-three claims against EU Member States.[6] The amounts at stake in these claims tend to be substantial, from tens to hundreds of millions of dollars.[7] These numbers demonstrate how important international investment arbitration has become for the maintenance of international economic relations.

Unlike in commercial arbitration, in investor-State cases party preferences for confidential dispute resolution largely have given way in the face of widespread recognition that such disputes raise important matters of public interest, *viz*. whether the State has violated its international legal obligations and will be required to pay compensation to the foreign investor. Thus, most investor-State arbitral awards are made public and are scrutinised and dissected, not only by specialised legal practitioners, but also by civil society organizations and the press.

Arbitrators in investor-State cases are conscious of the important responsibility that their role entails. The cases on which they sit require the ability to appreciate the subtleties of national and international legal systems, assess evidence adduced across borders and respond to arguments put by counsel from varied legal and cultural traditions. Moreover, the resolution of an investor-State arbitration requires negotiation and decision making among the sitting arbitrators who may not come from the same legal and cultural traditions. The elaboration and development of tools to assist arbitrators in carrying out their function in this multi-cultural setting is an important part of the process. Our research project, which is described below, contributes to the development of these tools by clarifying the role which psychological/communicative factors play in the arbitration process.

Our project thus fills a research desideratum. One reason that insufficient attention has of yet been given to the psychological factors at play in the arbitral process is the distance which has existed between the research findings of psychology on the one side and the academic socialisation of lawyers on the other side – a distance which is slowly being reduced by the scientific interest in "Psychology and Law" and in modern neuroscience.

[4] Almost every state in the world has entered into at least one agreement addressing the protection of foreign investors. Of the few states not to have entered into any treaties addressing investment protection are Brazil (which has signed many but ratified none), Ireland and North Korea.
[5] United Nations Conference on Trade and Development, *Global Investment Trends Monitor* (vol. 8) (24 Jan. 2012).
[6] United Nations Conference on Trade and Development, *Latest Developments in Investor–State Dispute Settlement*, IIA Issues Note No. 1 (April 2012).
[7] *See*, e.g., *CME Czech Republic BV v. Czech Republic*, Final Award (14 Mar. 2003) (award against Czech Republic of USD 270 million plus interest); *ADC Affiliate Ltd v. Hungary*, Final Award (2 Oct. 2006) (award against Hungary of approximately USD 76 million plus certain costs).

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Thus far, the psychology of the adjudicative decision-making process has been explored mostly for judges and juries in the United States,[8] but not for the arbitral process.

The majority of this research has been conducted within the traditional framework of psychology which uses quantitative methods. In contrast, our approach utilizes qualitative methods of psychological/communication research. Little, if any, similar work and studies have been carried out in the European and international context. How the mental activities and communicative demands of decision-making interact with the cultural differences at play in a trans-border dispute has not been examined scientifically at all.

Another reason that insufficient attention has been given to this issue is the still existing exclusion of empirical field work, since the vast majority of arbitration hearings are not public.[9] How we have nonetheless found a way to obtain relevant data will be explained below.

II. Analysis

Our main thesis is that some of the core features of international arbitration are such as to make psychological insight essential to the maintenance of the quality and the integrity of the arbitral process – core features like the requirement of impartiality; the complexity of the cases; the choice of decision-makers; lack of appeal; and the global aspects, including cultural differences, not only of legal systems, but also of the communication style of the arbitrators and legal counsel. Our main question is how these psychological/communicative challenges and the various ways to cope with them may trigger different decision-making processes in the minds of international arbitrators.

The main practical goal of our project is to contribute to increasing the level of the professional skills of international arbitrators regarding the communicative/psychological preconditions of the arbitral process. One way to attain this goal is to educate States and investors who will be involved in international investment arbitrations and to provide information about the inner dynamics of this dispute resolution mechanism. Furthermore, advocates as well as arbitrators will benefit from information about the specific psychological/communicative challenges with which they are confronted by being involved in investor-State arbitration. As noted above, this is an area in which systematic information does not yet exist. On the basis of the findings of our research we will develop a guideline of interactional psychology for international arbitration in order to develop the professional abilities of those involved in the process to cope with the challenges of international arbitration. This would include a mostly implicit evaluation of the means which are used to cope with these challenges.

Another practical goal of our research is to enable international arbitrators to reflect on and to discuss among themselves what hitherto has not been the focus of their attention: forms and types of practical knowledge (including routines) of these psychological/communicative challenges and the varying ways to cope with them.

[8] See notably F Schauer, "Is There a Psychology of Judging?", in D E Klein and G Mitchell, eds., *The Psychology of Judicial Decision-Making* (OUP 2010); D Simon, "In Praise of Pedantic Eclecticism: Pitfalls and Opportunities in the Psychology of Judging", in *The Psychology of Judicial Decision-Making*, *ibid*.; JR Sternlight and JK Robbenholt, "Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients' (2008) 23 *Ohio State Journal on Dispute Resolution* 437, available at http://ssrn.com/abstract=1127724; DJ Arkush, "Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for the Law", available at http://ssrn.com/ abstract=1003562; CR Drahozal, "A Behavioral Analysis of Private Judging" (2004) 67 *Law and Contemporary Problems* 105.

[9] Even in investor-State arbitration in which the decisions and awards of the tribunal are often made public, the proceedings themselves generally remain private and outside of public view.

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While our research going forward will be focuses on investor-State arbitration, because our research is orientated towards core features of the arbitral process, our approach is equally important for international commercial arbitration as it is for international investment arbitration. [10] Already we have conducted two pilot studies with arbitrators in international commercial arbitration which have given us the results discussed below.

A. Pilot Study One

The first pilot study used a questionnaire, with which we started this research work in 2008.[11] We had 19 completed questionnaires. Respondents were asked to rate a series of statements and subpropositions addressing an aspect of the core features of the arbitral process noted above. Each was to be ranked with a number from 1 to 5 according to the respondent's level of agreement, with 1 meaning total agreement and 5 meaning complete disagreement.

1. Individuality of the Arbitrator

The first finding to emerge from the replies was the wide variety of the ratings to any given statement. Data analysis in our research method looks for "clusters of similarities" – trends and patterns in the answers that provide clues as to the applicable categories. There are very few such clusters in our data. The questionnaire included certain statements that were expected to attract consensus, for or against. For example, the heading "Approaching a case" comprised a list of mental techniques, including "(a) Breaking the difficulty down into components that I consider manageable". It was expected that there would be little, if any, disagreement with (a), yet three (3) respondents completely disagreed, and two (2) rated the statement "in the middle" – indicating neither agreement nor disagreement. Further down the same list, the technique mentioned as (c) "Working out a desirable outcome and working backwards", was expected not to attract strong agreement – yet two (2) respondents strongly agreed, and three (3) gave it a middle ranking.

How can these findings be interpreted? Although it is premature to attempt a definite answer, the following questions arise, to be probed in the future steps of our research: Does the variety of replies indicate that arbitrators cultivate strongly individualistic approaches to decision-making? If so, where does the individualism take its source? Is it as a result of legal training? Is it one of the consequences of the lack of institutional fora for arbitrators to "test" their approaches – i.e., the lack of appeal or other substantive review in arbitration –, and have an opportunity to receive direct feedback about that approach from others others?

2. Strength of Resolve about Chosen Approach

Some respondents to the questionnaire provided several additional written comments, or expanded on the reasons behind the ratings given to the various statements. One comment was critical of the questionnaire statement that arbitrators should achieve absolute mastery of the material put forward by the parties. The respondent felt that arbitrators should be able to admit that they do not understand everything about a case,

[10] Rather than placing statistical emphasis on a large number of case studies, our qualitative method of research proceeds from the basis of a limited sample of "information-rich", and illuminative, participants. Qualitative data is especially useful where different participants are expected to manifest varying outcomes based on their own individual experience and circumstances. For our target group of arbitrators, this data is obtained by circulating questionnaires and conducting interviews.
[11] S. Nappert and D. Flader "Psychological Factors in the Arbitral Process" in *The Art of Advocacy in International Arbitration*, 2nd Ed. D. Bishop, E. G. Kehoe Ed. (2010) JurisNet, New York, USA Pages 121-148.

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and ask for help. Furthermore, the respondent stressed that fellow arbitrators on a tribunal are an important source of help, by filling in information such as cultural background or commercial aspects of a case.

Yet, unexpectedly, a majority of respondents (9) disagreed with the following statement in the questionnaire: "I often get the sense that I am missing an important part of a party's case and rely on discussing with my fellow arbitrators to fill in the missing parts." What inference may be drawn from these disagreements? A lack of intellectual humility or lack of awareness of limitations? How can this attitude be explained?

3. Refusal to Allow Recognition of Emotions or Unconscious Preferences

One important tenet of arbitration is the equal opportunity given to the parties to tell their story and express their grievances. The arbitrator, in trying to understand properly the whole story, necessarily makes use of what is called in microsociology "taking on the role of the other", seeing things from the other's perspective.[12] In so doing, however, the arbitrator must inevitably refer to his/her mental stock of knowledge about everyday life and situations – and about emotions.

The arbitrator who tries to understand the case presented by the parties without factoring in the parties' emotions is discounting *ab initio* an important factor to his/her understanding of the case, and ultimately to his/her decision-making. Therefore, he/she needs a degree of self-awareness. Of course parties resort to arbitration precisely because they trust arbitrators not to allow their own emotions to clutter their judgment. This, however, does not mean that arbitrators cut off all contact with their own emotional responses in order to gain an objective understanding of a party's case.

We assume that an important distinction should be made between one's emotional reactions and the process of understanding the emotions of others. The question is: What do arbitrators mean when they tell us that they must control their own emotional reactions to a case? If they understand "control" to be an absolute control, will there be a failure to give proper recognition to the parties' emotional reactions, with the practical consequence that it hampers the arbitrators' understanding of the case? This is of importance because it discounts the part played by the parties' emotions in the circumstances leading up to the dispute.

The early findings of pilot study one show that the psychological paths to the arbitral process appear more multi-faceted than was anticipated. This project is, in many ways, an incremental learning process. We learned that certain expectations of what might be "typical" reactions have to be modified because the respondents' approaches to the arbitration process turn out to be more individualistic than initially expected.

B. Pilot Study Two

We broadened the empirical basis of our research by conducting interviews in pilot study two according to the technique of a guide-line interview (hitherto 17 interviews), using a prepared list of topics. This was done in May 2011, thanks to financial support from Prof. Charlotte Waelde, and analysis of the results are on-going. The great majority of our interviewees had not participated in the questionnaire of pilot study one. Therefore

[12] In many arbitral proceedings the arbitral tribunal will be constituted by each party selecting one arbitrator and the two party-appointed arbitrators selecting a third to act as the President or Chair of the tribunal. While party-appointed arbitrators are under the same obligations of independence and impartiality as the President, the rationale for party appointment has long been to ensure that the tribunal will include at least one arbitrator who, by reason of culture and background, shares a certain rapport with the appointing party.

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they were asked the same questions which are on the questionnaire. This enables us to compare the responses given to the questionnaire with the responses given in the course of the interviews. All interviews having been transcribed, we are aiming now for a deeper understanding of the interviewee's answers to our questions.

We are analyzing the 17 transcribed interviews according to the following method.

Level 1. From the subjective perspective of the interviewees, we describe their understanding of the meaning of the various key words and key statements which refer to each sub-category, e.g. "emotion", "mastering the material", "neutrality", "culture" and others.

Level 2. From the point of view of the (communication) researcher, we analyse (in Berlin) the interviewee's understanding of the meaning of the key words and key statements and relate this understanding to a specific concept, e. g. the individual´s understanding of "emotions" may represent a concept of emotions as a matter of disturbance; "moral integrity" may represent an atomistic concept, morality being the core of an individual´s personality; "culture" may represent a concept according to which cultural differences are a matter of taste.

Level 3. Using practical and specialist legal knowledge on level 3, we assess (in London) the practical relevance of the findings for the arbitral process. In particular, the consequences for different decision-making processes of arbitrators are of importance here. These will be collected for continuing our work on the road map to cope with the challenges of the arbitral process.

Level 4. We analyze the evaluation (in terms of social values and value attitudes) which is implicitly done by the interviewee in order to make them transparent and available for a common discussion.

III. Next Phase Research: Focus on Investor-State Arbitration

In addition to the work that remains to be done on the interviews (Pilot Study Two), we intend to move forward to a broad study focusing particularly on international investment arbitration. The reason for the focus on investor-State arbitration is that, as described above, it has a dimension of social importance not always found in international commercial arbitration. Moreover, because investor-State arbitration is a relatively new application of the arbitration mechanism it is subject to on-going assessment and reassessment by States in their treaty-making processes.[13]

As we move forward with this new research, we are assessing certain methodological issues. We have now conducted research using two different techniques of gathering data – questionnaires and interviews. Both techniques are retrospective, asking the respondent to reflect upon decision-making that has occurred previously. And both techniques stimulate arbitrators to reflect on certain parts of their existing practical knowledge about the arbitral process, especially on its core features. Because deliberations among arbitrators are private and not subject to direct study, these techniques are the only ones available for understanding how the arbitral decision-making process takes place. Because the evaluation is mostly implicitly done by arbitrators as well as by the ongoing assessment and re-assessment by States in their treaty-making processes, we are interested to find the underlying criteria that are used to measure concepts such as the "efficiency" and "integrity" of arbitration. Here again, we plan to follow the qualitative approach by reconstructing this evaluation from the

[13] The Organization for Economic Cooperation and Development ("OECD"), for example, is in the process of conducting a large scale study of the use of arbitration in the resolution of disputes under investment treaties on behalf of its thirty-four member States. *See* http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/publicconsultationisds.htm

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perspective of the involved professionals. By using the documentary method of interpretation,[14] we will be analysing the data as documenting underlying patterns – either as social values which belong to a value system or as value-based attitudes of individuals or of social groups.[15]

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Remarks: *Opinions expressed in this contribution are those of the authors.*

About the Authors of this Issue

Professor Dr. Dieter Flader teaches linguistics and communication analysis at the Free University in Berlin. In 2011, together with Dr. Barbara Strohschein, he founded the Berlin Institute for Applied Humanities, which combines basic research work with practical consulting. The institute focuses on three main issues: intercultural communication, spirituality and management, and bullying and other problems of self-worth.

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[14] K. Mannheim, *Structures of Thinking*, London 1982.
[15] *See* S. Nappert and D. Flader "Psychological Factors in the Arbitral Process" in *The Art of Advocacy in International Arbitration*, 2nd Ed. D. Bishop, E. G. Kehoe Ed. (2010) JurisNet, New York, USA Page 136.

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