Kluwer Arbitration Blog

Open Letter to International Arbitration Institutions and Counsel: A Real-World Concrete Solution to Increase Diversity in International Arbitration Tribunals

Jose F. Sanchez, Kartik Rajpal (Vinson & Elkins LLP) · Saturday, November 5th, 2022

The international arbitration community has made progress on improving diversity across the field, but continues to fall short on appointing diverse international arbitration tribunals.

Experts point to a range of reasons for the lack of diversity in international arbitration tribunals, chief among which is the lack of an experienced pool, coupled with the reluctance of parties to appoint inexperienced arbitrators, which perpetuates historical issues over the lack of arbitrator diversity in international arbitration. In this post, we respond to these systemic issues with a concrete solution to the problem: arbitration rules and model arbitration clauses should include a mandatory obligation requiring parties to strive to appoint a diverse tribunal. Additionally, we propose that counsel implement the same requirement when drafting bespoke arbitration clauses. Our solution allows for flexibility in the appointment process, but provides a mandatory obligation, ensuring that counsel must consider diversity seriously.

The Benefits of Diverse Tribunals Are Unquestionable

A diverse tribunal is key to enhancing the legitimacy of arbitral tribunals, and improving the perception of fairness and impartiality in arbitration. A diverse arbitral tribunal here refers to representation of diversity across the tribunal. While this blog post does not attempt to define diversity, it finds guidance in the International Centre for Dispute Resolution ("ICDR") Diversity Initiative, which defines diversity as encompassing gender, race, ethnicity, age, religion, and sexual orientation. We also note the inclusion of geographic and national origin among other traits.[1)]

As the President of the International Chamber of Commerce ("ICC"), Claudia Salomon, notes, diversity is essential to maintain the legitimacy of international arbitration as a method of dispute resolution for the international business community. Other commentators have echoed this. After all, it is important for the decision-making tribunals to better represent the global business community at large. Representation helps build trust in the system and increase engagement with arbitration among those who are hesitant. The arbitration community agrees as well, with 57% of those surveyed finding diversity across a panel to have a positive effect on their perception of a tribunal's independence and impartiality.

Appointing diverse tribunals is morally the right thing to do. Moreover, a diverse tribunal also results in better outcomes. Research from leading institutions, such as The Wall Street Journal, McKinsey and Company, and Harvard Business Review, has shown, time and time again, that diverse teams perform better and make better decisions. Diverse tribunals bring different perspectives to the table and address previously ignored nuances. Furthermore, the international arbitration community wants more diverse tribunals. A recent survey found that increasing diversity was one of the top adaptations to make arbitration institutions or rules more attractive to users.

We have seen the development and growth of numerous laudable initiatives in recent years, including the Equal Representation in Arbitration ("ERA") Pledge (a pledge to improve the representation of women in arbitration and to appoint women as arbitrators on an equal opportunity basis); The African Promise (a pledge to improve the representation of African arbitrators); and the Cross-Institutional Task Force of the International Council for Commercial Arbitration ("ICCA"), which publishes statistics on the appointment of female arbitrators and outlines best practices and opportunities to promote gender diversity in international dispute resolution.

Progress Is Still Needed

Statistics from the ICCA reflected consistent growth in the appointment of women from 2015–2019, an increase from 12.2% to 21.3% of all appointments. That is progress, but further progress is needed. While statistics for age, sexual orientation, race and religion are not publicly available, there is no reason to believe that diversity statistics would be more encouraging there.

The perception of the international arbitration community also indicates a need for change. The outlook is positive on gender diversity, with 61% agreeing that progress has been made over the last three years. However, the perception remains that sufficient progress has not been made on geographic (only 38% agreeing), ethnic (31%), cultural (35%), and age (36%) diversity.

The Issue Lies with Party Appointments

With the desire to increase diversity in the composition of tribunals, and with ample reason to do so, why has the international arbitration world struggled to make progress?

This issue is most pervasive with party appointments. On average, in 2019, institutions appointed women to tribunals 34% of the time, while parties only appointed women to tribunals in a mere 13.9% of cases. At the London Court of International Arbitration ("LCIA"), the court, in 2020, appointed women in an impressive 45% of all cases, yet parties appointed women only 22% of the time. Therefore, a viable proposal would need to tackle party and counsel appointments.

Similar patterns are seen in other aspects of diversity. The LCIA court selected non-British arbitrators 47% of the time, compared to the parties in LCIA arbitrations, who selected a non-British arbitrator only 32% of the time.

Commentators point to a range of obstacles to increasing diversity. Common among these is the 'pipeline issue'—that arbitrators are themselves drawn from groups which are historically

homogenous, including judges and senior lawyers. Similarly, others have talked about the 'chicken and egg' problem, where appointments are based on experience but experience requires appointments. Justifications aside, parties, and their counsel, go back to the same—not very diverse—pool of arbitrators. This is the problem we seek to help address.

Our Proposal

We propose that international arbitration institutions implement the following language in their institutional rules: "the parties *shall strive* to appoint a *diverse tribunal*." The use of *shall* serves to establish a mandatory obligation. Such an obligation is essential to give this issue the attention it deserves and hold parties accountable and unable to get away with empty promises. The *strive* language ensures that the obligation is one of best efforts, so parties are excused from compliance where impracticable. Lastly, the mention of a *diverse tribunal* as opposed to diverse arbitrators gets to the core of the issue of diversity. It requires that appointing parties consider the tribunal as a whole, without the exclusion of any specific arbitrator. While this proposal shares the goals of diversity pledges such as the ERA, it differs by targeting all forms of diversity, is specific to the appointment of arbitrators, and would be a mandatory obligation imbedded either directly in an arbitration clause or indirectly via institutional rules.

This kind of clause could be incorporated in institutional rules through an 'opt-out' provision, which would apply unless parties expressly agree to exclude it. Such provisions are common in institutional rules, as seen in the Expedited Procedure and Emergency Arbitrator articles of the ICC Rules, the ICDR Mediation requirement, the Emergency Arbitrator, Confidentiality, and Costs articles of the Stockholm Chamber of Commerce, and the Emergency Arbitrator article of the LCIA Rules. The opt-out requirement would help solidify this rule as a default provision, while at the same time maintaining the party autonomy that is key to international arbitration. Moreover, as this rule would only apply to arbitration agreements which come into force after the new rule is adopted, party autonomy would continue to be protected.

We also suggest that international arbitration institutions include our suggested language ("the parties *shall strive* to appoint a *diverse tribunal*") in model arbitration clauses, which would likely lead to widespread adoption, as drafting counsel often use, or are influenced by, model clauses. After all, international arbitration practitioners surveyed stated that the most effective initiative to encourage greater diversity in arbitral appointments would be for institutions to adopt an express policy regarding arbitrator appointments.

We can only hope that this proposal creates a dialogue and effectuates positive change on the appointment of more diverse international arbitration tribunals.

Jose F. Sanchez is a New York based Partner of Vinson & Elkins LLP, where he focuses on International Dispute Resolution. Kartik Rajpal is an associate of Vinson & Elkins LLP also based in New York. The authors' ample experience working on international arbitration matters touching on numerous jurisdictions around the globe has prompted them to publish this piece, hoping that it helps improve diversity in the composition of international arbitration tribunals globally. This article only expresses the opinions of the authors, and not of any of the entities with which they are affiliated.

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References

?1 See generally Maria R. Volpe, *Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research*, 19 PEPP. DISP. RESOL. L.J. 201, 203–04 (2019), for a discussion on defining diversity in ADR.

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