DIVERSITY: TIME FOR DISRUPTION?

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OVER the last 10 years, conversation has turned to a serious consideration of diversity in international arbitration. In this context, it has been submitted that a multiplicity of views is fundamental for a fair process and outcome. It has been further posited that widening the pool of arbitrators gives greater choice and fewer conflicts, removes the imbalance of interpretations between different parties and encourages greater efficiency, as well as facilitating new perspectives.

In summary, a lack of diversity affects the quality of arbitral proceedings, in general, and of arbitral awards, in particular. In recent years, minorities and women organised and formed associations to attain a louder voice. A flurry of papers, interviews and surveys started to discuss the need for increased diversity. All agreed on the above: diversity in international arbitration was not only important, it was essential to the legitimacy of the process. They also acknowledged that, for decades, international arbitration was a closed community, some sort of “pale, male and stale” western gentlemen’s private club.

Many then argued that progress had been made in recent years, with international arbitration institutions leading the charge and groups such as ArbitralWomen rising to prominence. So, when the majority of the protagonists agree on the importance of diversity, it is often difficult to understand why true diversity is so hard to achieve. Why, despite
women entering the legal field at record rates, is the number of women in equity partnerships at law firms or arbitral tribunals continuing to lag behind. Why are arbitral panels at various institutions painfully “pale, male and stale”? Headlines still highlight racial, gender or social bias in international arbitration. In a counterintuitive way, it is comforting to see that diversity still makes the headlines but still, it is far from an outstanding advertisement for the arbitration process, at a time when it comes under fire in many jurisdictions. So where does it leave us? Progress occurred but diversity in tribunal appointments started from a very low base and more remains to be done. The world we live and operate in is diverse, completely and utterly diverse. The law firms, their clients, and pretty much any business involved in international trade is a melting pot of ethnic, geographical, religious and gender diversity, among others. Why is international arbitration not reflecting in its tribunals the diversity that surrounds it? It feels that the transformation is sluggish because only minorities, women and a few arbitral institutions are truly
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pushing for real diversity. It changes slowly because it is easy to nod and agree but it is considerably more difficult to give a chance to a slightly less experienced African-American female arbitrator than it is to give yet another ‘whopper case’ to one of the established big guns.

Diversity is difficult. Diversity is filled with unconscious biases. Diversity is multi-dimensional and therefore complex. It is not simply about gender or the colour of the skin, it touches, inter alia, on religion, experience, geographical location, even language. All of those impact in different ways how arbitrators think, communicate, or their perspective on cases. Diversity is also difficult because of practicalities: diversity relates to very private and potentially sensitive data that is not necessary collected consistently or even available easily. For instance, while most institutions collect data about gender, geography and sector of expertise, few collect information about race or sexual orientation. So where do we go from now?

Minorities, women and arbitral institutions will continue to promote more diversity. However, this will only move the marker a little. So the question remains: what could be disruptive enough to drive diversity into mainstream agendas? This article is unlikely to provide the ultimate answer but one thing that certainly holds back diversity is consistent and readily available data. Diversity craves data and currently, particularly at global level, diversity information is inconsistent if at all available. What would it take for a neutral organisation like the United Nations Commission On International Trade Law (UNCITRAL) to become the global custodian for sensitive diversity information which could then be used to create consistent global statistics?

Another idea would be to incorporate ‘tribunal selection’ in corporate responsibility programmes and show progress in diversity and inclusion reports. Pressure from clients on counsel, and self-awareness for counsel, could lead to significant change in the arbitration world, forcing leading institutions and practitioners to give even more of a chance to minority and women arbitrators. We also think that education remains key, particularly training focused on in-house teams. There is a continued

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need for arbitration training and mentoring programmes.

Global organisations such as the Chartered Institute of Arbitrators (CIArb) have expanded their reach way beyond North America, Europe and the core arbitral jurisdictions in Asia. Still, more needs to be done to help sophisticate ‘buyers’ of international arbitration globally so that they understand their needs further before they agree to arbitration clauses in their contracts. The selection of the right institution, its rules and panel is critical to a successful arbitration and remains often overlooked. Finally, an interesting idea would be to build optional diversity into model clauses as a gentle reminder to counsel and parties that they have such options.

Traditionally, model clauses include suggestions such as: “The law of this arbitration clause shall be... The place of arbitration shall be... The number of arbitrators shall be... The arbitration proceedings shall be conducted in... (insert language)”. Arbitration clauses could also include diversity related suggestions such as: “The tribunal shall have a minimum of one female arbitrator... The tribunal shall have a minimum of one African-American arbitrators...”

While the diversity conundrum remains arbitration’s unicorn, by almost any measure, arbitration is more diverse than it has ever been. Are we progressing fast enough? Are we learning fast enough? ArbitralWomen started more than 20 years ago and as a result, gender diversity is probably the most advanced, but what of the other diversity types?

New generations of counsel and arbitrators are pushing at the gates but some myths still block progress for women and minorities. Diversity is a collective problem and will only be achieved when the arbitral community pulls together to find a collective solution. Every group, every community, whether practitioners, clients, institutions or students, needs to get involved to drive the marker further towards true diversity. CD

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