

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



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## Could "Blind" Appointments Open Our Eyes to the Lack of Diversity in International Arbitration? by L. Greenwood

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## COULD “BLIND” APPOINTMENTS OPEN OUR EYES TO THE LACK OF DIVERSITY IN INTERNATIONAL ARBITRATION?

Lucy Greenwood<sup>1</sup>

### *The inequality is striking*

After significant efforts in the past twenty years to improve the number of women in the judiciary, now around one-third of the United States Supreme Court justices are women, as are 35% of the active judges currently sitting on the thirteen United States federal courts of appeal and 32% of active United States district (or trial) court judges.<sup>2</sup> These numbers are encouraging, yet they have not stopped commentators stating that there is “*still a long way to go*”.<sup>3</sup> The world of international arbitration, however, tells a very different story. The percentage of female arbitrators appointed to tribunals in concluded ICSID cases up to September 2014 was less than 6%.<sup>4</sup> The current best estimate of the percentage of female arbitrators appointed to international commercial arbitration tribunals is also around 6%.<sup>5</sup> Given the fact that female students in the United States and the U.K. have been accepted to study law at around the same rate as male students since the 1990s<sup>6</sup> and that law firms in the U.K. recruit more female than male law

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<sup>1</sup> FCI Arb, Foreign Legal Consultant, Texas, Solicitor, England & Wales, member of the Norton Rose Fulbright International Arbitration Group [lucy.greenwood@nortonrosefulbright.com](mailto:lucy.greenwood@nortonrosefulbright.com). The views expressed in this article are the author's own and do not necessarily reflect the views of Norton Rose Fulbright or Fulbright & Jaworski LLP. For the genesis of this article, I am indebted to Edna Sussman, with whom I discussed the notion of blind appointments as part of our preparations for the panel, “*Addressing the Internal Challenges That Affect Diversity In International Disputes*”, International Law Association Weekend, New York, October 2014.

<sup>2</sup> “*Women in the Federal Judiciary, Still a Long Way to Go*” 10 September 2014.

<http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1>

<sup>3</sup> *Id.*

<sup>4</sup> This figure was calculated on the basis of concluded ICSID cases from January 13, 1972 to August 29, 2014. Concluded cases were defined as all awards (even where subsequently annulled), annulment decisions, resubmission decisions, and fully constituted tribunals in proceedings that were discontinued before an award was rendered. Rectification decisions, interpretation decisions, revision decisions, and conciliation proceedings were omitted. So defined, there was a total of 267 concluded cases: 259 three panel tribunals and 8 cases involving sole arbitrators. Of the 785 appointed arbitrators, 44 were women.

<sup>5</sup> See “*Getting a Better Balance on International Arbitration Tribunals*” Lucy Greenwood and C. Mark Baker, *Arbitration International* Vol 28, No 4. Research conducted for the forthcoming article “*Is the Balance Getting Better? An Update on the Issue of Gender Diversity in International Arbitration*” Lucy Greenwood and C. Mark Baker, to be published in *Arbitration International*, 2015, led to the conclusion that this estimate could be revised upward, to around 10%, but this figure should be treated with caution.

<sup>6</sup> In 2001, Jonathan Glater noted that 49.4% of American first year law students were women. He observed that “[w]omen are expected to be the majority of students entering law school this fall”. Jonathan Glater, *Women are close to being majority of law students*, NEW YORK TIMES (March 26, 2001), available at <http://www.nytimes.com/2001/03/26/business/women-are-close-to-being-majority-of-law-students.html>. In the United Kingdom, “the proportion of applicants accepted onto university law degree course who were women increased from 48 per cent in 1986 to 50 per cent in 1991”. LAW SOCIETY OF ENGLAND AND WALES, ANNUAL STATISTICAL REPORT 71 (1992), available at <http://www.lawsociety.org.uk/7C46A58E-4688-4C8B-AEDD-A07ABD9F203E/FinalDownload/DownloadId-8234B57A15A1575C817DF1AFC161A38E/7C46A58E-4688-4C8B-AEDD-A07ABD9F203E/secure/file/167800/e/teamsite-deployed/documents/templatedata/Publications/Research%20Publications/Documents/trendsasr1992report.pdf>. By 2008, this number had risen to 64.26%. LAW SOCIETY OF ENGLAND AND WALES, ANNUAL STATISTICAL REPORT 29 (2009), available at <http://www.lawsociety.org.uk/7C46A58E-4688-4C8B-AEDD-A07ABD9F203E/FinalDownload/DownloadId-04457F8EBB575F4FA28DF2306A10DC04/7C46A58E-4688->

graduates each year,<sup>7</sup> there is no escaping the conclusion that “woefully few women are ever appointed as arbitrators”<sup>8</sup>. There is a striking inequality between men and women’s ability to secure arbitral appointments, even once women have navigated the additional hurdles they face in getting to a stage of their career at which they can begin to seek appointments.<sup>9</sup> If there is still a long way to go in relation to female representation in the judiciary, when it comes to female representation on international arbitration tribunals, we have barely begun the journey.

An important step on this journey is that diversity is finally beginning to be discussed and publications such as this TDM Special Issue “Dealing with Diversity in International Arbitration” provide significant contributions to the debate. This special issue seeks to analyse “discrimination and diversity” in this field.<sup>10</sup> However, in relation to these issues, the term ‘gender diversity’ is both unhelpful and incorrect. Women make up 60% of entry-level hires in UK law firms and comprise the majority of the US labour force. ‘Diversity’ is defined as “the quality or state of having many different forms, types, ideas”<sup>11</sup>, but adopting the phrase ‘gender diversity’ ignores the fact that there are only two genders. Universities, corporations, law-firms, international arbitration teams and international arbitration panels are either balanced or imbalanced. They either reflect the makeup of the talent pool and the world around them or they do not reflect the wider society. Research shows that there is a tremendous imbalance in international arbitration and that there are many factors at play in the selection of international arbitrators which operate to unfairly prejudice women.<sup>12</sup> It is time to act to redress that balance.

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[4C8B-AEEDD-A07ABD9F203E/secure/file/183555/e/teamsite-deployed/documents/templatedata/Publications/Research%20Publications/Documents/asr2009report.pdf](http://4C8B-AEEDD-A07ABD9F203E/secure/file/183555/e/teamsite-deployed/documents/templatedata/Publications/Research%20Publications/Documents/asr2009report.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> Presentation by Melanie Willems, 8 March 2013, published in ArbitralWomen’s newsletter, 2013 <http://www.arbitralwomen.org/files/founder/00041729572427.pdf>

<sup>9</sup> In 2014, Freshfields reported that women made up only 12% of its partnership, despite making up 55% of its trainees.

[http://www.freshfields.com/uploadedFiles/Locations/Global/Who\\_we\\_are\\_new/CR\\_Reporting/CR\\_Report\\_2014.pdf](http://www.freshfields.com/uploadedFiles/Locations/Global/Who_we_are_new/CR_Reporting/CR_Report_2014.pdf) (people tab). On average, around 11% of the partners practicing international arbitration at the top international arbitration firms are female, see “Getting a Better Balance on International Arbitration Tribunals” Lucy Greenwood and C. Mark Baker, Arbitration International Vol 28, No 4. In the international arbitration field, once a female associate makes it through the pipeline to partnership, she is likely to find that almost nine out of ten of her partner colleagues are male, a stark comparison to when she started work, when only around four out of ten of her trainee colleagues would have been men.

<sup>10</sup> Call for Papers, OGEMID, 3 December 2014.

<sup>11</sup> <http://www.merriam-webster.com/dictionary/diversity>

<sup>12</sup> The scope of this paper is confined to the issue of gender diversity in international arbitration. However, the issue of a general lack of diversity in international arbitration tribunals is beautifully summed up in the opening paragraph of Dr. K.V.S.K. Nathan’s article *Well, Why Did You Not Get The Right Arbitrator??: “An observer from planet Mars may well observe that the international arbitral establishment on Earth is white, male and English speaking and is controlled by institutions based in the United States, England and mainland European Union. For the most part, arbitrators and counsel appearing actively in international arbitral proceedings originate from these countries. The majority in a multi-member international arbitral tribunal is always white. The red alien from Mars will be puzzled in his own way because the majority of the published disputes before international arbitral tribunals involve parties from the developing countries and nearly three-quarters of the people on Earth live in those countries and are not white and more than half the total population are women.”* Dr. K.V.S.K. Nathan, “Well, Why Did You Not Get the Right Arbitrator?” 15(7) Mealey’s International Arbitration Report 24 (July 2000). The article dates from July 2000, but Dr. Nathan’s observations appear to be equally true today.

### *We are all conditioned not to appoint women as arbitrators*

By its very nature, implicit bias<sup>13</sup> cannot be avoided. It is not until it is identified, isolated and brought to the forefront of our consciousness that it can be addressed and corrected for in our subsequent behaviour. The effect of implicit bias individuals have against appointing women as arbitrators cannot be understated and is one of the single most influential factors for the disparity between male and female representation on international arbitration tribunals.<sup>14</sup>

Implicit bias is driven by gender stereotyping, the effect of which is evident at a very young age. Children as young as five exhibit gender bias, derived from the stereotyping they have been exposed to through families, peers and the media.<sup>15</sup> Gender stereotyping has been identified as one of the most powerful influences on decision making, particularly when considering women for leadership positions.<sup>16</sup> Probably the most apposite study into gender stereotyping for present purposes is a study into implicit gender biases in the legal profession which was published in 2011.<sup>17</sup> The researchers selected law students to participate in the study and designed a new Implicit Association Test<sup>18</sup> to determine whether implicit gender bias was inherent in members of the legal community. As expected, the study found that participants reported strong correlations between Judge/Male and Paralegal/Female and Work/Male and Home/Female. This was true regardless of the gender of the participant. A separate 2009 study investigating the promotion of women to partner level in law firms “*found consistent gender bias at the upper levels of corporate firms*”<sup>19</sup> and concluded that “*women who were hired as entry level associates by firms were much less likely than their male counterparts to be promoted to partner*”.<sup>20</sup>

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<sup>13</sup> Also known as implicit social cognition, implicit bias generally refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.

<sup>14</sup> This was discussed as one of the factors impeding the appointment of women as arbitrators in “*Getting a Better Balance on International Arbitration Tribunals*” Lucy Greenwood and C. Mark Baker, *Arbitration International* Vol 28, No 4, I have subsequently come to the conclusion that it is one of the most influential factors.

<sup>15</sup> “*Why Does Gender Matter? Counteracting Stereotypes with Young Children*” Olaiya E. Aina and Petronella A. Cameron “*stereotypes are fairly well developed by 5 years of age, and become rigidly defined between 5 and 7 years of age*” *Dimensions of Early Childhood*, Vol 39, No 3, 2011 [http://southernearlychildhood.org/upload/pdf/Why\\_Does\\_Gender\\_Matter\\_Counteracting\\_Stereotypes\\_With\\_Young\\_Children\\_Olaiya\\_E\\_Aina\\_and\\_Petronella\\_A\\_Cameron.pdf](http://southernearlychildhood.org/upload/pdf/Why_Does_Gender_Matter_Counteracting_Stereotypes_With_Young_Children_Olaiya_E_Aina_and_Petronella_A_Cameron.pdf)

<sup>16</sup> Antony Page, *Batson’s Blindspot: “Unconscious Stereotyping and the Peremptory Challenge”* 85, *B.U.L Rev* 155, 203-24. See also, Deborah L Rhode “*The Subtle Side of Sexism*” *Columbia Journal of Gender and Law* “*Gender stereotypes and unconscious bias concerning female competence and appropriately female behavior constitute significant barriers, particularly to leadership positions*”.

<sup>17</sup> “*Implicit Gender Bias in the Legal Profession: An Empirical Study*” by Justin D. Levinson and Danielle Young. *DUKE JOURNAL OF GENDER LAW & POLICY* Volume 18:1 2010.

<sup>18</sup> The implicit association test is a measure within social psychology designed to detect the strength of a person's automatic association between mental representations of objects (concepts) in memory. Take the Harvard Implicit Association Test at <https://implicit.harvard.edu/implicit/takeatest.html>

<sup>19</sup> “*Implicit Gender Bias in the Legal Profession: An Empirical Study*” by Justin D. Levinson and Danielle Young. *DUKE JOURNAL OF GENDER LAW & POLICY* Volume 18:1 2010, citing Elizabeth H. Gorman & Julie A. Kmec “*Hierarchical Rank and Women’s Organizational Mobility: Glass Ceilings in Corporate Law Firms*” 114 *AM. J. SOC.* 1428, 1429 (2009).

<sup>20</sup> See, in particular, Elizabeth H. Gorman “*Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*” 70 *AM. SOC. REV.* 702, 705-06 (2005) and concluding that “*the passage of time has undermined the view that not enough women have yet made their way*

One of the classic tests designed to challenge gender stereotyping is to ask an audience to try to imagine a trial lawyer, a figure skater and a US Supreme Court Judge, without reference to gender or race.<sup>21</sup> It is very difficult to do. If we immediately picture a man when we think of an arbitrator, what subconscious effect does that have upon us when we are asked by a client to consider candidates for their next dispute? Because men have traditionally dominated the arbitrator 'bar', choices for arbitrators are negatively affected by gender stereotyping about the appropriate candidate for the position, therefore female arbitrators face an additional layer of stereotyping due to the strong job-specific association that exists.<sup>22</sup> This assumption was neatly encapsulated in an international arbitration-specific survey conducted in 2007. The survey focused on nationalities of international arbitrators and sought to determine how the nationality of an arbitrator influenced the appointment.<sup>23</sup> Respondents were asked to consider hypothetical situations in which they were making an appointment and to determine how various permutations involving an arbitrator's nationality and national affiliation would affect their choice of arbitrator. The first hypothetical situation promulgated in the survey was that the potential arbitrator was married to a woman with a particular nationality.<sup>24</sup>

Whilst implicit biases can be developed at a very early age, they can also be reinforced by the use of language, in particular by the way in which different vocabulary is often used to describe identical behaviours demonstrated by men and women. For example, men who are engaged in so-called 'social bonding behaviour' (probably better known as talking over coffee) are more likely to be seen as "*mentoring or rainmaking*", whereas women are seen to be "*chatting or gossiping*".<sup>25</sup> Situations also arise in which benign assumptions based on gender can have negative effects on career aspirations and perpetuate stereotypes. In one study about the effect of gender on leadership, an example of how men and women can be treated differently in the workplace was provided in relation to a couple who both worked for the same firm "*after she had a baby, she was sent home at 5:30 p.m. every night - she had a baby to take care of. He,*

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*through the 'pipeline' to higher organizational levels". See also Elizabeth H. Gorman & Julie A. Kmec, "Hierarchical Rank and Women's Organizational Mobility: Glass Ceilings in Corporate Law Firms" 114 AM. J. SOC. 1428, 1429 (2009). In addition to focusing on the harmful effects of both conscious and automatic stereotypes, Gorman and Kmec point to in-group favoritism (males hire males) and reliance on gender as an indicator of competence as other causal factors.*

<sup>21</sup> As proposed by Gary Blasi in "*Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*" 49 UCLA L. REV. 1241, 1256 (2002).

<sup>22</sup> Elizabeth H. Gorman, "*Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*" 70 AM. SOC. REV. 702, 705-06 (2005). "*role incumbent schemas actually are somewhat different for jobs involving different levels of seniority and responsibility. Stereotypically feminine characteristics such as friendliness and cooperativeness may be more salient in lower level positions, which often require 'team play' and cheerful obedience to superiors than in higher positions, which are seen as demanding leadership*", as quoted in "*Implicit Gender Bias in the Legal Profession: An Empirical Study*" by Justin D. Levinson and Danielle Young. DUKE JOURNAL OF GENDER LAW & POLICY Volume 18:1 2010.

<sup>23</sup> Ilhyung Lee, "*Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)*, 31(3) Fordham Int'l L.J. 603.

<sup>24</sup> Professor Lee's survey stated "*The prospective arbitrator is American, with US citizenship, lives in the US and is married to a Japanese woman*". The survey asked respondents to indicate whether this raised concerns about the arbitrator's independence or impartiality.

<sup>25</sup> See Joan C Williams "*Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence To Prove Gender Discrimination: The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*" (2003) 7 Empl.Rts & Employ. Pol'y J 410.

on the other hand, was kept later than before the baby's birth - he had a family to support."<sup>26</sup> Other examples researchers cited included a woman who was not promoted because her superiors assumed she would not want a position that involved travel.<sup>27</sup>

It is important to reiterate at this point that gender stereotyping affects male and female decision makers equally. A female general counsel is just as likely to be unwittingly biased against appointing a female arbitrator as her male counterpart, therefore there is no point bemoaning the fact that 'Ms Arbitrator' has never recommended a female co-arbitrator, or that 'Ms General Counsel' has never promoted a female senior colleague. Not only does 'Ms General Counsel' have no greater obligation to appoint a female arbitrator than 'Mr Senior Partner', but 'Ms General Counsel' suffers from identical internal limitations as 'Mr Senior Partner' which are preventing them both from making the decision to appoint a female arbitrator. Gender imbalance is not a 'women's issue', in that women do not have a greater responsibility than men to act to redress the balance,<sup>28</sup> it is a global issue and must be treated as such.<sup>29</sup>

### ***This is not a problem, it is an opportunity***

There are numerous and extensive studies which have found a clear correlation between gender balanced leadership and better performance, but the prevailing attitude, particularly in the international arbitration world, seems to be that 'diversity' is a problem to be ignored, not an opportunity to be seized. Corporations like Microsoft,<sup>30</sup> IBM,<sup>31</sup> Chevron,<sup>32</sup> ExxonMobil,<sup>33</sup> Duke Energy,<sup>34</sup> and Sempra Energy<sup>35</sup> all have comprehensive supplier diversity guidelines aimed at increasing business with minority-owned businesses providing them with goods and services. Increasingly, corporate organizations are using their purchasing power to drive change and expect their suppliers and service-providers to have a clear diversity and inclusion policy and

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<sup>26</sup> See Joan C Williams "Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence To Prove Gender Discrimination: The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense" (2003) 7 Empl.Rts & Employ. Pol'y J 410. This is an example of what Williams terms the "maternal wall", where mothers experience benevolent stereotyping.

<sup>27</sup> Williams, *id.*

<sup>28</sup> Contributors to OGEMID whose postings are cited in this article have given their express consent to be quoted. Comments made on the OGEMID listserv in relation to an attempt to identify and recommend female arbitrators included: "Strange - we don't see any women recommending *other* women. Why?... " Christian Campbell July 2, 2009 demonstrate the prevailing attitude that women bear greater responsibility for these issue (emphasis in the original).

<sup>29</sup> For further discussion see "Getting a Better Balance on International Arbitration Tribunals" Lucy Greenwood and C. Mark Baker, Arbitration International Vol 28, No 4

<sup>30</sup> Microsoft, "Microsoft Supplier Diversity," available at <http://www.microsoft.com/about/companyinformation/procurement/diversity/en/us/default.aspx>.

<sup>31</sup> IBM, "Supplier diversity," available at <http://www-03.ibm.com/procurement/proweb.nsf/ContentDocsbyTitle/United+States~Supplier+Diversity>.

<sup>32</sup> Chevron, "Supplier Diversity: Reflecting Diversity in our Supplier Base," available at <http://www.chevron.com/productsservices/supplierinformation/supplierdiversity/>.

<sup>33</sup> ExxonMobil, "Supplier diversity," available at <http://corporate.exxonmobil.com/en/company/contact-us/directory/supplier-diversity>.

<sup>34</sup> Duke Energy, "Supplier Diversity Program Overview," available at <http://www.duke-energy.com/suppliers/supplier-diversity-overview.asp>.

<sup>35</sup> Sempra Energy, "Supplier Diversity Overview," available at <http://www.sempra.com/about/supplier-diversity/>.

strategy in place.<sup>36</sup> International arbitration lags far behind in the modern world in its approach to this issue.

Research, such as the study into law students described at the beginning of this article, has shown that once participants are aware of the existence of implicit biases, they are able to act to confront the bias and to make decisions contrary to their instincts.<sup>37</sup> However, relying on individuals to both identify and isolate their instinct and proceed to act in a different manner is not going to precipitate significant change in this area.

There is a view that arbitral institutions are best placed to try to address the issue<sup>38</sup>, but adopting this approach is not without difficulty. Institutions are not involved in the selection of arbitrators in the vast majority of cases they administer. The ICC indicated that it selects arbitrators in around 25% of cases,<sup>39</sup> the ICDR stated that it carried out “*very few direct, administrative appointments on cases*”.<sup>40</sup> The ICDR certainly has made efforts in recent years not only to improve the representation of women on its arbitration panels but also to provide the parties with balanced lists of names from which to select an arbitrator. According to Professor Gaillard’s 2014 Freshfields lecture on the “Sociology of Arbitration”: “*anecdotal evidence shows that institutions actively seek to appoint newcomers and promote diversity. It is the parties who resist change.*” If this is the case, it may well be that parties are not being presented with balanced lists by their lawyers, or that parties are failing to appoint female candidates from a balanced list. If we assume that a balanced list exists, whether that list is provided by an arbitration institution or by a law firm seeking to identify candidates in order to discuss them with its corporate client, then there is one radical way in which we can seek to eliminate the effect of gender stereotyping on the decision maker who will identify the appropriate candidate from the list: by making the list a gender blind one.

### *A system of “blind” appointments?*

Even once a list of arbitrators has been drawn up and includes a balanced list of names the female arbitrator is still at a considerable disadvantage. Studies have shown that men and women do not evaluate men and women equitably in professional capacities.<sup>41</sup> A study

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<sup>36</sup> Law firms, amongst other suppliers, are often required to answer a set of questions when responding to competitive tenders and to demonstrate how they will deliver the services drawing on a diverse pool of talent

<sup>37</sup> “*Implicit Gender Bias in the Legal Profession: An Empirical Study*” by Justin D. Levinson and Danielle Young. DUKE JOURNAL OF GENDER LAW & POLICY Volume 18:1 2010

<sup>38</sup> See Melanie Willems “*The institutions must lead the way in working on the situation. They are uniquely positioned to do so.*” ArbitralWomen Newsletter No.8, April 2013. Available at [www.arbitralwomen.com](http://www.arbitralwomen.com).

<sup>39</sup> Email from Mireze Philippe, Special Counsel, ICC, 26 June 2014. In her interview with Global Arbitration Review, Jacomijn van Haersolte-van Hof, Director General of the LCIA suggested that, “*while all users of arbitration have a role to play in increasing diversity, institutions are probably best placed to take the lead because they are in a position to provide transparency and have more insight than users of arbitration as to the availability and performance of potential arbitrators. They also have a long-term interest in ensuring a sustainable pool of candidates*” Global Arbitration Review, “*Institutions should lead way on diversity, says van Haersolte-van Hof*” (July 3, 2014), available at <http://globalarbitrationreview.com/news/article/32781/>.

<sup>40</sup> Email from Steve Anderson 3 September 2014.

<sup>41</sup> Dovidio, J. F., and S. L. Gaertner *Aversive racism and selection decisions: 1989 AND 1999*. PSYCHOL. SCI. 11(4):315–319, 2000, Valian, V. *Why So Slow? The Advancement of Women*. CAMBRIDGE, MA: MIT PRESS, 1998.

published in 2012 evaluated the attitudes of science faculty from research-intensive universities and investigated how they rated the application materials of a student—who was randomly assigned either a male or female name—for a laboratory manager position. Faculty participants considered the male applicant to be significantly more competent than the (identical) female applicant.<sup>42</sup> These participants also selected a higher starting salary and offered more career mentoring to the male applicant. The gender of the faculty participants did not affect responses at all, such that male and female faculty members were as likely to rank the ‘male’ applicant more highly. In another study, resumes and journal articles were rated lower by both male and female reviewers when they were told the author was a woman.<sup>43</sup> A Swedish study of postdoctoral fellowships awarded showed that female awardees needed substantially more publications to achieve the same rating as male awardees. In this study the peer reviewers overestimated male achievements and/or underestimated female performance.<sup>44</sup> In evaluating the qualifications of men and women assistant professors, reviewers were four times more likely to ask for supporting evidence about the woman, such as a chance to see her teach or proof that she had won her grants on her own, than they were for the man.<sup>45</sup>

Joanne Rowling submitted her first Harry Potter book to her prospective publishers under her full name. Because, in her words, “*she was a ridiculously grateful first time author*” she subsequently agreed that the publisher could change the name to J.K. Rowling because the publisher felt that, if Rowling’s gender was hidden, “*the boys who read the book would think that a man had written it*”.<sup>46</sup> Once a gender becomes known, people will unconsciously behave differently unless and until they are able to act to counter the effect of gender bias. Surely the most pragmatic approach to this is therefore to hide the gender, rather than wait for a mass change in perceptions and attitudes.<sup>47</sup>

One of the finest examples of successfully addressing implicit bias is demonstrated by the actions taken in the 1970s in relation to the under-representation of women in professional

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Wenneras, C., and A. Wold. *Nepotism and sexism in peer review*. NATURE 387(6631):341–343, 1997, as cited in Chesler, Naomi C. et al. *The Pipeline Still Leaks and More Than You Think: A Status Report on Gender Diversity in Biomedical Engineering*. ANNALS OF BIOMEDICAL ENGINEERING, FEB.(2010).

<sup>42</sup> “*Science Faculty’s Subtle Gender Biases Favors Male Students*” Corinne Ross-Macusin <http://www.pnas.org/content/109/41/16474.abstract#aff-1>

<sup>43</sup> Paludi, M. A., and W. D. Bauer “*Goldberg revisited: what’s in an author’s name*” Sex Roles 9(1):387–390, 1983, Steinpreis, R., K. A. Anders, and D. Ritzke “*The impact of gender on the review of the curricula vitae of job applicants and tenure candidates: a national empirical study*” Sex Roles 41 (7):509–528, 1999 as cited in Chesler, Naomi C. et al. “*The Pipeline Still Leaks and More Than You Think: A Status Report on Gender Diversity in Biomedical Engineering*.” ANNALS OF BIOMEDICAL ENGINEERING, FEB.(2010)

<sup>44</sup> Wenneras, C., and A. Wold “*Nepotism and sexism in peer review*” NATURE 387(6631):341–343, 1997 as cited in Chesler, Naomi C. et al “*The Pipeline Still Leaks and More Than You Think: A Status Report on Gender Diversity in Biomedical Engineering*” ANNALS OF BIOMEDICAL ENGINEERING, FEB.(2010)

<sup>45</sup> “*Beyond Bias and Barriers: Fulfilling the Potential of Women in Academic Science and Medicine*” National Academy of Sciences, 2006 at 4-28

<sup>46</sup> See interview with Joanne Rowling, <https://www.youtube.com/watch?v=jcKZxv-hNoU>

<sup>47</sup> It being, I would hope, an accepted fact that the gender of an arbitrator is not a relevant consideration. See the anonymous posting “*I recall an esteemed colleague, who acts as both counsel and arbitrator, stating at a conference that, when asked by a client to select an arbitrator, the desirability of promoting diversity is the last feature on anyone’s mind. ‘We are not being asked to make a statement’ he said, ‘we are asked to pick the best person for the job’*”, to [OGEMID@mailtalk.ac.uk](mailto:OGEMID@mailtalk.ac.uk) (9 February 2012 03.27 CST).

orchestras. At that time, roughly 10% of professional orchestra members were women. Once a screen was placed in front of the person auditioning, so judges could not see whether the musician was male or female, women were 50% more likely to pass the first round and 300% more likely to pass the final rounds, and the result of this simple action was that the representation of women in orchestras increased from 10% to around 35%.<sup>48</sup> When academic papers are blind peer reviewed, the number of papers written by women that are accepted for publication goes up significantly. After the journal *Behavioral Ecology* instituted a double-blind review policy in 2001, the proportion of its acceptances that went to female authors increased.<sup>49</sup> Following these studies there have been calls for blind reviews to become standard procedure in relation to Law Review articles.<sup>50</sup>

If, as seems likely, women are further penalized once their name<sup>51</sup> is added to a list of potential arbitrators, then one way of confronting this is for all names to be removed from the proposed list of arbitrators and for the CVs to be reviewed at face value<sup>52</sup>. For example, an institution would identify its list of suitable arbitrators for the dispute before it. It would standardize the CVs and remove the names from the list. It would then forward the list to counsel for the parties to make their selection. In the event that further research into a preferred candidate was needed, the party could contact the institution to find out who the arbitrator was in order to review his or her publications, published awards, and so on. However, the preliminary ‘blind’ process might have gone some way to rebalance the effect of implicit gender bias on the decision maker and certainly would have sensitized the decision maker to the gender issue and its irrelevance to the decision.

In advising clients on potential arbitrators, external counsel could take the same approach: identify the arbitrators, standardize the CVs and remove identifying information before presenting the clients with a list. This would not address the issue of women being added to the lists initially but it is clear that institutions are making efforts to provide balanced lists to the parties, and there is also increased pressure on law firms to consider a gender balance in drawing up lists of arbitrators. Also, as noted above, simply being aware of the need to engage in the ‘blind’ exercise may counteract the effect of implicit gender bias.

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<sup>48</sup> As reported in “*Willful Blindness: Why We Ignore the Obvious at Our Peril*” by Margaret Heffernan (Walker & Co, 2011), see also “*Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*” Claudia Goldin and Cecilia Rouse 1997 “*Using data on orchestra personnel, the switch to “blind’ auditions can explain between 30% and 55% of the increase in the proportion female among new hires and between 25% and 46% of the increase in the percentage female in the orchestras since 1970*”. The Vienna Philharmonic did not accept women to permanent membership until 1997.

<sup>49</sup> Amber E. Budden et al. “*Double-Blind Review Favours Increased Representation of Female Authors*” 23 *Trends in Ecol. & Evol.* 4, 4 (2007).

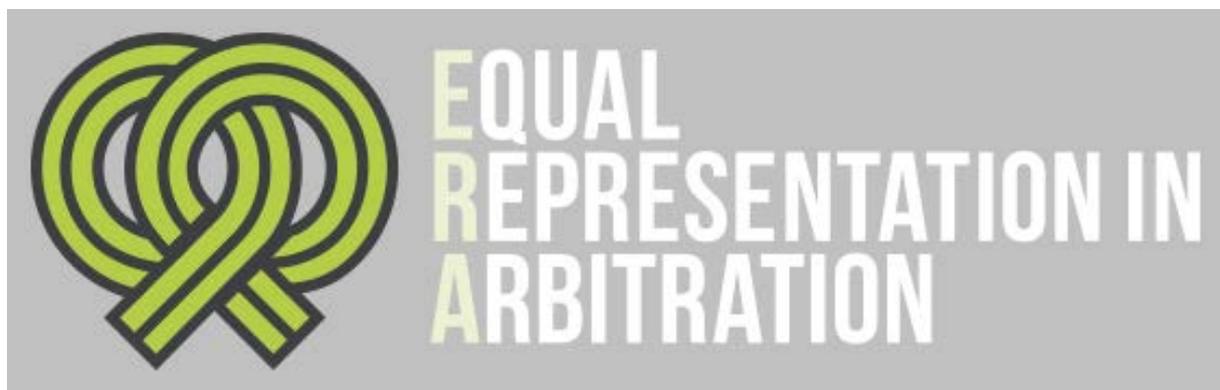
<sup>50</sup> “*A Call for Blind Review: Student Edited Law Reviews and Bias*” Jonathan Gingerich, 59 *J. Legal Educ.* \_\_\_ (2009). “*Research suggests that non-blind review of journal submissions makes it harder for women and non-U.S. scholars to publish, leads to prestige bias that hurts younger scholars, and undermines the perceived fairness of the submission review process among authors*”.

<sup>51</sup> For convenience, I assume that someone’s name will, more times than not, provide a strong clue to their gender.

<sup>52</sup> I would also suggest that CVs be standardized.

### ***Concluding Remarks***

In order to address the woeful underrepresentation of women on international arbitration tribunals in any meaningful way, there needs to be a complete shift in the way that international arbitration practitioners approach this issue. We have closed our eyes to this issue for too long. We need to educate our colleagues to understand that we are all prejudiced and shaped by our experiences in life, but that once those prejudices are identified, they can be corrected for. Until such time as we are confident in our abilities to identify and correct for those prejudices, the most effective and pragmatic solution is to remove the information which triggers the prejudices, namely by removing identifying gender information from lists of potential arbitrators. This will prevent irrelevant information from distorting our ability to make the most important decision in every dispute: selecting the right arbitrator. It may take a system of blind appointments to enable us to see our way through this issue.



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