



The Impartiality and Legitimacy of International Arbitrators

Opening Keynote

Professor Catherine A. Rogers

5 February 2024

**BASEL WINTER
ARBITRATION
SCHOOL 2024**

What does independence mean?

Whose independence?



LAWYERS

EXPERT WITNESSES

ARBITRATORS

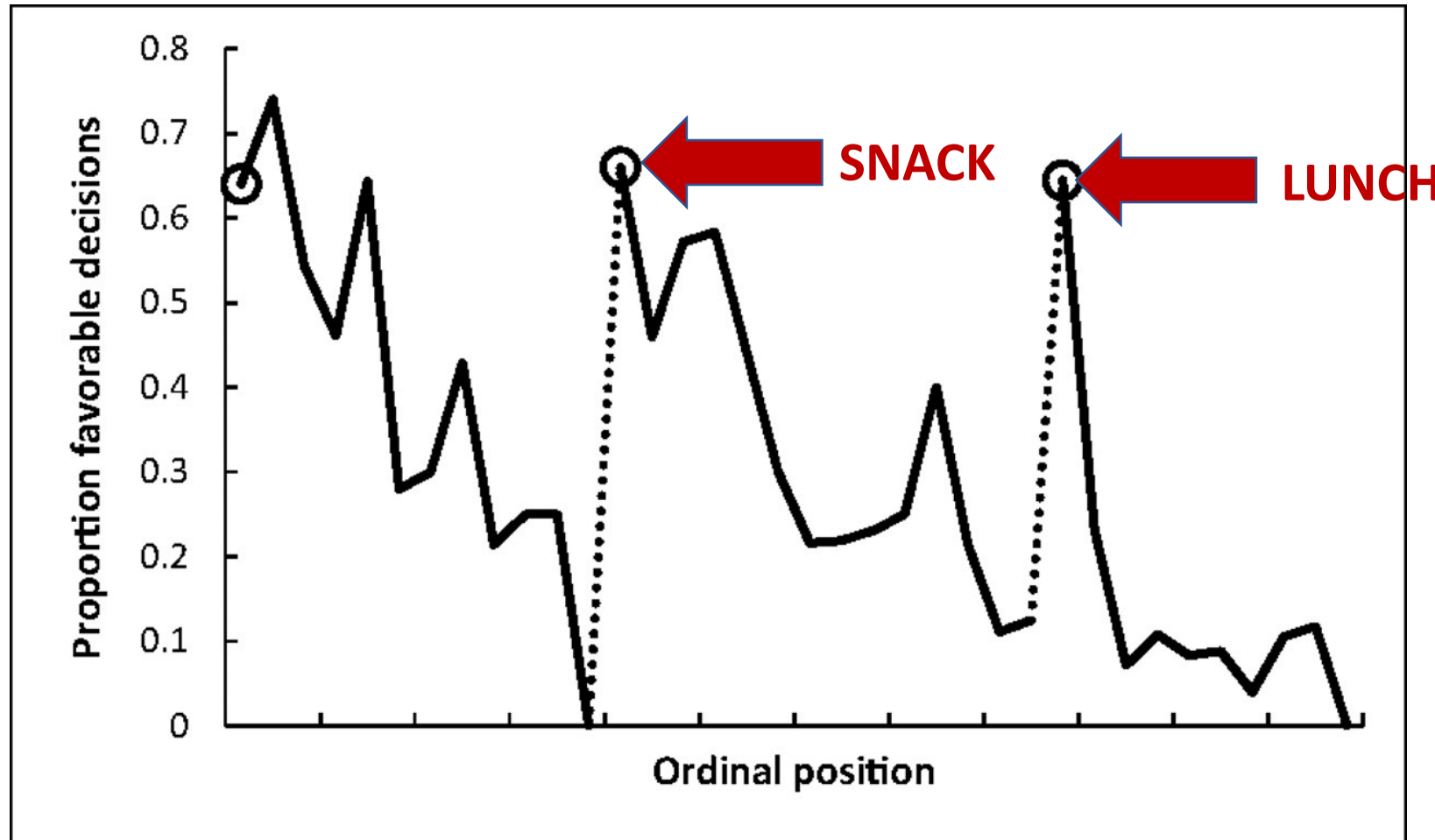
dependence

partiality

Absolute Impartiality is impossible

“The law is what the judge ate for breakfast.”

Jerome Powell



2011 study of Israeli judicial sentencing by Ben Gurion University in collaboration with Columbia University



Can parties agree to have the tribunal “resolve” their dispute based on an “absolutely independent” the role of dice?

If absolute impartiality is impossible, and some forms of “bias” are inevitable, it does not make sense to ask *whether* bias exists.

Instead we must ask:

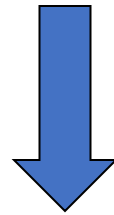
- **Which** forms of bias are legitimate?
- **Who** decides which forms of bias are legitimate?
- And **how** do we police the boundary between legitimate and illegitimate forms of bias?

Ethics Derive from the Functional Role of the Moral Agent

Procedures



Role



Ethics

The *unique* Role of the Chairperson

- Issuing interlocutory orders
- Fixing time limits and granting extensions
- Signing awards on behalf of the entire tribunal
- Preparing initial drafts of orders to be decided by the full tribunal
- Hosting or making arrangements for physical hearings
- Presiding over hearings
- Preparing an initial draft of the final award or delegating that task to one of the party-appointed arbitrators
- Monitoring the balance as between the two party-appointed arbitrators
- Managing financial matters in ad hoc arbitrations

What is the role of the party-appointed arbitrator?



The **power to appoint** is the power to determine **which extra-legal factors** will be represented among adjudicators

The **sin** of party-appointed arbitrators may not be that their impartiality obligations are a farce, but instead that they openly **personify** the **uncomfortable tension** underlying the impartiality of all adjudicators

The Role of the Party-appointed Arbitrator

- To be a bulwark against Groupthink
- To provide Representativeness
- To serve as a counter-weight

Thank you!

And good luck in the program!

catherine.rogers@unibocconi.it

Presentation based on: *Reconceptualizing the Party-Appointed Arbitrator and the Meaning of Impartiality,*

Harvard International Law Journal (2023)

Article available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4154481