

Tribunal Influence on More Accurate Case Evaluation: Driving Settlement

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Outcomes vs Settlement Options: the Survey

- **Empirical study:** 5653 civil U.S. litigation cases, 11,306 decisions ,14,000 attorneys, 2002-2007
- Massive decision errors- Settlement not taken hugely better than outcome in court or arbitration
- Decision error rates CONTRACT CASES :
 - plaintiff's decision errors rate 31%
 - defendant's decision error rate 60%
- larger cases with demands of between \$1 million and \$50 million plaintiff average cost of decision error \$327,000; defendant's average cost of contract cases error \$5,325,000- over 15 times more costly for defendant

Source: *Beyond Right and Wrong*, Randall Kiser: *Beyond Right and Wrong: the Power of Effective Decision-Making for Attorneys and Clients*, Springer 2010.

Overview

- Psychological biases of counsel and the parties
- Lead to case evaluation errors – lead to settlement decision errors
- The Arbitrator's role in assisting case understanding and resolution
- Helpful case management techniques

Why so many decision errors?

uncertainty of outcome

parties in the midst of a litigation or arbitration decisions are more intuitive and reflexive than analytical.

- Emotions
- Psychological biases
- heuristics
- All corrupt sound decision-making

Solution

“understand the biases and understand the case

If clients can understand how their perceptions, definitions, beliefs and attitudes are distorted by cognitive biases, it may be possible to improve settlement decision-making in general and expand settlement alternatives in particular.”

Source: *Beyond Right and Wrong: the Power of Effective Decision-Making for Attorneys and Clients*,

Randall Kaiser publ. 2010

Psychological Barriers to Sound decision making

- Over 100 unconscious influences -all impact sound decision making think about your cases
- optimistic overconfidence
 - egocentricity bias
 - reactive devaluation
 - attribution error
 - selective perception
 - selective memory
 - biased assimilation
 - framing – gain/loss
 - anchoring
 - sunk costs
 - Attribution errors
 - Confirmation bias
 - Halo effect
 - Equity seeing ETC

Egocentric bias

- People have a higher opinion of themselves than is realistic- skews case assessment-if you think you're a better than everyone else your assessment must be correct
- ICCA conference 2012
 - 85% of the responding arbitrators thought they were better than the median arbitrator at the conference in making accurate and impartial decisions
 - 92% of the arbitrators rated themselves as superior to the median arbitrator in efficiently resolving disputes
- *90% of judges think that at least half of their peers had higher reversal rates*
- *90% of drivers rate themselves above average*
- *spouses quantify what share of tasking responsibilities each performs - total is always more than 100%*

Selective Perception

- people see and hear what they have been preconditioned to believe they will see and hear and discard events inconsistent with their preconception
- the gorilla video example
- *students in different classrooms were informed that the same visitor in each classroom was another student demonstrator lecturer senior lecturer and professor and were asked to estimate his height. He was given an additional half inch for each incremental upgrade in his status. The visiting Prof. was thought to be two and half inches taller than the same individual introduced as a visiting student.*

Selective Memory

The human brain forms memories that are more cognitively acceptable than factually accurate. The brain strives to be loyal to the person's values and preconceptions.

- Classic experiment - the recollection of the World Trade Center attacks on September 11 -73% of participants incorrectly reported that they saw a videotape of first plane striking the first hour as it happened
- video is not available until the following day
- WITNESS EVIDENCE WORK BY ICC

Biased assimilation – confirmation bias

- People receive information in a way biased in favor of their own position. Interpret facts differently
- Arbitrator discussion
- Given identical facts – half told they were the plaintiff and half told they were respondent, both groups remembered significantly more facts that favored their own position.

Reactive devaluation

- evaluations are affected as much by the source of the information as its content
- discount adversary's ideas and arguments
- American respondents were asked to evaluate a broad nuclear disarmament proposal one group proposal was attributed to Pres. Ronald Reagan and President of the United States and the other identified as Soviet leader Mikhail Gorbachev 90% approved the proposal attributed to Ronald Reagan and 44% when they knew Gorbachev was the backer – same proposal
- another similar experiment the professor was unfairly appropriating student's research. He offered to resolve the problem by either paying \$750 to the students or adding the student's name as co-author. When the professor offered \$750 the students preferred co-authorship when offered co-authorship most students wanted money.

Sunk Costs

- People feel there is too much invested already to quit. A fallacy – no rational economic justification
- Lawyers told that \$420,000 had already been spent less likely to accept a settlement offer of equal economic value and likelihood of success than lawyers who had been told that only \$90,000 in attorneys fees had been spent
- ***War example***
- ***the need to prevent the recognition of failure appears to motivate additional expenditures even in situations where if one were to look only forward it would make no sense to continue***

Framing- Gain vs Loss

- *people are risk-averse when anticipating financial gains and risk-taking when facing financial losses*
- *examples*
- *people lock-in their gains by selling winning stocks and avoid recognizing their losses by keeping their losing stocks*
- *people tend to bet long shots at the race track or the casino in an effort to cover their losses*

Equity seeking

- ***Then emotion- people feel that they deserve to get a fair and equitable resolution that is in keeping with their perception of the strength of their claims.***
- ***Studies have shown that people in disputes are often more concerned with achieving what they considered to be a fair settlement of the case than maximizing their own expected value***
- ***study was done with plaintiff and defendant having a fixed fund from which the settlement would have to be paid. Absent settlement, distribution would be made out of the fund The amount allocated to the cost of going to trial was manipulated. How much was going to go for the cost of going to trial did not have the predicted impact on the probability of settlement.***
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Why talking about this

- developments as to arbitrator role

Recent initiatives

- ICC Arbitration and ADR Task Force –resolution and avoidance; broad review; multi-stakeholder; report imminent
- Claudia Salomon Maslow’s Hammer talk
- CCA, IMI and Straus Mixed Mode Task Force
- DIS - The Rules Clinic on Settlement Facilitation
- Prague Rules- assist parties in amicable settlement, with consent act as mediator
- New Conventions – Drivers?
 - Singapore Convention
 - Hague Convention on Choice of Courts
 - Hague Judgment Convention

Arbitrator as Facilitator- skip this slide?

- David Rivkin - town elder
- Gabrielle Kaufmann-Kohler- settlement facilitator
- Paolo Marzolini – dispute manager
- Catherine Kessedjian- collaborative arbitrator
- Michael Schneider- interactive arbitrator
- CEDR Rules –proactive steps

The Evolving Arbitrators' Role – the rules- briefly

- Evolution to “dispute manager” from pure “decision-maker”
- ICC Rules Appendix IV- “2014: “informing the parties that they are free to settle “ to 2021 “encouraging the parties to consider settlement” 2014 and 2021: “where agreed ... tribunal may take steps to facilitate settlement “
- Swiss Article 15(8):“With agreement, tribunal may take steps to facilitate settlement.”
- German DIS Rules Section 26: Unless any party objects, tribunal shall seek to encourage an amicable settlement, or of individual issues.”
- Hong Kong & Singapore: Arbitrator may act as mediator/conciliator
- ICDR Rule 6 – shall mediate concurrent with arbitration- opt out possible

UNCITRAL and IBA

- UNCITRAL Notes on Organizing Arbitral Proceedings
 - 1996 “The arbitral tribunal should only suggest settlement negotiations *with caution*”
 - 2016 “In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties.”
- IBA General Principle 4 (d) “an arbitrator may assist the parties in reaching the settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings.” (with express agreement that will not disqualify the arbitrator for such service)

Interview/Polling results

- “Do you think an arbitrator has a role in fostering settlement?”
- 78% interviewed said yes
- 80% of poll respondents strongly supported of supported

Accepted Process step examples-discuss-basics but done?

- first organizational meeting
- mediation window
- bifurcation
- dispositive motions/narrowing issues-
- mid-arbitration review (Kaplan Opening)
- preliminary views

Impact of arbitration process steps

- Preliminary views
- Active case management
- Early disposition of issues
- Bifurcation
- Mid-arbitration review
- Issue identification
- Probing questions
- Active listening
- optimistic overconfidence
- Egocentricity bias
- Biased assimilation
- Sunk costs
- Confirmation bias
- Reactive devaluation
- Equity seeking
- Loss aversion

Questions

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