

Kluwer Arbitration Blog

“I Was the Judge”: ACICA Diversity Panel Discussion

Christina Han (Ashurst) · Thursday, September 28th, 2023 · ACICA

Efforts to promote diversity in arbitration continue to garner awareness and support from arbitral institutions, legal practitioners, experts, and the arbitration community in general (see e.g., [here](#) and [here](#)).

Unconscious bias is a significant barrier to achieving greater diversity and can hinder opportunities, progression, and careers. It is often tricky to address because, as its description suggests, it is based on assumptions and biases which one may not be conscious of or believe in. A recent illustration of such assumptions in play is Lucy Greenwood’s Twitter post on International Women’s Day last year. She recounted a recent experience when her daughter was ill and asked the school to call her father because her mother was in a hearing. One response to the post thought her frustration was unjustified and suggested that she should have asked the judge to stop the hearing to allow her to pick up the call. She then revealed to him that she was the “judge”.

The significant impact of unconscious bias on gender diversity of arbitrator appointments was recognised and discussed in the [ICCA’s 2022 Report on Gender Diversity in Arbitral Appointments and Proceedings](#). Of course, unconscious bias does not only arise from gender and in the selection of arbitrators, but also arises from nationality, ethnicity, culture, accent, sexuality, and age (and more) and impacts counsel, experts, and others in the arbitration community.

On 20 June 2023, the [Australian Centre for International Commercial Arbitration](#) (“ACICA”) launched its Diversity Committee and held a [panel discussion](#) on unconscious bias and the effects of assumptions in arbitration. Georgia Quick (President, ACICA and Partner, Ashurst) moderated the discussion and the panel featured Lucy Greenwood (Arbitrator, Greenwood Arbitration), Anne Secomb (Arbitrator, Secomb Arbitration), Guillermo Garcia-Perrote (Executive Counsel, Herbert Smith Freehills) and Professor Blake McKimmie (Professor and Associate Dean, University of Queensland).

The panel shared their experiences and perspectives on the topic with a particular focus on gender, accent, and culture.

Diversity Statistics

Ms Quick opened the session with statistics regarding diversity in the ACICA and the cases under its administration. There was significant improvement in arbitrator appointments for women over

the last decade from 14% of total appointments to 27% in 2019, 38% in 2020, and 40% in 2021. This reached parity in 2022, but in a twist, 100% of party appointments were male. Within the ACICA, the executive team reached gender parity for the first time in 2021.

Another focus of the ACICA is the greater participation of women as speakers in conferences. At the ACICA and CIARB Australia International Arbitration Conference in 2022, nearly 43% of 41 speakers were women. Last year, the ACICA implemented the [Australian Arbitration Week Principles](#) which asks organisations intending to hold an event to commit to ensuring a fair gender balance and inclusion of diverse speakers with regard to ethnicity, geography and culture when planning their events.

Women as Arbitrators and Experts

Ms Greenwood noted that the improving trend of representation of women in arbitrator appointments was positive but highlighted the need to remain vigilant about diversity fatigue and that maintaining momentum is key. She opined that unconscious bias operates on a sliding scale and much more needs to be done around intersectionality and other aspects of diversity. Until there is a high degree of representation at the senior levels, the struggle with unconscious bias will remain as our minds are programmed to categorise people very quickly – often associating men with leadership and women with family and caring responsibilities.

As to experts, Ms Greenwood was concerned that gender diversity amongst experts lagged behind even that of arbitrators. Since beginning her full-time practice as arbitrator six years ago, only two women had given expert evidence before her. She hoped more women would be given opportunities to give evidence, noting that many expert witnesses were supported by talented women as “number two”. Steps are being taken to improve the representation of women expert witnesses. Ms Greenwood pointed to the [Equal Representation for Expert Witnesses Pledge](#) and hoped that it would replicate the impact of the [Equal Representation in Arbitration Pledge](#). The challenge that women face in being selected for their first arbitral appointment is perhaps similar to the challenge women face getting their first opportunity to testify.

Working Across Cultural Lines and Languages

International arbitration commonly involves working with people from a variety of cultural backgrounds and who speak different languages. Drawing on his experience working in different jurisdictions, Mr Garcia-Perrote observed the need to be curious and flexible in the way practitioners approach communication, recognising that not every culture, client or opposing counsel will behave in the same way. This involves welcoming perspectives from civil law and common law and being open to approaches from jurisdictions outside the usual suspects such as the US, UK, and Australia. He opined that this is particularly important when dealing with and cross-examining witnesses – practitioners should be aware that other cultures have a different way of approaching how evidence is given and how witnesses may come across to arbitrators. He also observed that culture can be a relevant factor when selecting arbitrators as clients may benefit from selecting someone with a familiar cultural background who may have a greater understanding of the client’s perspective.

Turning to accent bias, Ms Secomb noted that despite the international nature of this area of practice, about 80% of all international arbitration awards are in English. This does not leave much room for other major languages and means English is important for accessing opportunities in the field of arbitration – whether an appointment as arbitrator, expert, or counsel. Ms Secomb noted the need to be aware of accent bias, especially as most English speakers are not native speakers. She noted that studies have shown that foreign accents can negatively impact perceptions of a person’s competency, suitability for a job, intelligence and even honesty. Accordingly, it is critical to work to filter and identify legitimate considerations of language quality from linguistic quirks if we are to achieve more diversity in the field of international arbitration.

Effect on Legal Decision-Makers

Professor McKimmie explained that biases and stereotypes affect all decision-makers, whether they have had legal training or not. Turning to credibility assessments, he warned we should be mindful that the credibility of “others” can be perceived negatively as a result of unconsciously valuing certain group members more positively. He noted that studies show credibility assessments to be inherently unreliable and they are especially so if one relies on signals such as an accent.

On engaging with experts, Professor McKimmie explained that many preconceptions about gender and language work to affect our assessment of what makes someone an expert. He observed that many of these unconscious beliefs undermine women when they are in the expert role and deviations from those expectations can result in negative reactions. Overcoming this in arbitration can be particularly challenging as a decision-maker without the same expertise is often required to judge and evaluate an expert’s evidence and credibility. Decision-makers naturally seek cues to assist their assessment, and this gives rise to a risk of falling back on biases like gender.

What Are the Solutions?

The panel then discussed what could be done to lessen the effects of unconscious bias.

Professor McKimmie stated that it is helpful to maintain focus on the task itself in obtaining the best result. Diversity, by bringing together a variety of unique expertise, reduces the effect of biases and enhances the chances of making the best objective decision. However, it is important to recognise that working in diverse groups is a less comfortable process, as Ms Greenwood observed. Agreeing with this, Professor McKimmie explained that research shows that, like the process of learning, people in more diverse groups experience more discomfort as they are pushed outside of their comfort zones.

Other helpful measures include tracking statistics to raise awareness and make potential biases visible. Professor McKimmie noted that this is the first step to discussing and addressing unconscious bias. He also noted that better representation helps to challenge stereotypes and change expectations by broadening mental representations – for example, what it means to be an expert or to have expertise. He also noted the role of men in coming to the table and deepening their understanding of gendered perception.

Ms Greenwood agreed that much comes down to gendered expectations and assumptions which

are difficult to tackle. While there is no magic bullet, practical steps include more events raising awareness, promoting women's affinity groups, and bringing your whole self to work. Ms Greenwood also warned that the solution should not be to mould the community in a homogenous way because cognitive diversity leads to better outcomes (as shown by research).

Further to these suggestions, Ms Secomb noted that greater awareness of accent bias and its impact on those breaking into the field for chair appointments and other senior roles is helpful. Although change is a long process, she was optimistic that new generations of practitioners are gaining a better understanding of unconscious bias.

Mr García-Perrote opined that it is important to challenge assumptions. A useful approach is to break down a task into its specifics. He encouraged practitioners, when they see others making assumptions or not being open-minded and flexible on a particular task (such as selecting an arbitrator or expert), to consider having a conversation and suggesting alternative approaches with a focus on outcomes and effectiveness. In his experience, although this may be a difficult task initially, this has been fruitful as people are responsive to obtaining the best outcome and doing the right thing.

What's Next for ACICA?

This discussion will form part of a series to ensure that the dialogue is ongoing, and out of which the ACICA hopes further engagement can take place and meaningful change can happen to support its existing efforts.

Next for the ACICA is the rollout of the ACICA Wing Person Initiative. This initiative aims to build confidence and connections by matching arbitration practitioners who are less familiar or just want a boost with those in the arbitration community who are more confident with their connections to attend events during the Australian Arbitration Week (8-13 October 2023) together. Further details of the initiative can be found [here](#).

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