

# Kluwer Arbitration Blog

## Use of Interpreters in Arbitration: Lessons from the California Court of Appeals in *FCM v. Grove Pham*

Camille Ramos-Klee · Tuesday, February 27th, 2024 · Asociación Latinoamericana de Arbitraje (ALARB)

In a recent case, *FCM Investments LLC v. Grove Pham LLC* (“*FCM v. Grove Pham*”), the California Court of Appeal, Fourth Appellate District, Division One (the “Court”) vacated an arbitral award based on a “reasonable perception of possible bias” of a sole arbitrator towards a party who chose to testify using an interpreter. Though *FCM v. Grove Pham* was a domestic arbitration, the field of international arbitration is no stranger to the use of interpreters, especially as English has increasingly become the *lingua franca* of both arbitration and international business. Though interpretation in arbitration has not been formally studied, similar concepts examined in court interpretation could equally apply to arbitration. The lessons drawn from *FCM v. Grove Pham* and studies on court interpretation serve as a reminder to arbitration practitioners on best practices for working with parties and witnesses not fluent in the language of the arbitration.

### **Relevant Background**

*FCM v. Grove Pham* concerned a canceled real estate deal between a real estate investor and a nursing home operator. The sole arbitrator found that Grove Pham breached its obligations under the relevant agreement based largely on witness credibility. Specifically, the arbitrator viewed the decision by Phuong Pham, the owner of Grove Pham, to use an interpreter as a tactic to appear less sophisticated than she was and felt this weighed heavily on her credibility overall. In the award, the arbitrator noted three reasons for her belief that Pham was capable of testifying in English, namely that Pham had lived in California for decades, had engaged in sophisticated business transactions, and had “functioned as an interpreter.”

The Court, in reviewing a lower court’s decision to confirm the arbitral award, found that the arbitrator’s award was based on “misconceptions about English proficiency and language acquisition” and showed possible linguistic and/or national origin bias, which served as grounds for vacating an award under the [California Code of Civil Procedure §1286.2](#). Specifically, §1286.2(a)(3) states that a court shall vacate an award where it finds “[t]he rights of the party [making a petition to vacate] were substantially prejudiced by misconduct of a neutral arbitrator.” [Prior California case law](#) found misconduct where there was an “impression of possible bias” on the part of an arbitrator.

The Court emphasized that decades spent in the United States was not proof of English fluency, citing a [Pew Research Center Study](#) that showed over 40% of foreign-born U.S. residents spoke English “less than very well.” The Court further argued that ethnic enclaves, such as Orange County’s “Little Saigon,” near where Grove Pham was operated, allowed immigrants to run sophisticated businesses without being proficient in English since all or most of their clientele would be fluent in their native language. Finally, the Court confirmed that Pham was not certified as an interpreter and found the record unclear on what was meant by “functioned as an interpreter,” particularly when Pham had required her daughter to interpret prior conference calls with FCM. Overall, the Court found a significant potential for bias in the award since the arbitrator only provided a four-page decision that focused almost entirely on witness credibility. For this reason, the Court chose to vacate the award.

### **Bias and Diversity: Considerations for Use of Interpreters**

Prior discussions of linguistic diversity in arbitration have focused on the implications on counsel of the choice of language of the arbitration, such as [considering the cultural implications of the choice of English](#) or [being aware of accent bias](#) in arbitral proceedings, both topics that have been previously explored in this blog. In contrast, use of interpreters is influenced by the choice of language, since the choice of language impacts whether interpreters are necessary, but ultimately affects perceptions of witnesses rather than lawyers. Nonetheless, neutrals must be aware of the potential for conscious or unconscious bias in the event of a witness using an interpreter. The arbitrator in *FCM v. Grove* saw nothing wrong with her assessment of Pham, which speaks to a need to raise awareness of why a witness might choose to use an interpreter. The potential for bias in turn raises the question of what standard is required in order to use an interpreter in an arbitration. While a linguistic analysis for use of interpreters has not been conducted in arbitration, the closest approximation would be analyses of court interpreters. From the standards studied and imposed in a court setting, one might extract ideas for what the standards should be in arbitration.

### **Linguistic Views on Use of Court Interpreters**

In determining whether an individual is able to testify in a second language, linguists such as Philipp Sebastian Angermeyer in [Multilingual Speakers and Language Choice in the Legal Sphere](#) have distinguished between “interactional competence,” meaning the ability to participate in conversations based on contextual information, and “linguistic and conceptual competence,” or the ability to understand complex information based on minimal context. In essence, as described in [Bilingualism in the Real World](#) by Inbal Itzhak et. al., though an individual may appear to be fluent or nearly fluent in a second language, they could lack the vocabulary to discuss experiences outside of their normal routine. For example, one would expect lawyers who often work in a second language to have fully developed their vocabulary of legal terms but would not expect a scientist to be familiar with that same vocabulary. In this vein, since those who appear as witnesses in an arbitration generally are not testifying regularly, they may not have developed the vocabulary to either completely give their testimony or understand fully how the arbitration process works.

Additionally, Inbal Itzhak et. al. have highlighted the presence of statutes that establish a right to an interpreter in court proceedings, such as the [Canadian Charter of Rights and Freedoms \(Section](#)

14), which guarantees the right to an interpreter in any legal proceedings, including civil. Indeed, in *FCM v. Grove Pham*, the Court premised its finding partially on [California Government Code § 68092.1](#), which requires courts in California to provide interpreters to “all parties who require one.” Due to this statute, the Court noted that “courts cannot, as a matter of public policy, draw adverse credibility inferences from a litigant’s decision to exercise that right.” The presence of these and similar statutes combined with the decision in *FCM v. Grove Pham* demonstrate the importance of confronting biases when faced with witnesses who require an interpreter.

### **Best Practices for Use of Interpreters in Arbitration Proceedings**

The use of interpreters can prolong a hearing and break up the flow of a cross-examination. As was the case in *FCM v. Grove Pham*, so too may there be concerns that an interpreter is being used as an advocacy tactic. Yet access to an interpreter can be vital for certain witnesses, and demonstrated bias on that choice can result in the vacating of an award, as occurred in *FCM v. Grove Pham*.

For counsel evaluating whether an interpreter is necessary, considering the difference between interactional competence and linguistic and conceptual competence becomes important. A witness testifying on standard routines or regular work may already possess the vocabulary necessary to recount their experiences, whereas a witness discussing something out of their ordinary experience may face more difficulties. Parties might consider using an interpreter as support for a witness, meaning the witness will attempt to testify in English or the language of the arbitration with the interpreter intervening where the witness has difficulty responding to or understanding a question.

For arbitrators, the most important takeaway is to be aware of any unconscious bias towards witnesses who testify using interpreters. As can be seen in *FCM v. Grove Pham*, even potential bias regarding use of interpreters can be grounds for vacating an award. In such an international field as arbitration, combatting bias is paramount.

### **Conclusion**

*FCM v. Pham Grove* demonstrates a need for international arbitration practitioners to be aware of potential biases—both conscious and unconscious—towards witnesses who choose to use interpreters. Though *FCM v. Pham Grove* was a domestic arbitration applying domestic statutes, the existence of statutes guaranteeing a right to an interpreter in other jurisdictions combined with the regular use of interpreters in international arbitration show that the issues raised are global concerns. Linguistic studies of court interpretation provide some understanding of how these concerns should be addressed. Ultimately, as with any conscious and unconscious bias, the goal in international arbitration should be to maintain the integrity of the arbitral process and combat such biases.

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