LCIA Perspectives

To help mark the 125th anniversary of the formal inauguration in 1892 of “The City of London Chamber of Arbitration”, which evolved into the LCIA, we intend to publish a series of perspectives over the next twelve months, from a range of commentators from the diverse LCIA community. As the new(ish) Chairman of the LCIA Board, I am honoured to do the first “Thought for the Month”.

My involvement in international arbitration started around the time of the modern expansion and success of the LCIA. In 1981, the name had changed to “The London Court of International Arbitration” and in 1985, the year before I started working in London, new rules were promulgated and the LCIA Arbitration Court was established. The first president of the LCIA Court was Sir Michael Kerr. A new journal was established, “Arbitration International”, with its general editor Jan Paulsson and its assistant editors, Johnny Veeder and (now Sir) Jack Beatson. Since then, the LCIA has become one of the world’s leading international arbitral institutions.

In our perspectives series, we will look back on our proud history, but also look forward to the opportunities and challenges for the LCIA raised by issues facing international arbitration such as: legitimacy; confidence in decision making; demand for expedition; costs; gender and other forms of diversity; effective enforcement; and artificial intelligence.

I have been reading a book about Nudge theory, written by two American academics Richard H Thaler (who won the Nobel prize 2017) and Cass R Sunstein.

Nudge theory is a different and more sophisticated approach to achieving change in people than traditional methods of direct instruction, enforcement, punishment, etc. The use of Nudge theory is based on indirect encouragement and enablement. Nudge theory seeks to minimise resistance and confrontation, which commonly arise from more forceful “directing” and autocratic methods of “changing” people/behaviour.

The term ‘choice architect’ is used to refer to a person or organisation who uses Nudge techniques in seeking to change a group’s behaviour. It is intended to emphasise that change is enabled by designing choices for people, encouraging them to make decisions, ideally towards positive, helpful, outcomes.

Definition:

“Nudge theory” is mainly concerned with the design of choices, which influence the decisions we make. Nudge theory proposes that the designing of choices should be based on how people actually think and decide (instinctively and rather irrationally), rather than how leaders and authorities traditionally (and typically incorrectly) believe people think and decide or should decide (logically and rationally).
A recent example can be found in UK pension policy. In order to increase low pension saving rates among private sector workers, the Government mandated employers to establish an ‘automatic enrolment’ scheme in 2012. Since auto enrolment was introduced, active membership of private sector pension schemes has jumped from 2.7 million to 7.7 million in 2016.

Organ donation is another example of an area where nudge policy is seen to have worked. Spain operates an opt-out system, whereby all citizens are automatically registered for organ donation unless they choose to state otherwise. This is different from the UK where donors have to opt in. Spain is a world-leader in organ donation.

Buying fruit and vegetables has been nudged by green arrows on the floor of supermarkets. Adding 5p for the price of a plastic carrier bag has reduced by 80% the number of single-use bags sold in shops in the UK. Painting shop windows with the pictures of children has reduced the incidences of anti-social behaviour in an area of London. The most well known example of all is the pictures of bees in men’s urinals at Amsterdam airport.

What has this got to do with arbitration lawyers and the LCIA? Well, Sunstein is a professor of law at Harvard Law School, so he probably has lawyers in mind, especially law makers. But Nudge theory is all about influencing change more broadly.

For example, how can we influence greater diversity? A small but significant Nudge would be to ensure all shortlists for arbitrators include women and regional candidates. The LCIA can Nudge improvement by making appointments and bringing new people to the attention of the arbitral community and has done so, indeed by making small changes to its internal procedure resulting in a significant increase in the number of women being appointed.

Another example is how to influence good conduct by counsel. The LCIA’s General Guidelines for Parties’ Legal Representatives should Nudge better behaviour.

Nudge theory is also related to marketing. For the LCIA, how do we nudge contracting parties to include LCIA arbitration clauses? We welcome your suggestions.