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Broadening its scope of arbitration advocacy

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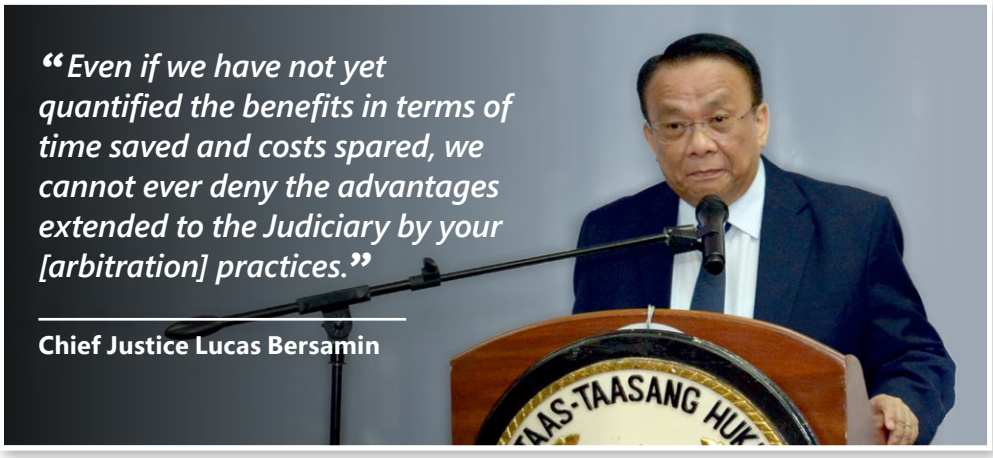

Chief Justice sees arbitration as viable alternative to litigation

By: Francisco Pabilla, Jr.

In his speech at the PDRCI General Membership Meeting on July 11, 2019, Chief Justice Lucas Bersamin affirmed that arbitration offers a better alternative than litigation in settling disputes for business and industry.

The Chief Justice said that while the benefits of alternative modes of dispute resolution (ADR) like arbitration had not been quantified in terms of saved time and costs, the advantages arbitration practice had extended to the judiciary could not be denied. He said that arbitration, among others, explains why the heavy court dockets had not become heavier and more clogged now.

Continued on page 4

WHAT'S INSIDE

PART IV

Hidden arbitrator bias

By Roberto N. Dio

Part 1 discussed apparent bias and its elements, lack of independence and lack of impartiality, while Part 2 discussed problems arising from disclosure and how it was addressed by the International Bar Association. Part 3 discussed the implicit bias of arbitrators. In this issue, the author will look at heuristics and the sources of implicit bias of arbitrators.

Heuristics

Implicit or subconscious biases are essentially shortcuts to deliberate thinking. Instead of making a critical analysis of the facts and issues, which is a laborious exercise that may take months of scrutiny of detailed documents and testimonies, the busy arbitrator may rely on past experience and conclude quickly that some facts in the dispute fit the result in another arbitration affirmed by the courts.

In other words, the busy—or, more accurately, distracted—arbitrator may substitute the law and contract terms with the more convenient but unwritten "rules of thumb" stored in his or her subconscious mind to decide the merits of the case. No wonder, according to a recent faculty article in the Emory Law Journal—

Some commentators sing arbitrators' praises, observing that they possess both subject-matter expertise and incentives to resolve disputes according to governing law. Other commentators decry their skill and demand instead that judges resolve disputes. They question the quality of arbitrator decision making, arguing that arbitrators often ignore applicable law and generally "split the baby" by making awards that fall halfway between the positions the parties advance. [1]

These rule-of-thumb strategies, or heuristics, shorten decision-making time and allow arbitrators to function without constantly reviewing the case record and stopping to think about their next course of action. Heuristics are helpful in many situations, but they can also lead to cognitive biases. These cognitive biases can result in the reversal of the deliberative process: instead of the evidence and the law shaping the result of the arbitration, the biased result will have to find some basis in the law and evidence.

According to Cherry in her article "Heuristics and Cognitive Biases," published in the VeryWellMind website (available at www.verywellmind.com/what-is-a-heuristic-2795235), psychologists have offered several theories why people, presumably including arbitrators, rely on mental shortcuts or heuristics.

One is effort reduction: according to this theory, people utilize heuristics as a type of cognitive laziness because heuristics reduce the mental effort required to make choices and decisions. Another is attribute substitution, which suggests that people substitute simpler but related questions in place of more complex and difficult questions, e.g., resolving who has the burden of proving delay instead of deciding the fact of delay and the party responsible for it. Finally, there is fast and frugal: this theory, which some arbitrators may find attractive, argues that heuristics are actually more accurate than they are biased. In other words, we use heuristics because they are fast and usually correct. Think of "splitting the baby" when the issue of costs comes up in the award.

1 Susan D. Franck, Anne van Aaken, James Freda, Chris Guthrie, and Jeffrey J. Rachlinski, "Inside the Arbitrator's Mind," 66 Emory Law Journal 1115, 1116-17 (2017).

Sources of implicit bias

Prof. Banaji has identified four related sources of unintentional or subconscious decision making: implicit forms of prejudice, bias that favors one own group, conflict of interest, and a tendency to overclaim credit (Banaji, 116). The first three are applicable to arbitrators.

Implicit prejudice

"If our only tool is a hammer, we will see every problem as a nail."

That aphorism, described by the American philosopher and author Abraham Kaplan as the "law of the instrument," is a form of cognitive bias that pervades ordinary thinking. Prof. Banaji's research showed that while most people strove to judge others according to their merits, people often judged according to unconscious beliefs, stereotypes and attitudes, or implicit prejudice. These include heuristics and other psychological traps such as anchoring, status quo, sunk-cost, confirming-evidence, framing, expertise, and other traps that are beyond the scope of this article.

Similarly, studies of judges' behavior have confirmed that inadmissible evidence, once seen, heard or received, have a profound impact on their final decisions [Edna Sussman, Arbitrator Deliberations: The Impact of the Unconscious on Decision Making, 7 New York Dispute Reso. Lawyer 8–9, No. 2, Fall 2014]. Since arbitrators generally admit all evidence prior to the award, they are susceptible to the same effect of inadmissible evidence.

In-group favoritism

We tend to do more favors for those we know and those we know tend to be like ourselves: people who share our nationality, social class, and perhaps religion, race, employer or alma mater (Banaji, 122). This includes an unconscious preference to appoint arbitrators whom we know, to nominate arbitral institutions with whom we are affiliated or where we may have interned or who may have appointed us as arbitrators, and to give more credit to the submissions of representatives with whom we have worked as an arbitrator, as co-counsel, or as a trustee in the same institution.

Conflict of interest

This type of implicit bias is different from its apparent counterpart. For instance, some arbitrators have complained of selection bias, which is a result of the nomination and appointment process. When the rules permit the parties to appoint the arbitrator, they can ensure that such person is not too independent minded by selecting someone who is more inclined to favor the position of the appointing party (Sergio Puig & Anton Strezhnev, Affiliation Bias in Arbitration: An Experimental Approach 7). Indeed, until recently, the practice of partisan party-nominated co-arbitrators was particularly common in the United States (Born, 139; Park, 20).

As Prof. Martin Hunter famously put it, "Indeed, when I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias." [M. Hunter, "Ethics of International Arbitration," 53 Arbitration 219, 222-23 (1987)].

The counterpart of the selection bias is the affiliation effect, where arbitrators may find it difficult to maintain impartiality because of a tacit preference for their appointing party. As observed by Puig, despite an arbitrator's best intentions to remain unbiased, she may be unconsciously primed to favor her nominating party simply by knowing that she was selected by that party.

Conclusion

In sum, perfect objectivity of arbitrators may well be impossible to achieve. As observed by one author, "If arbitrators are completely sanitized from all possible external influences on their decisions, only the most naïve or incompetent would be available." (Park, 2). Arbitrators, as well as the parties and their counsel, are better prepared to deal with implicit bias if they are fully aware of it, but awareness will not be enough. Prof. Banaji suggests that ethics training be broadened to expose arbitrators directly to the unconscious mechanisms that underlie biased decision making and provide them with exercises and interventions to help root out biases that lead to bad decisions.

About the Authors

Roberto N. Dio is the Secretary General of Philippine Dispute Resolution Center. He has been a commercial and construction arbitrator for close to 15 years. He is a senior litigation partner of Castillo Laman Tan Pantaleon & San Jose, www.cltpsj.com.ph, and serves as a volunteer supervising lawyer of the University of the Philippines Office of Legal Aid.

"The kinship of your practice of dispute resolution with the vocation of the judges and justices in judicial dispute resolution is close and probably more intimate than we can concede. But we differ in our delivery of justice. Your proceedings are definitely swifter than ours ... Thereby, your practice presents itself as the attractive but viable option to settle disputes, and offers yours as the better alternative for business and industry."

MEMBER SPOTLIGHT

Atty. Alfredo Pablo San Gabriel Malvar is a member of the law firm of Meer, Meer & Meer. He specializes in litigation, taxation, and corporate law.

He studied philosophy at the Ateneo de Manila University (ADMU), graduating with honors, in 1999. Upon graduation, he received the Ambrosio Padilla Award and the True Blue Award for Football.

He studied law at the same university and obtained his Juris Doctor degree, with second honors, in 2003.

After passing the Philippine Bar in 2004, he joined the law firm of Angara Abello Concepcion Regala & Cruz (ACCRALAW), where he worked for five years before joining his current firm in 2009.

From 2008 to 2012, he worked as an adjunct professor, lecturer, and thesis panelist at the Far Eastern University Institute of Law and De La Salle Professional Schools Joint JD-MBA Program.

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(Continued from page 1)

The Chief Justice congratulated PDRCI for instituting changes in arbitration practice that significantly altered the landscape of dispute resolution in the country in the past decades.

He said that for its part, the courts had not ignored the clamor for swifter justice. The Supreme Court has started evolving its own procedures to include many forms or means of ADR – the Judicial Dispute Resolution, the Court-Annexed Mediation during trial and on appeal, and court referrals to arbitration that generated a symbiotic relationship between ADR and the traditional dispute resolution of court litigation. He asked PDRCI to work more avidly towards strengthening this relationship and in discovering which relationship could be enhanced.

Finally, the Chief Justice said that the Supreme Court has developed jurisprudence affirming that arbitration complements regular court processes.

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