Kluwer Arbitration Blog

The Winner of 2017 GAR Awards for Best Innovation?: Transparency & Diversity

Lucy Greenwood (Greenwood Arbitration), Catherine A. Rogers (Arbitrator Intelligence), Mirèze Philippe, and Michael McIlwrath (MDisputes) · Sunday, March 12th, 2017

Last week GAR released the shortlist for its 2017 award for "best innovation by an individual or organization". What is notable about this year's shortlist is that of the ten innovations on the list, six directly address transparency and/or diversity in international arbitration. From an online directory of African arbitration practitioners, to the launch of "Dispute Resolution Data", which offers 100 data points on cases heard by a variety of institutions, to a clarion call to increase the number of women appointed to tribunals, international arbitration may be finally shaking off its 'pale, male and stale' image. The 21st century makeover that international arbitration has needed for so long may at last be here.

We are, of course, delighted that three innovations in particular have been recognized by GAR this year: the Pledge, Puppies or Kittens and Arbitrator Intelligence. All three are close to our hearts. As champions of these three projects, we are writing this collective blog post because we believe that the process of selecting a single project as the award winner blurs the collective purpose of our work.

Each adopts a different approach and methodology, but they all three aim—individually and cooperatively—to promote diversity and transparency. For this reason we believe that, whichever innovation among the many deserving shortlisted projects actually receives the actual award at the GAR Gala in Milan, 2016 marked a year for great strides in innovations promoting Transparency and Diversity.

The Equal Representation in Arbitration Pledge was the first global initiative to address the under-representation of women in international arbitration which gained traction within the community. Not only did it chime with growing dissatisfaction with the status quo, but it was also backed by sufficient resources to garner support on a global scale. Signatories to the Pledge commit to increase, on an equal opportunity basis, the number of women appointed as arbitrators, with a view towards reaching the goal of full parity. Specifically, signatories promise to take steps to ensure that, whenever possible, committees, governing bodies and conference panels in the field of arbitration include a fair representation of women; that lists of potential arbitrators or tribunal chairs include a fair representation of female candidates; and that arbitral institutions include a fair representation of female candidates on rosters. The Pledge currently boasts 1627 signatories and anecdotally, has caused a major change in approaches to appointing female arbitrators. The Pledge Steering Committee will release a statistical analysis on the one-year anniversary of the launch of

the Pledge to determine whether the Pledge has resulted in real change.

While the Pledge encourages greater consideration of diverse candidates, it is, of course, difficult to consider someone about whom little is known. Better access to information is also what the market wants. A recent study by Berwin Leighton Paisner found that a staggering 92% of respondents indicated that they would welcome more information about new and less well-known candidates, and a whopping 81% wanted to be able to provide feedback about arbitrator performance at the end of cases. The other two projects – Puppies or Kittens and Arbitration Intelligence – seek to help address this information gap.

The attraction of the article "Puppies or Kittens? How To Better Match Arbitrators To Party Expectations?", published in the Austrian Yearbook on International Arbitration and co-authored by Michael McIlwrath, Lucy Greenwood and Ema Vidak Gojkovic, was not merely in its quirky title. A practical step towards greater transparency and diversity, the co-authors, suggested, would be for arbitrators themselves to publicly disclose their preferences with respect to certain issues relevant to the conduct of proceedings. They argued that by just answering a short questionnaire, arbitrators could help parties better select candidates that match their expectations, and, in doing so, also "promote diversity by allowing parties to better assess newer entrants and consider them alongside arbitrators whose soft skills they know through reputation and word of mouth." The arbitrators would not be asked about their views on substantive legal issues. Rather, the Puppies or Kittens approach suggests arbitrators volunteer information on their attitudes towards issues of case management, to delegation of work to tribunal secretaries, to settlement discussions, to disclosure, and to costs, amongst others. This simple proposition stimulated debate at conferences, on list servs, at cocktail parties and in print during the year. While we are aware of only a few arbitrators who have so far adopted the proposal, what is clear is that it touched a nerve. As Lucy Greenwood says "No other industry operates by appointing skilled workers without a truly informed understanding of how they will carry out the work".

Probably the largest-scale project currently underway is Arbitrator Intelligence (AI). AI's stated mission is to promote transparency, fairness, and accountability in the selection of international arbitrators, and to facilitate increased diversity in arbitrator appointments. The primary means for AI to achieve these ends is its newly developed Arbitrator Intelligence Questionnaire (IQ). The purpose of the AIQ to approximate—through systematically gathered responses—the kinds of information that are currently sought by parties through ad hoc, person-to-person phone calls during the arbitrator selection process. Once collected, data from AIQ responses will be analyzed and results will made available to arbitration users, counsel, institutions, and also arbitrators through "AI Reports".

One central premise of AI's work is that lack of information is one of the primary impediments preventing expansion of the pool of arbitrators to include newer, and more diverse candidates. Imagine, for example, a female arbitrator who performed exceptionally well in her first few debut arbitrations. Because the arbitrations and resulting awards are confidential, her demonstrated abilities are unknown and unknowable outside that small group of parties and counsel who were directly involved in those first few cases. Future parties will only be able to consider her fully if they are lucky enough to come across one of those parties or counsel in their ad hoc research during the arbitrator selection process.

Now, reimagine that at the end of those few cases, the parties and counsel provided feedback through the AIQ about this arbitrator's excellent case management and decision making. Imagine

further that their feedback and related data analytics were then available to other parties (and institutions) who may want to consider this new arbitrator for a future case. AI believes this systematically collected information about this arbitrator's performance will make it more feasible for parties (and institutions) to give her meaningful consideration for future appointments, and for her to compete on a meritocratic basis with other more established arbitrators.

And the Winner Is….

These three initiatives described above challenge the status quo. Each adopts a different methodology and approach. But all three, both individually and collectively (along with several other short-listed nominees), aim to help international arbitration to meet the increasingly challenging environment it confronts in the 21st Century by increasing Diversity and Transparency.

The full list of the nominations for best innovation is set out below. No matter how you vote, please sign up for the Pledge at www.arbitrationpledge.com, visit www.arbitratorintelligence.com to support the Arbitrator Intelligence Questionnaire, and (for arbitrators) be open about whether you prefer Puppies or Kittens.

The nominations for best innovation – 2017 GAR Awards
• "Dispute Resolution Data" – founded by former American Arbitration Association president Bill Slate – goes live. It offers 100 data-points on every case heard by a variety of institutions, including the ICC
• Africa International Legal Awareness unveils an online directory featuring practitioners from the continent with expertise in the field
• The launch of the Equal Representation in Arbitration Pledge – a call to increase, on an equal opportunity basis, the number of women appointed as arbitrators
• Gabrielle Kaufmann Kohler and Michele Potestà suggest that the UN Convention on Transparency in Treaty-based Investor State Arbitration (Mauritius Convention) could be basis for reform to investor-state arbitration system
• Michael McIlwrath, Lucy Greenwood and Ema Vidak Gojkovic propose that arbitrators should identify their procedural preferences and case management techniques in a questionnaire
• HKIAC offers free hearing space where at least one party to an arbitration, mediation and conciliation is listed on the OECD Development Assistance Committee List
• Sundaresh Menon suggests a role for the Chartered Institute of Arbitrators as a "robust and independent" central disciplinary body with "bite" to investigate allegations of arbitrator misconduct
• Swiss Chambers' Arbitration Institution unveils a revolutionary new "turbo" arbitration clause allowing parties to super-expedite proceedings
• Barry Leon's proposal for a "deemed consent" to arbitration in national bankruptcy and insolvency laws and corporate statutes
• Arbitrator Intelligence – Catherine Rogers' initiative to level playing field when it comes to the selection of arbitrators through information and feedback on their performance

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