
HERODOTIAN MYTHS AND THE IMPARTIALITY OF ARBITRATORS

The ideal judge is a 'combination of Justinian, Jesus Christ, and John Marshall'.

Oliver Wendell Holmes

History is a myth that men agree to believe.

Napoleon Bonaparte

8.01 Most accounts of judicial and arbitrator impartiality read like Herodotian histories. Herodotus famously wove mythological accounts of iconic heroes into his depictions of historical events.¹ These mythological heroes elevated relatively mundane happenings into epic stories. They also, however, raised questions about the reliability of Herodotus' factual assertions.

8.02 In a similar vein, modern accounts of the impartiality of judges and arbitrators are often framed in terms that are absolute, transcendent, superhuman, and even mythological. For example, Ronald Dworkin expressly embraces a heroic myth by naming his ideal judge 'Hercules'² and imbuing him with superhuman skill, learning, patience, and acumen. The famous US Justice Oliver Wendell Holmes, meanwhile, described the ideal judge as a 'combination of Justinian, Jesus Christ, and John Marshall'.³

8.03 Like Herodotian myths, these legends of superhuman judges have obscured a clearer understanding of what judges actually do and what can reasonably be expected of them in terms of impartiality. They have also obscured a clear understanding of the impartiality obligations of arbitrators. In the absence of a clear, independent conceptualization, arbitrator impartiality obligations are simply borrowed from, or compared and contrasted with, the idealized nonhuman judge.⁴ Even with the

¹ See generally Blanche Elizabeth Vandiver, *Heroes in Herodotus: The Interaction of Myth and History* (1990).

² Ronald Dworkin, *Taking Rights Seriously* (1977) 105.

³ Robert A. Ferguson, 'Holmes and the Judicial Figure', 55 U. Chi. L. Rev. 506, 511 (1988) (quoting Henry J. Abraham, *The Judicial Process*, 5th edn., (1986) 55). For those who may not know, John Marshall was the Chief Justice of the United States from 1801–1835. He is among the most famous and important US justices because his judicial opinions helped establish the basis for judicial review in US constitutional law and made the Supreme Court of the United States a co-equal branch government.

⁴ See, e.g., *Sphere Drake Ins. Ltd v All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002) ('Evident partiality' under § 10(a)(2) [of the Federal Arbitration Act] is a subset of the conditions that disqualify a federal judge under 28 USC. § 455(b).); *Lozano v Maryland Casualty Co.*, 850 F.2d 1470, 1472 (arbitrators are not required to be impartial); *Toyota of Berkeley v Auto. Salesman's Union*, 834 F.2d 751 (9th Cir. 1987) (holding that arbitrators are not held to the same 'high standards' as judges); *Morelite Constr. Corp. v New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984) (stating that '[f]amiliarity with a discipline often comes at the expense of complete impartiality'); *Areca, Inc. v Oppenheimer & Co., Inc.*, 960 F. Supp. 52, 56 (S.D.N.Y. 1997) (interpreting the Second Circuit as '[having] adopted less stringent standards for disqualification of arbitrators than for federal judges'); *Reeves Bros. v Capital-Mercury Shirt Corp.*, 962 F. Supp. 408, 413 (S.D.N.Y. 1997) ('Arbitrators are, therefore, held to a lower standard of impartiality than Article

development of more precise regulation, the empty rhetoric of ‘impartiality’ continues to confuse the debate.

8.04 This chapter seeks to develop a more meaningful and robust concept of impartiality as applied to international arbitrators. Section A begins by debunking the myth of absolute judicial impartiality and the related platitudes that are often used to describe arbitrators’ obligations. The larger project of the chapter is to sort through, using the Functional Thesis from Chapter 7, the pressing open issues relating to international arbitrator impartiality obligations. As will be shown, these ethical issues have arisen because of changes in arbitrators’ role in certain contexts or a more general failure to define their role more precisely. Section B takes up issue conflicts that are currently at the fore with investment arbitrators, while Section C addresses the impartiality obligations of party-appointed arbitrators and makes an affirmative case for assigning them a specialized role distinct from arbitral chairpersons. Section D prescribes market-based reforms to increase transparency and level the playing field among parties through, among other things, the creation of a new Arbitrator Intelligence project.

A. The myth of the ‘non-humanness of judges’

8.05 Long ago US law professor Jerome Frank sought to debunk ‘the myth of the non-humanness of judges’.⁵ Today scholars still routinely announce that judges are human, as if it were a recent genetic discovery.⁶ Some formalistic accounts of adjudication treat law as a ‘science’ and presume that the ‘right’ outcome in any particular case is simply a matter of proper, clinical application of law to facts. This formalistic view of law still has some purchase in certain circles, particularly in civil

III judges.’); *First Interregional Equity Corp. v Haughton*, 842 F. Supp. 105, 109 (S.D.N.Y. 1994) (‘Arbitrators are . . . held to a lower standard of impartiality than Article III judges.’).

⁵ Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (1949) 147.

⁶ One article even uses ‘Judges as Humans’ as its super-title. See Chad M. Oldfather, ‘Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design’, 36 Hofstra L. Rev. 125 (2008). Stephen M. Bainbridge, ‘Abolishing LLC Veil Piercing’, U. Ill. L. Rev. 77, 98 (2005) (‘Like all humans, judges have inherently limited memories, computational skills, and other mental tools.’); Wendy Nicole Duong, ‘Law Is Law and Art is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Creative Processes’, 15 S. Cal. Interdisc. L.J. 1, 7 (2005) (‘Judges (as human beings with passion, emotions, and prejudices, living in a multi-faceted society) also read and hear other things besides legal precedents.’); Daniel A. Farber, ‘Backward-Looking Laws and Equal Protection: The Case of Black Reparations’, 74 Fordham L. Rev. 2271, 2298 (2006) (‘Judges are human beings and necessarily bring their own past experiences to bear when they consider legal issues.’); Chris Guthrie and Tracey E. George, ‘The Futility of Appeal: Disciplinary Insights into the ‘Affirmance Effect’ on the United States Courts of Appeals’, 32 Fla. St. U.L. Rev. 357, 375 (2005) (‘Judges, too, are human beings, and like other human beings, judges surely employ heuristics in their own decision-making.’); Amy Zimmerman Hodges, ‘Identifying the Linguistic Boundaries of Sex: Court Language Choice in Decisions Regarding the Availability of Sex and Procreation’, 11 Cardozo Women’s L.J. 413, 415–6 (2005) (‘Simply by being human, a judge, like any of us, uses basic knowledge of language as a necessary, often subconscious tool. in any writing.’). These references to the human side of judges, and several others, are all cited in Oldfather, n. 11.

law systems.⁷ As examined in Chapter 4, however, even real scientists who make actual genetic discoveries are themselves not objective in an absolute sense.⁸

8.06 Absolute impartiality can only be assured by non-human processes. In one colourful fictional example Francois Rabelais's Judge Bridlegoose resolved cases by casting dice in his chamber, one on behalf of each party, and deciding in favour of the party whose die had the higher number. Judge Bridlegoose was eventually prosecuted for this practice, and a real-life judge was similarly prosecuted for determining criminal sentences by flipping a coin.⁹

8.07 Bridlegoose's methodology is objectionable not because it produced the wrong results. In fact, he was ultimately absolved because all his accusers had upheld his decisions.¹⁰ The problem with dice-rolling or coin-flipping and other modes of absolutely impartial decision-making is that they can only be arbitrary. A process can only be absolutely impartial by limiting consideration to a range of inputs so narrow as to render outcomes arbitrary; they cannot involve complex facts or legal issues that imply a deliberative process of interpretation, assessment, and judgment that is inherently human. Adjudication by its nature requires translating competing sources of fact and legal arguments into binding conclusions.¹¹ Like any human process, it is subject to a range of limitations and influences that affect human decision-makers.

8.08 In the United States, the Legal Realist movement mainstreamed this view that judicial decision-making necessarily involves extra-legal factors beyond legal texts, precedents, and procedures. These extra-legal factors are generally understood to include 'ideology, judicial background, strategic reaction to other institutions, the nature of litigants, or the makeup of [tribunals]'.¹² Today, a vast body of empirical and psychological research has developed regarding judges and arbitrators.¹³ While this insight has long been a topic of intuition and legal theory, in recent years it has become a near-obsession for various social scientists, psychologists, and other

⁷ Michael Waibel and Yanhui Wu, 'Are Arbitrators Political?' 22 (forthcoming) (working draft cited with permission); *but see* Mitchel de S.-O.-I'E. Lasser, 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System', 104 Yale L.J. 1325, 1334 (1995) (arguing that today, even in civil law systems, a static view of judicial decision-making is part of the 'official portrait' of the civil law judge, but understood as an oversimplification).

⁸ See paras 4.35–4.36.

⁹ Judith Resnik tells of a real life example, in which a judge was censured for deciding a criminal defendant's prison term with the flip of a coin. Judith Resnik, 'Tiers', 57 S. Cal. L. Rev. 839, 841 (1984) (arguing that despite its efficiency and even in the absence of claims that the result was incorrect, '[t]he coin flip offended this society's commitment to rationality'). See David A. Harris, 'The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System', 35 Ariz. L. Rev. 785, 793–4 (1993) (citing other unconventional but apparently objective methods which have been similarly rejected by judges). *cf. LaPine Tech. Corp. v Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (commenting that 'reading the entrails of a dead fowl' would not be a decisional strategy that parties could contractually agree to have been employed by courts), *reversed on other grounds on rehearing en banc, Kyocera Corp. v Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003).

¹⁰ See Francois Rabelais (Donald M. Frame trans.), *The Complete Works of Francois Rabelais* (1992); Samuel Putnam (trans. and ed.), *The Portable Rabelais* (1974). Evidently, Judge Bridlegoose rolled dice primarily as a form of exercise, and not because of its assurance of absolute impartiality.

¹¹ For a working definition of 'adjudication', see paras 7.23–7.29.

¹² Gregory C. Sisk, 'The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making', 93 Cornell L. Rev. 873, 877 (2008).

¹³ Tracey E. George, 'An Empirical Study of Empirical Legal Scholarship: The Top Law Schools', 81 Ind. L.J. 141 (2006); Theodore Eisenberg, 'The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns', 2011 U. Ill. L. Rev. 1713 (2011).

empirical researchers documenting the heuristic and cognitive biases that influence human decision-making.¹⁴

8.09 Notwithstanding scholarly progress in understanding the complexities of adjudicatory decision-making, the ethical obligations that are said to apply to adjudicators when they engage in this process are still often framed in overly simplified, often binary terms. There is the absolute moral virtue of ‘impartiality’ and its supposed opposite, the deplorable sin of ‘partiality’ or ‘bias’.¹⁵

8.10 The simplicity of rhetoric denies that the humanness of judges and arbitrators means that they will always be subject to some form of bias. It is neither possible nor desirable to ‘strip’¹⁶ adjudicators of everything that influences or ‘biases’ their decision-making. Stripping them would necessarily remove all the qualities that make them competent and good decision-makers.¹⁷ Ethical regulation of adjudicator impartiality, therefore, is not about prohibiting all forms of partiality or bias. It is instead about selecting what types of partiality or bias are appropriate to the particular system and devising structures and procedures that harness those biases and prevent other undesirable ones.

¹⁴ For works on US judges, see Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, ‘Inside The Judicial Mind’, 86 *Cornell L. Rev.* 777, 784 (2001); Gregory C. Sisk, ‘The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making’, 93 *Cornell L. Rev.* 873, 877 (2008). For work on international arbitrators, see Michael Waibel and Yanhui Wu, ‘Are Arbitrators Political?’ (forthcoming) (working draft cited with permission); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (2008) 180–4; Edna Sussman, ‘Arbitrator Decision-Making: Unconscious Psychological Influences and What You can Do About Them’, 24 *Am. Rev. Int’l Arb.* 482 (2013); Gus Van Harten, ‘A Case for an International Investment Court’, *Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper* (30 June 2008), <<http://ssrn.com/abstract=1153424>> or <<http://dx.doi.org/10.2139/ssrn.1153424>>. Even if her published work to date has not focused directly on international arbitrators per se, Susan Franck has been a pioneer in empirical research assessing various issues relating to investment arbitration. See Susan D. Franck, ‘Empirically Evaluating Claims About Investment Treaty Arbitration’, 86 *N.C. L. Rev.* 1, 77–78 (2007).

¹⁵ As Judith Resnik has explained, the ‘buzzwords’ in discussions of judicial ethics are simplistic: “[i]mpartiality” is required; “bias” is forbidden’. Judith Resnik, ‘On the Bias: Feminist Reconsideration of the Aspiration for Our Judges’, 61 *S. Cal. L. Rev.* 1877, 1882 (1988); see Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* (1996) § 1.7, 14–15 (‘[I]t is generally agreed, at least in principle, that [the parties] are entitled to nothing less than a calm and dispassionate decision-maker who operates in an atmosphere of absolute neutrality.’), quoted in Debra Lyn Bassett, ‘Judicial Disqualification in the Federal Appellate Courts’, 87 *Iowa L. Rev.* 1213, 1233 n. 94 (2002) (emphasis added); see also Jeffrey M. Shaman, ‘The Impartial Judge: Detachment or Passion?’ 45 *DePaul L. Rev.* 605, 606 (1996) (‘[W]e demand that [judges] adhere to the highest degree of impartiality that is mortally possible.’).

¹⁶ During his confirmation hearings, Clarence Thomas testified that a judge should be ‘stripped down like a runner’ and be free from ‘the baggage of ideology’. Linda Greenhouse, ‘The Thomas Hearings: In Trying to Clarify What He Is Not, Thomas Opens Question of What He Is’, *N.Y. Times*, 13 Sept. 1991, A19 (quoting Clarence Thomas), cited in Martha Minow, ‘Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors’, 33 *Wm. & Mary L. Rev.* 1201, 1201 (1992).

¹⁷ As one scholar described in the context of judicial qualifications and bias:

[E]very judge brings to the bench a range of professional and life experiences which will influence his judicial decision-making. A judge may be deemed ‘qualified’ to serve based on his experience as a trial lawyer, as a partner in a prestigious firm engaged in commercial law practice, as a government lawyer, or as an esteemed legal academic. These experiences, and a judge’s ‘thinking’ about law, are part of the bundle of qualifications a judge brings to the bench.

Sherrilyn A. Ifill, ‘Racial Diversity on the Bench: Beyond Role Models and Public Confidence’, 57 *Wash. & Lee L. Rev.* 405, 460 (2000).

8.11 While many scholars have acknowledged the incoherence of treating impartiality as a static ideal separate from the humanness of decision-makers,¹⁸ '[l]awyers and lawmakers have neither debated these problems openly nor renounced the ideal of impartiality'.¹⁹ They have neither delimited the true meaning of the term 'impartiality', nor wrestled with the question of what kinds of bias are acceptable in a particular system of adjudication.²⁰ In the context of judges, procedural devices and rhetorical flourishes are often used to mask infidelity to the unachievable ideal.²¹

8.12 If absolute judicial impartiality is a mirage, it becomes even more distorted when superimposed onto the arbitrator.²² As examined in Chapter 7, the most essential guarantees of judicial impartiality, or at least the myth of impartiality, seem to be missing or openly flouted in the arbitral process.²³ Chapter 7 presented the Functional Thesis as a methodology for developing ethical norms that are suited to the role assigned to arbitrators, as opposed to extrapolating those norms from judicial ethics. For arbitrators, there are three primary touchstones that determine their inter-relational role in a particular arbitral regime or context: 1) the processes by which they obtain and manage evidence and arguments about the case, 2) their decisional methodology, and 3) the process by which they are appointed. The difficulty in applying the Functional Thesis to international arbitration is that the international arbitrator is a chameleon. Parties can, through agreement, alter each of these features.

¹⁸ See, e.g., Jennifer Gerarda Brown, 'Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny', 85 Minn. L. Rev. 363, 363 (2000); Donald C. Nugent, 'Judicial Bias', 42 Clev. St. L. Rev. 1, 23 n. 103 (1994); Jeffrey J. Rachlinski, 'Heuristics and Biases in the Courts: Ignorance or Adaptation?' 79 Or. L. Rev. 61, 102 (2000). Of course, not all scholars have come to appreciate this point and some continue to recite outdated clichés instead of engaging in analysis of what those standards mean. See, e.g., Alain A. Levasseur, 'Legitimacy of Judges', 50 Am. J. Comp. L. 43, 48–50 (2002).

¹⁹ John Leubsdorf, 'Theories of Judging and Judge Disqualification', 62 N.Y.U. L. Rev. 237, 238 (1987) (observing the same tendency in the context of discussions of judicial ethics).

²⁰ Professor Leubsdorf artfully illustrates the 'cloudy distinctions' that have been drawn in the judicial context: 'A federal judge, for instance, must withdraw for "personal bias" against a party, but not for an equally powerful bias against that party's case or counsel. A judge may hear a case although she previously expressed strong views on its crucial legal issues, but she must withdraw if she commented on the application of uncontroversial law to the facts of that case. A judge who owns a single share of stock in a large corporation may not hear a suit for a few hundred dollars against it, but a judge may retry a suit even though her first decision was vacated for numerous errors favoring one party. A judge may construe a statute she helped write, but not instruct a jury considering a traffic accident she saw . . . There may be justifications for these distinctions, but at first thought they seem better suited to creating an appearance of scruple than to removing a rationally bounded class of undesirable judges.' John Leubsdorf, 'Theories of Judging and Judge Disqualification', 62 N.Y.U.L. Rev. 237, 238–9 (1987). According to Debra Bassett, at least part of the reason for the distorted line-drawing is that 'law tends to be highly resistant to non-objective concepts or factors, and instead seeks logic, rationality, and predictability, shunning that which is subjective or non-quantifiable'. Debra Lyn Bassett, 'Judicial Disqualification in the Federal Courts', 87 Iowa L. Rev. 1213, 1240 (2002). Consequently, financial interests, which can be objectively identified, are subject to clear prohibitions, whereas other types of bias that might be even more disruptive, remain mired down in confused standards and procedures. See Bassett 1241–3.

²¹ See Leubsdorf, 'Theories of Judging and Judge Disqualification' 268 ('Judges and commentators find it all too easy to rely on procedural arguments to gloss over disqualification issues.')

²² As Leubsdorf has put it: 'To decide when a judge may not sit is to define what a judge is.' Leubsdorf, 'Theories of Judging and Judge Disqualification' 237.

²³ Instead of random assignment, parties deliberately and individually select arbitrators who are presumably predisposed toward their case. Instead of financial independence that comes with government employment and, in some systems, life tenure, arbitrators typically earn fees from individual appointments and rely on parties and co-arbitrators for future appointments.

8.13 When these features of arbitration shift significantly, as has occurred, for example, with the rise of investment arbitration, arbitrators' functional roles change, and hence their ethical obligations necessarily shift. These shifts, however, are not always immediately recognized or addressed, again for example with investment arbitrators. The next section considers the implications of the shifting role for investment arbitrators.

B. The new role and new ethics of investment arbitrators

8.14 Two of the most significant developments that precipitated shifts in the role of investment arbitrators are the introduction of new procedures to increase transparency in investment arbitration and the rise of a system of informal precedent. These developments, and their implications for investment arbitrators' ethics, are the topic of this Section.

8.15 With investment arbitrators, it is often presumed, without much analysis, that their unique role, and hence their professional responsibilities, are determined by the subject matter of the disputes they resolve²⁴ or the mere presence of States as parties.²⁵ These features of investment disputes might change expectations about investment arbitrators and might constitute reasons to assign investment arbitrators a different interrelational role than commercial arbitrators. Those features, however, do very little to actually change the role of investment arbitrators in managing proceedings or making substantive decisions.²⁶ In the absence of procedures and decisional methodologies that actually redefine their functional role, critiques that investment arbitrators fail to live up to changed expectations are somewhat misplaced. On the other hand, some changes have occurred to alter the functional role of investment arbitrators, making it necessary to reassess their ethical obligations.

1. Transparency reforms and the precedential effect of awards

8.16 One important development that altered arbitrators' role is adoption of procedures for investment arbitration to ensure greater transparency. In international commercial arbitration, because arbitral proceedings are presumptively confidential under applicable rules, arbitrators are generally regarded as having an ethical duty to maintain the confidentiality of the proceedings.²⁷ Although initially the same duty was presumed to apply in investment arbitration, more recently procedures to ensure transparency and participation of *amici* were introduced in investment arbitration that altered this presumption. The most important source of these reforms is the

²⁴ Karl-Heinz Böckstiegel, 'The Role of the Arbitrators in Investment Treaty Arbitration', in Albert Jan van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions* (2003) 376; Susan D. Franck, 'Investment Law, Dispute Resolution, and the Development Promise: Back to the Future, An Empirical Analysis of Investment Treaty Awards', 101 *Am. Soc'y Int'l L. Proc.* 459, 28–31 March 2007 ('Investment treaty arbitrators make decisions of public significance. Given this role, there have been concerns about the backgrounds of these decision makers.').

²⁵ One experienced arbitrator observed that some arbitrators have taken on the role of 'guardian' of the state's interests to ensure not only that justice is done, but also that justice appears to be done.

²⁶ Proposals for a world investment court or creation of an investment appellate body implicitly acknowledge that most concerns about arbitrator conduct are tied to the role assigned to arbitrators, even if their express criticisms often focus overly on their failure to comply with ethical obligations that may be objectionable, but appropriate to the role they are currently assigned. Gus Van Harten, *Investment Treaty Arbitration and Public Law* (2008) 180–84.

²⁷ Gary B. Born, *International Commercial Arbitration* (Kluwer, 2014) (citing confidentiality as an obligation of international arbitrators).

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules), which formalized new procedures for ensuring transparency. Specifically, the UNCITRAL Transparency Rules provide that:

In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal *shall ensure that those [transparency] objectives prevail*.²⁸

Although this rule does not use the language of ethics *per se*, as the italicized phrase indicates, its mandatory directive suggests that it is a professional ethical duty. Variance from such a professional duty would likely draw criticism that is framed as an ethical judgment. This rule in particular, and other rules that impose obligations on arbitrators to promote transparency, shifted the professional role of investment arbitrators. Their attendant ethical duties are presumed by many to have also shifted, even if those new duties were not formally referred to or debated as ethical duties.

8.17 Another important shift in the role of investment arbitrators has occurred because of changes in the methodology of their decision-making. Today, unlike commercial arbitrators, investment arbitrators are generally acknowledged as having express law-making functions, even if the extent, nature, and desirability of that function is still hotly debated. This law-making function, in turn, is said to imply a professional obligation to follow precedent that is largely absent in international commercial arbitration.²⁹

8.18 For example, Gabrielle Kaufmann-Kohler has argued that investment arbitrators have an obligation to follow precedent ‘so as to foster a normative environment that is predictable’.³⁰ Andrea Bjorklund adds that this obligation is heightened because investment arbitration as ‘a nascent legal system is struggling to develop rules’.³¹ In addition to an obligation to follow precedent, another commentator argues that the extended audience and purpose of investment arbitration awards creates specialized obligations for investment arbitrators in award drafting to:

... provide reasons that will persuade future adjudicators that the decisions that were made are the right ones. Among other things, this means that tribunals should identify where they disagree with earlier tribunals, and provide reasons for siding with one camp when there is already divergence, or for deviating from lines of consistent cases.³²

By suggesting that investment arbitrators are obliged to follow precedent and as a consequence that obligation ‘imposes additional explanatory burdens’ on award drafting, these commentators are identifying normative professional obligations that are implied based on investment arbitrators’ new law-making role. These ethical obligations are essential for arbitrators to fulfil that role. All these commentators are substance discussing ethical obligations, even using the term ‘ethics’. In addition to a generalized professional obligation to follow precedent, the shift in role that arises out

²⁸ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, art. 1(6).

²⁹ Although the development of an informal system of precedent in international commercial arbitration was discussed earlier, such precedent is always described as persuasive, not binding in large part because of the more limited functional role of commercial arbitrators.

³⁰ Gabrielle Kaufmann-Kohler, ‘The 2006 Freshfields Lecture—Arbitral Precedent: Dream, Necessity, or Excuse?’ 23 *Arb. Int’l* 357 (2007).

³¹ Andrea K. Bjorklund, ‘The Emerging Civilization Of Investment Arbitration’, 113 *Penn St. L. Rev.* 1269 (2009).

³² Irene M. Ten Cate, ‘The Costs of Consistency: Precedent in Investment Treaty Arbitration’, 51 *Colum. J. Transnat’l L.* 418 (2013).

of investment arbitrators' decisional methodology has also introduced other obligations that are generally referred to as 'issue conflicts'.

2. Role switching and issue conflict

8.19 As Chapter 6 demonstrated, international arbitration has provided greater clarity and guidance on what constitutes a conflict of interest for arbitrators, and what arbitrators should disclose in the selection and appointment process.³³ One area where considerable uncertainty and inconsistency still exist is with respect to the arbitrator's relationship with the subject matter of the dispute, as opposed to the parties and counsel.³⁴ Disagreement over so-called issue conflicts remains so profound that the terminology used to describe the cluster of concerns is itself muddled.

8.20 As a starting point, when the IBA Guidelines on Conflicts were drafted in 2004, these concerns were not particularly pronounced. The Guidelines were written primarily with a view toward conflicts as they arise with respect to the role assigned to arbitrators in commercial arbitration, not investment arbitration.³⁵ Moreover, the practices in investment arbitration that have given rise to concerns about issue conflict have evolved considerably since 2004 as well. Most specifically, as described earlier, a presumption that awards will be published, and a developing ethical obligation or professional norm that previous awards be deferred to (or that deviation be explained and justified), makes their law-making function more explicit. This evolution of a system of precedent and related functions has additional implications for arbitrator conflicts of interest that, to date, have not been dealt with clearly.

8.21 The Guidelines on Conflicts include on the Green List, as matters that do not need to be disclosed, previously expressed opinions in public sources, such as law review articles or public lectures.³⁶ The Guidelines are notably silent, however, about so-called role-switching, except to the extent that the 'specific issue' advocated by an arbitrator is implicated.³⁷

8.22 There are at least three distinct areas of concern that are collectively referred to as 'issue conflicts'. First, there is an issue that is sometimes referred to as the 'multiple hat' or 'hat-switching problem', what William 'Rusty' Park refers to as 'role confusion'.³⁸ The hat-switching problem arises when an arbitrator sits in a case that

³³ Andrea K. Bjorklund, 'The Emerging Civilization of Investment Arbitration', 113 Penn St. L. Rev. 1269, 1298 (2009) ('The increasing tendency of arbitrators to address prior decisions is having an interesting, and not yet fully developed, effect on the conflict-of-interests norms applied to international arbitrators.').

³⁴ For general commentary, see M.L. Harrison, 'Issue Conflict in International Arbitration: Much Ado about Nothing?' in I.A. Waird and Todd Weiler (eds.), *Investment Treaty Arbitration and International Law* (2009) 19–31; Judith Levine, 'Dealing with Arbitrator "Issue Conflicts" in International Arbitration', 61 Disp. Resol. J, Feb.–Apr. 2006 60, 65 (2006).

³⁵ Levine, 'Dealing with Arbitrator "Issue Conflicts"' 65 (criticizing the guidelines as providing 'scant guidance').

³⁶ Guideline 4.1.1 does not require disclosure if 'the arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated)'.

³⁷ Guideline 3.5.2 provides for disclosure if 'the arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise'. It is uncertain, and perhaps even doubtful, if the reference here to 'publicly advocated' includes advocacy in a case since proceedings are not necessarily public in the same way as a published paper or speech.

³⁸ William W. Park, 'Arbitrator Integrity: The Transient and the Permanent', 46 San Diego L. Rev. 629, 648 (2009).

may establish precedent for or otherwise affect another case in which the arbitrator acts as counsel. Second, there is the issue of arbitrators sitting in different unrelated cases that involve the same legal issue, for example, interpretation of the same or similar treaty provision. Finally, related to the second issue, there are concerns about an arbitrator serving in related cases, meaning cases that arise out of the same facts or transactions and thus involve related issues of fact and law and the same or related parties. This last issue is at least partially addressed by the IBA Guidelines on Conflicts.³⁹ All three situations have been brought into sharp focus in investment arbitration, even if they are relevant in other forms of arbitration as well.⁴⁰

a. Role switching

8.23 Questions about the appropriateness of hat-switching or revolving doors in investment arbitration once again illustrates the impulse toward self-regulation in international arbitration, as examined in Chapter 6.⁴¹ In investment and commercial arbitration, it remains commonplace for lawyers to take on both types of work contemporaneously. As one author notes, ‘the ICSID docket is replete with arbitrators who also represent clients in other BIT cases’.⁴² The increase in challenges based on such role-switching is on the rise. Perhaps not surprisingly, questions about hat-switching in investment arbitration have been raised by both critics⁴³ and leading arbitration specialists.⁴⁴ As Rusty Park explains:

The arbitrator might be tempted, even subconsciously, to add a sentence to an award that could later be cited in another case. Such an *arrière pensée* might lead to disparaging or approving some legal authority or argument regularly presented in similar disputes, and thus intended to persuade in a different matter where the arbitrator’s firm acts as counsel. The flip side of the coin might also present itself, with an arbitrator influenced by his or her position while acting as counsel in another case.⁴⁵

In practice, advocates necessarily cite relevant awards authored by a tribunal on which the advocate previously served as an arbitrator because, as explained earlier,

³⁹ Guideline 3.1.5 includes on the Orange List ‘the arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties’.

⁴⁰ The distinction between investment arbitration and international commercial arbitration is sometimes unclear, and often less important than imagined. For example, a multi-billion dollar international commercial arbitration arising out of a concession agreement with a state arguably raises policy issues and sovereignty concerns that are at least as important as the typical investment arbitration case.

⁴¹ See paras 6.58–6.107.

⁴² Luke Eric Peterson, ‘Arbitrator decries “revolving door” roles of lawyers in investment treaty arbitration’, <http://www.iareporter.com/articles/20100226_1> (2010).

⁴³ See, for example: Nathalie Bernasconi-Osterwalder *et al* *Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel* (IISD, 2011), <<http://www.iisd.org/publications/pub.aspx?id=1442>>; Michael Goldhaber, ‘Are two hats too many?’ *Transnational Dispute Management* (TDM) 3, no. 2 (2006), <<http://www.transnational-dispute-management.com/article.asp?key=781>>; or ‘Special Issue on Arbitrator Bias’, *Transnational Dispute Management* (TDM) 4 (2008), <<http://www.transnational-dispute-management.com/journal-browser-issues>>.

⁴⁴ Alison Ross, ‘CAS puts a stop to role-switching’, *Global Arbitration Review*, 14 October 2009, <<http://www.globalarbitrationreview.com/news/article/19054/cas-puts-stop>> (quoting Professor William Park as saying, ‘Lawyers cannot always move comfortably between arguing a point of legal interpretation and sitting on a tribunal deciding the issue.’).

⁴⁵ Park, ‘Arbitrator Integrity’ 648.

previous awards on point are treated as guiding precedent.⁴⁶ This role-switching problem has been a particular focus for investment arbitration,⁴⁷ where cases often involve similar legal issues, implicate important State interests and policies, and occur in a highly politicized environment in which arbitrators are accused already of being in one camp or another.

8.24 Despite recent concerns, many decisions by arbitral tribunals and arbitral institutions seemed to give a nod of approval, or at least tolerance, to the prevalence of existing practices. For example, in a ruling on a challenge to an arbitrator in a North American Free Trade Agreement (NAFTA) case regarding a different type of conflict, the International Centre for Settlement of Investment Disputes (ICSID) secretariat made a general observation about hat-switching, that: ‘[a]s things stand today, and irrespective of the advisability of such a situation, one may, as a general matter, be simultaneously an arbitrator in one case and a counsel in another. There is no need to disavow the possibility of assuming either role’.⁴⁸

8.25 Similarly, in perhaps one of the most high-profile cases to address this issue, the Republic of Ghana challenged the arbitrator nominated by the investor-claimant, Telekom Malaysia Berhad in an ad hoc investment arbitration case under the United Nations Commission on International Trade Law (UNCITRAL) Rules. The challenge was based on the arbitrator’s ongoing representation as counsel of a consortium of Italian investors in another case that involved interpretation of an expropriation provision that was similar to a provision at issue in the new arbitration over which the arbitrator was being asked to preside. Notably, the appointing authority followed existing practice in international arbitration, rejected the challenge, and found that there was no issue of partiality.

8.26 Subsequently, the District Court of The Hague, Netherlands saw things differently.⁴⁹ It found that ‘there will be justified doubts about [impartiality], if [the arbitrator] does not resign as attorney in the [other] case’ in which he was acting as counsel.⁵⁰ The District Court reasoned that in his role as attorney, the arbitrator had a ‘duty [in the other case] to put forward all possibly conceivable objections against the [ICSID] award’ and that ‘[t]his attitude is incompatible with the attitude [the attorney] has to adopt as an arbitrator in the present case, for example, to be unbiased and open to all the merits of the RFCC/Moroccan award and to be unbiased when examining these in the present case’.⁵¹ Notably, the court rejected the notion that the role-switching issue was covered under the IBA Guidelines’ treatment of a ‘general opinion . . . concerning an issue which also arises in the arbitration’ as not subject to disclosure or challenge.

8.27 International arbitration’s response to concerns about so-called hat-switching demonstrate it functioning as a self-regulating regime. When the IBA Guidelines on

⁴⁶ See paras 8.16–8.18.

⁴⁷ <<http://corporateeurope.org/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interest-s-investment-arbitrators>>.

⁴⁸ *Vito G. Gallo v Government of Canada*, Decision on the Challenge to Mr J. Christopher Thomas QC of 14 October 2009 of the Secretary-General of ICSID, para. 29.

⁴⁹ *The Republic of Ghana/Telekom Malaysia Berhad*, *Arrondissementsrechtbank [Rb.]*, District Court, The Hague, Challenge No. 13/2004, Petition No. HA/RK 2004.667 (Neth.) ¶ 1 (18 Oct. 2004) [hereinafter *Ghana/TMB 1*], available in English in 20 Mealey’s Int’l Arb. Rep. No. 1, 7; Document No. #05-050128-010Z.

⁵⁰ See *Ghana/TMB 1*, ¶ 4.

⁵¹ See *Ghana/TMB 1*, ¶ 4.

Conflicts were drafted in 2004, they did not address role-switching. Years later, the number of challenges in investment arbitration (by both investors and States) has increased, and a 'heated' debate has emerged about whether it was essential for a formal separation of functions of counsel and arbitrators in investment arbitration. While chronologically the Hague District Court decision was not a tipping point, it did function as a strong signal that if primary regulation within international arbitration did not resolve the issue, national courts might.

8.28 Today, many lawyers continue to oppose prohibitions against individuals serving as both counsel and arbitrators in investment arbitration.⁵² Several prominent arbitrators, however, have independently taken the position that, because they sit as arbitrators in investment cases, they will no longer serve as counsel in investment arbitrations.⁵³ This decision for unilateral withdrawal from the market as counsel carries with it significant financial consequences since earnings are much higher as counsel than as arbitrator.⁵⁴

8.29 Adding momentum to calls to prohibit hat-switching in investment arbitration, the issue is no longer subject to debate or personal choice in sports arbitration. The Lausanne-based Court of Arbitration for Sport (CAS) has adopted a formal rule preventing the same individual from acting as counsel and arbitrator in CAS proceedings.⁵⁵ The CAS explained that the International Council of Arbitration for Sport (ICAS) supplemented these provisions with the role-switching prohibition 'to limit the risk of conflicts of interest and to reduce the number of petitions for challenge [to arbitrators] during arbitrations'.

b. Issue conflict

8.30 More difficult than questions relating to hat-switching are questions relating to when an arbitrator's impartiality may rightly be challenged based on a previously asserted position or rendered a decision in another arbitration on the same or similar issue, or presided in a case in which a similar issue was heard.⁵⁶ Judges in many systems are permitted to sit in related cases, or to preside over cases that raise the same issue. The question becomes why it would be permissible for judges, but not for arbitrators. In analysing this question, it is again helpful to revert to the Functional Thesis rather than to simply conclude that arbitrators should be subject to more or less

⁵² Luke Peterson, 'Arbitrator decries "revolving door" roles of lawyers in investment treaty arbitration', <http://www.iareporter.com/articles/20100226_1> (citing Philip Sands as saying that 'he ceased taking on new investment treaty cases as counsel in mid-2007 so that he could begin to accept arbitrator appointments').

⁵³ Peterson, 'Arbitrator decries "revolving door" roles of lawyers'.

⁵⁴ For example, well-known arbitrator Albert Jan van den Berg has a personal policy of serving only as an arbitrator in investment cases. Participating as arbitrator earns considerably less in fees than as counsel, and can also affect staffing as the best and brightest associates may see working as counsel as holding better career opportunities than working for an arbitrator, no matter how well-regarded.

⁵⁵ Joseph R. Brubaker and Michael W. Kulikowsky, 'A Sporting Chance? The Court Of Arbitration for Sport Regulates Arbitrator-Counsel Role Switching', 10 Va. Sports & Ent. L.J. 1, 3 (2010) (On 1 October 2009, the CAS announced amendments to the Code of Sports-related Arbitration with the "most significant" change' being a new 'prohibition of the double-hat arbitrator/counsel role' in Article S18 of the Code, which states that 'CAS arbitrators and mediators may not act as counsel for a party before the CAS').

⁵⁶ Ruth Mackenzie and Phillipe Sands, 'International Courts and Tribunals and the Independence of the International Judge', 44 Harv. Int'l L.J. 271, 280-1 (2003) (noting the impartiality problem arising out of 'prior involvement . . . with an issue' in international public adjudication but merely indicating that '[i]n some cases the need for recusal will be clear, but in others it will be less so').

stringent rules than judges. The key, it turns out, is that judges' functional role exists within a decisional hierarchy that includes appellate review.

8.31 In contrast to investment arbitration, a judge's decision in the first case can be, and presumably was, tested on appeal. Once its 'correctness' has been confirmed on appeal, the judge's role, particularly in a system that involves a formal doctrine of *stare decisis*, is to ensure consistency among precedents.⁵⁷ Given that function, the potential for a judge to apply in the second case the decision from the first case looks more like added competence than an inappropriate bias or a pre-judging of the issues.

8.32 By contrast, after an arbitration decision in a particular case, the prevailing party presumably considers the decision more or less correct, while the opposing, losing party presumably regards it as erroneous. No appellate body confirms the 'correctness' of the award. Reappointment of the same arbitrator in a second, related case would mean appointing someone whom one party believes reached an incorrect outcome in the first case and is likely to repeat the same error in the second case. Although a system of soft precedent has now emerged in investment arbitration,⁵⁸ the important missing piece is substantive appeal. Without appeal, even a generalized obligation to follow precedent still allows a party to argue against pre-existing precedent in hopes of persuading a subsequent tribunal not to follow it. If research is correct in discovering that individuals are psychologically committed to conclusions they have already reached and less likely to revisit such conclusions,⁵⁹ arbitrators may be less able to fully reconsider parties' arguments.⁶⁰

8.33 Another important feature of investment arbitral tribunals' decisional methodologies is that they decide not only legal issues, but also factual issues. Judicial fact-finding roles in national legal systems affect national rules regarding repeat cases when the new case would involve the same facts, as opposed to the same law. Personal knowledge of disputed facts in a case are grounds for disqualification in various systems.⁶¹ For example, in a Swiss case,⁶² a party challenged the appointment of a Justice of the Supreme Court to hear a challenge to an arbitration award because that same judge had rendered a decision relating to an interim award from the same arbitration. The court rejected the challenge, but only because it found that the earlier decision and the current case involved different factual issues. The court indicated that a problem would indeed exist if the judge had already committed himself to a view on the substantive matters in the current case.

8.34 In a similar vein, in the United States and other systems that rely on juries and specialized fact finders in the court of first instance, a person would be excluded as a juror if that person had any prior knowledge of the parties or facts in the case.⁶³ One

⁵⁷ Consistency with previous decisions is valued even in systems that do not have a system of formal *stare decisis*. See Irene M. Ten-Cate, 'International Arbitration and the Ends of Appellate Review', 44 N.Y.U. J. Int'l L. & Pol. 1109 (2012) (describing the doctrine of *jurisprudence constante* in France and how in legal systems without binding precedent appellate review creates 'de facto vertical precedent').

⁵⁸ See paras 8.17–8.19.

⁵⁹ For a description of anchoring bias, and its effect on decision-making, see Guthrie *et al.*, 'Inside The Judicial Mind' 784.

⁶⁰ Michael S. Pardo, 'The Nature and Purpose of Evidence Theory,' 66 Vand. L. Rev. 547, 610 (2013).

⁶¹ Personal knowledge of disputed facts in a case is grounds for disqualification of US federal judges under 28. USC. § 455(b)(1).

⁶² *A v. B*, Case No. 4P.242/2004 (Swiss Supreme Court (1st Civil Chamber) 2004).

⁶³ Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (1994) 37 (tracing the history of juries from a repository of local knowledge to being charged with deciding solely on evidence presented).

of the primary reasons is that jurors are charged with making decisions based exclusively on evidence presented in the present case, and information learned in another case may not be presented in the subsequent case. Similarly, many systems preclude judges from sitting in cases in which they have already participated at another level. Thus, a judge is precluded in Japan from sitting in an appellate case if that judge had previously presided over the same case in lower court proceedings.⁶⁴ The ethical rules against issue conflicts, particularly those involving similar fact-finding, are not only linked to arbitrators' and judges' functional role, but are also justified by the cognitive limitations that affect their decision-making.⁶⁵

8.35 For these reasons, as well as related concerns about confidentiality, it is not surprising that the IBA Guidelines on Conflicts already require disclosure and possible disqualification for arbitrators sitting in cases that are factually related.⁶⁶ In most situations, issues conflicts do not present as clear or imminent a concern as hat-switching. Meanwhile, investment arbitrators' fact-finding function, combined with the absence of a corrective appellate mechanism and the precedential effect of awards, cumulatively suggest that issue conflicts present special problems for investment arbitration that are at least partly distinct from similar issues that may affect arbitrators who sit in similar, but unrelated commercial cases.

8.36 As a sign that international arbitration's self-regulatory machine is fully revving up on this issue, both the International Council for Commercial Arbitration (ICCA) and the IBA Task Force assigned to revising the IBA Guidelines on Conflicts are studying the issue conflicts and undertaking to provide greater guidance. It remains to be seen whether these entities might limit potential prohibitions to concurrent conflicts, like the Hague District Court in *Telekom*,⁶⁷ or adopt a more structural rule, following the cue from leading arbitrators. Whatever the ultimate recommendations and approach, one thing seems clear—hat-switching and issue conflicts are not issues that international arbitration can refuse to self-regulate if it wants to retain control and legitimacy on these topics.

C. Impartiality obligations of party-appointed arbitrators

8.37 The ethical obligations of party-appointed arbitrators is another area where the concept of 'impartiality' is poorly understood and conceptual muddiness about their role has led to (sometimes) unwarranted accusations of ethical misconduct. Party-appointed arbitrators have been a staple of the international arbitration process for centuries. As described in Chapter 2, with tripartite tribunals that dominate large

⁶⁴ Mark A. Levin, 'Symposium: Successes, Failures, and Remaining Issues of the Justice System Reform in Japan: Circumstances that Would Prejudice Impartiality: The Meaning of Fairness in Japanese Jurisprudence', 36 *Hastings Int'l & Comp. L. Rev.* 475, 486–7 (2013).

⁶⁵ Michael J. Saks and Robert F. Kidd, 'Human Information Processing and Adjudication: Trial by Heuristics', 15 *L. & Soc'y Rev.* 123, 123–6 (1980–81) (discussing cognitive psychology and legal fact-finding); Pardo, 'The Nature and Purpose of Evidence Theory' 610 ('When fact finders formulate a story of what happened, they may overvalue evidence that supports their story and undervalue or discount evidence that challenges it. If these shifts (or other types of cognitive biases) occur, then this information should inform the explanation-evaluation process, exposing situations where beliefs deviate from what is epistemically warranted.')

⁶⁶ IBA Guidelines.

⁶⁷ One significant challenge for a rule prohibiting concurrent role-switching is that it may not always be obvious at the commencement of a case what issues will be involved. Such a rule would also have to define what types of issues qualify since not every single issue, such as certain procedural or evidentiary issues, should be treated the same as outcome-determinative substantive issues.

commercial cases and investment arbitration, the conventional practice is that each party selects a party-appointed arbitrator and the two together then select the chairperson.⁶⁸ The ability of parties to select arbitrators is often identified as one of international arbitration's greatest strengths. The popularity of party-appointed arbitrators is consistently reaffirmed in practice and empirical studies regarding party preferences.⁶⁹ It is also confirmed by party rejection of proposed alternatives, for example, for 'screened' appointment procedures or institutional appointments.⁷⁰

8.38 Despite their popularity, there is a recurring sense that something is amiss with the entire idea of party-appointed arbitrators. Summarizing reactions of various scholars, Fabien Gélinas explains, '[c]laiming that the independence of a party-appointed arbitrator can be equated to that of a domestic judge, or that of a presiding arbitrator, has been called "hypocrisy", an "ideological façade", a "fiction", a "mythology", and a "triumph of rhetoric" for the "naïve"'.⁷¹ Several prominent historical anecdotes of 'particularly unattractive' conduct by party-appointed arbitrators seem to justify these critiques.⁷² Even beyond these more outlandish examples, the status and conduct of party-appointed arbitrators is seemingly always subject to some controversy.⁷³ As previewed in Chapter 2, when US law firms and arbitrators first arrived in international arbitrations *en masse*, they brought with them a unique US tradition from domestic arbitration of highly-partisan, party-appointed arbitrators.⁷⁴ In US domestic arbitration, parties and their counsel often picked over

⁶⁸ See paras 2.24–2.48.

⁶⁹ Andreas F. Lowenfeld, 'The Party-Appointed Arbitrator in International Controversies: Some Reflections', 30 *Tex. Int'l L.J.* 59, 59 (1995) ('There is a perceived need . . . for party-appointed arbitrators in international arbitration, and the predominant practice, as reflected in the most widely used rules, is to presume, or even to require, that if three arbitrators are to be appointed, each party shall appoint or nominate one of the three.').

⁷⁰ For example, the CPR Institute for Dispute Resolution developed a relatively novel, optional 'screened' appointment procedure for its domestic arbitration rules, which is intended 'to offer the benefits, while avoiding some of the drawbacks, of party-appointed arbitrators'. Robert H. Smit and Kathleen M. Scanlon, 'How New Nonadministered Rules Improve Arbitration Processes', 18 *Alternatives to High Cost Litig.* 172 (2000) (describing CPR Arbitration Rule 5.4).

⁷¹ Fabien Gélinas, 'The Independence of International Arbitrators and Judges: Tampered With or Well Tempered?' 24 *N.Y. Int'l L. Rev.* 1, 27 (2011) (quoting Pierre Bellet, '*Des arbitres neutres et non neutres*', in *Etudes De Droit International En L'honneur De Pierre Lalive* (Helbing & Lichtenhahn, 1993) 339, 407; Peter F. Schlosser, '*L'impartialité et l'indépendance en droit allemand*', in Jacques Van Compernelle and Giuseppe Tarzia (eds.), *L'impartialité du Juge et de L'arbitre* (Bruylant, 2006) 299, 305; Robert Coulson, 'An American Critique of the IBA's Ethics for International Arbitrators', 4 *J. Int'l Arb.* 103, 107 (1984); Alan Scott Rau, 'Integrity in Private Judging', 38 *S. Tex. L. Rev.* 485, 508 (1997); Christopher M. Fairman, 'Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?' 18 *Ohio St. J. Disp. Resol.* 505, 515 (2003).

⁷² Born, *International Commercial Arbitration* 1796 n. 871 (referring to 'particularly unattractive' example of *ex parte* communications between co-arbitrators and their nominating parties in a state-to-state).

⁷³ As Alan Scott Rau explains: 'Nowhere perhaps is the tension between traditional ideals of adjudicatory justice and the contractual nature of arbitration felt more keenly than in the case of the so-called "tripartite" panel, where each disputant is permitted to select "his" arbitrator and the two arbitrators named in this way are then to name the chairman of the panel. Party-appointed arbitrators on "tripartite" panels occupy an uncomfortable and ambiguous position—not quite "advocates", perhaps, but not exactly "judges" either.' Rau, 'Integrity in Private Judging' 497–98; see also Lowenfeld, 'The Party-Appointed Arbitrator in International Controversies' 65 ('There is a perceived need . . . for party-appointed arbitrators in international arbitration, and the predominant practice, as reflected in the most widely used rules, is to presume, or even to require, that if three arbitrators are to be appointed, each party shall appoint or nominate one of the three.').

⁷⁴ See paras 1.31–1.32.

partisans as party-appointed arbitrators and were allowed to communicate throughout arbitral proceedings with their party-appointed arbitrators, even about crucial issues involving strategy.⁷⁵ Such conduct was not only condoned by courts, but affirmatively ratified, as exemplified by the comments of one court that '[a]n arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial'.⁷⁶

8.39 Such partisanship, and particularly *ex parte* communication, is unacceptable in most other systems, and has long been considered unacceptable in international arbitration.⁷⁷ This fundamental clash over the role of party-appointed arbitrators became a pet topic, if not a litmus test, for international arbitration commentators.⁷⁸

8.40 The rise of international investment arbitration has shone a new spotlight on party-appointed arbitrators. Unlike international commercial arbitration, investment arbitration is often viewed as pitting investor interests against defenders of State policy interests. The visibility of investment arbitration cases, and the important policy interests at stake, have turned the original spotlight into a laser-like focus on investment arbitrators. The polarization of investment arbitration has led to allegations that certain arbitrators are 'ringers' for one side or the other, and that those who are routinely appointed by investors are biased against States, and particularly States with emerging economies. A number of high-profile challenges to investment arbitrators have added fuel to this fire.⁷⁹ Based on this track record, it is perhaps not surprising that some of international arbitration's most illustrious practitioners and its most ardent critics are united in questioning the legitimacy of party-appointed arbitrators, and even calling for their elimination.⁸⁰

⁷⁵ See, e.g., *Sunkist Soft Drinks, Inc. v Sunkist Growers, Inc.*, 10 F.3d 753, 759 (11th Cir. 1993) (finding no prejudicial misconduct despite finding that party-arbitrator met with representatives and witnesses of the appointing party before arbitration to plan strategy).

⁷⁶ See *Lorzano v Maryland Casualty Co.*, 850 F.2d 1470 (11th Cir. 1988).

⁷⁷ Detlev Vagts, 'International Legal Ethics and Professional Responsibility', 92 Am. Soc'y Int'l L. Proc. 378, 379 (1998) (discussing a hypothetical case involving contrasting approaches to *ex parte* communication with arbitrators as basis for panel discussion); Amb. Malcolm Wilkey, 'The Practicalities of Cross-Cultural Arbitration', in Stefan N. Frommel and Barry A.K. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* (1999) 86 (describing differing approaches to *ex parte* communication as a problem in international arbitration that must be overcome); Desiree A. Kennedy, 'Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations', 8 Geo. J. Legal Ethics 749, 765 (1995) (arguing against the legitimacy of *ex parte* contact with party arbitrators).

⁷⁸ See Carrie Menkel-Meadow, 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not', 56 U. Miami L. Rev. 949, 949–51 (2002); James H. Carter, 'Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for "Nonneutrals"', 11 Am. Rev. Int'l Arb. 295, 298–99 (2000); see also Lowenfeld, 'The Party-Appointed Arbitrator in International Controversies' 65 (noting international norms that seek to neutralize perceived partisanship in the party-appointed arbitrator).

⁷⁹ See, e.g., Luke Eric Peterson, 'Dutch Court Finds Arbitrator in Conflict Due to Role of Counsel to Another Investor', Invest-SD: Inv. L. & Pol'y Weekly News Bull., 17 Dec. 2004, <http://www.iisd.org/pdf/2004/investment_investsd_dec17_2004.pdf>.

⁸⁰ In addition to Jan Paulsson, critics of investment arbitration have long been attacking the practice of party-appointed arbitrators. Howard Mann and Konrad von Moltke, 'A Southern Agenda on International Investment?: Promoting Development with Balanced Rights and Obligations for Investors', *Host States and Home States* 17 (2005), <<http://www.iisd.org/publications/pub.aspx?id=687>> (suggesting that arbitrators in investment dispute settlement should be selected in a neutral manner and not by the parties to the dispute).

8.41 As examined in greater detail in Chapter 2,⁸¹ parties use the arbitrator selection process as the ultimate form of forum shopping, even though international arbitration is most often touted as providing an inherently neutral forum. This tension is perhaps best captured in the famous account by leading arbitrator Martin Hunter, when he indicated that selecting the optimal party-nominated arbitrator means finding ‘someone with the maximum predisposition towards my client, but with the minimum appearance of bias’.⁸² The crucial question, for critics and defenders alike, is how does ‘maximum predisposition’ fit with arbitrator ‘impartiality’?

8.42 With his characteristic willingness to shake things up, Jan Paulsson has recently answered this question with a definitive assertion that the two concepts simply do not fit. He characterizes the practice of allowing parties to appoint arbitrators ‘unilaterally’ as ‘ill-conceived’, an ‘unprincipled tradition’, and one that creates a ‘moral hazard’.⁸³ Another leading arbitration practitioner, Albert Jan van den Berg, has expressed a similar view.⁸⁴ Adding fuel to Paulsson’s fire, van den Berg supports his view with an empirical study he conducted that reveals the ‘astonishing fact’ that nearly all dissents by party-appointed arbitrators are written in favour of the party who appointed them.⁸⁵ ‘The root of the problem’ with dissenting opinions by party-appointed arbitrators, van den Berg believes, ‘is the appointment method’.⁸⁶

8.43 While he may not agree with Paulsson and van den Berg on almost anything else, one of investment arbitration’s most ardent critics, Gus Van Harten, has joined the chorus, offering a similar critique. Van Harten hypothesizes that investment arbitrators are more likely to adopt certain substantive positions because of ‘apparent incentives for arbitrators to favour the class of parties (here, investors)’ who are more likely to reappoint them in the future.⁸⁷ Based on these allegedly corrupting influences, Van Harten argues that ad hoc selection of decision-makers, particularly party-appointed arbitrators, makes arbitration inherently unsuitable for resolving investment disputes.

8.44 The purpose of this section is not to defend the practice of party-appointed arbitrators. Several commentators have already done so.⁸⁸ This section, instead,

⁸¹ See paras 2.24–2.39.

⁸² Martin Hunter, ‘Ethics of the International Arbitrator’, 53 *Arb.* 219, 223 (1987).

⁸³ Jan Paulsson, ‘Ethics, Elitism, Eligibility’, 14 *J. Int’l Arb.* 13, 9 (1997).

⁸⁴ This position is not entirely new as it was apparently also advocated by the late Hans Smit. Robert H. Smit, ‘Thoughts on Arbitrator Selection: Why My Father Was (Usually) A Good Choice’, 23 *Am. Rev. Int’l Arb.* 575 (2012) (describing how Hans Smit ‘was not a fan’ of party-appointed arbitrators, how ‘in his experience [they] were often partisan in favor of the party that appointed them’ which negatively ‘infects the integrity of the arbitral process’, and how he believed that that they ‘should be abolished forthwith’).

⁸⁵ Albert van den Berg, ‘Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration’, in Arsanjani *et al.* (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2010) 824.

⁸⁶ See van den Berg, ‘Dissenting Opinions’ 834.

⁸⁷ Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ (19 April 2012), *Osgoode Hall Law Journal*, Forthcoming; Osgoode CLPE Research Paper No. 41/2012, <<http://ssrn.com/abstract=2149207>>. Advocacy groups in the investment arbitration context have also been critical of party-appointed arbitrators. See, e.g., Corporate Europe Observatory, ‘Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom’, <<http://corporateeurope.org/publications/profitting-from-injustice>>.

⁸⁸ In response to these new attacks, several commentators have offered arguments in favor of party-appointed arbitrators. See, e.g., Michael E. Schneider, ‘President’s Message: Forbidding unilateral appointments of arbitrators—a case of vicarious hypochondria?’ 29 (2) *ASA Bull.* 273, 273 (2011) (‘The basic paradigm in arbitration as we know it is for each party to appoint its arbitrator and for the

makes an affirmative case for the existence of party-appointed arbitrators. In other words, it argues that if we did not already have a practice of party-appointed arbitrators, we would have to invent them to ensure the proper functioning of international arbitration.

8.45 As described earlier,⁸⁹ extra-legal factors in adjudicatory decision-making are inevitable and, in many respects, a healthy by-product of human decision-making. Even if inevitable, however, tolerance for them in a fair adjudicatory process is limited, both with regard to the nature and extent of such influences. Various features in system design aim to limit the effect of these extra-legal influences, even if (and perhaps especially because) they cannot necessarily be precisely confirmed or measured.

8.46 In national legal systems, judges are most often randomly assigned cases to reduce or at least randomize the systemic influence of extra-legal factors. In a system with random case assignment, a party may by chance benefit from or be disadvantaged by the extra-legal factors that may come into play as a result of assignment of a particular judge or judges to their case. They will not, however, be subject to the potentially compounded effect of extra-legal influences being an express and intentional consideration when the judge or a third party intentionally selects case assignments. It is the difference between a random factor or event that could happen in a fair game, and the results of a skewed game in which adverse changes are intentionally imposed.

8.47 In conceding the resistance to his proposed elimination of unilateral appointment of arbitrators, Paulsson speculates that the primary obstacle to weaning parties away from the practice is that confidence in ‘decent institutions’ is undermined by a ‘constant stream’ of new, unreliable arbitral institutions.⁹⁰ He reasons that the institutions are suspected of either poor judgment, cronyism, or corruption. It may, instead, be that parties are reluctant to trust any third party’s assessment of which extra-legal factors should be brought to bear on their case.

8.48 Van Harten has expressed similar scepticism about extra-legal considerations affecting intentional case assignment by appointing authorities in investment arbitration. Van Harten questions whether the International Chamber of Commerce (ICC), which is designated by some investment treaties as an appointing authority, is particularly well suited to perform that function in a neutral manner. As Van Harten notes, the ICC postures itself as ‘the world business organization’, ‘the voice of world business’, and an organization that ‘speaks for world business whenever governments make decisions that crucially affect corporate strategies and the bottom line’.⁹¹ Under Van Harten’s reasoning, the ICC will be more inclined to regard investor-friendly arbitrators as appropriate for selection, and therefore increase the likelihood that

two then to appoint a chairperson. The model has worked seemingly well for decades if not centuries...’); V.S. Mani, *International Adjudication: Procedural Aspects* (1980) 16–7 (describing control over the composition of the tribunal as the ‘royal road’ that has lured sovereign nations into international adjudication); Rau, ‘Integrity in Private Judging’ 506, 527 (noting the ‘widely shared conviction that the ability participate in the selection of arbitrators is critical to fairness’ and that ‘to many . . . the right to choose one member of the panel is the very “essence of arbitration”’) quoting Sir Michael Mustill, ‘Multipartite Arbitrations: An Agenda for Law-Makers’, 7 *Arb. Int’l* 393, 399 (1991).

⁸⁹ See paras 8.05–8.12.

⁹⁰ Paulsson ‘Ethics, Elitism, Eligibility’ 13–14.

⁹¹ Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication’.

certain, in his view, undesirable extra-legal considerations would play a role in a tribunal's decision-making.⁹²

8.49 The larger problem, in other words, is not intentional selection by the parties, but intentionality in selection generally. Because extra-legal factors necessarily affect adjudicators' decision-making, intentional selection by any entity means pre-determining which extralegal factors are most important. Any intentionality necessarily 'loads' the tribunal, and every institution is subject to certain predilections or perceptions. Sometimes those predilections may align with the collective predilections of the parties, in which case, institutional appointment can function well.

8.50 In most instances, however, sophisticated parties have specific preferences about which extra-legal factors they prefer to be brought to bear in a particular case based on their own legal position and case strategy and those preferences contrast with those of the opposing party. This observation provides two reasons why party-appointed arbitrators are traditionally perceived as performing important functions. First, they ensure that those considerations the appointing party thinks are important are represented on and assessed by the tribunal.⁹³ Second, they will 'serve as an "interpreter" of language, of legal culture, and of law for the benefit of fellow adjudicators'.⁹⁴ In this respect, arbitrator selection directly by the parties resolves the problem of intentional selection by a third party that may, intentionally or unintentionally, select arbitrators that are more advantageous to particular positions or case strategies. These explanations provide some justification for tolerating party-appointed arbitrators, but there is also an affirmative case to be made for party-appointed arbitrators.

1. The affirmative case for party-appointed arbitrators

8.51 Another, more generalized problem with arbitration tribunals is that, like any decisional body, they are subject to certain limitations that can produce errors in decision-making. As previewed at the beginning of this chapter,⁹⁵ a now well-established body of research by psychologists, behavioural economists, and other experts in a range of fields demonstrates that all human beings necessarily operate in a realm of 'bounded rationality'. Human judges and human arbitrators 'have inherently limited memories, computational skills, and other mental tools'.⁹⁶ Like other humans, they are subject to cognitive and heuristic biases that affect their decision-making.⁹⁷

8.52 Some of these heuristic biases may be tied to personal backgrounds and cultural cognitions of individual decision-makers.⁹⁸ Other heuristics tend to occur to some degree across all decision-makers, as well as parties and their counsel. These

⁹² Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication' ('[T]he entity that has the ultimate power to appoint in each case, after a claim has been filed, has much greater ability to influence the adjudicative process than if it only appointed the adjudicator once and for a set term.').

⁹³ Febien Gélinas, 'The Independence of International Arbitrators and Judges: Tampered With or Well Tempered', 24 N.Y. Int'l L. Rev. 1, 26 (2011).

⁹⁴ Gélinas, 'The Independence of International Arbitrators and Judges'.

⁹⁵ See paras 8.05–8.09.

⁹⁶ Stephen M. Bainbridge, 'Why a Board? Group Decisionmaking in Corporate Governance', 55 Vand. L. Rev. 1, 20 (2002).

⁹⁷ Guthrie, *et al.*, 'Inside The Judicial Mind' 777 (reporting the results of a study that supports hypothesis that trial judges use mental shortcuts, or heuristics, to make judicial decisions).

⁹⁸ Dan M. Kahan, 'The Cognitively Illiberal State', 60 Stan. L. Rev. 115, 137 (2007).

types include, for example, anchoring,⁹⁹ hindsight bias,¹⁰⁰ and egocentric bias, framing, and representativeness heuristic.¹⁰¹ One specific heuristic that has particular relevance in decision-making by a board or panel of individuals, and therefore may be more acute on arbitral tribunals, is the phenomenon called ‘Groupthink’.¹⁰²

a. Groupthink

8.53 Groupthink is a phenomenon developed by cognitive psychologist Irving Janis. Through his research, Janis demonstrated that Groupthink is a ‘mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of action’. Groupthink ‘occurs when the decision-making capabilities of a panel become affected by subtle peer pressure’.¹⁰³

8.54 The preconditions for Groupthink seem readily observable in international arbitration. Even as it becomes more diverse, the field of international arbitrators continues to be dominated by an elite group of insiders who are often referred to, even amongst themselves, as a ‘cartel’, a ‘fraternity’, a ‘club’,¹⁰⁴ or a ‘mafia’.¹⁰⁵ Collegiality, familiarity, and agreeability are important professional credentials for arbitrators,¹⁰⁶ and important qualities for career advancement as an arbitrator.¹⁰⁷

In his study of dissenting opinions, van den Berg identifies a strong correlation between party-appointed arbitrators and the party in whose favour dissenting opinions

⁹⁹ Guthrie, *et al.*, ‘Inside The Judicial Mind’ 784.

¹⁰⁰ Guthrie, *et al.*, ‘Inside The Judicial Mind’ 784.

¹⁰¹ See also Chris Guthrie, ‘Misjudging’, 7 Nev. L.J. 420 (2007).

¹⁰² Mark Seidenfeld, ‘Cognitive Loafing, Social Conformity and Judicial Review of Agency Rulemaking’, 87 Cornell L. Rev. 486 (2002) (discussing group dynamics and its influence on the outcomes of agency decision-making).

¹⁰³ Irving L. Janis, *Victims of Groupthink* (Houghton Mifflin, 1972) 9 (emphasis added). Several other scholars have advanced similar theories. See Cass R. Sunstein, ‘Deliberative Trouble? Why Groups Go to Extremes’, 110 Yale L.J. 71, 85–86 (2000); Stephen M. Bainbridge, ‘Why a Board? Group Decisionmaking in Corporate Governance’, 55 Vand. L. Rev. 1, 32 (2002).

¹⁰⁴ Iran-United States, Case No. A/18, 5 Iran-US Cl. Trib. Rep. 251, 336 (1984) (describing ‘professional’ arbitrators’ as ‘forming an exclusive club in the international arena’, and are ‘automatically brought into almost any major dispute by the operation of predetermined methods’).

¹⁰⁵ Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Trans-national Legal Order* (1996) 50 (noting that the international arbitration community is ‘regularly described as a mafia’); Toby Landau, ‘Taking on the “inner mafia”’, 7(6) *Global Arbitration Review* (2012),

<<http://www.globalarbitrationreview.com/journal/article/30863/london-taking-inner-mafia>> (noting the ‘degree of familiarity and contact between individual arbitrators and between arbitrators and counsel in the international field continues to grow, and continues to be reinforced by the modern and now widespread phenomenon of the international arbitration conference’ which occurs ‘[w]ith extraordinary frequency’). *But see* Paulsson, ‘Ethics, Elitism, Eligibility’ 19 (arguing against the term ‘mafia’).

¹⁰⁶ As Dezalay and Garth have explained: ‘The principal players . . . acquire a great familiarity with each other. . . . The extraordinary flexibility of [their] rotation of roles [between counsel and arbitrator] contributes greatly to the smooth running of these mechanisms of arbitration. It promotes the reaching of acceptable awards under a regime where the players do not speak of contradictions and antagonisms that, if formulated explicitly and disclosed, would create some difficulties of legitimation.’ Dezalay and Garth, *Dealing in Virtue* 49.

¹⁰⁷ Detlev Vagts and William W. Park, ‘National Legal Systems and Private Dispute Resolution’, 82 Am. J. Int’l L. 616, 623–4 (1988) (book review) (noting as an example of ‘unfortunate dimensions’ of arbitration experience that may undermine independent decision-making ‘a junior arbitrator may defer to a more senior member of the international arbitration mafia in the hope of being recommended in another case’).

are written. He also identifies, however, that party-appointed arbitrators only dissent in approximately 22% of cases, meaning that 78% of all investment arbitration cases are decided unanimously. From this statistic, it might be characterized as a group that strives for and generally achieves unanimity in decision-making.¹⁰⁸ Paulsson himself seems to describe the existence of this precondition of Groupthink in international arbitration when he notes that leading arbitrators ‘deliberate within an intellectual zone of shared confidence’.¹⁰⁹

8.55 Arbitrators reading the description of heuristic biases and Groupthink have an inner voice that is probably now protesting: ‘Certainly not me!’ It is important to stress that the propensity to engage in Groupthink does not reflect on arbitrators’ intelligence, earnestness, or diligence. It is a by-product of human decision-making in group settings. It is a natural propensity of panels or groups of decision-makers whenever certain factors or preconditions are present. The behavior has been tested in numerous experimental studies¹¹⁰ and has been observed in various decision-making settings, including sophisticated corporate boards of directors, foreign policy panels, administrative agencies,¹¹¹ and attorney work groups.¹¹²

8.56 Trained judges, and by extension skilled arbitrators, may be less subject to some of these heuristic biases than ordinary citizens.¹¹³ Professional training and commitments to the ideal of impartiality may dampen their effect, but these psychological phenomena are not generally a matter of choice. Studies indicate that we are all, to some degree, subject to these various shortcomings and shortcuts to decision-making. In fact, even trained psychiatrists and clinical psychologists, whose job it is to make clinical, scientific assessments about patients, have been

¹⁰⁸ For an extended analysis of how to evaluate the statistical significance of the 22% rate as against other rates of dissent in other contexts, see Catherine A. Rogers, ‘The Politics of Investment Arbitrators’, 24 Santa Clara Int’l L. Rev. 217 (2013); see also C. Mark Baker Lucy Greenwood, ‘Dissent—But Only If You Really Feel You Must: Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances’, 7 Disp. Resol. Int’l 31, 38–9 (2013). Although generally discouraged, dissenting opinions are not categorically or uniformly considered unacceptable. The First Interim Report of the Working Party (1 October 1986), cited in the Commission’s Final Report on Dissenting and Separate Opinions, *International Court of Arbitration Bulletin* (1991) Vol 2 No 1, Paragraph 2, <<http://www.iccdri.com>>; Donald Donovan, cited by Manual Arroyo, *op cit*, Francis Patrick Donovan, ‘Dissenting Opinions’ (1996) 7 ICC *International Court of Arbitration Bulletin* 76.

¹⁰⁹ Paulsson, ‘Ethics, Elitism, Eligibility’; see also Jason Webb Yackee, ‘Controlling the International Investment Law Agency’, 53 Harv. Int’l L. J. 392, 407 (2012) (the ‘small, relatively closed’ investment arbitration ‘community is more likely to be relatively ideologically cohesive and better able to coordinate its policymaking efforts’).

¹¹⁰ In one study of a closely related phenomenon of ‘herding’, a computer game was developed that involved a real test subject and two computer controlled subjects. After some time, the experiment excluded the live test subject, which caused ‘social pain’ measurable in activity in the same parts of the brain that react to physical pain. James Montier, *Behavioural Investing: A Practitioner’s Guide To Applying Behavioural Finance* (2007) 14 (describing study and using it to explain investor behavior and stock market bubbles).

¹¹¹ Janis, *Victims of Groupthink* 10–3; Irving L. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* (Cengage Learning, 1982); Marleen A. O’Connor, ‘The Enron Board: The Perils of Groupthink’, 71 U. Cin. L. Rev. 1233, 1239 (2003).

¹¹² Mary Twitchell, ‘The Ethical Dilemmas of Lawyers on Teams’, 72 Minn. L. Rev. 697, 753 n. 230 (1988) (describing how problems of ‘Groupthink’ can emerge within lawyer work teams and affect strategic decision-making).

¹¹³ Guthrie, ‘Misjudging’ 458 n. 216.

demonstrated in studies to project their own preconceptions and assumptions into diagnoses and assessments of their patients.¹¹⁴

b. Party-appointed devil's advocates

8.57 Janis not only identified the problem of Groupthink, he also prescribed a remedy. In response to a problem that is structural and integral to inter-personal group dynamics, the solution he proposes is similarly structural and integral. The most effective ways to reduce the prevalence of Groupthink, according to Janis, is to insert into a tight-knit group certain individuals whose assigned function is to challenge the consensus of that group. The function of this person is to serve as what Janis calls the 'devil's advocate', meaning someone who systematically and intentionally argues for a position contrary to whatever position is being advocated or contemplated within the group. Janis proposes that this role be formally designated and that the position be 'rotate[d] among group members at each meeting'.¹¹⁵ This is the justification, for example, for shareholder-nominated directors. Proponents of shareholder-nominated directors argue that they can break through Groupthink because they have different interests and alliances than the other corporate officers on the board.¹¹⁶ Similarly, on an arbitral tribunal, arbitrators who are appointed by the parties are essentially identified because of a perceived propensity to look sceptically and question decisions that may have negative consequences for the party who appointed them.

8.58 In addition to the structural idea of a devil's advocate as a prophylactic against Groupthink, Janis also offers what might be regarded as 'style tips' for how devil's advocates should conduct themselves in order to be most effective. Janis suggests in fulfilling this 'unambiguous assignment', the designated devil's advocate should 'present arguments as cleverly and convincingly as [the person] can, like a good lawyer, challenging the testimony of those advocating the majority position'.¹¹⁷ The devil's advocate, according to Janis, should ask tough questions and encourage suggestions in a low-key style, all while withholding his or her own opinion to avoid being too confrontational.¹¹⁸

8.59 These 'style tips' from Janis about how to be a good devil's advocate are remarkably similar to admonitions about how to be a good party-appointed arbitrator. As many commentators have observed, the party-appointed arbitrator who acts overly aggressive or too overtly partisan will end up alienating other members of the tribunal and undermining their own ability to effectively influence the tribunal's decision-

¹¹⁴ Loren J. Chapman and Jean Chapman, 'Test results are what you think they are', in Daniel Kahneman, Paul Slovic, and Amos Tversky, *Judgment under Uncertainty: Heuristics and Biases*, pp. 238–48.

¹¹⁵ O'Connor, 'The Enron Board' 1233, n. 30. The incidence of Groupthink on corporate boards of directors has been the subject of extensive scholarly commentary. James D. Cox and Harry L. Munsinger, 'Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion', 48 *J.L. & Contemp. Probs.* 82, 99 (1985). One particularly cynical view expressed the concern this way: 'It's always been interesting to me that you take these intelligent, accomplished, honorable people, and somehow you put them around a boardroom table and their IQ points drop 50 percent and their spines fly out the room.' 'All Things Considered', Nell Minow Discusses How Companies Can Restore Investor Confidence (NPR radio broadcast, 2 July 2002) (cited in O'Connor, 'The Enron Board' 1233 n. 30).

¹¹⁶ Lucian Arye Bebchuk, 'The Case for Shareholder Access to the Ballot', 59 *Bus. Law.* 43, 63 (2003).

¹¹⁷ Janis, *Victims of Groupthink* 267–8.

¹¹⁸ Janis, *Victims of Groupthink* 267–8.

making.¹¹⁹ Anecdotal accounts are replete with stories of overly aggressive, overtly partisan party-appointed arbitrators being ostracized, discounted, or ignored on tribunals. In other words, referring back to Martin Hunter's prescription at the beginning of this section, the optimal party-nominated arbitrator is 'someone with the maximum predisposition towards my client, but with the minimum appearance of bias'.¹²⁰

8.60 The ideal party-appointed arbitrator is someone who can argue forcefully to check the majority's positions that are in opposition to those of the appointing party, but in a 'low key' way that does not seem overtly partisan. By systematically but constructively second-guessing the majority, and expressly challenging it when appropriate, party-appointed arbitrators can improve the process, within tribunal deliberations, in the process of drafting the award and by, in some cases, actually writing a dissent. Several commentators have offered anecdotal explanations of how party-appointed arbitrators contribute to deliberative functions on the tribunal. Most such explanations, however, are often offered by way of apology for historical practices or justification for a party's preferences.¹²¹ These accounts provide important real-world verification of the value of deliberations in which party-appointed arbitrators press against a Groupthink-gravitational pull to the path of least resistance.

8.61 Under this view, party-appointed arbitrators are not a necessary evil that must be tolerated to make parties feel comfortable or because there are no viable alternatives. They are, instead, an important structural feature of international arbitral tribunals. The threat and potential reality of publishing a dissent is part of this process of challenge that promotes accountability. It can also promote party confidence in a process that lacks any form of appellate review, and is regarded as creating some potentially perverse incentives for overly eager agreement by arbitrators with co-panelists in order to secure future appointments.¹²² This last point brings us back to van den Berg's study.

¹¹⁹ See Laurie Craig, *et al.*, *International Chamber of Commerce Arbitration* (2000) 196 ('There is little advantage to having *one* guaranteed vote on a three-person tribunal.');

Lawrence W. Newman, 'A Practical Assessment of Arbitral Dispute Resolution', in Thomas E. Carbonneau, (ed.), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, rev. ed. (1998) 5–6 (arguing that a frequent, though mistaken, strategy in international arbitration is to appoint arbitrators who 'blatantly favor one side', which ends up polarizing the tribunal and 'leaving the chair to decide');

Andreas Lowenfeld, 'The Party-Appointed Arbitrator in International Controversies: Some Reflections', 30 *Tex. Int'l L.J.* 59, 60 (1995) (overzealous party-appointed arbitrators lose credibility with the other members of the tribunal);

Jennifer Kirby, 'With Arbitrators, Less can be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated', 26 (3) *J. Int'l Arb.* 337, 350 (2009) ('[A] party's decision to nominate a cat's-paw may call into question that party's integrity and good faith in the eyes of the chairman, and lead the chairman to be more sceptical about the party itself and its case than he might otherwise have been.').

¹²⁰ Martin Hunter, 'Ethics of the International Arbitrator', 53 *Arb.* 219, 223 (1987).

¹²¹ See, e.g., Michael E. Schneider, 'President's Message: Forbidding unilateral appointments of arbitrators—a case of vicarious hypochondria?' 29 (2) *ASA Bull.* 273, 273 (2011) ('The basic paradigm in arbitration as we know it is for each party to appoint its arbitrator and for the two then to appoint a chairperson. The model has worked seemingly well for decades if not centuries...');

Vagts and Park, 'National Legal Systems and Private Dispute Resolution' 644 (noting that party-appointed arbitrators 'promote confidence in the international arbitral process' and 'party input into the selection of arbitrators has long been common practice').

¹²² See Dezalay and Garth, *Dealing in Virtue* 49–50 ('It's a mafia because people appoint one another. You always appoint your friends—people you know.');

Vagts and Park, 'National Legal Systems and Private Dispute Resolution' 623 (noting as an 'unfortunate dimension' of arbitration that 'large fees

c. Party-appointed arbitrators and dissenting opinions

8.62 As examined in Chapter 7, Albert Jan van den Berg has conducted a study in which he concludes that nearly all publicly available dissenting opinions in investment arbitrations were issued by party-appointed arbitrators in favour of the party who appointed them.¹²³ From this data, he concludes that ‘dissenting opinions [in investment arbitration] barely serve a legitimate purpose in a system with unilateral appointments’ and therefore suggests that investment arbitration would be ‘more credible if party-appointed arbitrators observe the principle *nemine dissentiente* [i.e., without dissent]’.¹²⁴ He further postulates, as noted earlier, that the problem with dissenting opinions is the appointment process, specifically the practice of party-appointed arbitrators.

8.63 Van den Berg’s data does indeed seem at first blush to be a striking indictment of party-appointed arbitrators. As analysed in Chapter 7, however, the strong correlation is neither entirely surprising, nor a clear impeachment of party-appointed arbitrators.¹²⁵ It does, however, raise questions about the ethics of dissenting opinions by party-appointed arbitrators.

8.64 Consistent with facilitating the devil’s advocate function, dissenting opinions also have a role to play in promoting party confidence in the process. Van den Berg and others reject the notion that separate opinions can enhance party confidence in the process,¹²⁶ and instead raise concerns that dissenting opinions generally undermine

[can] exert too much influence on professional arbitrators’, causing ‘[s]ome arbitrators [to] be so eager for new appointments that they relax rigor and integrity’).

¹²³ See van den Berg, ‘Dissenting Opinions’ 824–5 (reasoning that ‘[a] nearly 100 percent score of dissenting opinions in favor of the party that appointed the dissenting arbitrator is statistically significant’ and ‘raises concerns about neutrality’).

¹²⁴ See van den Berg, ‘Dissenting Opinions’ 831, 834. It would seem that van den Berg’s observance of the principle *nemine dissentiente* is a minority view within the arbitration community. At a recent debate on the worth of dissenting opinions in commercial arbitration hosted by the Chartered Institute of Arbitrators between Alan Redfern and Peter Rees QC, 78% of the audience disagreed with the proposition that ‘dissenting opinions in international arbitration [are] unwelcome’. See Kyriaki Karadelis, ‘A debate on dissent’, *Global Arb. Rev.*, 25 Nov. 2011, <<http://www.globalarbitrationreview.com/news/article/29986/a-debate-dissent/>>.

¹²⁵ For an analysis of why even a strong correlation does not in itself suggest misconduct by individual party-appointed arbitrators or systemic disregard of party-appointed arbitrators’ professional obligations, including the duty of impartiality, see Rogers, ‘The Politics of Investment Arbitrators’ 235–41. If a party-appointed arbitrator was ‘now expected to dissent if the party that appointed him or her has lost the case entirely or in part’, we would expect that the rate of party-appointed arbitrators dissenting to be much higher than 22%.

¹²⁶ C. Mark Baker Lucy Greenwood, ‘Dissent—But Only If You Really Feel You Must: Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances’, 7 *Disp. Resol. Int’l* 31, 38–9 (2013) (‘There is some argument that the fear of a dissent being published may focus the tribunal members on the need to produce their very best work in an award; a sort of quality control, otherwise provided by an appellate court review. The counter argument is also true, namely that the ability to publish a dissenting opinion may make an arbitrator less likely to engage in constructive deliberations with the tribunal members with whom he or she disagrees.’). Van den Berg also rejects the notion that dissenting opinions can contribute to the development of law. In support of this position, he argues that ICSID dissents are not cited by subsequent tribunals, except in one ‘curious exception’. Van den Berg, ‘Dissenting Opinions’ 831. Brower and Rosenberg provide a compelling response, examining how dissenting opinions can and have contributed to the development of law. Charles N. Brower and Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-Van Den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded* (Juris, 2012) 36. They also note that ICSID tribunals have cited dissenting opinions on several occasions, not only the one cited by van den Berg. Interestingly, ICSID tribunals have also on

the authoritativeness of an award, parties' willingness to comply, and, in some instances, enhance losing parties' ability to effectively challenge an award.

8.65 Without diminishing concerns about potential misuse, the availability of dissent and the practice of dissenting only in part instead can promote party confidence in arbitral decisions. For example, in *Wena v Egypt*, the arbitrator appointed by Egypt issued a two-sentence statement that he 'concur[s] in the Tribunal's entire award', including the award of compound interest, but was 'not persuaded' that 'interest should be compounded quarterly'.¹²⁷ The separate opinion on a narrow, and seemingly insignificant issue, arguably underscores the arbitrator's substantive agreement with the rest of the tribunal on the balance of the issues.¹²⁸ In the absence of the separate opinion, the appointing party would not know that the arbitrator affirmatively agreed with the tribunal's decision, and may well assume the award was effectively a 2-1 decision with acquiescence, but not affirmative agreement, by its party-appointed arbitrator.

8.66 This affirmative case for the party-appointed arbitrator would not be complete without a few final comments. First, although party-appointed arbitrators perform a function similar to Janis' devil's advocate, there are important differences. The devil's advocate is appointed to question and offer scepticism about any position being considered by the board. A party-appointed arbitrator, on the other hand, is selected only to challenge particular positions that may be contemplated by the tribunal—those positions that are harmful to the appointing party's position.

8.67 A related observation about differences between Janis' devil's advocate and party-appointed arbitrators is that it is not an individual party-appointed arbitrator who acts as a devil's advocate, but rather *both* party-appointed arbitrators together at different stages depending on the majority position. This observation raises important issues about equality in the appointment process. For this design feature to work similar to Janis' devil's advocate, it is necessary that the two party-appointed arbitrators are similarly effective in challenging a majority position. It should be ensured that the processes for selecting party-appointed arbitrators are fair and afford the parties equal opportunities to maximize their preferences. As explored in greater detail in the final section, there is reason to believe that this precondition of equal opportunity is not firmly assured under current standards and practices.¹²⁹ Moreover, having party-appointed arbitrators serving as devil's advocates puts new stress and premium on selection of the arbitral chairperson.

8.68 Finally, it would violate the 'style tips' for party-appointed arbitrators. As a practice, unilateral appointments create the risk of hyper-partisan party-appointed arbitrators, the bogeyman that animates much of van den Berg's and Paulsson's

several occasions cited dissenting opinions from the International Court of Justice. Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals—An Empirical Analysis', 19 *Eur. J. Int'l L.* 301, (2008).

¹²⁷ See *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Statement of Professor Don Wallace, Jr. (8 Dec. 2000).

¹²⁸ Notably, because it is a relatively small sample, if this and the other cases Brower and Rosenberg argue should not be treated as dissents were subtracted from van den Berg's sample, the overall rate of dissents was less than 20% and the percentage of dissents favoring an appointing party would be closer to 85% not 100%. This latter number still represents a strong correlation between party-appointed arbitrators and dissents favoring the appointing party. As explained below, however, this correlation may well be the result of factors other than rank partisanship.

¹²⁹ See paras 8.94–8.104.

analyses. Hyper-partisan arbitrators have certainly made a few appearances over the years, including in some very high-profile cases, as surveyed by Paulsson.¹³⁰ They can undoubtedly be disruptive and even disturbing. This type of party-appointed arbitrator, however, is a relatively rare and self-correcting problem, both within individual cases and over time.

8.69 As parties become more sophisticated in their selection methods and more aware of the potential hazards of an overly partisan party-appointed arbitrator, they are increasingly reluctant to appoint self-defeating hyper-partisan arbitrators. A self-correcting problem does not require radical reforms, especially at the expense of the value that party-appointed arbitrators can bring to tribunal decision-making. Increased transparency and formal feedback about arbitrators, as proposed in the final section, can help deter these practices and enable parties to avoid knowingly appointing such arbitrators.¹³¹

2. The impartiality of party-appointed arbitrators

8.70 Making an affirmative case for party-appointed arbitrators, which redefines their functional role, also necessitates re-examining their ethical obligations. Critiques of party-appointed arbitrators are usually framed in ethical terms, such as those used by Paulsson and van den Berg. In accordance with the Functional Thesis, developed in Chapter 7, party-appointed arbitrators have necessarily been assigned a more differentiated functional role than sole arbitrators or arbitral chairpersons. This role differentiation portends at least some differences in their ethical obligations. Despite the need for differentiation, the same terminology ('impartiality' or 'independent') is consistently applied to both categories of arbitrators.¹³²

8.71 Most national arbitration laws and arbitral rules ostensibly impose on all members of arbitral tribunals identical obligations of impartiality, independence, or neutrality.¹³³ Some commentators attempt to make hair-splitting linguistic distinctions, which tend not to be particularly persuasive. For example, some sources indicate that while all arbitrators must be 'neutral', they may have different levels of 'impartiality' or 'predisposition'. Others suggest that while party-appointed arbitrators may be subject to different standards of neutrality, they must all be equally impartial and independent.¹³⁴

¹³⁰ Paulsson, 'Ethics, Elitism, Eligibility' 347–8.

¹³¹ See paras 8.94–8.104.

¹³² The rhetorical alignment of impartiality standards appears to have been originally an effort to explicitly reject an earlier (and now nearly extinct) form of intentionally highly-partisan party-appointed arbitrator that was prevalent in US domestic arbitration practice. Despite this valid objective, the effort has caused considerable conceptual confusion.

¹³³ See, e.g., UNCITRAL Model Law, art. 12; Swiss Law on Private International Law, art. 180; English Arbitration Act, 1996, §24(1)(a); German ZPO, §1036(2); Belgian Judicial Code, art. 1690(1); Indian Arbitration and Conciliation Act, art. 12(3); Netherlands Code of Civil Procedure, art. 1033(1); Tunisian Arbitration Code, art. 57(2).

¹³⁴ Compare de Fina, 'The Party Appointed Arbitrator in International Arbitrations—Role and Selection', 15 *Arb. Int'l* 381, 386 (1999) ('[T]here is some leniency in arbitrations as to the *neutrality* of a party appointed arbitrator but there is no such leniency in the *absolute requirement of impartiality and independence* whatever the circumstances.');

with Tupman, 'Challenge and Disqualification of Arbitrators in International Commercial Arbitration', 38 *Int'l & Comp. L.Q.* 26, 49 (1989) ('Unquestionably all members of the tribunal in international arbitration should be held to the *same standard of independence*, whether appointed by a party or not. The concept of a *non-neutral* arbitrator as it exists in some common law systems simply has no place [in international arbitration].')

8.72 Language about the identity of ethical obligations of all arbitrators on a tribunal may well have developed as an effort to vanquish rhetorically the highly-partisan version of party-appointed arbitrators in the historical examples and US domestic practices outlined earlier. Verbal redefinition is supported by the ‘Note on Neutrality’ in the 2004 American Arbitration Association/American Bar Association (AAA/ABA) Code of Ethics for Arbitrators in Commercial Disputes, which sought to shift away from historic domestic US practices and adapt to international practices. The ‘Note’ provides:

[I]t is preferable for all arbitrators including any party-appointed arbitrators to be *neutral, that is independent and impartial*, and to comply with the same ethical standards. . . . This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties’ agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise.¹³⁵

Effective ethical obligations of party-appointed arbitrators cannot be formulated simply by playing games with words like ‘neutrality’ or ‘impartiality’. Such abstract, value-laden terms do not provide meaningful guidance.¹³⁶ Their meaning only gains real content by analysing them in context and in light of the specific roles assigned to actors to whom those obligations are applied.¹³⁷

8.73 Chapter 7 established that, even if denied rhetorically, party-appointed arbitrators necessarily have differentiated ethical obligations as a consequence of the differentiated interrelational roles they are assigned. These differentiated roles are established through the different procedures for designated party-appointed arbitrators (most notably the possibility of interviews for party-appointed arbitrators but not for arbitral chairpersons).¹³⁸

8.74 Van den Berg concedes that differences exist, but characterizes them as a ‘few exceptions’ to party-appointed arbitrators’ obligations of impartiality.¹³⁹ This language may be inescapable given the binary terms that are usually invoked to explain impartiality obligations.¹⁴⁰ Characterizing conduct as an ‘exception’ to impartiality obligations, however, makes it sound like party-appointed arbitrators

¹³⁵ AAA/ABA Code of Ethics, Note on Neutrality (emphasis added). *See also* Byrne, ‘A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel’, 30 Ford. Urb. L.J. 1815 (2003); Paul Friedland and John Townsend, ‘Commentary on Changes to the Commercial Arbitration Rules of the American Arbitration Association’, 58 Disp. Res. J. 8 (2004); Meyerson and Townsend, ‘Revised Code of Ethics for Commercial Arbitrators Explained’, 59 Disp. Res. J. 10 (2004); Sheppard, ‘A New Era of Arbitrator Ethics for the United States: The 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes’, 21 Arb. Int’l 91 (2005).

¹³⁶ *See* paras 8.01–8.22.

¹³⁷ This is the essential lesson of Jonathan Swift’s ‘Digression on Madness’, where he effectively illustrates how ethical judgment lies not in simply choosing between contrasting values, but in conceptualizing the nature of the contrast and the inter-relationships that exist between the seemingly opposite values. This and other provocative and enlightened insights about *A Tale of a Tub* can be found in James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community* (1984) 114–117.

¹³⁸ Born, *International Commercial Arbitration* 1719 (‘It is common and ordinarily unobjectionable practice for parties, or their counsel, to contact potential choices for a co-arbitrator, to ascertain their suitability, availability, and interest, and, where appropriate, to discuss the selection of a presiding arbitrator.’).

¹³⁹ Van den Berg, ‘Dissenting Opinions’ 42.

¹⁴⁰ *See* paras 8.09–8.10.

have a ‘free pass’ to occasionally be naughty. Instead, properly understood, these are not ‘exceptions’ to impartiality obligations, but distinctions in the nature of impartiality obligations that are appropriate given the differentiated role assigned to party-appointed arbitrators.¹⁴¹

8.75 Party-appointed arbitrators’ ethical obligations may also differ in the level of restraint that is properly exercised in issuing dissenting opinions. To the extent that dissents may, under the right conditions, facilitate party-appointed arbitrators’ functional role, including their ability to act as a devil’s advocate, arguably they should have greater ethical latitude than chairpersons to issue dissents. Moreover, dissenting opinions that aim at providing legitimate explanations of outcomes and explaining disagreements on the tribunal to appointing parties may be seen less as a sign of bias, and more as a verification that the devil’s advocate role has been fulfilled.

8.76 Acknowledging that party-appointed arbitrators have different ethical obligations from arbitral chairpersons or sole arbitrators does not mean that they do not have impartiality obligations altogether. It should, however, lead to a more realistic definition of those standards and avoid unfair criticisms of party-appointed arbitrators. Meaningfully differentiated impartiality obligations may also, as proposed in Chapter 7, suggest that party-appointed arbitrators should be subject to somewhat more flexible standards regarding disqualification than arbitral chairpersons.¹⁴² In the meantime, the specialized role assigned to party-appointed arbitrators, particularly the function as a devil’s advocate who counterbalances the opposing party’s devil’s advocate, also puts a premium on fairness in the selection process.

D. Reforming and refining the selection process

8.77 The differentiated inter-relational role for party-appointed arbitrators developed in Chapter 7 and the affirmative case for the devil’s advocate described earlier necessarily focuses attention on the appointment process. Tribunals can only function fairly if the appointment process is fair and affords equal opportunities for parties to appoint co-arbitrators and influence the appointment of the arbitral chairperson. There are serious questions about whether those preconditions exist under current procedures and in the existing market for arbitrator services.

1. Procedural asymmetries

8.78 Considerable disagreement still exists within the arbitration community regarding critical features of the arbitrator selection process. According to some commentators and sources, it is impermissible or at least unseemly to engage in any pre-appointment communication with party-appointed arbitrators.¹⁴³ Other sources suggest that general inquiries about an arbitrator’s availability and expertise are permissible, but not discussions about prospective chairpersons or conducting joint interviews.¹⁴⁴ This disagreement and resulting divergent practices exist despite the

¹⁴¹ See paras 7.86–7.99.

¹⁴² See paras 7.86–7.96.

¹⁴³ See, e.g., Ronald Bernstein *et al.* (eds.), *Handbook of Arbitration and Dispute Resolution Practice*, 4th edn. (Sweet & Maxwell, 2003) 98–99.

¹⁴⁴ See Charles H. Resnick, ‘To Arbitrate or Not to Arbitrate’, *Bus. L. Today*, May/June 2002, 37, 38 (advocating interviews of arbitrator candidates, but cautioning that parties ‘should do so only jointly with opposing counsel’); Francis O. Spalding, ‘Selecting the Arbitrator: What Counsel Can Do’, in

fact that the AAA/ABA Code of Ethics, IBA Rules of Ethics, IBA Guidelines on Conflicts of Interest, and the IBA Guidelines on Party Representation all indicate that such communications are permissible as long as the merits of the case are not discussed.¹⁴⁵ The Chartered Institute, meanwhile, has published stringent guidelines about how and under what conditions pre-appointment interviews are appropriate, which include requirements for note-keeping recording the interviews.¹⁴⁶

8.79 Although a trend seems to be emerging toward permitting interviews, reports from the field are that wide variation in practice still exists. Meanwhile, the arrival of parties that are new to international arbitration or are not represented by experienced arbitration counsel means that whatever informal consensus may exist will not necessarily be followed.

8.80 These different perspectives about the process for appointing the tribunal are much more troubling than the oft-noted cultural differences about evidentiary and procedural rules that apply during an arbitration.¹⁴⁷ Whereas disagreements about internal procedures can be submitted to the tribunal to resolve during the normal course of an arbitration (and are therein transparent and subject to fair resolution), disagreements about the arbitrator appointment process, however, often remain masked in opaque phases that precede commencement of an arbitration and appointment of the tribunal. A party may never know whether its opposing party engaged in interviews or exchanged views with its party-appointed arbitrator about appointment of the chairperson.

8.81 Although it seems like a minor point of divergence, appointment of the tribunal is one of the most sensitive moments in the life of an arbitration case. If, as argued earlier, party-appointed arbitrators are to serve as devil's advocates, it is essential that they be equal counterbalances to each other. This counterbalancing effect cannot be achieved if one party is carefully vetting arbitrators, while the other is assiduously avoiding any communication. In that situation, the selection process may be producing a lopsided tribunal because one side's arbitrator is selected through a more deliberate process.

8.82 Perhaps even more importantly, one particular area of concern is the extent to which disagreement affects communications about potential chairpersons. If only one party discusses with its party-appointed arbitrator potential chairpersons, and that

What the Business Lawyer Needs to Know About ADR, 351, 356 (stating summarily that interviews 'can be undertaken appropriately only if done jointly by counsel for all parties'). Notably, both of these authors are arbitrators and their rather emphatic conclusions appear to be based more on opinion and experience than published rules or established practices.

¹⁴⁵ IBA Rules of Ethics, art. 5(1); AAA/ABA Code of Ethics, Canon III(B); IBA Guidelines on Conflicts of Interest, Green List, 1(5)(1); 2013 IBA Guidelines on Party Representation, Guideline 8(a).

¹⁴⁶ Chartered Institute of Arbitrators, Practice Guideline 16: The Interviewing of Prospective Arbitrators, art. 13(7).

¹⁴⁷ See Serge Lazareff, 'International Arbitration: Towards a Common Procedural Approach', in Stefan N. Frommel and Barry A.K. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* (1999) 31 (noting an increasing awareness among both arbitrators and practitioners of 'an emerging "harmonised procedural pattern" in international arbitration'); Berthold Goldman, 'The Application of Law; General Principles of Law—The Lex Mercatoria' in Julian D.M. Lew (ed.), *Contemporary Problems in International Arbitration* (1986) 124; Christian Borris, 'The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process' in Stefan N. Frommel and Barry A.K. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* (1999) 1, 13–14.

party's preferences are effectuated by the party-appointed arbitrator, what might have been an asymmetrical tribunal can become one that is truly skewed.

8.83 One solution for continuing ambiguities and divergent practices is for parties to agree expressly on the extent or limits of interviews. While this approach may seem relatively straightforward, it can be difficult to implement when an arbitrator is identified in a claimant's request for arbitration, which is filed before the respondent is necessarily aware that the dispute is heading to arbitration. At that point, a claimant may not want to show its hand or concede anything about the process leading up to its arbitrator choice.

2. Information asymmetries

8.84 While some procedural asymmetries affect *how* parties select arbitrators, information asymmetries regarding substantive issues affect *who* the parties select as arbitrators. For these reasons, information asymmetries are more amorphous than procedural asymmetries, but raise more serious concerns.

8.85 In selecting arbitrators, parties assess an arbitrator's overall reputation for integrity, intelligence, and acumen, as well as expertise in particular national law, subject area, or industry. As examined in Chapter 2, a party with any degree of sophistication, however, also inevitably considers a range of issues particularly important to that party's case strategy, including whether an arbitrator's approach to certain procedures, management skills, approach to contract or statutory interpretation, approach to arbitral jurisdiction including, more recently, willingness to consolidate cases or decide issues relating to non-signatories, and the like.¹⁴⁸ Although an arbitrator's capabilities in all these respects are critical, anecdotal information about an arbitrators' decisional history and personal and professional inclinations is not generally available through public sources. Moreover, in-depth questions about such topics are also generally regarded as beyond the scope of permissible interview topics.

8.86 The primary means by which parties and counsel obtain information about prospective arbitrators is personal enquiries and related ad hoc research. This process relies heavily on existing relationships among members of the international arbitration community. As a result, it privileges arbitration insiders and well-financed parties who can retain leading arbitration firms. It distinctly disadvantages State parties from developing countries that either do not have extensive experience with investment arbitration or that cannot afford the services of a leading law firm.¹⁴⁹

8.87 Typically, large law firms and corporations solicit general information from colleagues who have had recent experience with those in the pool of potential arbitrators. So-called 'in search of' or 'ISO' emails are routine in large-firm litigation and arbitration practices. Information generated from these general enquiries is then followed up on, usually through individualized research and more personal phone calls, to colleagues in the field. Those doing the research hope the individuals they contact can provide the most accurate and specific feedback about arbitrators regarding issues that are most essential to the case at hand.

¹⁴⁸ See paras 2.35–2.48.

¹⁴⁹ While this may seem like a helpful advantage for companies going up against less-sophisticated parties, it may not be a panacea. Procedural inequalities may affect perceptions of fairness and legitimacy of the process, and hence willingness to voluntarily comply with a final award.

8.88 This information is supplemented by scouring academic works, judicial opinions that might be authored by (or comment on) an arbitrator, and those rarely published arbitral awards by an arbitrator. The aim of all these efforts is to glean insights about the arbitrator's decisional history, temperament, or intellectual orientation on particular issues. Given the stakes (and the players), it is a surprisingly low-tech process with an inherently hit-or-miss quality. It can also be quite expensive.

8.89 The nature and accuracy of information generated by any particular enquiry can vary depending on the identity of the person asking the question, the person responding, and the arbitral candidate. Personal opinions about arbitrators are not fail-safe. Memories can be faulty; assessments can be biased or self-interested; information can be outdated. However, arbitration insiders and large, well-funded parties are much less likely to suffer potential misdirection. There are several reasons.

8.90 First, leading arbitration specialists generally have the most and best quality information on arbitrators. As noted in Chapter 2, service as an arbitrator is an important credential for building a practice as counsel.¹⁵⁰ One reason is that such service provides unique insights about how various arbitrators actually operate on tribunals, during deliberations, and in award drafting.

8.91 The willingness to share the most sensitive information about arbitrators will inevitably depend on how well those asked know and trust the person making the enquiry. It is only natural that sensitive and valuable information is more readily shared with friends and close colleagues. But the effect of this individualized and personalized sorting of enquiries among favoured friends and colleagues, however, is that counsel for *opposing parties* in the *same arbitration* could pose the *same enquiry* about the *same arbitrator* to the *same person*, but receive *different* responses! The study of information asymmetries in other markets rarely if ever contemplates a level of disparity that is so precise and systematic.

8.92 Furthermore, some parties can also hedge against imperfect information by casting a broader net. According to one anecdote, a leading practitioner tracked down information about a particular arbitrator by personally contacting both sets of opposing counsel for every case in which the arbitrator was determined, based on extensive research by junior colleagues, to have presided. Given that leading specialists often charge over US\$1000 per hour, this type of research is a luxury that can only be afforded by well-funded parties.

8.93 Information and resource asymmetries exist in many adjudicatory contexts and professional settings.¹⁵¹ As one commentator described information asymmetries in the market for professional services:

The theory of information asymmetries posits that wide information disparities exist in professional services markets (which includes... legal services) between providers and purchasers. The theory's premise is that professional services are highly specialized and highly skilled, and that very little specific information about the quality of professional services is available to the public.¹⁵²

¹⁵⁰ See paras 1.40–1.41.

¹⁵¹ Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', 9 Law & Soc'y Rev. 95, 98 (1974).

¹⁵² Marina Lao, 'Discrediting Accreditation?: Antitrust and Legal Education', 79 Wash. U. L.Q. 1035, 1079 (2001).

The market for arbitrator services, however, involves uniquely severe asymmetries that have exceptionally important consequences. These consequences relate directly to the real and perceived legitimacy of any particular arbitration, and have already demonstrated to be particularly disruptive for perceptions of legitimacy in investment arbitration.

3. A market-based solution to a market problem

8.94 This section proposes a new *Arbitrator Intelligence (AI)*. While a full blueprint of the project is beyond the scope of this book, this final section provides a brief sketch of its overall objectives and structure.

8.95 The basic idea is to create an information resource about arbitrators that is equally accessible, comprehensive, substantive, and reliable. Increasing access to information, including categories of information that are currently limited to arbitration insiders, the *AI* will aim at reducing information asymmetries, levelling the playing field among participants, and promoting greater transparency in the arbitrator selection process. The *AI* will also promote market-based accountability among arbitrators, and provide opportunities for new arbitrators to establish reputations and increase the likelihood of being selected.

8.96 The *AI* will aim at three categories of information: public, semi-public, and feedback. It will organize basic biographic information into individualized webpages for international arbitrators based on traditional forms of publicly available information. A second category of information, which might be considered semi-public, is arbitral awards. Whenever an award is sought to be annulled or recognized or enforced, it is filed with a court. In many systems, court files, including their attachments, can be accessed and copied.

8.97 The most innovative, and delicate, aspect of the *AI* would be a mechanism for providing feedback about arbitrators. The aim of this feature is to replicate that critical information that is currently gathered through ISO emails and accessible only to some parties. The aim will be to solicit and consistently obtain constructive, reliable, and useful feedback. Critics are concerned that *AI* may simply be a new advertising space for international arbitrators or a ‘good news only’ source.¹⁵³ Others have noted concern that it might be an arbitrator-related version of Wikipedia, or the equivalent of a grocery store ‘comment box’ that acts as a receptacle for all rational and irrational gripes, or a tabloid that collects reckless and scintillating gossip. The challenge will be to provide constructive, reliable feedback.

8.98 To avoid these concerns, feedback will not be ‘open source’, such as on eBay, Amazon, or other online vendor sites. It will instead be solicited as responses to specific questions. Those questions will aim at the types of issues parties currently seek information about through informal inquiries.

8.99 The *AI* undoubtedly raises a number of important practical and legal questions. Who would provide that feedback—counsel or parties? Should feedback be collected before or after an award is rendered? Could arbitrators themselves or arbitral institutions provide feedback? What about confidentiality? How would feedback avoid distortions by disgruntled losing parties and overly buoyant prevailing parties?

¹⁵³ See, e.g., <http://www.iaiparis.com/pages_p_html.asp>; Juris Publishing, ‘Roster of International Arbitrators’, <<http://www.jurispub.com/books.asp?id=164>>; <<http://www.chambersandpartners.com/15649/57/editorial/2/1>>.

Would feedback be publicly attributed to the person providing it? If not, how would contributors be accountable? How would the *AI* obtain arbitrator-specific information since most conduct is undertaken as a member of a three-person tribunal? How would confidentiality about the parties' dispute and arbitral proceedings be protected? Could the *AI* be potentially liable for defamatory or otherwise improper postings?

8.100 While these are difficult questions, they are not absolute impediments. Editorial policies and procedures will be developed to answer these questions. Those policies and procedures, along with the content of the questionnaire for eliciting feedback, will be developed by an editorial board with input from an advisory board composed of various stakeholders.

8.101 In addition to these practical questions, there are also a host of structural challenges to establishing *AI*. Most obviously, there are collective action and free rider problems. Narrow self-interest in maximizing their own information relative to others may deter parties and counsel from willingly participating. Moreover, some may be sceptical that, as so-called 'rational actors', leading arbitration specialists might agree to any mechanism that would threaten their control over the market for arbitrator services. While these are serious challenges, they likewise have solutions.

8.102 The *AI* would be a 'regulator' and targeted collection and dissemination of information would be a form of 'regulation', as those terms are defined in Chapter 6.¹⁵⁴ As such, just like other private regulators, the *AI* would have to establish its legitimacy and develop strategies for cultivating buy-in from various actors. Feedback might be coordinated with arbitral institutions, which are well-placed to administer and collect feedback questionnaires. On the other hand, as explained in Chapter 6, institutions are not necessarily able to make such information publicly available and may welcome an external resource that can act as a buffer. This opportunity may be particularly enticing to regional institutions, whose resources in this regard are more limited, but whose input and contributions will arguably fill information gaps that currently exist for major European and North American institutions.

8.103 Buy-in can also be cultivated by conditioning access to information on an agreement to provide feedback in the case for which information is sought. Organizations that provide collective representation for parties, such as the Corporate Counsel International Arbitration Group, may encourage participation.

8.104 While the *AI* will aim primarily at assisting in the selection process in individual cases, it has the potential for more structural implications. The mere potential for feedback may be an effective deterrent for arbitrators otherwise inclined to dally at the margin of ethical conduct. Paulsson uses the term 'moral hazard' to describe what he believes is the presumed untrustworthiness and bad faith of party-appointed arbitrators.¹⁵⁵ Among economists, the term has a more specific and technical meaning. Most generically, a moral hazard is a situation when an individual has a tendency or incentive to take risks because the costs that could be incurred by the risk will not be felt by the party taking the risk.¹⁵⁶ For international arbitrators, the preconditions of moral hazard seem pretty well established. More generally, arbitral proceedings of the arbitration community are relatively closed, reducing the risk of

¹⁵⁴ See paras 6.10–6.30.

¹⁵⁵ Paulsson, 'Ethics, Elitism, Eligibility'.

¹⁵⁶ For a classic analysis and definition of 'moral hazard' in principal-agent relationships, see Richard J. Arnott and Joseph E. Stiglitz, 'The Basic Analytics of Moral Hazard', 90 *Scandinavian J. Econ.* 383, 384 (1988).

discovery. There is an absence of any mechanisms for professional discipline, which reduces the risk of punishment. The arguably excessive caseloads and undue delays in rendering awards, discussed in Chapter 6, as presumably examples of arbitrators taking increased professional risks knowing that consequences are attenuated, arbitral institutions have been seeking to reduce.

8.105 Arbitrators are coming under greater pressure from parties and arbitral institutions to demonstrate efficiency and one bad-apple arbitrator can undermine perceptions about the performance of the entire tribunal. However, the antics of bad-apple arbitrators—such as those identified by Paulsson—are generally known to arbitration insiders, but are rarely known outside inner circles. Although highly-partisan party-appointed arbitrators is a self-correcting problem within an individual tribunal, self-correction across cases requires parties in future cases to be able to access the relevant information.

8.106 Feedback that could be made available to future users in the arbitrator selection process would reduce this moral hazard. It may also be a remedy for the other members of a tribunal to differentiate themselves and avoid being collectively impugned. Weeding out ‘bad’ arbitrators may also increase the potential for appointments of ‘good’ arbitrators. Even talented junior arbitrators, women arbitrators, and arbitrators from outside the traditional international arbitration hubs have difficulty establishing strong reputations to increase their chances of appointment.

8.107 Effectively, the *AI* would reconfigure how information about arbitrators is generated, disseminated, and used in arbitrator selection processes. By levelling the playing field in the arbitrator selection process, making critical information more generally accessible, and increasing arbitrator accountability, the *AI* can strengthen the legitimacy and functioning of the arbitrator selection process.

E. Conclusion

8.108 As described in Chapter 6, the professional conduct of international arbitrators illustrates the potential for international arbitration to engage in effective self-regulation. Even if significant strides have been made, however, some efforts remain stalled because the topic gets mired down in rhetorical platitudes such as Herodotian-like myths about absolute impartiality.

8.109 Because arbitrators are intentionally chosen and paid on a per-case basis, arbitrator ethics are instead a perfect example of how grandiloquence undermines rather than promotes confidence and clarity in professional ethics. It illustrates, in other words, a recurring theme of this book—that effective professional ethics do not dictate what should be done in a vacuum sealed off from all real-world influences and particularly from market influences. The overriding question for professional ethics norms in the twenty-first century is: What does it mean to be professionally ethical within, not apart from, an operating marketplace? It is a question that international arbitration must answer for all its participants, but it is also uniquely well-positioned to answer. Chapter 9 takes up some of the most difficult aspects of this question, namely how party autonomy fits with arbitration’s adjudicatory function, and what that relationship implies for the role of the arbitrator.