

This paper is part of the TDM / ArbitralWomen special on "Dealing with Diversity in International Arbitration" edited by:



Rashda Rana SC
39 Essex Street
President ArbitralWomen



Louise Barrington
Independent Arbitrator
and Director Aculex
Transnational Inc

ARBITRALWOMEN

The International Network of
Women in Dispute Resolution

Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.transnational-dispute-management.com

© Copyright TDM 2015
TDM Cover v4.1

Transnational Dispute Management

www.transnational-dispute-management.com

Gender and International Commercial Arbitrators: Contributions to Sex Discrimination in Appointments by D.R. Demeter, P. Eastal and N. Nelson

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

**GENDER AND INTERNATIONAL COMMERCIAL ARBITRATORS:
CONTRIBUTIONS TO SEX DISCRIMINATION IN APPOINTMENTS**

Dalma Demeter, Patricia Easteal* and Noni Nelson

Corresponding author

Professor of Law, University of Canberra

patricia.easteal@canberra.edu.au

Abstract

In this paper, we look at gender differences in communication and negotiation in general and in judging and mediation specifically. We then examine the tasks and skills involved in international commercial arbitration and identify potential gender differences in the style and reasoning in arbitration and how either the differences, or the perception of them could contribute to sex discrimination in appointment. We theorise how this is a likely effect of the invisible gender biases through which the role of a private binding decision-maker is seen. We conclude by suggesting an alternative model that celebrates diversity.

Introduction

The attempts of women in the late nineteenth and early twentieth centuries to gain entry into the legal profession have been met with sustained resistance. The absolute exclusion that prevailed was a clear manifestation of the institutional deployment of power against women.¹

Although there has been some improvement in recent years, women continue to experience inequitable treatment within the legal system and its related professions.² In private law firms and in the Bar, women are still apt to be defined as outsiders given a legal culture that continues to be ‘built around men and...defined by traits at the masculine end of a gender personality continuum: neutral and rational as opposed of emotive; adversarial instead of mediating; and impersonal in lieu of caring.’³ From legal practice to the judiciary, there is a conservatism with a correlate resistance to change that is conducive to practicing law in a certain way because ‘that’s the way it has always been done.’⁴

What about arbitrators though? Are women in that field also perceived of as being outside of the normative ‘club’ particularly as international commercial arbitrators, given that commercial is ‘hard’ law as opposed to family law or children’s law, which are seen as ‘soft’ (at least within academia) and better suited for women?⁵ A 2007 Global Arbitration Review survey of ArbitralWomen members found that 46% of its

¹ Margaret Thornton, *Dissonance and Distrust Women in the Legal Profession* (Oxford University Press, 1996) 41.

² Fiona McLeod and Leonie Kennedy, ‘Women in Practice’ in Patricia Easteal (ed) *Women and the law in Australia* (LexisNexis Butterworths, 2010).

³ Patricia Easteal ‘Setting the Stage: The ‘Iceberg’ Jigsaw Puzzle’ in Patricia Easteal (ed), *Women and the law in Australia* (LexisNexis Butterworths, 2010) 1-20.

⁴ Patricia Easteal, *Less than equal: Women and the Australian legal system* (LexisNexis Butterworths, 2001).

⁵ See Terry Hutchinson, ‘Seeking Yoda: Mentoring Women Legal Academics’ (2002) 2 *Queensland University of Technology Law and Justice Journal* 175.

members said they had experienced ‘unwitting bias’ during international arbitration.⁶ Women acting as counsel report experiencing condescending treatment with one woman commenting that ‘male arbitrators sometimes refer to female counsel by first names, while calling the opponent ‘Mr.....’ – “incredibly annoying”.⁷ One female counsel also reported ‘being mistaken for the secretary when she was in fact lead counsel on the file’ while another woman counsel mentioned ‘being taken for a trainee and ignored for much of the proceedings.’⁸ Experiences such as the following are reported:

We have to be twice as good to make the same impression.⁹

The difference between men and women...is the fact that there is no room for mistakes which are forever remembered, as opposed to mistakes made by men.¹⁰

When a man succeeds his success is attributed to his skills, whereas the success of a woman is related to luck; a man is assertive but the woman is considered aggressive...Women must be capable in their professional life, present in their family and social life, efficient everywhere, in summary excellency is required from women and they are expected to make efforts on all fronts.¹¹

It is interesting that the UNCITRAL Model Law on International Commercial Arbitration itself, although amended in 2006, uses male-specific language, which

⁶ Lucy Greenwood and Mark Baker, op cit., n. 130, at 661 citing David Samuels, ‘Network Effects’ (2007) 2 *Global Arbitration Review* 9.

⁷ David Samuels, ‘Network Effects’ (2007) 2 *Global Arbitration Review* 9, at 10.

⁸ Louise Barrington, ‘Arbitral Women A Study of Women in International Commercial Arbitration’ in Geoffrey Beresford Hartwell (ed) *The Commercial Way to Justice* (1997) 229, 226.

⁹ Clarisse von Wunscheim quoted in Samuels, above n 7, 11.

¹⁰ English translation of Philippe, ‘Women have a role to play in the dispute resolution world’ (2008) *Les Cahiers de Driot et de Procedure* 23, at 27 see <<http://www.arbitralwomen.org/files/publication/46011902041128.pdf>>.

¹¹ Philippe, Ibid.

reinforces the ideal that a male arbitrator is the norm (see Articles 11-15 on the composition of arbitral tribunal).

The limited data available do show women continue to be a minority,¹² 'if not a "tiny fraction" of the international arbitrator population.'¹³ Of the 599 arbitrators listed in the survey of commercial and treaty disputes by the American Lawyer Scorecard 2007, 34 appointments were women, 30 of which were in treaty disputes.¹⁴ The International Institute for Conflict Prevention and Resolution (CPR Institute) reported that 'women comprised 10 percent of its roster of neutrals and 25 percent of the prestigious National Roster and were selected 13 percent of the time' in 2011. In 2010 'the American Arbitration Association (AAA) administered only three arbitrations in which the parties had selected a panel that was entirely made up of women'; however, in the same year, 'women were appointed in roughly 15 percent of AAA arbitrations involving claims for money' and in 23 percent of non-monetary labour cases.¹⁵ In addition, one Columbia Law School study found that just 6.5 percent of all appointments in investment treaty arbitrations were women, with two well-known and respected women making up three-quarters of that percentage. This is contrasted with the most popular male arbitrators who accounted for only 5 percent of the total appointments of men.¹⁶

Further, although institutions do tend to appoint more diverse candidates than individual parties, the percentage of women appointed remains very low. Of the London Court of International Arbitration's (LCIA) 336 appointments in 2011, 22 were women: 16 of the 119 arbitrators selected by the LCIA Court and 6 of 217

¹² Lucy Greenwood, 'Unlocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals' (2013) 42 *International Law News* see http://www.americanbar.org/publications/international_law_news/2013/spring/unlocking_pipeline_achieving_greater_gender_diversity_international_arbitration_tribunals.html.

¹³ Greenwood and Baker, above n 6, 654; Maurice Goldhaber, 'Madame La Presidente' (2004) 1 *Transnational Dispute Management* quoting S. Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 *North Carolina Law Review* 1.

¹⁴ Samuels, above n 7, 10.

¹⁵ Deborah Rothman, 'Gender Diversity in Arbitrator Selection' (2012) *Dispute Resolution Magazine* 23-24.

¹⁶ Rothman, *Ibid.*

arbitrators selected by the parties.¹⁷ Similarly, the Stockholm Chamber of Commerce (SCC) reports that 6.5% of party *and* SCC appointed arbitrators between 2003-2012 were women compared with 8.4% of those appointed by the SCC only.¹⁸

Not surprisingly then, a few years ago for example, a (male) author provoked waves of reaction when stating *inter alia* that ‘an observer from planet Mars may well observe that international arbitral establishment on earth is white, male and English speaking [...] The red alien from Mars will be puzzled in his own way because [...] more than half the total population [on Earth] are women.’¹⁹ Even if the situation has slightly (and questionably) improved since this observation, what are the reasons behind this homogenous male dominance of the field? Are there gendered communication styles that affect how men and women negotiate agreement between two parties and/or how they make determinative decisions? How could such differences, or the perception of them and the invisible gender biases in constructing the role of binding enforcer contribute to sex discrimination in appointment?

In order to respond to these questions in the following paper, first we look briefly at some of the findings concerning differences in communication and thinking between males and females. Next, we examine what has been found as far as gender variation for different dispute resolution practitioners: mediators, arbitration counsel and judges. Then, we ask whether these differences could affect how men and women act as arbitrators or whether perceptions of them and/or of outcome by gender could be contributing to discrimination in selection of arbitrator. Before proceeding though, a caveat: We must note that the female and male styles of communication and other gendered characteristics are generalized observations that do not apply to everyone; the effects of intersectionality must be considered. We must also acknowledge that the current theoretical analysis is based on existing literature and anecdotal evidence from the profession flagging the issue, which need to be corroborated with further empirical research.

¹⁷ Greenwood and Baker, above n 6, 665.

¹⁸ *Ibid.*

¹⁹ Dr Nathan ‘Well, Why Did You not Get the Right Arbitrator?’ (2000) 15 *Mealey’s International Arbitration Report* 24.

Perceived Gender Differences in Communication

Some gender scholars discern between stereotypically feminine ‘expressive’ traits (nurturance and kindness) and stereotypically masculine ‘instrumental’ traits (independence and competitiveness):²⁰

men are inclined to be strong, dominant, powerful, aggressive, logical, tough and resistant to emotional issues. This macho characterisation is professionally good. Women are inclined to be vulnerable, intuitive, empathetic, emotional, subjective, personal and sensitive to context.²¹

It is hypothesized that these sorts of dissimilarities do contribute to gendered communication styles, with evidence that men’s language tends to express a more competitive perception, and women’s language tends to express a more interdependent perception.²² A number of differences between the vocabulary, syntax verbal and para-linguistic styles of male and female communication have been identified.²³ Women’s sentences are more likely to end with a question mark either by intonation or with a ‘tag’ question such as, ‘It’s a fair outcome, isn’t it?’ and tend to use terms such as ‘we’ to a greater extent. In addition, women sometimes appear to lessen their commitment to what they are saying through the use of conversational ‘down-toners’ that minimise the impact of what they are saying,²⁴ including ‘hyper-polite circumlocutions’ such as ‘It would be really nice if you could please leave me

²⁰ Ibid.

²¹ William Felstiner, Ben Pettit, E Lind and N Olsen in Ulrike Schultz and Gilesa Shaw (eds) *Women in the World’s Legal Professions* (Hart, 2003) 27.

²² Deborah Tannen, *You Just Don’t Understand - Women and Men in Conversation* (Ballantine, 1990).

²³ Discussed in Patricia Easteal, Sally Bradford and Lorana Bartels, ‘Language, Gender and ‘Reality’: Violence Against Women’ (2012) 40 *International J. of Law, Crime and Justice* 324, available at <<http://dx.doi.org/10.1016/j.ijlcj.2012.05.001>>.

²⁴ Penelope Eckert and Sally McConnell-Ginet, *Language and Gender* (Cambridge University Press, 2003) 183-184.

alone’, and ‘semantically ambiguous adjectives and intensifiers’ such as ‘I guess it was kind of OK’.²⁵

In addition to having a less powerful, more indirect and person/process orientation in their interaction style, women have been found to be more collaborative, facilitative and conciliatory communicators.²⁶ This contrasts with a masculine communication style, which tends to promote autonomy, competitiveness and confrontation.²⁷ Accordingly, men are more apt to interrupt, challenge, dispute, ignore and try to control the topic of discussion.²⁸ Indeed:

all communication practices are tied in some way to the cultural norms put in place by patriarchy...[and] there is no magic communication forum that frees the speaker completely from the constructed gender communication practices of his or her own culture.²⁹

While this paper does not intend to reinforce stereotypes and female legal professionals are not necessarily conforming to such stereotypes, it does appear that the masculine communication style, which is more direct and powerful, and seen as correlating with more objective and logical thinking, fits the ideal of a successful arbitrator. Such a perception can also lead to the inadvertent exclusion of female

²⁵ Lucie White, ‘Subordination, Rhetorical Survival Skills, and Sunday shoes: Notes on the hearing of Mrs. G’ in Katherine Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview, 1991) 404, 406.

²⁶ Linda Coates, Janet Beavin Bavelas and James Gibson, ‘Anomalous language in sexual assault trial judgments’ (1994) 5 *Discourse & Society* 189; Tannen, above n 22; Ronald Wardhaugh, *An Introduction to Sociolinguistics* (Wiley-Blackwell Publishing, 6th ed, 2010).

²⁷ Janet Holmes, *Gendered Talk at Work: Constructing Gender Identity* (Blackwell, 2006) 9.

²⁸ Wardhaugh, *Ibid*, 13.

²⁹ Melissa Ames and Sarah Himsel Burcon (eds) ‘Introduction: Women and Oral Culture’ in *Women and Language Essays on Gendered Communication Across Media* (McFarland, 2011) 12.

approaches to decision-making.³⁰ Consequently, clients may be deprived of more diverse approaches to decision making that female arbitrators have to offer.³¹

Translating into Negotiation, Mediation and Determinative Decision-making

Because dispute resolution processes themselves are interactive, involving many different combinations of participants, setting and context, it is difficult to isolate gender as a direct cause of variation. Findings are mixed concerning gender as a contributor to variation in dispute resolution, and in examining outcome of dispute resolution by gender of the third party or decision-maker, there is inconclusive evidence to suggest that gender has (or doesn't have) any significant or predictable impact on dispute resolution generally.³² For instance:

Prior criminal history and offense severity are the main determinants of the sentencing decisions of both women and men judges, and women judges invoke a trial penalty in a fashion similar to their male counterparts. These findings are consistent with [the view] that the distinct life experiences of men and women judges and their differing beliefs...are in most respects offset by the judicial recruitment and socialization process.³³

On the other hand, fairly recent research indicates that the difference that gender makes is quite 'variable', with some younger aged people engaging in more 'cross-

³⁰ Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 *Melbourne Journal of International Law* 205; Sandra Berns, 'Judicial Decision Making and Moral Responsibility' (1991) 13 *Adelaide Law Review* 120.

³¹ Anja Louis, 'Equality, Difference and All That Jazz: The Infamous Debate and a Spanish Take on It' (2001) *Griffith Law Review* 10, 211; Thornton, above n 1, 265; Rosemary Hunter, 'Can Feminist Judges Make a Difference' (2008) 15 *International Journal of the Legal Profession* 70.

³² Andrea Kupfer Schnieder, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143; Carrie Menkel-Meadow, 'Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers What Difference Does "Gender Difference" Make?' (2001) 17 *Negotiation Journal* 257.

³³ Darrell Steffensmeier and Chris Hebert, 'Women and Men Policymakers' (1999) *Social Forces* 77 1183.

over' or 'merging' between stereotypical male and female approaches to dispute resolution.³⁴ For example, some argue 'that women's interpersonal style allows them to collaborate and achieve creative solutions but that in mixed-sex dyads, where the other party is competitive, these abilities may be exploited as weaknesses.'³⁵ Anecdotal reports concerning variation in style by sex of the lawyers acting in arbitral matters make similar observations:

Female advocates are more willing to concentrate on the critical issues of a case rather than engage in point-scoring for its own sake. There seems to be less ego in their lawyering...negotiations with opposing women arbitration practitioners are usually harmonious and rational, and accordingly much cheaper for clients. Women are also often better at organising their time...If the clients simply want to get on with resolving their dispute efficiently, then women probably deliver a better service.³⁶

Also, when representing someone else, women are credited with having different and sometimes better leadership, problem solving or representative skills.³⁷

Furthermore, men have been shown in experimental studies to be more successful than women in using 'tit for tat' strategy in matrix games. 'They collaborated only with a collaborative partner and competed with a competitive one, a profitable strategy in matrix games.'³⁸ Men's 'willingness to collaborate was therefore attributed

³⁴ See Carrie Menkel-Meadow, 'Portia Redux: Another Look at Gender, Feminism and Legal Ethics' in Stephen Parker and Charle Stampford (eds) *Legal Ethics and Legal Practice* (Clarendon Press, 1995).

³⁵ Noa Nelson, Adi Zarankin and Rachel Ben-Ari, 'Transformative Women, Problem-Solving Men? Not Quite: Gender and Mediators' Perceptions of Mediation' (2010) *Negotiation Journal* 287 at 291 (discussing Linda Babcock and Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* (Princeton University Press, 2003).

³⁶ Quoted in Samuels, above n 11, 19.

³⁷ Deborah Kolb and Judith Williams, 'Everyday Negotiation' in Deborah Kolb and Jean Bartunek (eds) *Hidden Conflict in Organizations: Uncovering Behind The Scenes Disputes* (Sage Publications, 1992

³⁸ Nelson et al, above n 35.

to an assertive, self-serving attitude rather than to a social, interdependent one.³⁹ When faced with moral dilemmas, Gilligan found that men tended to employ an ‘algebraic equation’ method using rules and legal reasoning to balance property rights against human needs in order to come to a single solution.⁴⁰ Men were inclined to operate more with an ‘ethic of rights’, while women tended to rely on an ‘ethic of care’.⁴¹

Accordingly, another study identified that women were more apt to compromise or give in to the other side, especially when they had a relationship such as friend, family member, repeat player, or workplace superior with the other person.⁴² This fits with early research showing that women were more apt to prevaricate and look for other solutions,⁴³ searching for both processes and outcomes that could meet the needs of all the parties involved in a dispute.⁴⁴ Therefore, female mediators have been found to ‘have a stronger interpersonal orientation’,⁴⁵ and ascribe more importance to the emotions and nonverbal behaviour of the parties than male mediators who instead emphasize a more instruments, settlement-orientated, approach.⁴⁶ They are also purportedly more facilitative compared to male mediators who report taking more control through transactional leadership to orchestrate a distributive framework in which to achieve a settlement.⁴⁷ Men are more apt to view conflict as an opportunity

³⁹ Amy Walters, Alice Stuhlmacher, and Lia Meyer, *Gender and Negotiator Competitiveness: A Meta-analysis* (1998) discussed in Nelson et al, above n 35, 291.

⁴⁰ Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982).

⁴¹ Sue Davis, ‘Do Women Judges Speak ‘In A Different Voice?’ Carol Gilligan, Feminist Legal Theory and The Ninth Circuit’ (1992-1993) 8 *Wisconsin Women's Law Journal* 143-45.

⁴² Menkel-Meadow, above n 34, 5.

⁴³ Discussed in Menkel-Meadow, above n 34, 5.

⁴⁴ Menkel-Meadow, Ibid.

⁴⁵ Nelson et al., above n 35, 292-3.

⁴⁶ See Margaret Herrman, Nancy Hollett, Dawn Eaker and Jerry Gale ‘Mediator reflections on practice: Connecting select demographics and preferred orientations’ (2003) 20 *Conflict Resolution Quarterly* 403 cited in Nelson et al., above n 35, 292-3.

⁴⁷ See Nelson et al., above n 35, 293; Alice Stuhlmacher and M Morrisett, ‘Men and women as mediators: disputant perceptions’ (2008) 19 *International J. of Conflict Management* 249, at 251 looking at the findings from David Maxwell, ‘Gender Differences in Mediation Styles and Their Impact on Mediator Effectiveness’ (1992) 9 *Mediation Quarterly* 355.

to reassert and reinforce status differences and maintain their position by distributing resources to followers in order to keep them subordinate and will focus their attention on substantive rather than qualitative aspects of the parties' relationships.⁴⁸ Females have been shown to use more formulations during mediation, reframing, rephrasing and summarising information that disputants provide during a mediation for clarification, while men use them to maintain control.⁴⁹

Another difference is that in arriving at a settlement, women may consider resolution more contextually:

There is this myth that women are not as strong as men in getting what they want in negotiation because they have a tendency to accept lower value settlements, ...this is because women have a capacity to take more into consideration, so they will give up more value in monetary terms for alternative tangible benefits.⁵⁰

Consequently, one study found that female judges' sentencing decisions were 'contextualized more by defendant characteristics such as race, sex, an age' and prior record in both incarceration and length of imprisonment. These findings support the 'hypothesis that women judges will be more affected by recidivism risk and will be more particularistic in their sentencing than men judges'.⁵¹

Another potential gender difference in decision-making: although female lawyers may manifest no difference in decision-making to male lawyers on questions in which the ethical rules are relatively clear, when the rule is ambiguous, female lawyers have

⁴⁸ Maxwell, *Ibid.*

⁴⁹ Sandra Ragan, 'Alignment and Conversational Coherence' in Robert Craig and Karen Tracy (eds) *Conversational Coherence: Form, Structure, and Strategy* (1983); Stuhlmacher and Morrissett, above n 47, 249.

⁵⁰ Jill Evans, 'Redressing the Balance' (2012) 10 *The Resolver* 13.

⁵¹ Steffensmeier and Hebert, above n 33, 1184.

been found as slightly more likely to consider ‘justice’ to the other side rather than ‘pure’ zealous advocacy.⁵²

How Could these Gender Differences Translate into International Arbitration?

In order to answer this question, first we must identify briefly the role of the international arbitrator and its similarities with other dispute resolution professionals discussed above.

Arbitrators are perceived to play various roles in different settings. This includes the historical view of the arbitrator as diplomat (see the ‘Casablanca case’ France v Germany, Permanent Court of Arbitration, 22 May 1909, The Hague.), which is criticised and no longer used in that form. While the arbitrator as settlement facilitator is a debated part of an arbitrator’s role, in legal cultures (predominantly civil law) where judicial proceedings include and encourage settlement attempts from a judge, facilitating a consensual solution is accepted or even expected from arbitrators as well.⁵³ Finally, the most important role of an arbitrator is that of a ‘pragmatic problem-solver’⁵⁴ who is most commonly compared to a judge, albeit one with ‘three different personalities’ in light of the arbitrator being not only a decision-maker, but also in a special relationship with the parties for being a ‘chosen judge’, and also acting as a ‘catalyser to the negotiated rules’, rendering the arbitrator to be ‘one man (sic) [in] three roles’.⁵⁵ An arbitrator is also defined as a ‘social engineer’ acting ‘to decide a dispute in accordance with the will and the legitimate expectations of the parties’ in an autonomous forum.⁵⁶

⁵² Rand Jack and Dand Jack, *Moral Vision and Profession Decisions: The Changing Values of Women and Men Lawyers* (Cambridge University Press, 1989).

⁵³ Christian Bühring-Uhle, Lars Kirchhoff, Gabriele Scherer, ‘The Arbitrator as Mediator. Some Recent empirical Insights’ (2003) 20 *Journal of International Arbitration* 81.

⁵⁴ Michal Alberstein, *Pragmatism and Law, From Philosophy to Dispute Resolution* (Ashgate Dartmouth, 2003).

⁵⁵ Mohammed Bedjaoui, ‘The Arbitrator: One Man – Three Roles: Some Independent Comments on the Ethical and Legal Obligations of an Arbitrator’ (1988) 5 *Journal of International Arbitration* 7.

⁵⁶ Chalamambos Pamboukis, ‘On Arbitrability: The Arbitrator as a Problem Solver’ in Loukas Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (2009) 125.

Regardless of how they are perceived, however, generally speaking, international arbitrators have a duty to:

Make themselves acquainted with the facts of the case and the claims, allegations and defences of the parties and, within a reasonably short period of time, to make a reasoned award, based upon the applicable law, which fulfils the requirements for the award to be enforceable.⁵⁷

Irrespective of the differences in being appointed by the disputing parties and having a mandate to render such decisions limited to that appointment, '[i]n the abstract, the mechanism applied by a judge and by an arbitrator, is not any different.'⁵⁸ Similarly to a court judge, '[a]n arbitrator must in particular have a real aptitude for judging.'⁵⁹ An arbitrator's decision-making - just as a judge's - is inherently affected by the fact that both arbitrators and judges are human beings, whose 'minds function anatomically just as do the minds of others.'⁶⁰ For this reason, '[b]efore considering him as a judge, the arbitrator as a *man* (sic) should be borne in mind.'⁶¹

As the literature though rightfully observes about the communication skills required:

[g]one are the days (or at least they should be gone by now) where the arbitrator runs an arbitration before him like an old-fashioned judge mumbling from time to time 'please go on' or 'objection sustained', otherwise remaining silent until he renders his judgment to the surprise of the parties in front of him.⁶²

⁵⁷ Allan Philip 'The duties of an Arbitrator' in Lawrence Newman and Richard Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (Juris, 2008) 67.

⁵⁸ Mauro Rubino-Sammartano, 'The Decision-making Mechanism of the Arbitrator vis-a-vis the Judge' (2008) 25 *Journal of International Arbitration* 167.

⁵⁹ Bedjaoui, above n 55, 10.

⁶⁰ Edna Sussman, 'Arbitrator Decision-making: Unconscious Psychological Influences and What You Can Do about Them' (2013) 24 *The American Review of International Arbitration* 488.

⁶¹ Bedjaoui, above n 55, 9.

⁶² Hilmar Raeschke-Kessler, 'The Arbitrator and settlement Facilitator' (2005) 21 *Arbitration International* 523.

Rather than ‘watching a game’ played by disputing parties only to proclaim one of them victorious at the end,⁶³ even ‘an arbitrator as judge’⁶⁴ is expected ‘to establish a fruitful line of communication with the disputing parties and their counsel’.⁶⁵

Indeed, communication is a key skill of an arbitrator because it functions ‘as a primary tool for listening to the parties, synthesizing their respective positions, and obtaining satisfactory results.’⁶⁶ This includes the ability to communicate in an ‘other-orientated’ style because of the high involvement of ‘people from different legal backgrounds...societies, and obviously with different interests’ which ‘demands flexibility’.⁶⁷

Whether an arbitrator’s communication is used only to manage the arbitration process or to ‘talk some sense into [the parties]’⁶⁸ reflects the type of role adopted, which depends on ‘the parties, the arbitrator him- or herself and the applicable legal rules (both procedural and substantive)’.⁶⁹ As a decision-maker,

the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration.⁷⁰

The more that an arbitrator acts as a dispute settlement facilitator and the more intrusive the technique used in the parties’ decision-making process, the more skills

⁶³ Piero Bernardini, ‘The Role of the International Arbitrator’ (2004) 20 *Arbitration International* 114.

⁶⁴ Bedjaoui above n 55, 9.

⁶⁵ Bernardini, above n 63, 116, referring to ‘interactive arbitration’ – see Bernardo Cremades, ‘Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration’ (1998) 14 *Arbitration International* 157.

⁶⁶ Raeschke-Kessler, above n 62, 3.

⁶⁷ Ibid.

⁶⁸ Christian Buhring-Uhle, Lars Kirchof and Gabriele Scherer, *Arbitration and Mediation in International Business* (Sweet & Maxwell, 2006) 87.

⁶⁹ Bernardini, above n 63, 114.

⁷⁰ Raeschke-Kessler, above n 62, 525.

particular to negotiation/mediation/conciliation that the arbitrator needs.⁷¹ However, we note that mediator-style settlement facilitation, while common in some cultures,⁷² is not the primary role of international commercial arbitrators. In line with this, while communication skills may be part of mediator accreditation,⁷³ no such skills are explicitly required from an arbitrator.

Now, turning to gender - no one has yet identified a specific 'female' style of arbitration. Even though communication skills, decision-making aptitudes or the extent and style of an arbitrator's facilitative approach may appear different between male and female arbitrators, differences may be related to variations in cultural dimensions rather than gender.⁷⁴ Just as 'two judges may decide the same dispute in a different or even in the opposite way [...] two arbitrators may do the same'.⁷⁵

Nevertheless, given what we have described for gender differences in mediation and negotiation, we would hypothesize that there may be similar variation by the sex of the arbitrator, to the extent to which mediation and negotiation skills could be more, or at least as relevant as judging skills. Here then are a couple of examples of where women's way of thinking and relating linguistically could translate into differences in how they arbitrate.

A 'women's style' might be a good fit in delivering split outcomes, but less suitable for the evidence-based decision-making that most international commercial

⁷¹ Raeschke-Kessler above n 62, 531, referring to Robert Mnookin, Scott Peppet and Andrew Tulumello, *Beyond Winning. Negotiating to Create Value in Deals and Disputes* (Harvard University Press, 2000) 46.

⁷² *Ibid*, 525.

⁷³ See Laurence Boulle, *Mediation principles, process, practice* (LexisNexis Butterworths, 3rd ed., 2011) 486 and following.

⁷⁴ Fan Kun, 'Cultural Dimensions, Psychological expectations and behavioural Patterns in Arbitration' presentation at the 2013 Brunel conference on The Roles of Psychology in International Arbitration, summary available at http://www.brunel.ac.uk/__data/assets/pdf_file/0008/299528/Cultural-Dimensions,-Psychological-Expectations-and-Behavioral-Patterns-in-Arbitration_Fan-Kun.pdf

⁷⁵ Rubino-Sammartano, above n 58, 168.

arbitration actually uses.⁷⁶ See, for example, Posner who asserts that compared to judges, arbitrators are more likely ‘to split the difference between the two sides’ in order to ensure future appointments.⁷⁷ Contrary to this perception, however, according to a 2012 survey, counsel declared to have experienced ‘baby-splitting’ in only 17% of their cases, while arbitrators acknowledged such decisions in as few as 5% of their cases.⁷⁸

Do (Perception of) Differences Contribute to Discrimination?

This paper does not advocate for positive discrimination and does not argue that successful female arbitrators are more ‘man-like’. It does argue, however, that gender differences, or at least the perception that they exist, might be contributing to sex discrimination in arbitral appointments. If women are seen as more facilitative and naturally less controlling, such characteristics may be negatively evaluated when looking for ‘personal characteristics related to [an arbitrator’s] ability and availability to handle the case, which if absent would negatively affect the fair conduct and resolution of the dispute.’⁷⁹

Certainly the view that there were gender differences (and overall deeply embedded sexual inequality characteristic of the era) led to the first arbitration manual back almost 400 years ago instructing that ‘[a]nyone could be an international arbitrator except those of unsound mind, idiots and unmarried women’.⁸⁰ Having come a long way since that rule, contemporary observers wonder ‘[w]hy, for example, when

⁷⁶ William Park, ‘Rectitude in International Arbitration, *Arbitration International*’ (2011) 27 *Arbitration International* 525.

⁷⁷ Richard Posner, *How Judges Think* (Harvard University Press, 2010) 128

⁷⁸ The 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, Queen Mary University, available at <<http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf>>.

⁷⁹ Horacio Grigera Naon, ‘Factors to Consider in Choosing an Efficient Arbitrator’ in Albert Jan van den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series* (1999) 287.

⁸⁰ Gerald Aksen, ‘Reflections of an International Arbitrator, *Arbitration International*’ (2007) 23 *Journal of International Arbitration* 255, at 256 referring to a 1648 textbook called *The Law of Arbitration*.

women are so well represented at arbitration conferences, are there so few appointments of women international arbitrators’?⁸¹

We must keep in mind that arbitration is a private and determinative process that can be used in place of judicial proceedings. In arbitration ‘parties agree to the binding resolution of their disputes by adjudicators, known as arbitrators, *who are selected by the parties*, either directly or indirectly via a mechanism chosen by the parties.’⁸² What factors appear to affect selection? Domestic and non-commercial cases bear characteristics influenced by local or field-specific socio-cultural traditions and norms that affect the choice of arbitrators in a uniform and generally accepted way within that jurisdiction or field. In international arbitration, the multicultural influences and the differences between the backgrounds of participants in a single case balance against each other. Therefore, international cases are not affected to that extent by municipal expectations. In addition, cross-border business relationships are less reactive to aspects that are not directly relevant to the commercial transaction itself. In theory, this environment ensures/should ensure that arbitrators are chosen only with efficiency in mind, to perform their duties in solving the dispute.

Who best to choose then? Dated research showed that parties placed considerable importance on biographical characteristics of an arbitrator as these traits were seen as influencing all aspects of the arbitral process including possibly the success of the outcome.⁸³ A more recent study has confirmed that ‘[o]pen-mindedness and fairness, prior experience of arbitration, quality of awards, availability, knowledge of the applicable law and reputation are the key factors that influence corporations’ choices

⁸¹ David Hacking, ‘Ethics, Elitism, Eligibility: A response –What happens if the Icelandic Arbitrators fails through the ICC?’ (1998) 15 *Journal of International Arbitration* 73.

⁸² Michael McIlwrath and John Savage, *International Arbitration and Mediation A Practical Guide* (Kluwer, 2010) 5.

⁸³ See for eg: David Bloom and Christopher Cavanagh, ‘An Analysis of the Selection of Arbitrators’ (1986) 76 *American Economic Review* 408; Eric Lawson Jr., ‘Arbitrator Acceptability: Factors Affecting Selection’ (1981) 36 *The Arbitration J.* 22; Julis Rezler and Donald Peterson, ‘Strategies of Arbitrator Selection’ (1978) 70 *Labor Arbitration Reports* 1307; Leslie Briggs and John Anderson, ‘An Empirical Investigation of Arbitrator Acceptability’ (1980) 19 *Industrial Relations* 163; Walter Primeaux Jr. and Dalton Brannen, ‘Why Few Arbitrators are Deemed Acceptable’ (1975) 98 *Monthly Labor Review* 27.

about arbitrators’.⁸⁴ These findings are consistent with a 2013 survey, which showed that ‘[t]he most influential factors in the appointment of arbitrators were the individual’s (1) commercial understanding of the relevant industry sector; (2) knowledge of the law applicable to the contract; and (3) experience with the arbitral process; technical (non-legal) knowledge and language were also cited but were less influential’.⁸⁵ Another study found that after ‘the Grand Old Men’ of past generations followed by the ‘Technocrats’ of the nineties’, a ‘third generation’ of arbitrators is now being selected primarily still based on specialisation and experience in arbitration, but also that appointments are driven by increasing expectations for management abilities.⁸⁶

Because of the private and predominantly confidential nature of arbitration, ‘the appointing parties and institutions are not subject to political pressures for diversity...and institutions have not, until now, been subject to pressure from the media’.⁸⁷ This process has been described as a ‘natural and expected aspect of the party appointment system’ that ‘need carry no suggestion of disqualifying impartiality’.⁸⁸ It has been argued further that this kind of elitism is ‘no sin’ and that surely the ‘ambition to work at the highest possible level’ is a healthy one.⁸⁹ Consequently in selecting arbitrators, it would seem that perhaps gender diversity becomes (at a conscious level) ‘the last feature on anyone’s mind’.⁹⁰ The parties are:

⁸⁴ 2010 International Arbitration Survey: Choices in International Arbitration p. 3, available at <http://www.whitecase.com/files/Publication/839d2762-bf8e-4daa-b40a-1b643081b801/Presentation/PublicationAttachment/3c346b83-27ba-4ed1-a99e-e1811e47b997/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf>

⁸⁵ International Arbitration Survey 2013: Corporate choices in International Arbitration p.5, available at <<https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>>

⁸⁶ Thomas Schultz and Robert Kovacs, ‘The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth’ (2012) 28 *Arbitration International* 161.

⁸⁷ Goldhaber, above n 13.

⁸⁸ Doak Bishop and Lucy Reed, ‘Practical Guidelines for Interviewing, Selecting and Challenging Party-appointed Arbitrators in International Commercial Arbitration’ (1998) 14 *Arbitration International* 396.

⁸⁹ Jan Paulsson, ‘Ethics, Elitism, Eligibility’ (1997) 13 *Journal of International Arbitration* 19.

⁹⁰ *Ibid*, 662-3.

likely to be far more pre-occupied with researching the potential arbitrators track record, his or her writings in the field, his or her language capabilities and in reviewing any previous decisions, rather than noting the potential arbitrators gender. This is a factor of the short-term nature of most arbitral appointments.⁹¹

Indeed, due to the nature of the work, prior experience as an arbitrator is considered to be the ‘pre-eminent qualification for an arbitrator-candidate’⁹² and with little else but the number of previous appointments to go on, this is ‘viewed as a badge of quality’.⁹³

...it is a huge responsibility when billion-dollar decisions are decided by judges you pick yourself. It’s hard to vote for anything except a proven track record of experience. Until recently there were very few women in the ranks with the experience to be selected as chief advocates or arbitrators because of how relatively new the practice is.⁹⁴

As a consequence, low numbers of women combined with a preference towards the arbitration ‘elite’⁹⁵ that tends to naturally become closed to new arrivals,⁹⁶ even if only based on a well-defended meritocracy principle,⁹⁷ have led to a ‘[p]arty appointment system that enforces the status quo by favoring an elite handful of repeat players’.⁹⁸ This creates an ‘echo-chamber effect’ whereby ‘arbitration is dominated by a few aging men’ who are “pale, male and stale”.⁹⁹

⁹¹ Lucy Greenwood and Mark Baker, ‘Getting a Better Balance on International Arbitration Tribunals’ (2012) 28 *Arbitration International* 662-3.

⁹² Catherine Rogers, ‘The Vocation of the International Arbitrator’ (2005) 20 *American University International Law Review* 957.

⁹³ Greenwood and Baker, above n 91, 658-9.

⁹⁴ Goldhaber, above n 13 quoting Lucy Reed (partner at Freshfields Bruckhaus Deringer).

⁹⁵ See Paulsson, above n 89.

⁹⁶ Hacking, above n 81, 75.

⁹⁷ Paulsson, above n 89, 20.

⁹⁸ For the results of a 2013 poll conducted by the Kluwer arbitration blog, see <<http://kluwerarbitrationblog.com/blog/2013/02/26/results-of-the-kluwer-arbitration-blogs-first-poll/>>.

Current practice shows that parties are sometimes hesitant to appoint someone who does not have a well-established reputation in international arbitration. This is rumoured to have resulted in a perceived ‘elite’ group of arbitrators who share between themselves appointments in the majority of significant cases...¹⁰⁰

Even though the practice of ‘repeat appointments’ are - at least to some degree - limited by the risk of being challenged for conflict of interests,¹⁰¹ women may be disadvantaged because there are markedly fewer of them and their ‘track records’ may be less proven. This is a systemic barrier coupled with ‘persistent ideas about the nature of suitable candidates that work against women’.¹⁰² It preserves male arbitrators in elite roles and exclude female arbitrators with less experience, posing further difficulties for those women to gain that experience.¹⁰³

The ‘persistent ideas’ about men and women may be a less visible source of bias, possibly explaining why the percentage of women appointed as arbitrators appears to be even lower than the small proportion of available/existing arbitrators who are female. Although arbitrators are chosen according to ‘external selection criteria’,¹⁰⁴ beneath the surface, nominating parties are influenced by their subjective or intuitive value judgements¹⁰⁵ and are likely to be looking for qualities that they perceive ‘will increase their chances of success’¹⁰⁶ or for ‘experienced lawyers who project an image of gravitas, or at least an image gravitas with which they are familiar.’¹⁰⁷ This may well be a *masculine* image.

⁹⁹ Francois-Poncet quoted in Goldhaber, above n 13.

¹⁰⁰ Ibid.

¹⁰¹ Fatima-Zahra Slaoui, ‘The Rising Issue of ‘Repeat Arbitrators’: A Call for Clarification’ (2009) 25 *Arbitration International*, 103.

¹⁰² Cherie Blair (Tony Blair’s wife) quoted in Goldhaber, above n 13, 134.

¹⁰³ Rashda Rana and Michelle Sanson, ‘*International Commercial Arbitration*’ (2011) 134-135.

¹⁰⁴ Ibid.

¹⁰⁵ Grigera Naon, above n 79, 306

¹⁰⁶ Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration An Asia Pacific Perspective* (Cambridge University Press, 2011) 263.

¹⁰⁷ Goldhaber, above n 13, 2

Clients may play an important role in maintaining the currency of the gendered social scripts. They have sometimes refused to accept a woman's authority with some women reporting that 'they have been required to demonstrate to clients that they are twice as good as the average man and a lot more aggressive.'¹⁰⁸

Such systemic barriers may include women being disadvantaged through the tendency of clients and counsel to appoint arbitrators 'in their own image,' which is invariably male.¹⁰⁹ Their speech styles may be consciously and unconsciously compared against males, whose speech patterns are considered the 'norm'.¹¹⁰ It appears then that what is commonly perceived as a bona fide professional in legal practice in general and in international arbitration in particular is, by an underlying definition, filled with male characteristics. This inevitably results in female players adjusting to the rules of the game in order to have their professionalism recognised.

The consequences of this social script and less visible biases are evident in survey responses of women working in the arbitral field. In one study, seven 'mentioned a feeling of lack of credibility, that they had to prove themselves', with one stating 'that male colleagues can be rather patronising, making comments about welcoming the 'lovely lady'' causing the woman to sense 'a slight presumption of incompetence'.¹¹¹ Another woman who completed the survey stated that 'looking good does not help one's professional credibility either'.¹¹²

In addition, women arbitrators may experience a lack of support from other more senior established females in their profession and in allied occupations such as litigators. Certainly, 'having striven to succeed in a male-dominated profession, and

¹⁰⁸ For example, Margaret Thornton, *Dissonance and Distrust Women in the Legal Profession* (Oxford University Press, 1996) 155.

¹⁰⁹ Greenwood and Baker, above n 91, 660.

¹¹⁰ Louise Barrington, 'Arbitral Women A Study of Women in International Commercial Arbitration' in Geoffrey Beresford Hartwell (ed) *The Commercial Way to Justice* (1997) 236.

¹¹¹ Ibid.

¹¹² Ibid.

believing they had to blend in with the males, successful women litigators are sometimes reluctant to support a well-qualified female arbitrator for fear of bringing unwanted attention to their own gender'.¹¹³ In addition, successful women appear to be more critical of other women than of men from their profession.

Many women avoid women-only networks, just as many ethnic minority arbitrators avoid fraternising with each other. Efforts are concentrated on blending in and toning down differences; they do not want to be singled out as needing 'positive discrimination'.¹¹⁴

Because 'the majority of experienced international arbitrators are male, this leads to a tendency to qualify discussions of diversity with references to maintaining standards',¹¹⁵ feeding unconscious gender biases with research showing 'that men and women do not evaluate men and women equitably in professional capacities'.¹¹⁶ This focus on capabilities without gender distinction tends to mask the issue of inequality or discrimination 'behind the quality of the persons selected even if the *natural* reaction still leads towards the choice of men.'¹¹⁷

¹¹³ Deborah Rothman, 'Gender Diversity in Arbitrator Selection' (2012) *Dispute Resolution Magazine* 25.

¹¹⁴ Sophie Nappert and Sarita Woolhouse, 'Diversity Amongst Arbitrators and the Usefulness of Lists' (2009) 1 *Transnational Dispute Management* 3.

¹¹⁵ Greenwood and Baker, above n 91, 661.

¹¹⁶ Ibid, 660; see, also John Dovidio and Samuel Gaertner, 'Aversive Racism in Selection Decisions: 1989 and 1999' (2000) 11 *Psychological Science* 315; Virginia Valian, *Why So Slow? The Advancement of Women* (MIT Press, 1998); Christine Wenneras and Agnes Wold, 'Nepotism and Sexism in Peer Reviews' (1997) 38 *Nature* 341 as cited in Naomi Chesler, Gila Barabino, Sangeeta Bhatia and Rebecca Richards-Kortum, 'The Pipeline Still Leaks More Than You Think: A Status Report on Gender Diversity in Biomedical Engineering' (2010) *Annals of Biomedical Engineering* 1928.

¹¹⁷ English translation of: Philippe, 'Women have a role to play in the dispute resolution world' (2008) *Les Cahiers de Droit et de Procedure* 26.

A Model in which Diversity Replaces Discrimination

A McKinsey study found that companies with three or more women in senior management scored more highly in criteria such as motivation, leadership and work environment than those with no women and concluded that there was ‘no doubt’ that highly gender diverse companies outperformed their competitors in terms of return on equity and stock price growth over the period of 2005 – 2007.¹¹⁸ This link between productivity and better use of women in the workplace is well-established.¹¹⁹ For instance, the British Government’s Lord Davies Review found that ‘better decision-making is assumed to occur as a result of directors having a range of experiences and backgrounds...Women bring different perspectives and voices to the table, to the debate and to the decisions.’¹²⁰

Applying that diversity model to arbitration, it would make sense then for parties to have a choice of arbitrators that reflects diversity. Otherwise, the ‘credibility and viability of arbitration as a method of international dispute resolution is stunted.’¹²¹ While, historically, ‘arbitrators were selected primarily by reputation and word of mouth,...with the advance of technology and, perhaps the rise of more informed and discerning clients and practitioners, other processes have emerged,’¹²² such as the use of appointments made by arbitral institutions and online lists. The system might start to change encouraging appointment of those with less experience, thereby contributing to a more heterogeneous field. Indeed, in other commercial areas,

¹¹⁸ Joanna Barsh and Lareina Lee, ‘Changing companies minds about women’ *McKinsey and Company* (online) September 2011, see

<http://www.mckinsey.com/insights/organization/changing_companies_minds_about_women>

¹¹⁹ *Global Gender Gap Report 2009*, World Economic Forum, see

<www.weforum.org/pdf/gendergap/report2009.pdf>

¹²⁰ Lord Davies Review, ‘Women on Boards’ (February 2011) *Department for Business, Innovation & Skills* (BIS) (UK) 8, citing Zelechowski, D. and Bilimoria, D. ‘Characteristics of women and men corporate inside directors in the US’ (2004) *Corporate Governance: An International Review* 12(3): 337–42

¹²¹ Nappert and Woolhouse, above n 114, 2, see also Greenwood and Baker, op. cit., n. 132; Greenwood, op. cit., n. 133.

¹²² Rana and Sanson, above n 103, 134

diversity has been championed, not to make corporations ‘feel good’ but ‘as a matter of business judgement’.¹²³

Although outcomes may not differ according to the sex of a decision-maker,¹²⁴ there could be gendered stylistic differences that might prove invaluable. Thus we believe that even within the constraints of the current model of international commercial arbitration, women’s natural predisposition to find solutions answering both parties’ needs could make them more suitable for delivering outcomes that contribute to preserving long-term business relationships despite of the dispute to be decided. Existing research concerning judges and gender also leads to the hypothesis that women would be better suited to act as arbitrator in disputes to be decided as *amiable compositeur*, where decisions are based on equity principles rather than strict legal provisions.¹²⁵ Such cases, though, are not common enough to provide a sufficient basis for a representative study confirming or negating this presumption: ‘[w]hile the power is there in most circumstances, parties rarely empower tribunals to decide as either *amiable compositeur* or *ex aequo et bono*’.¹²⁶ Arguably, the female communication style does fit more naturally with the ‘other-orientated’ style that is not an intrinsic aspect of the primary role of international commercial arbitrators as currently perceived. Thus, the opportunity for women to act as arbitrators in cases favoring fairness as opposed to black-letter law – and as such embodying the particular behaviors that have been linked to women’s way of communicating, appear to be limited in international commercial arbitration until or unless more diverse styles become normalized.

¹²³ Nappert and Woolhouse, above n 114, 2.

¹²⁴ Brian Bemmels, ‘The Effect of Grievants’ Gender and Arbitrator Characteristics on Arbitration Decisions’ (1990) *Labor Studies Journal* 60.

¹²⁵ Mauro Rubino-Sammartano, ‘Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (Discretionary Authority to Mitigate Strict Law): Apparent Synonyms Revisited’ (1992) 9 *Journal of International Arbitration* 5-16.

¹²⁶ Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer, 2012) 1046.

And unfortunately, any ability for women to interject difference can be mediated by two obstacles concerning the existing model of arbitration. First, there is the potential effect of discrimination: low numbers of women and ‘tokenism’.¹²⁷

when you talk to women at the very top, it becomes clear that part of their success is due to convincing men that they aren’t like other women...denying their status as women becomes a reflex. So when they get high up enough – far from making a difference for the women who come after them – they’re still in the business of proving to the guys that they’re really *not* one of the girls.¹²⁸

Secondly, women do tend to be more facilitative and naturally less controlling. Such characteristics, while not necessarily affecting decision-making, may be *perceived* to influence a woman’s role as arbitrator for negatively affecting the ‘personal characteristics related to [an arbitrator’s] ability and availability to handle the case, which if absent would negatively affect the fair conduct and resolution of the dispute’.¹²⁹ The increasing expectation of strong management skills driving arbitrator selection in the current business environment¹³⁰ can potentially further aggravate the discriminatory consequences of such a perception of women. Thus, the persistent appointment of the ‘pale, male and stale’ is seen as a *natural* and expected aspect of the party appointment process.

Is it *natural* though? For the most part, international commercial arbitration is seen as requiring arbitrators who are able of controlling an otherwise party-determined process and are capable of imposing decisions that are not always approved or appreciated by those who pay for the entire process. Arbitration is determinative, and the arbitrators’ decisions are binding and enforceable. Even though legislation recognises the system and an arbitrator’s role, if compared to judges and magistrates,

¹²⁷ Judith Baxter, *The Language of Female Leadership* (Palgrave Macmillan, 2010) 19.

¹²⁸ Susan Estrich, quoted in Deborah Rothman, ‘Gender Diversity in Arbitrator Selection’ (2012) 22 *Dispute Resolution Magazine* 25.

¹²⁹ Grigera Naon, above n 79, 112.

¹³⁰ Schultz and Kovacs, above n 86.

especially in *ad hoc* proceedings, there is nobody behind the arbitrator to impose respect (or even personal safety). This lack of external control leads to the equation of the male communication style (and men) with determinative authority, the same way it did when the first generation of arbitrators were ‘Grand Old Men’, admittedly all males who had reached the top of their legal careers¹³¹. In fact, a standard of normalcy can mask discrimination in arbitral appointment - equating binding decision-making with a *masculine* voice. However the equation of enforceable decisions with power and gravitas must be understood as learned and holistic in origin. Within a landscape marked by hegemonic boundaries, power is largely conveyed by baritone tones and thus constructed as a manly virtue. Indirect sex discrimination takes place in choice-making for sopranos are not heard as evoking the power needed to enforce.

We believe though that this could be seen as an example of an assumption that has become *factual* based upon precedent and interpretation through the endemic less-visible and normalised biases. The first step is to recognise that this is invisible indirect discrimination. A male-style cognition seems to permeate the ‘voice’ of the law and its decision-making procedures with its emphasis upon abstract rules instead of connectedness. Thus, in a plenitude of ways, women are defined as outsiders or as ‘other’ within deeply embedded systemic, direct and indirect discrimination. For instance, it has taken many decades for some workplaces to recognise that holding workplace meetings in the evening, given our gender division of labour in the domestic sphere, is a manifestation of indirect sex discrimination. Obvious now, but not so for years, when such scheduling was considered a *normal* employment practice.

With awareness of non-apparent, indirect discrimination wrapped in the misleading cover of professional characteristics, binding decision-making could be reconstructed though in different, non-gender specific ways. More enforceable decisions could be made using principles of equity, and increasing the focus on helping business relationships survive their disputes could become a more normative practice. Although parties and counsel from common law jurisdictions find any mediating role

¹³¹ Yves Delazay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996) 35.

inappropriate to arbitrators,¹³² an active involvement of an arbitral tribunal aimed to facilitate settlement between the disputing parties is accepted or even expected from arbitrators in Japanese, Chinese, Austrian, German and Swiss arbitration.¹³³ This latter approach is more in line with recent trends towards increased use of mediation-type dispute resolution mechanisms globally¹³⁴ and could serve as a model for a less adversarial and/or less authoritative, yet still determinative, arbitration (not to be confused with med-arb or other hybrid methods).

Conclusion

Perhaps then it is time for international commercial arbitration and those who choose the arbitrators, to re-think their belief system and to ‘think outside of the box.’ The ‘box’ - the best practice model of arbitration primarily used is conservative and resistant to change but seen as ‘natural’ and normal’. Indeed, whether an arbitrator is permitted to act as a genuine mediator or conciliator during arbitration depends on the applicable law and the parties’ consent.¹³⁵ We would also note that as discussed earlier, an arbitrator as judge is not actually expected to be a detached male omnipotent figure with communication limited to proclaiming a victor. An arbitrator possessing typical female communication skills can naturally lead the parties to a mutually satisfactory outcome, and an empathic approach can be conducive to parties better accepting lost claims. Exuding (masculine) power and dictating the terms of resolution is certainly not the only way to effect and enforce a determinative decision.

The reality is that a communication style that orchestrates and encourages disputing parties and their counsel to communicate is integral to the arbitrator’s role. Listening to the parties, a greater ability to communicate in an ‘other-orientated’ style and a capacity to integrate the parties’ positions are invaluable skills of arbitrators. These

¹³² Bühring-Uhle et al., above n 53, 87.

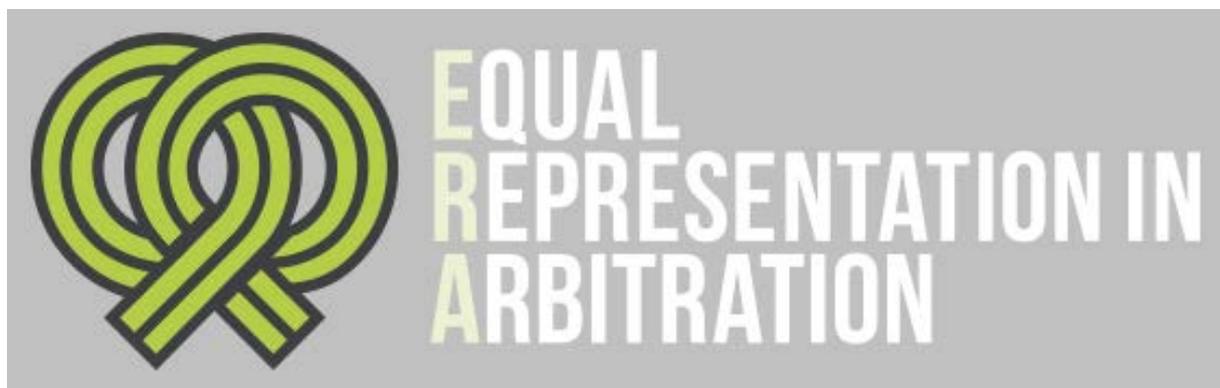
¹³³ Raeschke-Kessler, above n 62, 525.

¹³⁴ Katherine Stone, *Alternative Dispute Resolution, Encyclopaedia of Legal History* (Oxford University Press, 2004).

¹³⁵ Alexander Petsche and Martin Platte, *The Arbitrator - The Arbitrator as Dispute Settlement Facilitator* in Christian Klausegger, Peter Klein, Florian Kremlehner, Alexander Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Welser, Gerold Zeiler (eds) *Austrian Arbitration Yearbook* (2007) 87-103.

skills are also useful in managing the parties, the proceedings and the deliberations of the tribunal. They are also indicia of women's communication style. Women's language style and cognition may be more holistic and facilitate better collaboration and creativity in generating outcomes that are satisfying to both parties. Gender differences and historical preconceptions no longer need to have a place in selecting arbitrators, and, in thinking outside of the box, women's 'natural' communication characteristics could in fact be seen as an advantage in acting as arbitrator.

Further study is needed to see if such alleged gender differences do effectuate variation in arbitration and/or discrimination in appointment. An empirically-based project employing qualitative and quantitative methods and analysis could identify if arbitration is affected by gender-specific characteristics. If this project is supported, the current paper may be the forerunner of a series of publications to further identify and deconstruct existing and perceived gender stereotypes and better inform the arbitration community.



This article from the **TDM 4 (2015) ArbitralWomen/TDM 'Dealing with Diversity in International Arbitration' Special** has been made available in support of the "*Equal Representation in Arbitration*" Pledge initiative (www.arbitrationpledge.com) – for citation purposes please use the following:

P. Eastal; D.R. Demeter; N. Nelson; "Gender and International Commercial Arbitrators: Contributions to Sex Discrimination in Appointments"

TDM 4 (2015), www.transnational-dispute-management.com

URL: www.transnational-dispute-management.com/article.asp?key=2240