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Implicit Bias in Arbitrator Appointments: A Report from the 15th Annual ITA-ASIL Conference on Diversity and Inclusion in International Arbitration

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The past year has made clear that the issue of diversity and inclusion is, at last, firmly on the agenda. The 15th Annual ITA-ASIL Conference, held in Washington, D.C. on 4 April 2018, was the first major international conference to tackle this issue in the context of international arbitration.

Speakers critically examined the lack of diversity in arbitral tribunals, as well as in lead counsel and expert appointments, with respect to gender, race, national origin, and other forms of diversity. Speakers also explored potential solutions from practitioner, institutional, and academic perspectives. Conference co-chairs Won Kidane (Seattle University School of Law) and Caroline Richard (Freshfields Bruckhaus Deringer LLP) led the event, which featured Prof. Anna Spain Bradley (University of Colorado Law School), Gonzalo Flores (ICSID), Prof. Susan Franck (American University Washington College of Law), Lucy Greenwood (GreenwoodArbitration), Mélida Hodgson (Foley Hoag LLP), Prof. Lucy Reed (National University of Singapore), Prof. Catherine Rogers (Pennsylvania State University), Prof. Anne Marie Whitesell (Georgetown University Law Center), and Nassib Ziadé (Bahrain Chamber for Dispute Resolution).

Recent data from many arbitral institutions indicates that female arbitrators constitute only about 16% of total appointments. Further, using ICSID's 2017 statistics as an example, only about 4% of cases are arbitrated by entirely non-Anglo-European tribunals. As Prof. Lucy Reed explained in her keynote address, these low levels of diversity are likely due to caution + habit + bias. Parties approach high-stakes disputes with caution, and thus form a habit of appointing arbitrators from a limited group of individuals with the most experience. Bias enters the equation, Reed argued, because many people consider the 16% proportion to be a "good enough" sign of progress, even though it is far from parity. In Reed's view, replacing habit and bias from the equation with *patience*, *persistence*, and *inclusion* can result in improved diversity.

The concept of bias—both conscious and unconscious—was a key theme that emerged during the conference. In particular, many speakers emphasized the need to become aware of and counteract one's implicit biases, which are unconscious attitudes or stereotypes that our brains use to make automatic judgments about others.

Lucy Greenwood shared examples of empirical studies outside the realm of arbitration that have

demonstrated the insidious effect of implicit biases.[1] For example:

• Numerous studies have found that resumes and journal articles were rated lower by both male and female reviewers when the reviewers were told that the author was a woman.
• A study examining postdoctoral fellowships found that female awardees needed a substantially greater number of publications to achieve the same rating as male awardees. Peer reviewers overestimated male achievements and/or underestimated female performance.
• In evaluating male and female professors, reviewers were four times more likely to ask for supporting evidence about the woman's qualifications than they were for the man.
• Studies have shown that men historically are promoted based on potential, whereas women are promoted based on what they have previously achieved.

These implicit biases can have significant implications on the arbitrator appointment process. Newer and diverse arbitrator candidates may be overlooked when practitioners consider prospective arbitrators, or may be evaluated by different standards. The appointment of diverse arbitrators can also be inhibited by the tendency of practitioners to appoint arbitrators who are similar to themselves in gender, age, or background. As Lucy Reed stated, "If habit is knowing and selecting whom you know, bias tends to slide into knowing and selecting people just like you."

The conference speakers emphasized that although implicit biases are pervasive, they can be neutralized through personal awareness, meaningful training, and purposeful action. Speakers recommended that practitioners take the following actions, among others, to counteract implicit biases and enhance diversity in international arbitration:

• Take an implicit bias test (such as the Harvard Implicit Association Tests) to become aware of the unconscious influences that may affect one's consideration of potential arbitrators;
• Engage in hands-on implicit bias and diversity training, such as the workshops offered by the Alliance for Equality in Dispute Resolution;
• Change one's arbitrator appointment practices to foster the inclusion of more diverse candidates, such as by listing the desired characteristics of an arbitrator before brainstorming names, spending an extra five minutes in compiling lists of potential arbitrators to consider newer and diverse candidates, and rethinking certain assumptions in evaluating arbitrator candidates (such as the perception that a track record of prior appointments is the most relevant marker of an arbitrator's experience and competence);
• Address information asymmetries and broaden access to information about diverse arbitrators, through initiatives such as Arbitrator Intelligence's questionnaires on arbitrators' decision-making and case management; and
• Support and broaden initiatives such as the Equal Representation in Arbitration Pledge, which encourages practitioners to appoint more female arbitrators.

In the author's view, the international arbitration community has the opportunity and the responsibility to tackle these issues actively and openly. Although initiatives such as those described above have contributed to an increase in diversity, the passage of time alone is unlikely to produce adequate change. For instance, the National Association of Women Lawyers' most recent survey of demographic data from the top 200 U.S. law firms (in terms of revenue) provides an illuminating example. Although women have long represented approximately half of law students and entry-level associates, the likelihood that women will become equity partners has remained largely unchanged in the last ten years: 16% in 2007 compared to 19% in 2017. At the current rate, and without new and continued efforts to address the lack of diversity, gender parity

might not be achieved in the next hundred years.

Further, as Prof. Susan Franck explained in her concluding remarks, there are unlikely to be blanket solutions to the lack of diversity in international arbitration, because the challenges affecting gender, race, national origin, and other forms of diversity often vary. Effectively addressing these challenges and increasing diversity and inclusion will help ensure the legitimacy, accuracy, and acceptability of the international arbitral process and of the outcome.

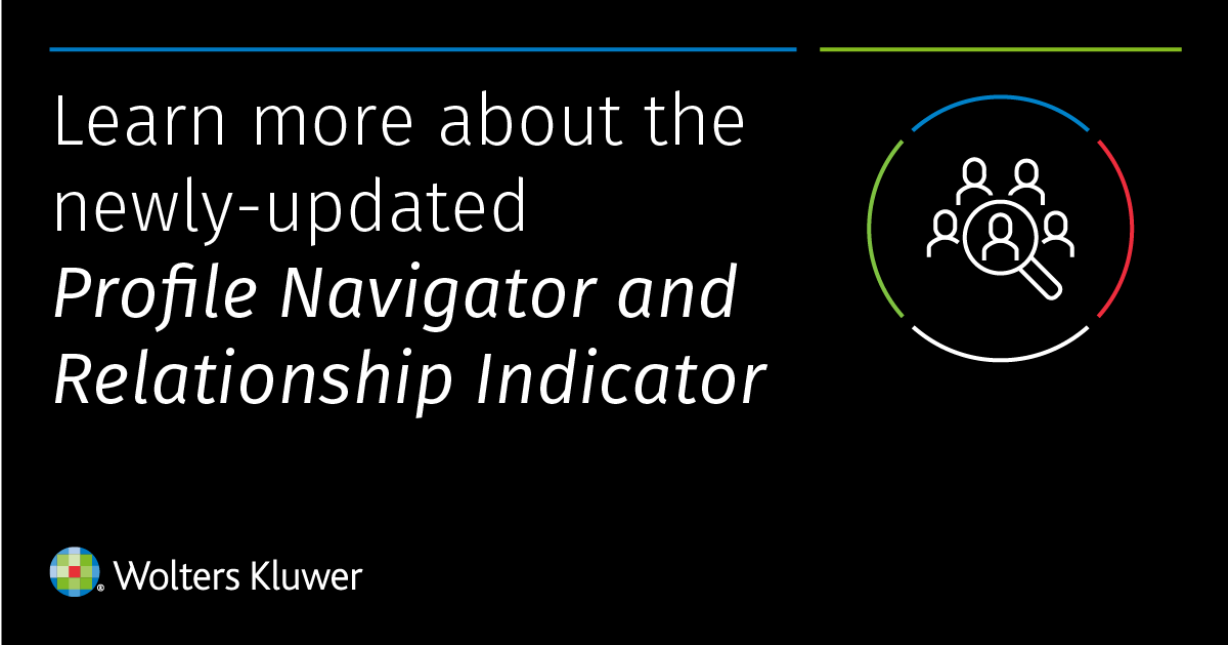***To make sure you do not miss out on regular updates on the Kluwer Arbitration Blog, please subscribe here.***

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References

?1 See Lucy Greenwood and C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, Arbitration International, Vol. 28, Issue 4 (2012); Lucy Greenwood and C. Mark Baker, *Is the Balance Getting Better? An Update on the Issue of Gender Diversity in International Arbitration*, Arbitration International, Vol. 31, Issue 3 (2015).

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