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Research Article

AI V. ARBITRATOR: HOW CAN THE EXCLUSION OF EVIDENCE INCREASE THE APPOINTMENTS OF THE ARBITRATORS?

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ABSTRACT

Background: *The present article was prompted by the growing influence of artificial intelligence in international arbitration. Artificial intelligence poses a challenge to the arbitration market since its advantages make it inevitable that in the future, it will take over some of the arbitrator's fact-finding functions. Accordingly, the question arises as to how arbitrators can improve fact-finding and, consequently, maintain their demand in the arbitration market. This article*

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analyses in detail one of the alternatives for such an improvement – a stricter application of the rule on the admissibility of written witness testimony.

Objects: *The article sets out the following objectives: (1) to uncover why artificial intelligence could be considered a better fact-finder than the arbitrator; (2) to identify how arbitrators apply the rule on the admissibility of written witness testimony in international arbitration proceedings; (3) to justify a different application of the latter admissibility rule that both improves the quality of fact-finding and, accordingly, allows arbitrators to keep pace with artificial intelligence.*

Methods**:** *The article is grounded in the doctrinal legal research method since it will examine three legal sources: 1) the widely applicable IBA Rules on the Taking of Evidence in International Arbitration; 2) the arbitral tribunal's awards; (3) legal scholarship. The research additionally uses an economic analysis of law as well as an interdisciplinary approach, which reveals certain psychological phenomena related to decision-making in arbitration.*

Results and Conclusions: *The application of the rule of admissibility of written testimony of a witness in international arbitration leads to various negative consequences in the fact-finding process. For arbitrators to keep pace with artificial intelligence in the fact-finding process and increase their demand in the arbitration market, it is necessary to adopt a stricter approach to the latter admissibility rule. This approach leads to the exclusion rather than the evaluation of written witness testimony in international arbitration proceedings.*

1 INTRODUCTION

The Fourth Industrial Revolution and the associated developments of information technology are affecting many areas of our lives, such as economics, medicine, business, etc. This new revolution is evolving at a much faster pace, has a much greater impact, and affects a much larger number of countries, economies, and industries around the world than its predecessors.[1]

This revolution inevitably affects the legal system and its most integral part – dispute resolution institutions. International arbitration is no exception in this respect. Various litigation forums, such as international arbitration, have been impacted by these upheavals in both positive and negative ways. Probably one of the most promising consequences is the use of artificial intelligence (hereinafter AI) in dispute resolution. For example, China already has digital courts presided over by an AI judge.[2] Meanwhile, in Estonia, technology is being developed to enable AI to resolve disputes concerning up to €7,000.[3] Although we still cannot clearly predict how AI will affect the fact-finding and the decision-making process in international arbitration, it is clear that the influence of AI in this respect will continue to grow.[4]

The increasing influence of AI should be a not-so-pleasant message for arbitrators. After all, arbitrators are market participants who try to maximise their benefits. Arbitrators acting in the market for arbitration services have a clear interest in reappointments in

1 For more details, see K Schwab, Ketvirtojo pramonės revoliucija (Vaga 2017) 11-3.

2 GH Kasap, 'Can Artificial Intelligence ('AI') Replace Human Arbitrators? Technological Concerns and Legal Implications' (2021) 2 Journal of Dispute Resolution 1.

3 ibid 1.

4 See M Waqar, 'The Use of AI in Arbitral Proceedings' (2022) 37 (3) Ohio State Journal on Dispute Resolution 353-4.

future arbitration cases.[5] Meanwhile, the impact of AI in the decision-making process may inevitably lead to a reduction in arbitrators' appointments, workload, and, ultimately, fees for arbitration services. Although AI is not in a position to take over an essential part of the fact-finding functions of arbitrators, at least for the time being,[6] the rapid development of information technology will oblige any arbitrator to ask the following question: how will he/she be able to maintain his/her service supply in the arbitration market?

The main purpose of this article is to argue that one way to improve the fact-finding process, maintain the demand for arbitrators in the market, and prevent the entrenchment of AI is to adopt a stricter approach towards the rules on the admissibility of evidence. More specifically, this research focuses on specific admissibility rules, i.e., the admissibility of written testimony of a witness who was not examined during the arbitration hearing. The generally accepted version of this rule is set out in Art. 4(7) of the widely applicable IBA Rules on the Taking of Evidence in International Arbitration (hereinafter IBA Rules[7]):

> If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

Accordingly, the article analyses the possible improvements in the application of this admissibility rule and how these improvements could maintain market demand for arbitrators' services.

2 AI v. ARBITRATOR

Before the analysis of the admissibility of evidence in international arbitration, this section briefly describes why AI can be considered a superior fact-finder. In other words, this section tries to provide some reasons that could lead to an increase in the demand for AI and a decrease in the demand for arbitrators in the future arbitration market.

The reasons for the increase in demand for AI can be very diverse. For example, arbitrators, like any other human beings, have limited working hours. In contrast, AI can work essentially without interruption. Also, AI can store and organise significantly larger amounts of information in its memory than humans. Since the analysis of these causes could be the subject of separate research, this article focuses on only one group of causes that is inextricably linked to the arbitration process, i.e., cognitive biases in the evidentiary process.

Arbitrators, like any other human beings, are affected by cognitive biases in the decision-making process, which can be defined as systematic and predictable deviations from the axioms of rational decision-making.[8] Cognitive errors have been identified primarily in psychology. One of the greatest contributions in this field has been made by Nobel Laureate D. Kahneman. In his book *Thinking, Fast and Slow*, Kahneman distinguishes between two systems of thinking: System 1, which is characterised by intuitive, fast, emotional, and unconscious decision-making, and System 2, which is characterised by slower, calculating,

5 RA Posner, How Judges Think (Harvard UP 2008) 127-8. Also see B Guandalini, Economic Analysis of the Arbitrator's Function (Kluwer Law International 2020) 327-8.

6 M Piers and C Aschauer 'Administering AI in Arbitration' in R Nazzini (ed), Construction Arbitration and Alternative Dispute Resolution: Theory and Practice Around the World (Informa Law from Routledge 2022) ch 5, 65-6.

7 International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration: Adopted by a Resolution of the IBA Council 17 December 2020 (IBA 2021) <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b> accessed 20 October 2022.

8 E Zamir and D Teichman, Behavioral Law and Economics (OUP 2018) 22.

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logical, but time-consuming and effort-intensive decision-making.[9] System 1's strong influence on our decision-making and the laziness of System 2 produces a variety of sometimes unconscious decision-making errors, including cognitive biases.

At first glance, it may seem that lawyers are able to avoid or at least identify various cognitive errors. This is not true. Various empirical studies have shown that lawyers are prone to make various cognitive errors in the decision-making process. Unjustified overestimation of certain information, prejudices, life experience, personal traits, etc., have a significant impact on both the lawyer and people without any legal training. Arbitrators are no exception in this respect.[10]

Cognitive biases can manifest themselves in many different ways. Due to the limited scope of the research and the multitude of biases, the article focuses on two cognitive biases, namely the confirmation bias and the framing bias. These biases were also chosen because of their direct impact on the evidentiary process.

Firstly, confirmation bias is the tendency of decision-makers to bias the information in favour of a previously formed opinion or belief. As is pointed out in the legal scholarship: 'People not only look for confirmatory evidence, they also tend to ignore disproving evidence, or at least give it less weight, and to interpret the available evidence in ways that confirm their prior attitudes'.[11]

This bias also has a significant impact on the arbitration process. For example, Richard C. Waites and James E. Lawrence, in their article 'Psychological Dynamics in International Arbitration Advocacy', reach the following conclusion:

A typical arbitrator concludes the initial phase with a single dominant story in mind. In fact, researchers have determined that a sizeable percentage of arbitrators have established a clear leaning by the end of the opening statement (prior to any exposure to witnesses or evidence). This would mean that for most arbitrators, the actual arbitration presentation is a process of filtering through the evidence to test their individual hypothesis about the case – to either confirm or to alter their original notion of what the case story really is.[12]

The influence of this bias is also identified by other authors. For example, E. Sussman argues that one of the consequences of this bias is the strong influence of previously formed opinions or beliefs in the decision-making process.[13]

Secondly, there is the framing bias. This bias usually manifests itself in the fact-finder' tendency to place more faith in the clear and convincing presentation of information than in the content of the information provided. In other words, the factual history, rather than the credibility of evidence, determines the fact-finder's decision in a particular instance.

A good example of this bias is a study by psychologist Solomon Asch. Participants were given

9 D Kahneman, Mąstymas, greitas ir lėtas (Eugrimas 2016) 33-47.

10 J Hornikx, 'Cultural Differences in Perceptions of Strong and Weak Arguments' in T Cole (ed), The Roles of Psychology in International Arbitration (Kluwer Law International 2017) ch 4, 75; F Schauer, 'The Role of Rules in the Law of Evidence' in C Dahlman, A Stein and G Tuzet, (eds), Philosophical Foundations of Evidence Law (Virginia Public Law and Legal Theory Paper Series, OUP 2021) ch 5, 15; RA Posner, Jurisprudencijos problemos (Eugrimas 2004) 174, 178.

11 Zamir and Teichman (n 9) 59.

12 RC Waites and JE Lawrence, 'Psychological Dynamics in International Arbitration Advocacy' in RD Bishop and EG Kehoe (eds), The Art of Advocacy in International Arbitration (2nd edn, JurisNet LLC 2010) ch 4, 109.

13 E Sussman, 'Biases and Heuristics in Arbitrator Decision-Making: Reflections on How to Counteract or Play to Them' in T Cole (ed), The Roles of Psychology in International Arbitration (Kluwer Law International 2017) ch 3, 59-63.

character descriptions of two individuals: A: intelligent – industrious – impulsive – critical – stubborn – envious; B: envious – stubborn – critical – impulsive – industrious – intelligent. Both A and B have identical character traits, the only difference being the order of the traits. The following conclusion was drawn from the participant's assessment of the personalities of A and B:

> The impression produced by A is predominantly that of an able person who possesses certain shortcomings which do not, however, overshadow his merits. On the other hand, B impresses (most subjects) as a 'problem' whose abilities are hampered by his serious difficulties. [...] [S]ome of the qualities (*e.g.*, impulsiveness, criticalness) are interpreted in a positive way under Condition A, while they take on, under Condition B, a negative color.[14]

As can be seen, the participants did not base their decision on the character traits, which were identical, but on how these traits were presented.

The influence of framing bias can also be seen in arbitration proceedings. Sussman highlights the influence of this bias on arbitrators' decision-making and points out:

> Arbitrators should isolate the facts in their own thinking in order to step back from the influence a better framed story might have on them. [...] Counsel, of course, should use their skills to the best of their ability and present their story in the most favorable light and in a manner most likely to have the psychological impact they desire.[15]

Accordingly, irrelevant evidence which is presented coherently and clearly can have a much greater impact on the decision-making process than evidence that is genuinely relevant to the case but is inconsistently presented.

Are these two cognitive biases also inherent in AI? The answer to this question is quite simple – no. Unlike humans, AI is able to assess all the information in an unbiased manner, i.e., without the undue influence of the evidence presented in advance or the consistency of the story based on the evidence. It is precisely this aspect that gives AI a significant advantage in the arbitration market over an arbitrator. The latter point is also made by co-authors B. A. Garner and A. Scalia in the introduction to their book *Making Your Case: The Art of Persuading Judges*:

> While computers function solely on logic, human beings do not. All sorts of extraneous factors – emotions, biases, preferences – can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are).[16]

While we can agree with this quote on the point that, unlike computers, humans are prone to make all sorts of cognitive errors, the part of the quote that says that we cannot do anything about it is incorrect. One way of reducing the significance of these biases is to apply the admissibility rules. A possible solution will be described below.

3 THE ADMISSIBILITY OF EVIDENCE IN INTERNATIONAL ARBITRATION

This study further substantiates how the application of the rule of admissibility of written witness testimony could avoid the above-mentioned cognitive biases. However, before proceeding to a critical analysis of the latter admissibility rule, it is first necessary to elaborate on two aspects: (1) the general framework of admissibility of evidence in international

14 J Wistrich, C Guthrie and J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153 (4) University of Pennsylvania Law Review 1266.

15 Sussman (n 14) 57.

16 BA Garner and A Scalia, Making Your Case: The Art of Persuading Judges (West Group 2008) XXIII.

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arbitration (see part 3.1.); (2) the established practice of application of the rule of admissibility of written witness testimony (see part 3.2.).

3.1 The general framework of admissibility of evidence in international arbitration

The admissibility rules in international arbitration can be summarised in two words: arbitrator's discretion. The issue of admissibility of evidence is left exclusively to the discretion of arbitral tribunals unless the parties agree otherwise.

The latter conclusion is supported by various arbitration law sources. For example, Art. 19(1) of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter Model Law) establishes the principle of party autonomy: 'Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings'.[17] In the absence of an agreement between the parties, Art. 19(2) of the Model Law becomes applicable:

> Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Substantially identical provisions are contained in the rules of arbitration proceedings – for example, see Art. 27(4) of the UNCITRAL Arbitration Rules,[18] Art. 19 of the ICC Arbitration Rules,[19] and Art 36(1) of the ICSID Arbitration Rules.[20] In addition, Art. 9(1) of the IBA Rules contains identical provisions: 'The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.'

Unlike the Model Law or the rules of arbitration procedure, the IBA Rules directly establish specific admissibility rules (see, for example, Art. 9(2) and (3) of the IBA Rules, as well as the already mentioned Art. 4(7) of the IBA Rules). Nevertheless, both the IBA itself and the legal scholarship recognise that the application of admissibility rules depends on the broad discretion of arbitrators.[21]

Since it is particularly rare for the parties themselves to agree on the application of specific admissibility rules,[22] the application of the admissibility rules most of the time is left to the discretion of the arbitrators. Accordingly, in this respect, the key question concerns how arbitrators exercise this broad discretion granted by various sources of arbitration law.

17 UNCITRAL Model Law on International Commercial Arbitration 2006 <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 20 October 2022.

18 UNCITRAL Arbitration Rules 2021 <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed 20 October 2022.

19 ICC Arbitration Rules 2021 <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration> accessed 20 October 2022.

20 ICSID Arbitration Rules 2022 <https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf> accessed 20 October 2022.

21 IBA Working Party and IBA Rules of Evidence Review Subcommittee, 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (International Bar Association, 2010) 25 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 20 October 2022; P Ashford, The IBA Rules on the Taking of Evidence in International Arbitration: A Guide (CUP 2013) 146.

22 WW Park, 'The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion' (2003) 19 (3) Arbitration International 289.

The answer to the latter question may vary widely depending on the situation of each arbitration case where the admissibility of evidence is at issue. Nevertheless, legal scholarship allows us to distinguish a general approach of arbitral tribunals, i.e., the liberal approach towards the admissibility of evidence. This approach is characterised by legal scholarship in the following way:

> […] tribunals nearly always adopt a flexible approach to admissibility of evidence; it is unlikely that a party will be prevented from submitting evidence that may genuinely assist the arbitral tribunal in establishing the facts, should they be disputed.[23]

Other scholars also confirm this view, stating that: 'Arbitration tribunals will admit almost any evidence submitted to them in support of parties' position, they retain significant discretion in the assessment and the weighing of the evidence'.[24]

Therefore, the general approach to the admissibility of evidence can be characterised as follows: arbitrators will generally accept all the evidence submitted by the parties, but arbitrators will retain a wide margin of discretion in deciding on the weight to be accorded to the evidence submitted by the parties.[25]

3.2 The admissibility of written witness testimony

Part 3.1 revealed the arbitrators' general approach to the admissibility rules; thus, it is now time to turn to the specific rule of admissibility of written witness testimony.

As already mentioned, the universal version of this rule is enshrined in Art. 4(7) of the IBA Rules:

> If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

One of the main reasons for this rule is the exercise of the party's right to question a witness. If a witness fails to appear, the party forfeits this right, and the arbitrators are left only with the witness's written testimony. In addition, such evidence should be declared inadmissible, not only because the opposing party loses the right to cross-examine the witness but also because neither the party nor the arbitrators have any way of ascertaining the accuracy of written evidence. Cross-examination is often described as 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'.[26] Meanwhile, in the absence of a witness, parties lose this legal mechanism which leads to a high risk of overestimation of such testimony.

As is clear from the wording of Art. 4(7) of the IBA Rules, the mere absence of a witness is not sufficient to disregard the witness testimony. To declare the testimony of witnesses inadmissible, the arbitral tribunal has to establish two circumstances: (1) there is no valid reason not to appear for testimony; (2) there are no exceptional circumstances. Without

23 N Blackaby et al, Redfern and Hunter on International Arbitration (6th ed, OUP 2015) 378.

24 J Lew, L Mistelis and S Kröll, Comparative International Commercial Arbitration (Kluwer Law International 2003) 561.

25 Additionally, see S Saleh, 'Reflections On Admissibility of Evidence: Interrelation Between Domestic Law and International Arbitration'(1999) 15 (2) Arbitration International 155.

26 JH Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada (2nd edn, Little Brown 1923) 27.

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going too much into the content of the latter two circumstances, in this respect, it is important to note that the IBA Rules do not provide an answer as to what constitutes 'valid reason' or 'exceptional circumstances' and leave the determination of these circumstances to the discretion of arbitral tribunals.[27]

However, when there is no valid reason for the absence of a witness, and there are no exceptional circumstances, Art. 4(7) of the IBA Rules makes it quite clear that arbitral tribunals '[...] shall disregard any Witness Statement [...]'. Nevertheless, the case law of arbitral tribunals is moving in a different direction. It is quite clear that in practice, arbitral tribunals follow the liberal approach and, as a consequence, tend not to declare such evidence inadmissible but rather to give it appropriate weight in light of other factual circumstances of the case. This approach is well described in one UNCITRAL arbitration case:

> The Tribunal considers that the general principle to be applied is that, where written direct testimony is submitted with a memorial as evidence on which the relevant party relies, the witness in question should be offered for oral examination at the witness hearings unless the opposing party states that his or her presence is not required. Where a party fails or refuses to produce any such witness the written testimony will not be ruled inadmissible, but the Tribunal is likely to attach little or no weight to the written testimony concerned to the extent that it is not corroborated by other documentary or witness evidence.[28]

Therefore, when arbitral tribunals apply Art. 4(7) of the IBA Rules, tribunals tend to follow the above-mentioned liberal approach. In other words, arbitral tribunals tend not to declare the written testimony of a witness inadmissible but rather decide to admit the evidence and then give it an appropriate, usually lesser, evidentiary weight.

4 THE STRICTER APPROACH TOWARDS THE ADMISSIBILITY OF EVIDENCE IN INTERNATIONAL ARBITRATION

Part 3 of the article highlighted both the general approach to the admissibility of evidence in international arbitration and the application of rules regarding the admissibility of written witness testimony. Part 4 will provide critical observations. First of all, part 4 reveals why the approach taken by the arbitral tribunal should be considered flawed (see part 4.1.). Secondly, it explains why arbitrators should apply the rule regarding the admissibility of written witness testimony more strictly and responds to possible counter-arguments against the proposed application (see part 4.2.).

4.1 Problems related to the status quo of admissibility of written witness testimony

At first glance, the arbitrator's decision not to exclude evidence but to give it weight sounds reasonable. After all, even if a party did not have the opportunity to question the witness at the hearing, this does not necessarily mean that the evidence is unreliable and cannot be useful to the case. Nevertheless, the latter approach and its application completely overlook

27 ND O'Malley, Rules of Evidence in International Arbitration: An Annotated Guide (Informa Law from Routledge 2019) 136.

28 SD Myers Inc v Government of Canada (First Partial Award) (UNCITRAL, 13 November 2000) <https://www.italaw.com/cases/969> accessed 20 October 2022. Also, see Case ARB/94/2 Tradex Hellas SA v Republic of Albania (ICSID, 24 December 1996, 29 April 1999) <https://www.italaw.com/cases/1110> accessed 20 October 2022.

the fact that arbitrators, unlike AI, make various cognitive errors during the fact-finding process. Arbitrators who decide to evaluate the written witness testimony run a high risk of overestimating the value of such evidence due to cognitive biases. This risk will be illustrated by reference to two cognitive biases which have already been described above (see part 2).

Firstly, if a witness's testimony is not excluded, confirmation bias can influence the arbitrator's decision-making process in a variety of ways. Some possible examples:

(1) arbitrators will be inclined to overvalue the written testimony if it is consistent with the arbitrators' preconceived, but not necessarily correct, views on the outcome of the case. In such a case, this bias will tend to lead arbitrators to exaggerate the importance and relevance of such evidence;

(2) arbitrators will tend to overestimate the value of testimony if the written testimony is submitted at the beginning of proceedings. In such a case, there is a strong likelihood that this evidence will have a significant impact on the formation of a preconceived position, which will be very difficult to influence by the evidence presented later in the arbitration;

(3) arbitrators will tend to overestimate the value of the testimony if the arbitrator feels sympathy towards the witness. For example, the arbitrator likes the witness's experience, character, writing style, and presentation of ideas, or the arbitrator and the witness have similar cultural, political, or social status. In these instances, the arbitrator will be inclined, even unconsciously, to favour the testimony of such a witness.

Secondly, the framing bias also increases the risk of over-evaluating the written testimony. The framing bias would occur if the party providing the written testimony of a witness were able to present this evidence together with a cogent, coherent, and illustrative factual story supported by other evidence. In such instances, there is a strong likelihood that the arbitrator will base its decision not on the content of evidence constituting the coherent story but on the fluidity of the presentation of information, including the written testimony which corroborates that story. Accordingly, the coherent and illustrative but not necessarily true story will inevitably invoke the framing bias, and hence, arbitrators may not even notice the unreliable nature of the written testimony.

Thirdly, the risk of the latter cognitive errors is even higher in arbitration proceedings due to several additional reasons:

(1) arbitrators are mostly lawyers, and a legal background does not provide knowledge of assessing facts, i.e., knowing how to determine the weight or credibility of the evidence. In law faculties, one usually will not find courses focused on the study of fact-finding. All of this is usually left to the field of legal practice rather than legal education. Accordingly, the legal education of an arbitrator per se will rarely help to avoid mistakes in the determination of facts;

(2) the main criterion for choosing an arbitrator is not the arbitrator's ability in the fact-finding process. Often, one of the main criteria for selecting an arbitrator is his/her legal knowledge or experience in the relevant business sectors.[29] In contrast, an arbitrator's ability to dissociate himself from cognitive biases or his ability to properly assess the facts are usually unreasonably not considered as criteria for assessing a person's ability to arbitrate a case;

29 Latham & Watkin, Guide to International Arbitration (Latham & Watkin 2014) 8 <https://www.lw.com/admin/Upload/Documents/Guide-to-International-Arbitration-May-2014.pdf> accessed 20 October 2022; 'How to Select an Arbitrator' (International Centre for Settlement of Investment Disputes) <https://icsid.worldbank.org/node/20541> accessed 20 October 2022.

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(3) arbitration law usually allows to appoint as arbitrator a person with no legal training at all. For example, in disputes with a specific field of expertise, it is often advisable to appoint an expert in that specific field who may not have a legal background.[30] Although rare, in practice, there have been cases where a person without a legal background but with specific knowledge and experience in arbitral proceedings has been appointed as the president of the arbitral tribunal.[31] Legal education, although it does not *per se* provide practical experience in fact-finding, at least acquaints a person with the essence of court proceedings, the rules of evidence, and other procedural rules, which help to understand and, in some cases, avoid various errors in the evidentiary process. In contrast, an arbitrator without legal training is often even more susceptible to various errors related to the overestimation of the weight or reliability of evidence.

Therefore, the arbitrators' tendency not to exclude but to evaluate the written witness testimony creates fundamental problems for the decision-making in arbitration proceedings. Failure to exclude evidence creates a significant risk of two cognitive biases. This risk prevents arbitrators from assessing the evidence impartially and objectively. In turn, this inevitably has a negative impact on accurate decision-making in the arbitration process.

4.2 The stricter approach toward the admissibility of written witness testimony

The tendency of arbitral tribunals not to exclude written witness testimony opens a risk of various cognitive biases. This tendency gives a clear advantage to AI, whose decision-making, as mentioned above, is not subject to various cognitive errors. Inevitably, the admissibility of such evidence and the consequential occurrence of various cognitive errors will create additional conditions for future growth in the demand for AI in the arbitration market. Thus, we should pose ourselves the question: how can arbitrators avoid these cognitive biases in the evidentiary process? Part 4.2 of the article will further argue that one way to reduce the impact of these cognitive biases is a stricter application of the admissibility rule established in Art. 4(7) of the IBA Rules. In other words, arbitrators should exclude, rather than evaluate, the written witness testimony under the conditions set out in Art. 4(7) of the IBA Rules. Detailed arguments in support of this approach are set out below.

Firstly, the inadmissibility of written witness statements would be consistent with a linguistic interpretation of Art. 4(7) of the IBA Rules. Art. 4(7) of the IBA Rules does not state that '[…] the Arbitral Tribunal may disregard any Witness Statement […]' or '[...] the Arbitral Tribunal could disregard any Witness Statement [...].' On the contrary, Art. 4(7) of the IBA Rules expressly provides that, under certain conditions, the arbitral tribunal should disregard the written testimony of a witness, i.e., '[...] the Arbitral Tribunal shall disregard any Witness Statement [...]'.

Secondly, the arbitrators' decision to exclude written testimony reduces the risk of confirmation bias and framing bias. The exclusion of testimony will avoid confirmation bias because:

(1) excluded written testimony will not be able to influence or support the arbitrators' preconceived views on the outcome of the case;

30 JM Waincymer, 'Procedure and Evidence in International Arbitration' (Kluwer Law International 2012) 278.

31 J Fry, J Beechey and S Greenberg, The Secretariat's guide to ICC arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration (International Chamber of Commerce 2012) 157.

(2) the timing of the submission of eventually excluded written testimony in proceedings will be irrelevant; and

(3) the character, social status and other aspects of the witness will also be irrelevant.

As far as framing bias is concerned, the strict application of the admissibility rule immediately prevents the use of the testimony for the party's story about the facts of the case. In other words, the party's representatives will not have the opportunity during the proceedings to "wrap" the written testimony into a coherent, factual story of the case.

Accordingly, the decision to exclude written witness testimony, at least in some respects, puts the arbitrators and the AI on an equal footing. As mentioned above, by deciding to exclude written testimony, arbitrators avoid an evaluation of such evidence and thus avoid two cognitive biases that are often present in arbitration proceedings. In this instance, the evaluation of written testimony by the arbitrator is not conditioned by either confirmation or framing biases. Hence, at least in this respect, arbitrators, as participants in the arbitration market, are in no way inferior to AI.

While there are advantages to a stricter approach to the admissibility of evidence, it must be acknowledged that this approach is open to a number of criticisms. The two main counter-arguments against a stricter approach are: (1) the exclusion, rather than the evaluation, of written witness statements, threatens to exclude relevant and material evidence; (2) even if the written witness statements are excluded, it will inevitably influence the arbitrators' decision-making process. The following two points will explain why these counter-arguments should not replace a stricter approach towards the admissibility rule.

Firstly, the exclusion, rather than the evaluation, of written witness statements threatens to exclude relevant and material evidence. Unfortunately, this threat is unavoidable. If arbitrators decide to take a stricter approach to the admissibility of evidence, we will inevitably be faced with cases where relevant evidence is excluded.

Nevertheless, the latter does not justify abandoning a stricter approach for several reasons:

(1) it is doubtful whether we will ever find a legal rule whose application does not have negative consequences. For this reason, it is not rational to expect an ideal and always correct result from the admissibility rules;

(2) we must choose the lesser of two evils, i.e., on the one hand, by choosing to exclude evidence, we risk excluding potentially relevant evidence, and on the other hand, by choosing not to exclude evidence, we risk misleading the arbitral tribunal. The written testimony of a witness who has not been cross-examined at the hearing is practically impossible to verify in arbitration proceedings. As a rule, it will usually be unreliable evidence, and the admissibility of such evidence, due to the cognitive errors made by the arbitrators, leads to an even greater risk that we should not be willing to take;

(3) as mentioned above, written witness testimony will usually be unreliable evidence since without questioning the witness on the content of his/her testimony, neither the parties nor the arbitrators will be able to ascertain the accuracy of the testimony.

Accordingly, if we look at this problem not in terms of a particular case but in terms of all cases in general, the negative consequences of excluding evidence would be significantly less than in cases of non-exclusion. This point has been made by F. Schauer:

> […] a rule-based approach to evidence may produce frequent epistemic suboptimalities when it excludes genuinely probative evidence [...]. But, analogously, the suboptimality of such decisions, even when aggregated, may be less than the suboptimality, in the aggregate,

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> of fact-finding by decidedly suboptimal decision-makers, whether they be judges or members of a jury.[32]

Secondly, the arbitrator's ability to ignore inadmissible information. The content of inadmissible evidence influences the arbitral tribunal. An arbitrator who is familiar with the content of relevant evidence, even if eventually that evidence is declared inadmissible, will often not be able to ignore this inadmissible but relevant information. This problem, both for judges and arbitrators, has been confirmed by various empirical studies.[33] Accordingly, sceptics of a stricter application of admissibility rules might reasonably ask: why exclude written witness testimony at all if it still influences the arbitrator's decision-making process?

Legal scholarship offers several solutions to this problem. For example, some authors suggest replacing the judge who has accessed the inadmissible information, although authors themselves acknowledge that such a method would be rather costly.[34] Meanwhile, some jurisdictions address this problem by providing that the admissibility of evidence is to be decided by a different judge at the initial stage of proceedings.[35]

However, an often-overlooked solution to this problem is to pay more attention to the rules of admissibility of evidence. In other words, another way of addressing this problem is the adversarial process, during which the parties raise questions about the admissibility of evidence.[36] Arbitrators who, during an adversarial process, hear parties' questions and arguments on the inadmissibility of written testimony will inevitably take note of the dangers of such evidence and, once it has been excluded, will be able (at least in some cases) to distance themselves from the content of testimony.

Ultimately, the exclusion of testimony will result in the exclusion of testimony from the arbitration file altogether. Consequently, the arbitrators will not consider such testimony during their assessment of evidence and will not consider or rely on such evidence during the writing of the final award. The exact opposite situation exists when the arbitrators decide not to exclude but to assess the written testimony. In this instance, the party will continue to rely on the testimony, and the arbitrators will examine its relevance during the final evaluation of evidence and describe it in the final award. It is quite clear that in the latter case, the written testimony will have a significantly greater impact on the arbitral tribunal than the testimony which would be immediately excluded from the case file.

Therefore, the strict approach towards the admissibility rule should not be undermined by frequent counter-arguments, i.e., the risk of exclusion of relevant evidence and the incapability of arbitrators to ignore inadmissible information. This leads to the conclusion that one of the more effective ways for arbitrators to distance themselves from the two cognitive biases is to adopt a stricter approach to the admissibility rules. The latter approach, at least in this respect, would allow arbitrators to avoid cognitive biases and thus improve the quality of fact-finding. This approach, among other things, in the near future would allow the arbitrators to maintain a higher demand for their services in the arbitration market.

32 Schauer (n 11) 22.

33 For example, see E Peer and E Gamliel, 'Heuristics and Biases in Judicial Decisions' (2013) 49 (2) Court Review 114; Wistrich, Guthrie and Rachlinski (n 15) 1251; Sussman (n 14) 50.

34 B Nunner-Kautgasser and P Anzenberger, 'Inadmissible Evidence: Illegally Obtained Evidence and the Limits of the Judicial Establishment of Truth' in V Rijavec, T Kereteš and T Ivanc (eds), Dimensions of Evidence in European Civil Procedure (Kluwer Law International 2016) ch 5, 201-2.

35 For further details, see A Juozapavičius, 'Duomenų (įrodymų), gautų pažeidžiant teisę, naudojimo neleistinumas Lietuvos baudžiamajame procese' (Daktaro disertacija, Vilniaus universitetas 2012) 100.

36 For further details, see RA Posner 'An Economic Approach to the Law of Evidence' (1999) 51 Stanford Law Review 1498.

5 CONCLUSIONS

In contrast to AI, arbitrators make various cognitive errors in the decision-making process. Two cognitive biases relevant to the arbitration process have been identified in this research: (1) the confirmation bias, which is manifested by the fact-finder's tendency to bias the evaluation of information towards the decision-maker's pre-existing opinions or beliefs; (2) the framing bias which is manifested by the fact-finder's tendency to base his/her decision on the framing rather than the content of presented information.

The analysis of various arbitration law sources suggests that arbitral tribunals tend to adopt a liberal approach towards the admissibility of evidence. The latter approach leads arbitrators to generally accept most of the evidence submitted by the parties. This approach is also reflected in the application of Art. 4(7) of the IBA Rules: arbitral tribunals are not inclined to exclude the written witness testimony but rather try to give such testimony an appropriate, usually lesser, evidentiary weight.

The liberal approach of arbitral tribunals to evaluate and not exclude the written testimony opens up a significant risk of confirmation bias and framing bias in the decision-making process. The latter cognitive biases create the risk that arbitrators, even unconsciously, overestimate the value of written testimony in arbitration proceedings. Such a risk could be eliminated if the arbitral tribunals adopt a stricter approach towards the admissibility rule and consequently decide not to evaluate but to exclude the written testimony. Stricter application of the admissibility rule avoids the confirmation and framing biases and, at least in this respect, puts the arbitrators and the AI on an equal footing in the fact-finding process.

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