Join in the Campaign on Women Arbitrators: Co-sponsored by Arbitrator Intelligence and ArbitralWomen!

Kluwer Arbitration Blog
December 3, 2018

Catherine A. Rogers (Arbitrator Intelligence, Inc.) and Louise Barrington, Mirèze Philippe

Please refer to this post as: Catherine A. Rogers and Louise Barrington, Mirèze Philippe, 'Join in the Campaign on Women Arbitrators: Co-sponsored by Arbitrator Intelligence and ArbitralWomen!', Kluwer Arbitration Blog, December 3 2018, http://arbitrationblog.kluwerarbitration.com/2018/12/03/join-in-the-campaign-on-women-arbitrators-co-sponsored-by-arbitrator-intelligence-and-arbitralwomen/

This year ArbitralWomen (AW) celebrates its 25th Anniversary. Founded in 1993, AW is a network of women from diverse backgrounds and legal cultures active in international dispute resolution in any role, including, arbitrator, mediator, expert, adjudicator, surveyor, facilitator, lawyer, neutral, ombudswoman or forensic consultant. With close to a thousand members from over 40 countries, AW has been instrumental in fostering a dynamic global discussion about the gender imbalance in arbitrator appointments and arbitration practice. Through these efforts, AW and its members have helped identify the myriad causes for the gender imbalance, from pipeline leakage, to unconscious bias, to the need to better support work-life balance issues.

AW has also introduced important innovations to remedy the gender imbalance, including a mentorship program, formal and informal events at which causes and solutions are discussed. AW is a strong supporter of the Equal Representation in Arbitration Pledge (ERA Pledge or the Pledge). The Pledge, is "a call for the international arbitration community to commit to increase, on an equal opportunity basis, the number of women appointed as arbitrators." In addition, The Pledge promotes "pledges and charters launched by other organisations and groups, aiming to promote women practitioners namely in dispute resolution but also more broadly in the legal and business fields."

By now, we know that all these efforts have been having important effects. Today, arbitral institutions are publishing both general statistics about gender and other diversity criteria and, in some instances, the names of arbitrators appointed to the cases they administer. Meanwhile, the percentage of women appointed as arbitrators by institutions in 2016 was, on average, around 17%, up considerably in just a year from the 2015, when the average was 12% and up dramatically from 2012, when the percentages was a mere 6%. Statistical correlation does not always equal causation, but Lucy Greenwood's scholarship provides anecdotal input that seems to suggest that much of this progress is in fact tied to implementation of The Pledge.

However, institutional appointments account for only a fraction of all arbitrator appointments.

Concerns about lack of diversity are less evident in the estimated 75% of cases in which parties appoint arbitrators. As **Lucy Greenwood** cautions, there is a "stark disconnect between the rate at which institutions appoint women and the willingness of the parties to do so."

Parties have many reasons to appoint diverse tribunals. A robust and growing body of literature demonstrates that group decision-making can be markedly improved when decisional bodies have a diverse composition. Other studies have long confirmed, not surprisingly, that representativeness of judges improves perceived legitimacy of adjudicatory apparatus. These studies suggest we would all benefit from greater diversity among arbitrators.

These studies have limited impact on actual behavior, however, because they measure the benefits of diversity in the abstract. Arbitrator selection, by contrast, is hyper-individualized and highly personal—both in the process and substance of assessing potential arbitrators. So, to affect parties' actual practices and priorities when they are selecting individual arbitrators, it is necessary to address their more specific incentives. When parties are asked they often provide an explanation to the effect: "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.'"

According to a survey conducted by 2017 survey by Bryan Cave Leighton Paisner, 93% of respondents identified "expertise" and 91% identified "efficiency" as the most important features in appointing arbitrators. In the words of our anonymous commentator cited above, they are looking for "the best person for the job."

The problem is that this information is generally not available on arbitrators' CVs. Given the confidential nature of arbitration, the traditional (and still only) way to collect this information is through personal phone calls with individuals who have appeared before a potential arbitrator or, better yet, sat as a co-arbitrator with that person.

There are two main problems with this approach.

The first problem with arbitrator research based only on person-to-person inquiries is that it creates an information bottleneck. The limited number of individuals who can provide such information stifles the ability of newer and more diverse arbitrators to develop international reputations that the BLP statistics tell us are key to getting appointments.

To illustrate, let's take a hypothetical.

Imagine a young Brazilian woman has been appointed by arbitral institutions in three sizable and complex arbitrations. And she was simply **AWESOME**. The parties were wowed. Her co-arbitrators were impressed. And the institutions were delighted. How many attorneys worldwide now know about her exceptional abilities? Maybe 20? 30? 40 tops? And what are the chances that one of those 40 people will receive a phone call about her future appointment? To borrow from the philosophical question about a tree silently falling in the woods: What happens if an arbitrator has a fantastic reputation, but no one knows about it?

The second problem with ad hoc person-to-person research is that such research largely confines assessment of potential arbitrators to subjective evaluation by a limited number of individuals. This research technique functions more as a telephonic lottery than systematic evaluation. Workplace research in the United States suggests that cognitive biases—those implicit biases we all have but are often unaware of—most easily translate into **employment discrimination** when hiring is premised on subjective evaluations and processes that do not involve systematic evaluation.

Arbitrator Intelligence seeks to promote diversity both by breaking the information bottleneck, and by providing an alternative to the highly subjective, ad hoc nature of arbitrator assessments.

The means to these ends is the **Arbitrator Intelligence Questionnaire,** or AIQ. If parties and counsel complete an AIQ at the end of each arbitration, Arbitrator intelligence will compile the collected about arbitrators, analyze it, and compile it into Arbitrator Intelligence Reports on individual arbitrators. These reports will then be made available (for a fee) through our partner, Wolters Kluwer.

The content of the AIQ was developed to replicate the same kinds of information currently sought, and available only, through personal phone calls. Unlike phone calls, however, the AIQ seeks to disaggregate the abstract qualities of "expertise" and "efficiency" into objective, measurable data points. For example, to paraphrase a few questions from the AIQ: Did the arbitrators grant document production? Did they ask questions that demonstrated familiarity with the record? Based on data collected through the AIQ, Arbitrator Intelligence will also be able to determine the overall duration of arbitrations and time to issue the award, and numerous other valuable objective data.

Arbitrator Intelligence has been collecting data about arbitrators through the AIQ since the summer of 2017, and already has approximately 500 responses that cover more than 1200 examples of arbitrator case management and decision-making. Arbitrator Intelligence is now analyzing this data to develop Arbitrator Intelligence Reports.

After a highly successful Campaign in Latin America, we have sufficient data to create a sample reports on a Latin American arbitrator. However, Arbitrator Intelligence still needs more data to be able to generate sample reports on women arbitrators.

To generate this data, Arbitrator Intelligence and ArbitralWomen are calling on parties, counsel, and third-party funders to complete AIQs on recently completed arbitrations. The AIQ has two phases, which together take about 15 minutes to complete. Anyone with access to the file can complete Phase I, and anyone who participated in the actual proceedings can complete Phase II.

Do your part! Take a few minutes any day from now until December 14 to help generate information about women arbitrators. And stay tuned for when, in early January when Arbitrator Intelligence will be hosting a series of webinars and focus group sessions to obtain input on sample AI Reports.