Kluwer Arbitration Blog

Let's Stop Talking About the Arbitrator Diversity Problem

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Wouldn't it be fantastic if 2018 was the year we stopped talking about the problem of diversity in international arbitration? That is, what if we solved the problem today – and no longer needed to discuss it? We can. Today – by recognizing it's not the problem. I propose a new standard for addressing the issue.

Let's first put the so-called problem in proper perspective. Much has been said and written about the lack of arbitrator diversity in international arbitral panels and how it is either unjust, unfortunate or detrimental to the process. For years, the group Arbitral Women has, commendably, been raising awareness of the problem. Other groups have rallied to the cause. Leading institutions have responded, nearly across the board, pledging to include women and diverse practitioners in their panels, lists and appointments. Corporate counsel from an array of leading companies and others signed the Equal Representation in Arbitration Pledge committing to take action. ITA-ASIL, ICCA and other leading arbitral organizations are devoting conferences and conference sessions to the topic.

Yet, despite the growing awareness of the issue, many active voices on the issue, and some recent gains, appointments of women to tribunals of leading arbitral institutions hoover around 20% and diverse practitioners are similarly under-appointed. We widely recognize there is something wrong but we haven't effected a solution.

Embracing the Norm

Professor Catherine Rogers has named this predicament the Arbitrator Diversity Paradox. In a Kluwer Arbitration Blog post at the end of 2017, Professor Rogers articulated the paradox that public consensus increasingly reflects a pervasive concern about the lack of diversity among international practitioners but there is an apparent failure to translate the concern into appointments for women and other diverse practitioners. Professor Rogers argues that the key to unlocking the paradox is better intelligence on arbitrators. Of course, Professor Rogers is right; more information is needed to identify qualified arbitrators and implement change.

More fundamentally, the paradox is resolved by refocusing our view on what is normal. A panel that is diverse should be recognized and embraced as the norm. A panel that is not diverse should be identified as deficient, abnormal and unacceptable.

Think about it, what's normal and what's not? What's not normal are panels that don't include women or diverse practitioners. It's topsy-turvy to call a panel composed solely of white males

normal when women and minorities constitute the majority of our population. A panel that does not include a woman or diverse practitioner neither represents the majority nor has the benefit of diverse perspectives. It is, in essence, incomplete and defective.

So, while I applaud the many fine initiatives to raise awareness regarding the qualifications of women and diverse practitioners, I suggest it's time to extend our focus to the fact that there is something fundamentally perverse about consistently appointing panels composed solely of white males. A monotony of panel members does not make a panel better. It denies healthy deliberations and skews the norm.

Once we reconsider what is and what isn't normal, we're properly positioned to implement a standard that addresses the situation.

But let me pause and ask: Is it wrong to set a new normal? The answer is absolutely not – because we already recognize there is something wrong with our current perspective. Despite the growing visibility of women and diverse practitioners in the field, appointments are lacking. The 2016 Berwin Leighton Paisner (BLP) survey on diversity in arbitrator panels found that 80% of respondents believe tribunals are not properly constituted on diversity grounds. Apparently, there is significant demand for a new normal.

Setting the Standard

The standard should address the norm. Here is the standard I propose:

All panels should include at least one woman or other diverse practitioner and panels that do not are "Defective Panels."

Yes, just as poorly drafted arbitration clauses can be pathologically defective so too should we consider panels that aren't constituted to benefit from the perspectives and contributions of women and diverse practitioners to be pathological and abnormal.

I am not suggesting that a Defective Panel cannot proceed and resolve a case. It has been done, all too regularly, all too often. Rather, I am suggesting that we recognize that a panel so narrowly constituted is neither healthy nor normal. It can possibly do the task but it is not the ideal means. Such panels should be discouraged.

How do we apply the standard? As follows:

1. *Parties/Counsel*: Parties and counsel are to be informed that the standard for a properly constituted panel in international arbitration is to include at least one woman or diverse practitioner. If neither of the parties selects a woman or diverse practitioner as their appointee, the appointed Chair should be a woman or diverse practitioner. We call a panel that is not properly constituted a "Defective Panel."

2. *Institutions*: Institutions should promote the standard and their compliance with it to parties, counsel and arbitrators. Institutions should follow the standard and make institutional appointments to ensure that at least one woman or diverse practitioner is on every panel. Institutions should acknowledge that a panel not properly constituted is a "Defective Panel."

3. *Arbitrators*: Arbitrators should support the standard and make Chair appointments to ensure that

at least one woman or diverse practitioner is on every panel. Where a woman or diverse practitioner is already appointed by a party to a panel, the wing arbitrators should consider whether there are other qualified women or diverse practitioners to serve as Chair. Arbitrators should acknowledge that a panel that does not include at least one woman or diverse practitioner is a "Defective Panel."

Objections to the Standard

Being lawyers, our first instinct is to look to flaws. For the sake of the profession, the practice and your own dignity, I suggest you resist the urge here. Rather, allow me to address several potential critiques for you.

Is just calling a Defective Panel "defective" going to solve the problem? No, of course not. Recognizing that a panel is defective merely raises awareness. But implementing the standard in appointments will solve the problem.

Are there enough qualified women and diverse practitioners to serve? Yes, the reality is that there are hundreds of qualified women and diverse practitioners available for every case. Beyond sitting arbitrators, there are many young and diverse qualified arbitration counsel who can serve ably as a third arbitrator on a panel.

But what if I need an Arbitrator with expertise in a particular subject area? Most of the shining stars in our profession are generalists. Not every panel member needs to be a specialist. Moreover, the suggestion that there are no qualified women or diverse practitioners with subject matter expertise to sit on most cases is an absurdity. Look a little harder. Cases where a Defective Panel is required should be the exception not the rule.

Should we wait until we have more data on candidates to implement the standard? There are capable candidates now. There is no doubt that arbitral institutions, initiatives like Arbitrator Intelligence and organizations like Arbitral Women will continue to identify and profile qualified candidates. Implementing the standard will accelerate those intelligence-gathering efforts.

Is the standard a quota? Is it a reverse quota? No, the standard does not set any limit on the number of women or diverse practitioners who may serve on a panel. Nor does it set a limit on the number of men or non-diverse practitioners. Rather, it simply acknowledges that there is something inherently wrong if a panel is not diverse.

Should the standard be higher? It could be but the standard attempts to recognize the norm. Perhaps the standard will evolve over time but, at present, there is broad agreement that there is something wrong with a panel that lacks any diversity.

I'm an older, white male so what's in it for me? If your self-interest outweighs your willingness to accept that diversity improves the process, consider that most users will welcome the standard and it may improve user acceptance of arbitration, use of arbitration and, accordingly, your number of appointments. If nothing else, diverse panels can add some spice to your life.

Going Forward

Most of the panels I sit on today are Defective Panels. Ideally, we should all have the courage to admit that we've sat on or contributed to the constitution of Defective Panels. More importantly,

now is the time for all of us to move beyond the past and encourage parties, arbitral institutions and our fellow counsel and arbitrators to resist constituting Defective Panels in the future.

Redfern, Kaplan, Reed, Born and others have brought great innovation to international arbitration. What I propose is, however, much more modest. There is nothing revolutionary in recognizing monotony is not the norm. Let us simply acknowledge what is appropriate in panel appointments – and let us call out Defective Panels when we see them. Recognizing diverse panels as the norm is an accomplishment that can be attributed to us all.

By embracing the standard, we can stop talking about problem of arbitrator diversity and implement the solution.

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