

Nurturing Discourse: An Overview of AIAC's Diversity in Arbitration Week

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Arbitration's international character is derived from it being a melting pot of individuals from divergent academic, professional, age, gender, racial and ethnic backgrounds. But how far have we come from the adage that arbitration is "pale, male and stale"? The Asian International Arbitration Centre ("AIAC") launched its inaugural Diversity in Arbitration Week ("DAW") as part of its ADR Online: An AIAC Webinar *Special Series* between 14th and 17th July 2020. During the week, 90-minute webinars were held each day on select topics relating to diversity in arbitration. What culminated was a week's worth of engaging and insightful discussion on where we are, where we need to be and what needs to be done to enhance the facets of diversity.

Gender

Gender diversity is arguably the most prominent aspect of diversity being addressed by the arbitration community. To understand more about the unique experience of female arbitrators in practice, the AIAC collaborated with the Equal Representation in Arbitration Pledge ("ERA") on a webinar titled "Remotely

Personal". Opening remarks for the webinar were delivered by Sitpah Selvaratnam (Tommy Thomas & ERA Global Steering Committee) with Mohanadass Kanagasabai (Mohanadass Partnership) expertly moderating. The panel comprised of six female arbitrators – Juliet Blanch (Arbitration Chambers), Briana Young (Herbert Smith Freehills), Tan Swee Im (39 Essex Chambers), Christine Artero (The Arbitration Chambers Pte Ltd), Patricia Saiz Gonzales (ESADE Law School) and Olufunke Adekoya, SAN (ÁELEX) – all of whom shared stories of the explicit and implicit biases faced in their careers whilst stressing the importance of female practitioners being given opportunities, based on merit, to excel in their careers. The panel highlighted that there remains a societal expectation for women to shoulder most household and parental responsibilities, although corporate culture is now more receptive to the needs of working parents through flexible working arrangements, which has increased female retention rates. Nevertheless, pipeline leak and repeat appointment issues remain prevalent in arbitration. The panel was of the view that until more women make it to the top of their respective practice areas, the chance of increasing female arbitrator nominations is slim.

Since its inception in 2016, the ERA Pledge has played a significant role in female arbitrator appointments with the LCIA recently winning the ERA Pledge GAR Award 2020 for appointing 43% female arbitrators in 2018. Although this is undoubtedly a step in the right direction, more can be done by law firms and arbitral institutions to heighten female representation in arbitration; whether it be by providing mentorship and promotion opportunities for talented and capable females, or by making concerted efforts to nominate and appoint more females as arbitrators. Nevertheless, the panel stated female practitioners themselves also play a key role since only by increasing their profile will they increase their chances of appointment, despite the systemic challenges.

Age

Age and, by proxy, experience, were also two vital aspects of diversity touched upon during DAW, predominately in the context of young practitioners landing their first arbitration appointment. In collaboration with the Asia-Pacific Forum for International Arbitration ("AFIA"), the second webinar titled, "Roundtable on Age Diversity in International Arbitration – An Imagined or Real Problem" was held. Opening Remarks for the webinar were delivered by Jonathan Lim (Wilmer Cutler

Pickering Hale and Dorr LLP & Co-Chair of AFIA) with Janice Lee niftily moderating (Harry Elias Partnership). The panel comprised of Diana Rahman (AIAC), Emmanuel Duncan Chua (Chevron Corporation - immediate past), Dr. Michael Hwang SC (Michael Hwang Chambers LLC) and Isuru Devendra (Latham & Watkins).

What became apparent was that the perceptions attached to age appeared to differ depending on the arbitration stakeholder in question. From a counsel's perspective, the preference is for practitioners with sufficient experience in the subject matter of the dispute. Hence age, gender and/or cultural backgrounds were not considered prohibitive factors in nominating arbitrators. From a client's perspective, the preference towards young arbitrators is primarily driven by the busy schedules and expense of more seasoned arbitrators who are high in demand. Whilst comparable, young and astute arbitrators had the added advantage of bringing high energy levels to the proceedings, which is generally welcomed by clients.

Arbitral institutions once again were considered uniquely placed to reduce age barriers, where AIAC was referenced for making 30 of the 155 appointments of first-time arbitrators in 2019.

Although there is no magic formula for young practitioners trying to break into the industry and forge their arbitration careers, it was unanimous that specialised knowledge in a specific area of the law, whilst being cognisant that smaller is better (in terms of the claim amount) and a less complex dispute is more appropriate for one's first few appointments, would give a young practitioner a competitive edge to land their first appointment.

Professional

A benefit of arbitration is the ability to choose a subject-matter expert (*i.e.*, industry professionals) to act as an arbitrator as opposed to a legally trained individual. In collaboration with the Chartered Institute of Arbitrators ("CI Arb") (Malaysia Branch), the third webinar of DAW was titled, "*Professional Diversity in Arbitration - Inevitable or Idealistic?*". Opening Remarks were delivered by Foo Joon Liang (Gan Partnership & Chairperson of CI Arb Malaysia Branch) with Choon Hon Leng (Raja, Darryl & Loh) craftily moderating the session. The panel consisted of arbitrators, both lawyers and industry professionals - namely, Ir. Harbans Singh

K.S. (HSKS Dispute Resolution Chambers), Karina Albers (algeny & Karina Albers), Daniel Tan Chun Hao (Tan Chun Hao Advocates & Solicitors), Fatima Balfaqeeh (RKAH Consultancy), Suzanne Rattray (Rankin Engineering Consultants) and Professor Philip Yang (Philip Yang & Co., Ltd) – all of whom shared their unique journeys into arbitration as well as the benefits and shortcomings of arbitral tribunals which have industry professionals.

The general theme was that industry professionals who act as arbitrators, especially those with substantive subject-matter expertise, can bring a great deal of pragmatism to a proceeding since more complex commercial transactions are created by business professionals and not by lawyers. Notwithstanding, industry professional arbitrators need to develop an understanding of the law and ADR to be effective arbitrators. A noteworthy observation made was that although industry professionals have access to ADR training programs through CIArb and other reputable institutions, courses in arbitration tend to be more theoretical as opposed to practical. Currently, there is minimal, if any, opportunity to simulate an arbitration proceeding. In light of this, institutions and training providers were urged to provide options to foster soft, practical skills as the way forward.

Race and Ethnicity

Undoubtedly, when it comes to diversity, the elephant in the room tends to be racial and ethnic diversity. In collaboration with #Careers in Arbitration, the fourth and final webinar was titled, “*Globalising Arbitration - Enhancing Racial and Ethnic Diversity*”. Opening Remarks were made by Amanda Lee (Seymours Solicitors & Founder of #Careers in Arbitration) with Catherine Ann Rogers (Arbitrator Intelligence, Queen Mary & Penn State Law (*on leave*)) brilliantly moderating the session. The panel comprised of Dr. Emilia Onyema (SOAS University of London), Dr. Kabir Duggal (Arnold & Porter Kaye Scholer LLP), Professor Darius Chan (Fountain Court Chambers), Sarah Malik (SOL International Ltd) and Thiago Del Pozzo Zanelato (Pinheiro Neto Advogados).

It was noted that counsels do not place much emphasis on racial & ethnic diversity due to the entrenched systems of party-appointed arbitrators and repeat appointments. In this regard, the efforts of initiatives such as the ERA Pledge, the Arbitrator Intelligence Questionnaire, and the AIAC’s DAW were noted for

promoting racial and ethnic diversity in arbitration. However, the panel lamented the lack of communal efforts to close the racial and ethnic gap. Emphasis was also placed on the importance of understanding the struggle of an intersectional individual fighting a battle against gender, ethnic and racial issues, and thus becoming implicitly marginalised at multiple levels whilst trying to engage with the rest of the industry. An appreciation of the nuances and role culture has on the conduct of an arbitration proceeding was also considered imperative to improving the quality of arbitral justice.

Arbitral institutions and counsels were once again considered best placed with moving things forward. For instance, arbitral institutions could be more proactive in approaching the unknown and finding raw talent, whilst counsels could take an active role in persuading their clients in having a diverse panel.

Conclusion

The key takeaway from the DAW discourse is that there is a long way to go when it comes to enhancing diversity in arbitration. However, the power to effect change does not lie with one individual or organisation; rather, collective and concerted efforts are required from all international arbitration stakeholders and participants to close the diversity gap. Although initiatives already exist to address some of the existing barriers to diversity, this does not mean we can be complacent that a resolution to diversity and inclusion issues is imminent.