The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence

Kluwer Arbitration Blog
December 27, 2017

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Please refer to this post as: Catherine A. Rogers, 'The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence', Kluwer Arbitration Blog, December 27 2017, http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators/

A strange paradox marks the debate about international arbitrator diversity.

Public consensus increasingly reflects a pervasive concern about the lack of diversity among international arbitrators. ArbitralWomen can claim much credit for focusing attention on the lack of gender diversity, as evidenced by now more than 2500 signatures on The Pledge. Meanwhile, many corporate users now insist that firms include diverse candidates on lists of proposed arbitrators.

Concern about the lack of diversity is also reflected in the results of a survey on diversity by Berwin Leighton Paisner (BLP). In that survey, 80% of respondents believe that tribunals contain too many white arbitrators, while 84% believe that they contain too many men, and 64% felt that there were too many arbitrators from Western Europe or North America.

The good news is that these efforts seem to have nudged arbitral institutions toward greater diversity in institutional appointments. In 2016, women constituted, on average, around 17% or institutionally appointed arbitrators, considerably up from 12% just a year earlier in 2015, and dramatically up from the mere 6% in 2012.

The bad news is that institutions account for only a fraction of all arbitrator

appointments. And concerns about lack of diversity are not having a similar effect 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."

This lack of "willingness" is underscored in other findings from the BLP survey. While 84% responded that tribunals had too many men, only 50% of respondents thought that it was desirable to have gender balance on arbitral tribunals, and 41% thought that "it makes no difference." Responses on ethnicity and national background followed a similar pattern. 80% and 64%, respectively, said too many arbitrators were white or from Western Europe and North America, but only 54% responded that ethnic balance on a tribunal was desirable, with 31% saying that "it makes no difference."

These responses reveal an apparent contradiction. On the one hand, they demonstrate widespread concern about the lack of diversity. On the other hand, they suggest an apparent inability to translate those concerns into actual appointments in individual cases. This gap is captured not only in the BLP statistics cited above, but also in the comments of an anonymous commentator, who explained "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.'"[fn]Anonymous posting to OGEMID@mailtalk.ac.uk (9 February 2012, 03.27 CST), cited in Lucy Greenwood & Mark Backer, Getting a Better Balance on International Arbitration Tribunals, 28 Arbitration INTERNATIONAL 653, 661 at n. 42 (2012).[/fn]

Therein lies the diversity paradox.

The key to resolving this paradox is to close the gap between the altruism that animates abstract concerns about diversity, and the strategic pragmatism that dominates arbitrator selection in individual cases. To achieve a more representative pool of arbitrators, in other words, we should appeal not only to the "better angels of our nature,"[fn]The phrase "better angels of our nature" comes from a post-Civil War speech by U.S. President Abraham Lincoln: "We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory will swell when again touched, as surely they will be, by the better angels of our

nature."[/fn] but also to the more Machiavellian instincts that inform our case-specific arbitrator appointments.

Our better angels do not have to be strangers to our inner Machiavellis—they meet in the many contexts in which we "do right by doing good."[fn]David B. Wilkins, Doing Well By Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers, 41 HOUSTON L. REV. 1 (2004).[/fn] With respect to diversity, for example, a robust and growing body of literature demonstrates that group decisionmaking can be markedly improved when decisional bodies have a diverse composition.[fn]David Rock & Heidi Grant, Why Diverse Teams Are Smarter, Harvard Business Review, November 4, 2016.[/fn] Other studies have long confirmed, not surprisingly, that representativeness of judges improves perceived legitimacy of adjudicatory apparatus.[fn]See, e.g., Tom R. Tyler, Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government, 28 LAW & SOC'Y REV. 809, 818 (1994).[/fn] 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 unlock the diversity paradox, let's look more closely at parties' actual practices and priorities when they are selecting individual arbitrators.

If not diversity, what are parties looking for when they appoint arbitral tribunals? Going back to the BLP survey, 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."

As we all know, 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.

For those concerned about diversity,[fn]This is the first in a series of five Kluwer blog posts about Arbitrator Intelligence and the market for arbitrator services. [/fn]

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 our 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 AI 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.

Can the Arbitrator Intelligence, through data from the AIQ, promote diversity in international arbitration? We are optimistic for two reasons.

First, we hope to tap into arbitration specialists' self-interest (not, or not only, their commitment to improving arbitrator diversity). Looking again to the BLP survey, there is reason to be optimistic. A staggering 92% of respondents indicated that they would welcome more information about new and less well-known candidates whom they could appoint. To generate this information, we need parties and counsel (and third-party funders) to complete AIQs. Lots of them! This may seem like a big ask for busy lawyers, but again looking to the BLP survey, 82% of respondents indicated an interest in providing feedback about arbitrators.

Second, by increasing information and reducing subjectivity in arbitrator assessment and selection, Arbitrator Intelligence undertakes to promote a more robust meritocracy. With more information, newer arbitrators can be more fairly evaluated based on their actual performance and more effectively compared to other arbitrators based on objective criteria. They can also develop reputations for excellence and efficiency that are independent of personal vouching through ad hoc phone calls that currently impedes their progress.

AI's ability to succeed, of course, depends on parties and counsel submitting AIQs at the end of each arbitration. So, as the 2018 New Year begins, consider taking the few minutes necessary to complete AIQs at the end of each case. Join the several law firms that have agreed to provide retrospective AIQs on cases completed in the past few years. Sign the Arbitrator Intelligence Pact, promising to support our mission of promoting transparency, accountability and diversity.

In other words, in 2018, do your part to solve the diversity paradox—both by acting both in your (and your clients') own self-interests and by answering to the better

angels of your nature.