



INTERNATIONAL LAW NEWS

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Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals

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By Lucy Greenwood

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A Slim and Pristine Binder

Although clumsily expressed, Mitt Romney's request that his staff bring him "whole binders full of women" had a positive effect in counteracting the fact that all the cabinet applications he had received were from men: two years into Mitt Romney's term of gubernatorial office, 42 percent of new appointments to positions in his cabinet were women. If the same approach were adopted in making arbitral appointments, anyone who called for such a binder would find it slim and pristine. Though data are scarce, certain sources indicate that only around 6 percent of appointments to international arbitration tribunals are female arbitrators, and some statistics, such as those relating to investment treaty arbitration tribunals, are distorted by the repeat appointments of two female arbitrators. It is a simple fact: international arbitration tribunals do not reflect the diversity of individuals in any real-world business demographic, and they look increasingly anachronistic in the modern world.

The challenge—which the international arbitration community has been reluctant to confront—is modernizing a dispute resolution mechanism that is itself a creature of modern times. International arbitration in its present form grew up as a very exclusive club. A small handful of individuals largely pioneered the field and others were lucky to receive appointments without having to show any previous experience or credentials. William Tetley QC recounts that in 1982, he was approached by two acquaintances to act as a chair of an ICC arbitration tribunal. He "rushed to the McGill Law Library



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to ask what the ICC was." He "got the Rules, read them in the taxi driving back and found them to be brief, concise and the epitome of common sense." His appointment as chair of a major international arbitration tribunal was confirmed.

The situation is very different today, as international arbitration has expanded dramatically, with all major commercial arbitration institutions reporting significant increases in their case loads in the last decade. Yet the pool of available arbitrators remains small and exclusive, and the process of appointing arbitrators remains almost as amateurish as it was in 1982. Often the process is as simple as writing a list of names that spring to mind when considering who to appoint. Yet tools that may make this process more scientific are under consideration, particularly the proposed International Arbitrator Information Project, recently conceived by Professor Catherine Rogers. This would primarily be a research project with the aim of collecting and providing parties with easy electronic access to critical information for making informed decisions in the arbitrator selection process. If adopted by the arbitration community, this project could play a key role in providing access to lesser-known and more diverse arbitrator candidates.

It's the Last Thing on Anyone's Mind

Diversity in arbitrator selection is, as one practitioner recently put it, "the last thing on anyone's mind" when they are looking for an arbitrator. It is a factor of the short-term nature of most appointments that previous legal/industry experience, language, cultural background, reputation among other arbitration practitioners, and legal qualifications will all be considered and discussed, whereas gender will not. Yet gender diversity should be taken into account, particularly given that there is strong empirical support for the notion that diverse groups produce better outcomes.

There are numerous studies showing that gender-balanced leadership improves corporate governance, lessens unnecessary risk-taking, and reduces so-called "groupthink." A McKinsey study reviewed 101 companies that published the composition of their governing bodies and found that companies with three or more women in senior management functions scored more highly for each organizational criterion (such as motivation, leadership, work environment) than companies with no women in senior positions. McKinsey then conducted a further study into the 89 European-listed companies with the highest level of gender diversity in top management posts. All 89 companies had stock market capitalizations of over €150 million. The study concluded that there was "no doubt" that these highly gender-diverse companies outperformed their sector in terms of return on equity and stock price growth over the period 2005–07. McKinsey of course

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acknowledged that the studies did not show a causal link between diversity and performance but did conclude that the studies, which were statistically significant, showed that companies with a higher proportion of women on the management committees were also the companies that performed best. It is clear, therefore, that diversity does not deserve to be the “last thing” on arbitration practitioners’ minds when selecting an arbitral tribunal.

There are two circumstances that result in the absence of women on international arbitration tribunals: (1) a lack of women at the senior end of the profession and (2) implicit bias in the minds of appointers, which prevents female appointments. The former is often termed “pipeline leak,” while the latter is practically a pipeline plug. This second issue, although it impacts far fewer women, may well prove to be more difficult to address.

Patching the Leaks

Almost 65 percent of graduate legal trainees at entry level in the U.K. are women, according to a 2010 survey by the Law Society, and around 50 percent of law students in the United States are women. However, only around 20–30 percent of partners in law firms are women, and only 11 percent of partners in international arbitration teams are women (calculated by identifying the number of women on the top 10 arbitration teams in the world, according to *Global Arbitration Review*). This attrition is known as “pipeline leak” and is usually attributed to various factors, including office climate, difficulties in managing dual careers, lack of female role models and mentors, and lack of flexible work options and attitudes to flexible working. Law firms have sought to address the issue of pipeline leak in recent years. Developments in information technology, in particular, have meant that flexible working is a genuine option; it has become less stigmatized, and it is much less likely to involve the flexible worker stepping off the partnership track. There can be some confidence that the situation will improve in due course—but will it improve sufficiently, or sufficiently soon enough to make a real difference? The reality somewhat dampens this optimism. According to 2006 projections from the Women’s Bar Association of the District of Columbia, if women continue making partner at the same rate as in 2006, women will not achieve parity with men until 2115.

The Pipeline Plug

The blockage that faces many women seeking arbitral appointments, if they make it through the pipeline, is perhaps even more concerning than pipeline leak. This “pipeline plug” arises because of biases against appointing female arbitrators. These biases are particularly insidious because those making appointments are genuinely not aware that they have them.

There are many studies that demonstrate the presence of implicit

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practices in the areas of global electronic commerce law, technology, and payment systems. He co-chairs the Section’s U.N. & International Organizations Committee and is a past chair of the Section of Science & Technology Law.

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bias. In one notable study, resumés and journal articles were rated lower by male and female reviewers when they were told the author was a woman. Another study of postdoctoral fellowships awarded showed that female awardees needed substantially more publications to achieve the same rating as male awardees. 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. However, when academic papers are blind peer reviewed, the number of papers written by women that are accepted for publication goes up significantly. Given the disconnect between the percentage of women partners in international arbitration practices (around 10–15 percent) and the percentage of women being appointed to international arbitration tribunals (around 5–6 percent), it is possible that similar biases are at play in the field of international arbitration.

Unblocking the Pipeline

Eliminating a bias that the vast majority of those appointing arbitrators do not even know they have is a major challenge, but it is one that should be confronted. The notion of unconscious bias needs to be discussed, accepted, and addressed in the international arbitration community and, increasingly, there is greater awareness of this issue. Ultimately, change will come down to an individual taking personal responsibility for giving due consideration to a diverse slate of candidates on every occasion that an arbitrator is appointed. Such personal responsibility requires an awareness of the external and internal influences that may steer the individual towards appointing a stereotypical arbitrator. It also requires an ability to resist those influences. While initiatives such as the CPR Task Force on Diversity and the ongoing efforts of Arbitral Women are to be welcomed, the issue is very much a personal one, and it requires everyone who is in a position to appoint an arbitrator, regardless of the gender of that person, to understand and accept the implicit biases that may operate to influence their decision making.

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