

Diversity and Intergenerationality - Report on the Seminar “OGEMID and TDM past, present and future: a celebration”

Kluwer Arbitration Blog

May 20, 2018

Giammarco Rao

Please refer to this post as: Giammarco Rao, ‘Diversity and Intergenerationality - Report on the Seminar “OGEMID and TDM past, present and future: a celebration”’, Kluwer Arbitration Blog, May 20 2018, <http://arbitrationblog.kluwerarbitration.com/2018/05/20/diversity-and-intergenerationality/>

Back in the early 20th century, the business community created arbitration with the aim of offering an alternative to the perceived inadequacies of state courts in dealing with foreign parties, law, and claims. At the time, cases and claims were characterised by European, Mediterranean, and American elements. As a result, the arbitration community was described as:

“an Anglo-European (plus the odd American) gentlemen’s club, where everyone knew everyone else, either personally or by reputation, where arbitrators and counsel regularly lunched or golfed together, and where everyone was usually familiar with the style and proclivities of the members.”[fn] L. Barrington and R. Rana SC, ‘ArbitralWomen/TDM Special Issue on ‘Dealing with Diversity in International Arbitration’ [2015] TDM4, 1-2.[/fn]

In the last couple of decades, international arbitration has evolved. As pointed out by Adekoya,[fn] F. Adekoya, SAN, ‘Is International Arbitration Truly International - The Role of Diversity’ [2018] TDM. [/fn] a notable increase of disputes from the Middle East and Africa can be seen from the statistics released by ICSID, the ICC, and the LCIA. However, the data on counsel and arbitrators do not reflect the diversity present in those disputes. International arbitration remains the domain of a selected number of persons.

It is against this backdrop that on 10 May 2018, academics and practitioners gathered at the conference **OGEMID and TDM past, present and future: a celebration**, held at Jones Day’s London offices, to discuss diversity and intergenerationality and celebrate OGEMID and TDM in the ten years since the passing of their founder, Professor Thomas Wälde.

Professor Wälde founded the discussion forum and publication to offer practically and academically sound tools for the fields of international arbitration, ADR, and international investment law.

The conference focused on the topics of diversity and intergenerationality central to Professor Wälde’s vision, enriched and shaped by the community he created. The introductory remarks, by OGEMID Moderators Baiju Vasani and Sophie Nappert, and TDM Editor Mark Kantor, focused on what that vision means. Baiju recalled that Professor Wälde’s objective was to include in arbitration people from all around the world, as well as from different generations, to test the status of established wisdom. This was reflected in the care and attention he gave, acting as an expert on one of Baiju’s

cases as a young associate, to Baiju's impressions and thoughts and to treat them on an equal footing as those of more experienced partners. Sophie paid tribute to Professor Wälde's passion in creating a community dedicated to the discussion of different topics without any taboo. Mark highlighted the guidance that Professor Wälde offered to the world of arbitration, the purpose of TDM in delivering this guidance, and how TDM benefited from OGEMID. TDM is an online platform where scholars, practitioners, and government officials can communicate their ideas to the community to which they belong. The importance of the journal is demonstrated by the number of university subscribers, giving access to students and researchers in the field.

In true Professor Wälde fashion, the conference dealt with the topic of diversity and intergenerationality in international arbitration through a short panel discussion, followed by debate with the audience which highlighted different perspectives and angles on the issues. To begin with, Dr Catharine Titi^[fn] Catharine Titi is a Research Scientist at the French National Centre for Scientific Research (CNRS) and Member of the CREDIMI, Law Faculty of the University of Burgundy. She holds a PhD from the University of Siegen in Germany. ^[/fn] pointed out that diversity is of paramount importance for two reasons. First, in truly multicultural environments, any person enhances the team by bringing to the table something unique connected to his or her background. At the same time, the members of the team do not take for granted any statement, and thus, team members come up with diverse angles, perspectives, and responses. However, Catharine noted that when choosing a candidate for a role, the choice should not be based on positive discrimination. Unless creating a team, when the role is to be taken by only one person, the process of selection should take into account the most capable person regardless of any diversity requirements. Moreover, she briefly commented that the underrepresentation of women in the international arbitration field might be due to a woman's career choices. In the same way, she noted that the perception of women as being less authoritative than men might represent an issue to tackle.

In the second place, Dr Alessandra Asteriti^[fn] Alessandra Asteriti is Junior-Professor for International Economic Law at the Leuphana University Lüneburg. She is also a post-doctoral researcher at the University of Glasgow, School of Law.^[/fn] put emphasis on the meaning of diversity and how it depends on the perspective from which it is taken into consideration. In particular, even though this would not be enough in certain circumstances, it was stressed that being part of a group is the first step to take, and only then, diversity of backgrounds and experiences could play a role. For example, it is not surprising that 71% of senior judges went to private school. As a result, it was submitted that there is a necessity to agree on the set of skills or qualities required to be the best for a role. In doing so, importance should be given to diversity so as to allow, for example, women not to run behind a model and necessarily match with that model.

Moreover, Guled Yusuff^[fn] Guled Yusuf is a Senior Associate at Allen & Overy, London.^[/fn] touched upon the issue of geographic diversity by looking at the appointments in ICSID tribunals. In particular, attention was focused on the underrepresentation of African nationals as arbitrators in ICSID cases. In fact, counsel disproportionately appoint arbitrators from North America and Western Europe notwithstanding the presence of talented African nationals. Furthermore, Guled pointed out that diversity is relevant to the benefits of a tribunal in terms of legitimacy. Indeed, a multilateral system which lacks diversity could not truly be called multilateral. The involvement of all actors in the appointment system was raised as a remedy to the diversity issue, whereby law firms should appoint more diverse tribunals whereas States should keep up-to-date panels of arbitrators. In doing so, the efforts made by ICSID to provide parties with more diverse candidates would be facilitated.

Following the panellists' remarks, four propositions were put forward by Baiju on how to face the challenge of diversity in international arbitration:

1. Too much emphasis is placed on gender diversity at the expense of regional diversity;

2. The Pledge is a valuable initiative but it does not have the desired effect;
3. Removing party appointment and leaving the appointments to institutions will facilitate the constitution of more diverse tribunals;
4. Doing away with arbitral secretaries will prevent arbitrators from handling overly large caseloads, and thus facilitate the appointment of newcomer arbitrators.

Catharine commented on the third proposition. In particular, she stated that, even though party appointment might come with some disadvantages, the rejection of the whole system should be discouraged since it is still a valuable one. Moreover, Guled noted that a closed list of arbitrators, as that provided by the Court of Arbitration for Sport, might offer an interesting solution to remedy the defects of the system.

As to the proposal of doing away with arbitral secretaries to force busy arbitrators to lighten their caseload, a member of the audience noted that what needs to be tackled is the underlying issue of large caseloads distributed amongst a limited number of individuals. The issue of diversity will not be solved by discouraging young professionals from entering the arbitration field via the tribunal secretary route. A participant suggested that deadlines as to when rendering the award might be the solution to that issue. Moreover, Baiju noted that that the appointment of diverse tribunal secretaries might offer an additional opportunity of introducing the diversity factor in arbitration.

Regarding the proposition that too much emphasis is put on gender diversity at the expense of regional diversity, it should be noted that attention is to be focused on both given that the gender and geographical elements might be combined. The main challenge is to appoint subjects who distinguish themselves not only by their gender but also by their backgrounds. On the one hand, regional diversity brings something uniquely related to the subject's diverse background. On the other hand, the gender factor also brings diverse perspectives and angles. This is why their combination ought to be favoured and facilitated.

After briefly discussing potential areas of improvement for OGEMID and TDM, the closing remarks by Professor Maurice Mendelsohn QC emphasised their origins. By keeping the roots of OGEMID and TDM firmly in mind, we can look forward to the future of the community of professionals sharing interests and mutual respect, united under the vision of Professor Wälde.

In conclusion, this conference was the perfect example of how this growing community is carrying the torch of Professor Wälde's vision by providing a lively, no-holds-barred discussion between passionate professionals of different generations and backgrounds.

The author is an LLM candidate in comparative and international dispute resolution at Queen Mary University of London.

To make sure you do not miss out on regular updates on the [Kluwer Arbitration Blog](#), please subscribe [here](#).