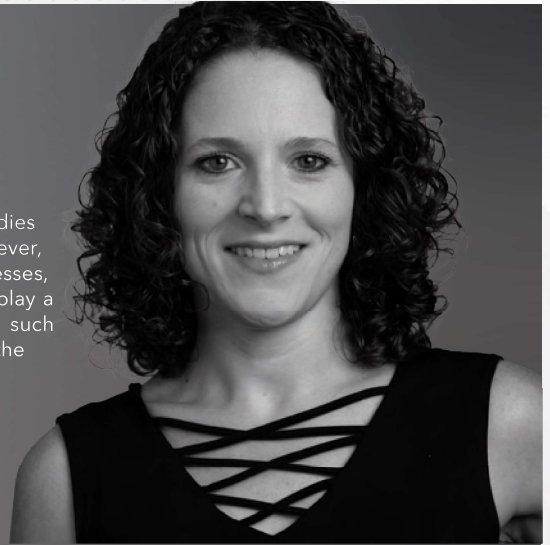


FROM THE CHAISE LONGUE: OBSERVING ARBITRATION THROUGH PSYCHOLOGY

When discussing psychology and the legal sphere, most people will think of the studies undertaken in assessing witness memories and testimonies in criminal matters. However, it is possible to use psychological research to understand the biases of witnesses, counsels, and arbitrators in international arbitration proceedings, all of which can play a key role in determining a party's strategy in putting forth its case. Furthermore, such insights can also assist in understanding how an arbitration practitioner can be at the peak of performance, which in turn will enable the practitioner to provide better representation, whilst also promoting a more conducive working environment. To discuss these thought-provoking issues, the AIAC caught up with Ula Cartwright-Finch¹ to discuss how psychology can be used to improve both the lives of arbitration practitioners and arbitration practice as a whole.



1. What sparked your interest in exploring the intersection of psychology and neuroscience with business and law, and what continues to fuel your passion to date?

From my first week in a law firm, it was clear that there was a pretty big disconnect between what I had learned in psychology and what happens in typical legal practice. For example, total sleep deprivation is disastrous for your cognitive functioning, and I remember the surprise I felt seeing colleagues who were visibly impaired after pulling all-nighters. It's a false economy to stay up all night, but most lawyers don't know the data from sleep research or the restorative benefits of a quick nap.

At that point, though, I was still learning how to be a lawyer myself. It wasn't until several years later that I really thought critically about the intersection of psychology and law. I was in Hong Kong at the time, and a colleague found out I had a PhD in cognitive neuroscience. They had a brilliant idea about delivering a client seminar on cognitive biases, so I put that together – and the event was so popular we were literally turning people away at the door. So, it was really other people's passion for the topic that inspired me initially.

The way lawyers and arbitrators respond to themes like witness memory, or biased decision-making is also what keeps me interested. Now that I'm working on this full time, I also have a deeper appreciation of just how much scope there is to use science to improve business and legal practice.

2. Your legal experience is not only extensive but impressive, with over 12 years in various global firms spanning London, Hong Kong, and Madrid. But you started your career in psychology and neuroscience. What made you switch to law?

I'd been studying psychology for almost a decade before I went into law. I absolutely loved the subject, and I learned a great deal during my PhD. But there were aspects of academic research I struggled with. At that time, partnerships with industry were relatively rare, and one of my big frustrations was the impact factor. You could work really hard, discover brilliant things, but your practical impact on the world would be quite small. Academic journals have relatively select readerships!

So, I started looking at other careers. I considered training as a gas engineer so I could open a plumbing business run by and for women. But it takes three years to qualify as a gas engineer in the UK and only two to convert to law, so law school won!

Law had been in my mind when I was young. I studied it as an extra subject at school. During my PhD, I worked with a lawyer when I ran some experiments at the Science Museum in London. We had to negotiate a contract between UCL, myself and the museum, and I really enjoyed that process. I went on to do a vacation scheme at the lawyer's firm, Farrer and Co., and fell in love with the whole experience. Farrer & Co. is based in Lincoln's Inn, which is like Hogwarts for lawyers. It's enchanting, and I loved the work I did on my placement. The subject matter was sensitive and human but solving it legally required rigorous analysis, so it felt like a good match for my skills. After that, I was sold.

¹ Dr Ula Cartwright-Finch is Managing Director of Cortex Capital, a consultancy that fuses insights from behavioural and brain science with the practice of business and law. Ula trains and advises lawyers, arbitrators and experts on topics including virtual hearings, witness memory & interviewing, negotiation and decision-making. She also works with a range of corporate and banking clients on leadership, diversity & inclusion and wellbeing programmes.

Ula has more than 12 years' experience as an international arbitration lawyer working in global law firms in London, Hong Kong and Madrid. She also has first-hand experience in regulatory, risk and compliance in investment bank and telecoms firms. Before converting to law, Ula studied psychology for over a decade, including a PhD in Cognitive Neuroscience. Now she collaborates with leading researchers applying psychology to legal practice.

Ula served as Scientific Advisor to the ICC Task Force on the Accuracy of Fact Testimony in International Arbitration. She is a Visiting Lecturer at Queen Mary University of London and Humboldt University of Berlin, and an Honorary Research Fellow at the University of Warwick.

3. Your days running Cortex Capital must involve operating on a very tight schedule. How do you ensure to protect your well-being and ability to continue to perform? Are there practical strategies you would like to share?

I'm very deliberate and very disciplined when it comes to well-being practices. Partly because I've learned the hard way what happens when you neglect that side of things and partly because I've read the research on how they benefit your performance. I started looking into the scientific literature on mindfulness when I was preparing a training session on difficult conversations. The benefits to cognitive functioning were so compelling, I signed up for a meditation retreat the moment I could. I don't always want to, but now I practise mindfulness most mornings. I also go on tech-free retreats twice a year as a proper reboot. Having a full week away from email requires some planning but what it gives you in clarity of thinking and perspective is worth the Netflix sacrifice.

I also run or cycle most days. And I prioritise sleep, which is boring but necessary. Something new I picked up this winter is cold water swimming. It's difficult to capture with words what jumping into freezing water does for you, but bang for buck, it's the most effective well-being practice I've found so far. And I'm all for getting results fast! I also deliver training on wellbeing, and it helps communicate the message when you've walked the walk.

4. Of your contributions in literature, in the form of books, journals, and articles, as well as in speaking engagements, what is one of the memorable experiences that you cherish?

It's difficult to pick one! An article I wrote on gender diversity and team performance in international arbitration is a favourite for a few reasons.

First of all, I broke the back of it when I was on holiday in Fiji, so some very happy associations there. The research literature itself is also fascinating – though not always easy to reconcile. Assimilating everything into a comprehensive but coherent argument, I remember being an enjoyable intellectual challenge.

To be able to bring science and data to discussions on diversity is also something I'm really pleased I can do. It gives people an accessible and neutral framework within which to handle what can otherwise be quite a sensitive topic. I think there's a lot of fear in speaking about diversity issues. No one likes to make mistakes – especially lawyers – and so it's often that which holds us back, rather than lack of desire to get involved. Science offers a global language we can use to talk about things. Even better than that, it points us towards the most effective solutions.

Diversity as a topic is also close to my heart. My mother has always been a passionate advocate for social justice, so I grew up steeped in Amnesty International posters and feminist thinking. We don't often reflect on the impact of our formative experiences – or we assume everyone has the same influences – but it's an area that runs deep for me.

5. Although the fields of science and law appear disconnected, your work highlights that the practice of international arbitration, or dispute resolution in general, is a field that depends on the operation of numerous human minds - arbitrators, counsels, experts, witnesses and secretariats. In this regard, what is the importance of importing scientific breakthroughs into the legal industry?

As an interdisciplinary field of study, psychology and law has been around for decades for exactly the reasons you mention. Every aspect of dispute resolution rests on our actions and decision-making. But we don't come with an operating manual that

explains how or why we behave the way we do. The goal of psychology is to understand human behaviour and cognition, so learning about these processes is an obvious way to improve legal practice.

For a long time, research in this area has been stuck on eyewitness testimony and jury decision making. But what I see is enormous potential to apply scientific knowledge across the entire cosmos of dispute resolution – from de-biasing our decisions around selecting arbitrators, to gathering and evaluating witness evidence more accurately, to delivering more persuasive submissions, to improving arbitrator's decision-making, to creating the best environment for negotiating a settlement. You could even get down to the nuts and bolts of legal practice and use behavioural design architecture to nudge lawyers to improve their time recording.

The bottom line is that we can use the scientific understanding of human behaviour to improve outcomes of human behaviour in the context of international arbitration.

6. What advice would you have to professional arbitrators and legal counsels alike to avoid biases in their critical decisions on a day-to-day basis?

Each decision faces different potential biases, so it's difficult to give generic advice. But there are simple things we can do if we want to beat biases.

Setting aside a bit more time to consider the issue is really important. Most of us operate in a state of perpetual time famine where everything is done under huge time pressure. If we want to make good decisions, we need to give ourselves proper time to reflect.

Stress testing the decision is another effective step. Thinking through alternative options, assuming our decided position is wrong, and bouncing ideas off others are all useful strategies.

In the context of legal decision-making, our intuition can lead us astray, so relying on data instead of gut instinct is also a must.

7. Listening is often said to be an art form in itself. Given the monumental amount of information exchanged during most arbitration hearings, which often go on for several days, involving early hours and late nights, how would you suggest one embarks on the process of training their brain to respond to this information influx, process it, and remain focused on the important aspects of the case?

Big arbitration hearings are a bit like marathons for the mind. Listening is an active process, not a passive state, so doing it well takes more energy and more skill than we might think. This is especially true when the subject matter is unfamiliar or complex.

Ideally, we need to be doing everything we can to put ourselves in the right state for peak performance – eating well, sleeping well, regular exercise and mental training. All these things improve our brain's ability to focus, to understand and to remember what we hear.

We can also be clever about how we use breaks. There's a lot of science around what sort of break packs the most punch when it comes to recharging our brain's ability to perform. During virtual hearings, for example, most people switch immediately from one virtual room to another in the breaks. This means they miss out on the energising effects of physically moving around or getting some fresh air. The key here is learning how to keep your mind functioning optimally over a long period of time.

8. You served as the Scientific Advisor to the ICC Task Force on 'Maximising the Probative Value of Witness Evidence'. What were some interesting facts that you found during this experience with regard to the accuracy of the witnesses' memory in international arbitration?

For me, it wasn't the science itself that was surprising. I was already familiar with the research on false memory and eyewitness testimony from my studies, and I'd written several papers applying those findings to international arbitration.

What was fascinating to me personally was hearing arbitrators and practitioners discussing witness evidence and their views on human memory. I often fall into the trap of assuming everyone knows what I know, so this made me appreciate how much vital education there is to be done on this topic. The Task Force also gave me a much greater understanding of the cultural nuances in handling witness evidence across jurisdictions.

It was also a fantastic opportunity to introduce the arbitration world to scientific research – and vice versa. A big part of our work involved collaborating with Dr Kimberley Wade at the University of Warwick. With her guidance, we conducted an original experiment testing for memory biases in the context of a contractual dispute of the sort typically submitted to arbitration. This study provided compelling evidence that witness testimony in arbitration suffers exactly the same memory biases we see in the criminal sphere. Now Kim and I are working together to expand that research, so there will be more to come on this fascinating topic.

9. Witnesses can often be unreliable, have fudgy memories, or lie. Without giving away your trade secrets, what methods have you found work best when approaching witnesses, be it your own or the opposition's?

This very much depends on the context, but an interviewer or cross-examiner's demeanour can have a significant influence on how many beans a witness is prepared to spill. I think carefully about how I come across throughout an interview, for example, to enable the best communication between myself and the witness. That includes spending time building rapport, making the right sounds to encourage the witness to keep talking, allowing them the silence to think and speak.

The other foundational skill in gathering evidence is reading the witness. I pay attention to what they are doing with their hands and their arms. Have they suddenly shifted position, paused their testimony or changed their tone of voice? Any changes from a witness's baseline behaviour tell me I should look deeper. It's called body language for a reason – there's a great deal you can translate outside of the spoken word when you take the time to look.

10. With the benefit of all your work in psychology, in your opinion, will arbitral awards rendered as a result of virtual hearings be accepted as being as fair and just as those made following in-person hearings?

I don't think we're going to see a swathe of successful set asides solely on the basis that the hearing was held virtually rather than in person.

There's no doubt that a virtual environment has certain inherent limitations that impact the lived experience of arbitration hearings. We have fewer social data to go on, like body language and eye contact, which reduces the amount we can communicate and perceive interpersonally. The higher cognitive demands of a busy hearing screen filled with multiple faces, documents and control panels means that we may take less in. As a result, there will be some disputes that are far less suited to being heard virtually, such as lengthy, complex cases or cases where a witness's credibility is in issue. But in general, I think we've discovered that video

conferencing does have the capability to handle arbitration hearings, despite the psychological implications for arbitrators and advocates.

In fact, there's a great deal that arbitrators and counsel can do to improve virtual hearings when you understand the psychological factors involved. I'm doing a lot of work in this area right now, advising on the sorts of adjustments science would suggest we make to deliver the most effective submissions over Zoom, for example, or to reduce the chances of witnesses behaving badly on the virtual stand.

11. You have published many works supporting your belief that it is important to increase diversity in arbitral tribunals. What do you think arbitral institutions, like the AIAC, as well as those selecting neutrals, can do to push for progress in this area?

Arbitral institutions are already leading the way in promoting diversity on arbitral tribunals. Looking at the statistics, it's really law firms that have the serious catching up to do.

But we are still far from parity in gender or ethnicity, and there is always more we can do. I'm working on a big project at the moment, putting decision-making around arbitrator selection under the microscope. Dissecting how these decisions are made has thrown up some really great ideas about how to de-bias arbitral appointments and where to focus in future to encourage change.

One of the biggest obstacles in law firms proposing diverse candidates is that they aren't as familiar with them. For obvious reasons, counsel and parties want their arbitrations to be run and decided by someone tried and tested who they know they can trust. Initiatives that raise the profile of both experienced and up-and-coming diverse arbitrators will help parties expand their "go-to" list of candidates. That's another direction arbitral institutions could pursue to help promote progress.

12. Looking back on your journey, what would you like to suggest, of course, with the benefit of hindsight and work in psychology, to your former colleagues in legal practice that you believe would greatly improve their personal and professional lives?

Ending where I began, get more sleep! It's a difficult piece of advice for lawyers to take because the billable hour ties individual success to the number of hours worked – and therefore awake. But sleep is the tide that raises all health boats. As any wellbeing expert will tell you, if you only do one thing to improve your cognitive performance and emotional health, it's prioritising your sleep.

More generally, spending more time on our well-being. It's easy to get caught up striving for the next goal and the next goal. We often don't reflect on whether we could be living better or happier lives day to day.

Our state of mind is probably the biggest factor determining our quality of life and our performance. We can do exactly the same thing and have a great time doing it or a terrible time doing it, depending on our mindset. Yet few people spend the time actively cultivating their mental state. Luckily, it's one of those areas where you get out what you put in, so it's well worth the time investment.