

INSIDE ARBITRATION: DIVERSITY - WHAT HAS BEEN DONE SO FAR AND CAN THE ARBITRATION COMMUNITY DO MORE?

22 February 2022 | Insight

Legal Briefings - By **Paula Hodges QC, May Tai and Elizabeth Kantor**

Promoting gender diversity has become a key focus for the international arbitration community and beyond. In the Global North, it is generally acknowledged that the topic has gone from being a "*fringe, water cooler conversation*" to a key business priority.¹ Companies are facing greater internal and external pressure to increase the representation of women, particularly on boards and in senior leadership positions, and to provide equal opportunities and compensation at all levels.

Within the arbitration community, efforts have been focussed on ensuring the fair representation of women as arbitrators. The cross-institutional task force on gender diversity in arbitral appointments and proceedings conducted by the International Council for Commercial Arbitration (ICCA Taskforce) has also sought to identify and explore the underlying issues causing women to leave the legal profession. It recognises that addressing the lack of female arbitrator appointments is only the tip of the iceberg in seeking to achieve a more inclusive arbitration community and, indeed, legal profession.

The arbitration community has also started to acknowledge that in pursuing gender diversity, we must not ignore other forms of diversity – in particular ethnic, racial and cultural diversity – nor the intersectionality of gender with other forms of diversity, such as, sexual orientation. However, efforts in this sphere are at a much more fledgling stage.

Whilst the international arbitration community cannot single-handedly assume responsibility for fostering a more inclusive environment to practise arbitration, what more can we do to increase diversity in our profession?

WHY IS DIVERSITY IN ARBITRATION IMPORTANT?

The case for diversity in arbitration is obvious, but bears repeating. For aspiring arbitration lawyers and arbitrators, increasing diversity – in all its forms – is about breaking down the barriers to entry that exist so that everyone can operate within a meritocratic system.

For users of arbitration, different perspectives from both arbitrators and counsel improve the quality of the decision-making process. Studies have also shown that cognitive biases such as "groupthink" (where a group of people who are theoretically capable of making excellent decisions nevertheless end up making poor ones as a result of flawed group process and strong conformity pressures)² are less likely to occur if there are diverse decision-makers. There has also been some new research that has shown that mixed gender teams tend to score more highly across a range of tasks due to the social sensitivity brought by women to the group.³

Diversity improves how arbitration is perceived across a broad spectrum of stakeholders and tribunal diversity adds legitimacy to the proceedings in the eyes of the users. A diverse pool of potential arbitrators allows users to access candidates who may bring a different perspective to the proceedings or be able to view the contracting parties and the contractual framework within a wider social, religious or cultural perspective. Importantly, actively pushing for diversity allows users to harness potentially untapped talent while also helping to avoid real or perceived conflicts as a result of repeat appointments of the same arbitrators by the same parties.

However, recognising the importance of diversity in the arbitration community does not require the de-legitimisation of more established arbitrators or counsel. There is little to be gained from the use of divisive and inflammatory terminology to highlight inequality. Indeed, experience should be respected and users will want to turn to experienced counsel and arbitrators when the stakes are high. Moreover, repeated use of the phrase "pale, male and stale" could serve to alienate those whose efforts are most likely to bring about change in terms of arbitrator appointments. An arbitrator tasked with recommending an alternative candidate or proposing a presiding arbitrator for their tribunal is more likely to recommend a diverse candidate if they feel included in the movement rather than ostracised from it.

WHAT HAS BEEN DONE SO FAR?

The arbitral community has been making a conscious effort to improve gender diversity over the last decade. The first major move was in 2015, when, in recognition of the under-representation of women on international arbitral tribunals, arbitration practitioners, global representatives of corporate entities, states, arbitral institutions, and academics drew up the "Equal Representation in Arbitration" (ERA) pledge, whose objectives are to improve the profile and representation of women in arbitration and to appoint women as arbitrators on an equal opportunity basis. The pledge contains actionable steps to improve gender diversity, including the requirement for lists of potential arbitrators, committees, governing bodies and conference panels to include a fair representation of female candidates, and where possible, for a fair representation of female arbitrators to be selected. It also requires gender statistics for appointments to be collated and to be made publicly available.

As at May 2021, the ERA pledge had over 4,000 signatures, from parties, counsel, arbitrators and institutions who have all made efforts to ensure the fair representation of women as arbitrators. Arbitral institutions and law firms have also met their commitment to publishing statistics on gender diversity.

But have those efforts translated into results? The ICCA Taskforce [reported](#) in 2020 that women comprise just over 20% of all arbitrators, up from around 10% in 2015. To put this figure into context, the 2021 [UK annual Diversity of the Judiciary report](#) revealed that 33% of partners in UK law firms are women (although that statistic drops to 25% for equity partners). The proportion of female QCs is lower, with the [Bar Standards Board](#) reporting a 16.8% figure for 2020. Although there do not appear to be any statistics available regarding the proportion of women acting as counsel in international arbitration, it is likely that those statistics would mirror the proportion of women at various levels in law firms.

Outside of the UK, the statistics for law firms are similar in the USA, for example - with women comprising 30% of non-equity partners and 22% of equity partners.⁴ For a frame of reference outside of the law, the [Hampton-Alexander Review of FTSE women leaders](#) reported that in the UK there are now over 34% of women on FTSE 350 boards, and women now occupy around 30% of all leadership roles. In OECD countries, 22.3% of board members are women.⁵

The proportion of female arbitrators is therefore approximately 10% worse than the proportion of female partners at law firms in the UK and US, but slightly better than the overall percentage of female QCs. However, the statistics published by leading arbitral institutions in 2021 (for the reporting year of 2020) do suggest that these percentages are gradually increasing (see table).

ARBITRAL INSTITUTION AND DATE	PROPORTION OF FEMALE APPOINTMENTS
SIAC (2020)	32.2%
HKIAC (2020)	22.8%
LCIA (2020)	33%
ICC (2020)	23.4%
ICSID (up to 30 June 2021)	31%
Average	28.5%

Aside from gender, institutions (such as the ICC and LCIA) have also started to track and publish the regional origins of parties, and the nationality of arbitrators. These statistics indicate that the overwhelming majority of arbitrators are from the Global North. Nonetheless, it is clear that the home jurisdictions of many parties who are users of arbitration are either under-represented or not represented at all. The process of pulling these statistics together should help to promote awareness of this paucity of territorial and cultural diversity, and encourage institutions (in the first instance) to appoint arbitrators from a wider pool of candidates enabling them to gain experience and then promote themselves to parties and other arbitrators.

In addition, there are a variety of diversity initiatives in place, which will hopefully gain traction. These include the African Promise, which aims to tackle the underrepresentation of African arbitrators on tribunals, especially in arbitrations connected to Africa. The move to virtual conferences has also enabled a greater diversity of speakers to participate in conferences and increase their profiles by networking on a global scale.

WHAT ARE SOME OF THE HURDLES THAT ARE SPECIFIC TO ARBITRATION?

Many barriers to entry are non-arbitration specific. For example, the most obvious barrier to the lack of gender diversity is the poor retention of women in the legal profession. Whilst there are now equal numbers of men and women choosing to go to law school and join the legal profession, the representation of women drops significantly among the more experienced and senior members of the profession – whether solicitors, barristers or judges. Fixing this retention issue is critical to diversifying the gender of counsel and arbitrators in arbitration, given that counsel and arbitrators are drawn from the senior members of the legal profession.

These barriers to entry are recognised to be even worse with respect to ethnic diversity – with barriers existing not only in relation to retention, but also at the recruitment stage.

Nonetheless, as a truly international form of dispute resolution that prides itself on being separate from local court practice, the international arbitration community has a unique opportunity to provide a service that caters to the needs of its users worldwide.

This means providing a choice of arbitrators who have relevant social, cultural or religious perspectives irrespective of gender or nationality issues. This will not be possible if users of arbitration continue to come from all over the world, but arbitrators are predominantly from the Global North.

The party-appointment of arbitrators is a unique feature of arbitration, but parties have a propensity to appoint established arbitrators, particularly in high value, complex matters, which holds back the representation of diverse candidates on arbitral tribunals. For example, the ICCA Taskforce reported that in 2019, the percentage of female arbitrators appointed by parties (as opposed to arbitral institutions or co-arbitrators) was, on average, 13.9%. The ICCA Taskforce also confirmed that in general, institutions appoint a greater proportion of female arbitrators than parties or co-arbitrators.

These statistics are to some extent unsurprising. The selection process is led by counsel and users of arbitration, who wish to make a decision that is in the best interests of the client/party. This militates against "first-timers" in favour of well-established arbitrators. Clients value the experience of their arbitration counsel and few are likely to recommend someone of whom they do not have first-hand experience. As a consequence, the more experienced practitioners from the senior ranks of the legal profession, many of whom are men from the Global North, are still likely to pick up the majority of appointments.

THE FUTURE

It is clear that there is a lot more we can do to achieve diverse representation in arbitration, even if we cannot single-handedly remove the barriers to entry that exist within the legal profession at large.

Whilst increased transparency and the publication of statistics are a good start, more active steps include co-counselling with local counsel to promote and improve regional expertise, continuing to train, champion and sponsor good candidates, and creating opportunities for more diverse candidates to promote themselves and shine. Facilitating and increasing access to information about potential arbitrator candidates is also crucial – the new Delos Arbitrator Database, an open access database, which allows any arbitrator or aspiring arbitrator to register and appear free of charge, is a great step in the right direction.

What can law firms do?

- When it comes to appointing arbitrators and engaging with the arbitration community, act in accordance with the objectives of the ERA pledge
- Consider anonymising short-lists of arbitrator candidates
- Train, sponsor, mentor and champion diverse candidates within organisations and ensure diversity of counsel teams
- Use influence to boost profile of local practitioners in different jurisdictions and seek opportunities to invite them to speaking engagements and introduce co-counselling opportunities

What can clients do?

- Actively engage in the arbitrator appointment process and challenge counsel to justify their short-lists and counsel teams
- Consider level of experience required – eg for lower value claims or less complex disputes
- Consider whether institutional appointment of arbitrators would be appropriate in some cases, and avoid co-arbitrator/party appointments
- Be open to new names and be on the lookout for impressive potential candidates

What can would-be arbitrators do?

- Consider applying for initiatives at institutions – eg the ICC's Africa program. The Canadian Institute of Chartered Arbitrators has also commenced a pilot shadowing programme
- Submit your CV to an arbitral institution for inclusion on their arbitrator list
- Raise your profile through speaking engagements, events and publications
- Build your network • Act as tribunal secretary/spend time at an institution

- Justin D'Agostino, CEO of HSF, is currently Co-Chair of the ERA Pledge, of which HSF is a proud signatory. Briana Young, Professional Support Consultant and practice manager in the Greater China arbitration practice at HSF, is also joining the Pledge's leadership team as Secretary of the Pledge Global Steering Committee while the current Secretary is on maternity leave.
- HSF is proud to have supported Delos in the launch of the Delos Arbitrator Database.
- HSF was the proud host of the African Arbitration Academy in October 2021 and has been participating in the initiative since it was first conceived in 2019.

1. See the Hampton Alexander Review which focuses on female representation on FTSE boards.
2. Is increasing gender and ethnic diversity in arbitral tribunals a valid concern and should arbitral institutions play a greater role in ensuring diversity? Dr. Ula Cartwright-Finch, August 2019. See also Won Kidane's book on the Culture of International Arbitration.
3. See Dr Ula Cartwright-Finch's article as above.
4. <https://www.catalyst.org/research/women-in-law/>
5. See the World Economic Forum's Global Gender Gap Report 2020.

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