

Redressing the Balance: The Path Ahead for Gender and Generational Diversity on Arbitral Tribunals

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On 19 September 2016, Freshfields hosted an ICC YAF event at its London offices on gender diversity in arbitration and the Pledge for Equal Representation in Arbitration (“Pledge”), a topic which has been the centre of discussions on panels organised by ArbitralWomen around the world. The Pledge initiative, orchestrated by **Sylvia Noury** of Freshfields and launched in May this year, addresses issues related to under-representation of female arbitrators on arbitral tribunals and has already had a positive effect, as practitioners – both men and women – have joined the debate all across the board. The purpose of this panel was to have an interactive debate about the reasons for the barriers to gender diversity and how to overcome them.

The panel debate was introduced by **Leilah Bruton**, Senior Associate from Freshfields. Together with Bruton the panel was composed of strong female voices **Samantha Bakstad**, Counsel BP Legal, London, **Kate Davies**, Partner Allen & Overy, London, **Mirèze Philippe**, Special Counsel ICC, Paris, and also of **Chris Parker**, Partner Herbert Smith Freehills, London, the male voice on the panel.

Bruton first invited the panel to share their views about whether gender diversity in arbitral appointments matters. The panellists confessed that like many practitioners they did not think about gender diversity when nominating arbitrators and that the recent efforts undertaken to raise awareness about the under-representation of women on arbitral tribunals made them realise that everyone must contribute to redressing the balance because gender diversity matters for several reasons. Panellists agreed that the most important responsibility is to make honest efforts to look for and find a broader pool of talents.

This author said that at least half of the world's population is composed of women and that it would be a disconnect from reality if we deny gender diversity in arbitration, in fact in any field. Women have throughout history contributed to building the world's society, but in spite of that, the world remains male-oriented and male-dominated which is illogical. Women are as important as men in contributing to all the social, political, educational and professional components of any society, and their absence is even detrimental because they have their views, their experience, their talents and we would be missing this wealth of input. Gender diversity brings to the room essential components because men and women often have different approaches, views, and analyses of situations. Neither is better than the other, they work differently but they are complementary and both are indispensable.

An article published this summer addressed the dearth and almost the absence of women in engineering schools in France; the male students interviewed felt uncomfortable about this situation, namely because they are deprived of half of humanity, men are less mature if they stay among themselves, and conversations rise to a higher level when women are present.

The issue of whether greater diversity helps to improve legitimacy of international arbitration was raised. The author referred to a blog posted on Kluwer by Joseph Mamounas on 10 April 2014 in which he summarises very well the positive answer to this question. He wrote that "A lack of pluralism is a denial to users", and also quoted Benjamin Franklin who said "If everyone is thinking alike, then no one is thinking"!

One of the questions in the Queen Mary survey of 2015 about Improvements and Innovations in International Arbitration, was "If users could have any improvement made to international arbitration what would it be? The myriad of answers included

“broadening the pool of arbitrators in number as well as in ethnic and gender diversity”. Therefore gender diversity is viewed as being a needed improvement.

“Pale, male and stale” does not reflect the composition of society, and there lies the problem. Everyone bears a responsibility in cultivating diversity. Promoting the talents in dispute resolution should be the main objective, and this clearly includes women and young practitioners who are often excluded.

The barriers to gender diversity are numerous; some are subtle others clearly visible. Stereotypes are probably the worst enemy. Most business and legal communities are still male-dominated and there seems no willingness to bring women onto the stage. Many people see gender diversity as a non-issue. This may have been unconscious but is it limited to unconsciousness? The situation would have continued if women did not rise their heads to show that they exist, that they are talented, and that they are entitled – like their male counterparts – to be considered for certain roles. The discrimination towards female practitioners in any field is an old story, but one which is perpetuated despite the progress of society. The situation has been changing in the last two decades, although insufficiently and very slowly. Talented female practitioners in dispute resolution are numerous but statistics of nominations stagnate at approximately 10%. We “should be striving towards a true meritocracy in international arbitration” said Noor Kadhim on 26 September 2016 in a Kluwer blog.

In her book about her famous mother, Dame Rose Heilbron, the equally famous Hilary Heilbron said that her mother was the first female King’s counsel (and later Queen’s counsel when the king died) to be made silk in 1949, exactly 30 years after the Sex Disqualification Removal Act of 1919 in UK. Hilary herself was the 29th woman QC in 1987, so it was not a great deal of progress for women in 38 years, wrote Cherie Blair in her foreword to the book. Dame Heilbron experienced discrimination but succeeded to overcome it, thanks to the quality of her work and to her personality.

The successful career of Dame Heilbron was rather unique especially in the mid 20th century and did not stop when men came back from the Second World War. Many women who served in various roles during both World War I and II were not as lucky. The example of Joy Lofthouse, pilot of spitfires during the WWII is a testimony; she reported that there were 164 women flying spitfires and they were welcomed by men; but the minute the war ended there was no place for them to

continue a career of pilot. These women were sent back to the kitchen!

Women filled gaps but were no longer considered useful in such positions, or perhaps men did not want to share power with women. This is discrimination and conscious bias.

Another barrier for women is the difficulty to return to practice after having been absent a few years to raise children. Some firms have put in place returnship programmes to address this problem but this remains scarce.

Lack of visibility is one of the main barriers. Women in general do not promote themselves as men do. They are difficult to find if they do not publish their profile on websites such as ArbitralWomen. Co-arbitrators, corporate, lawyers, institutions, will think about female practitioners if they have met them, heard them, read their publications or awards, or otherwise learned about them. The author told the audience of sixty young practitioners, men and women, that it is everyone's responsibility to promote each other and thus to promote talented colleagues.

We must use all means available to us to raise awareness about the under-representation of female arbitrators, whether in private meetings or in conferences, by promoting female and young practitioners, and reminding our colleagues of everyone's duty to attain better representation. Raising awareness is powerful when many join the movement. The more you make noise about under-representation, the more people will hear and hopefully understand that message.

There exists an opportunity that practitioners do not build enough on and which should be more promoted and used. The vicious circle of usual suspects can be broken by the usual suspects themselves. Renowned arbitrators sometimes turn down proposals of appointments for various reasons. Some of these arbitrators turn down offers but recommend other arbitrators which is very helpful and doing a favour to the parties and to the arbitration as a whole. The usual suspects and renowned arbitrators are probably the best source for promoting newcomers, more than institutions or users. They may not only recommend new talented women and young practitioners but also endorse and mentor them. There are many talented women and young practitioners, but if no one is willing to give them the opportunity to show their talents, those talents will be wasted. It is everyone's duty to contribute to offering equal opportunities to qualified practitioners. The contribution of reputed arbitrators to the arbitration community and to diversity is

invaluable.

Pretending that, as often heard, no female practitioners were found to fill a position is not serious. Websites such as ArbitralWomen offer a 'Find Practitioners' facility and practitioners in general have their contacts that they may call on to ask for referrals. This problem was addressed by the Pledge Steering Committee, who decided to assist persons wishing to find female practitioners, as announced on 8 September 2016 in Kluwer's: 'One Step Further after the Launch of the ERA Pledge: A Search Service for Female Arbitrators Appointments'. A Search Committee was constituted to address requests posted on the Pledge website at www.arbitrationpledge.com via the 'Arbitrator Search' tab.

The panellists were also invited to share views about whether the Pledge goes far enough in addressing gender barriers, and it was considered that, by proposing and measuring concrete actions, it does properly address this issue. One of the commitments listed in the Pledge concerns the assessment of the efforts undertaken by the stakeholders, mainly arbitration institutions and corporates, who are requested to publish statistics in order to measure evolution. The author is convinced that next year's statistics will show an improvement. Arbitration institutions have made visible progress in appointing female arbitrators in recent years. The ICC, for example, has taken gender and generational diversity very seriously and has encouraged its national committees to take this into consideration in order to reflect the various components of local arbitration communities.

To the question about whether the Pledge should have covered further diversity issues, the author responded that redressing the balance must start somewhere and gender diversity was the most pressing.

Through the Pledge, Noury has taken the right action to encourage stakeholders to take responsibility, because the success of better representation of women on arbitral tribunals depends on everyone. Simply having gathered players in dispute resolution to discuss the dearth of women on arbitral tribunals and potential solutions has already had a positive effect to address these barriers. ArbitralWomen's efforts over the past two decades have been directed at promoting women in dispute resolution. The Pledge now offers another timely concrete and important step: a crucial milestone to build better cooperation and strive for inclusiveness. We should continue building on this momentum.

The author recommended to the young practitioners to use all available means to become visible, by participating to meetings like this YAF event and other related dispute resolution conferences, registering with the ICC National Committees of which they are nationals, being active in working groups such as ArbitralWomen, IBA, ICC, UNCITRAL, publishing, speaking, arbitrating at the Vis pre-moots, and showing their talents.

Finally, it is imperative to continue making noise about the Pledge and gender equality in order to rally more stakeholders and to achieve equal representation on arbitral tribunals.

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