

Keynote paper to the Africa Interest Group of the American Society of International Law on International Women's Day.

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Challenging the gendered status quo in international arbitration: each individual's role.

Introduction

Appreciation: Many thanks to the AIG of the ASIL for the invitation to me to give this keynote speech on this IWD on the theme "Let's Choose to Challenge". I am grateful and say happy IWD to all the ladies!

Focus: I will answer three relevant questions on my topic:

1. Whether there is a gendered imbalance in the appointment of arbitrators in international commercial and investment arbitration.
2. Assessment of some measures taken by the community to remedy this imbalance.
2. How each individual member of our community can contribute to this change.

Caveats:

My comments in this presentation are predicated on: (a) intersectionality of diversity where gender is an element; (b) the appointment of experienced and skilled individuals as arbitrators; and (c) the acknowledgement of party autonomy as a cardinal principle in international arbitration.

My discussion will build on the findings of the 2017 survey Report from BCLP on, *Arbitration Survey: Diversity on Arbitration Tribunals*,¹ which found that 84% of their respondents thought there were too many men on tribunals and 50% thought there should be gender balance on panels of qualified candidates with necessary expertise and experience. 100% of their Respondents also agreed that all participants in arbitration should contribute to this desired change.

1. whether there is a gendered imbalance in the appointment of arbitrators in international commercial and investment arbitration.

We are all aware that disputing parties as part of party autonomy have the right to appoint/nominate for appointment, the individual they wish to act as arbitrator. In some situations, the arbitral centre appoints some or all arbitrators. The statistics I refer to do not differentiate between those situations when the Institution appoints. This is because my discussion is on the international arbitration community at large and not necessarily on one section of it. I also recognise gender fluidity and neutrality but for purposes of this paper, I adopt the two biologically assigned gender of male and female. As already mentioned, I recognise that the lack of diversity is even worse when we focus only on race, geography,

¹ BCLP (Brayan, Cave, Leighton, Paisner) at: <https://www.bclplaw.com/en-US/insights/diversity-on-arbitral-tribunals-are-we-getting-there.html>

disability or generation but these elements are relevant only to the extent that it includes or intersects with gender.

Statistics

I will draw data from the 2019/20 statistics published by ICSID, LCIA, AAA , SIAC and Cairo Regional Centre.

ICSID in 2019 appointed 192 individuals as arbitrators, conciliators and ad hoc committee members. Of these, 81% were men versus 19% women.

LCIA prides itself as “a leader in gender diversity”² in 2019 appointed 163 females out of 566: 29% of all arbitrator appointments compared to 23% in 2018.

AAA-ICDR: administered 9,737 cases in 2019 with 30% of its arbitrator appointments in B2B cases described as diverse meaning: women and ethnic minorities.

Cairo Regional Centre has administered a total of 1,433 cases since its inception. In the third quarter of 2020, 34 arbitrators were appointed and two were females.

Singapore IAC: in 2019 SIAC appointed 159 individuals as arbitrators of which 58 were female = 36.5%. A total of 297 individuals were appointed but no data on gender balance.

These examples provide numbers that speak for themselves.

Conclusion 1: the data confirms to us what we already know that in the appointment of arbitrators determining international commercial and investment disputes, there is a major gendered imbalance between male and female arbitrators; and this is not a situation that is acceptable to the international arbitration community.

Caveat: I recognise that women now lead a number of arbitral institutions either as President of their arbitration courts (ICC, LCIA, AAA) or as administrative leads (LCIA, Lagos CA, LACIAC, AFSA, SIAC).

I must recognise that anecdotal evidence confirms that there are many ‘qualified’ females available to be appointed as arbitrators than the number of those appointed, such that it is not a question of lack of expertise or knowledge or even skills. There is therefore supply, why then is there no demand?

2. I will now explore some of the current initiatives adopted within the international arbitration community to counter this state of affairs. I acknowledge that these various initiatives have recorded some successes but have not made much practical difference (as per arbitral appointments) to the vast majority of female members of the international arbitration community.

Some current initiatives

I will discuss three organisations set up to take remedial initiatives against lack of gender (and other) diversity within the international arbitration community:

² LCIA 2019 Annual Casework Report at: <https://www.lcia.org/LCIA/reports.aspx>

The **ERA** [Equal Representation in Arbitration³] Pledge was published in 2015 to improve the profile, representation and appointment of female arbitrators. As at 07 March 2021, ERA has 4,562 signatures. This is a major achievement and evidence of the support for a greater degree of equality of appointment within the arbitration community.

African Promise is wider than gender and is one of those initiatives that the focal element is geographical inclusion.⁴ The African Promise was launched in September 2019 and focuses on improving the profile and representation of African arbitrators and their appointment in international arbitration. As at 07 March 2021, 328 individuals have signed the African Promise.

REAL [Racial Equality for Arbitration Lawyers] launched on 18 January 2021.⁵ This date is important not just because in the USA, it is Martin Luther King, Jr day, but more importantly, because even as at 2021, our community is still battling with this question of lack of inclusivity.

However, we now need to ask how many of these signatories have actually changed their behaviour by appointing more female (or African or younger) arbitrators? It is not enough to sign the *Pledge* or *Promise* or to add one's name to it if the spirit of these tools is completely ignored.

Conclusion 2: remedial measures through the use of pledges and promises provide awareness; and conference and webinar discussions keep the issue of diversity relevant and on the agenda. These measures are contributing but we must acknowledge that they have not led to the major rebalancing which our community need to see. Therefore, the issue of inclusion has almost become a conference/webinar talking point and an item to be included in conference programs for completeness.

I then conclude that the lack of diversity with an element of gender operational within the international arbitration community means that arbitration itself remains archaic and very much in need of modernisation. This very unrepresentative appointment norm is the status quo in international arbitration. In my view, this status quo needs to change and arbitral tribunals need to become more inclusive.

3. I now turn to answer my third question which is an exploration of how each individual in their circle of influence can contribute to the actualisation of this change within our community. The suggestions I will give are practical and little steps that each member of our community can undertake, and that I hope will help bring about this change we all say we desire to see within our community. In effect, one message you need to take from my keynote is that we must see change and soon indeed. We do not need to wait for a few more decades before we actually act to bring about the change we all want to see.

Individual Actions for Communal Change

³ ERA Pledge at: <http://www.arbitrationpledge.com>

⁴ African Promise at: <https://afas-global.org/the-african-promise/>

⁵ REAL at: <https://letsgetrealarbitration.org>

I have shown that there remains a major problem of lack of inclusion on arbitral tribunals within the international arbitration community which members of the community themselves recognise and acknowledge and have set up various remedial initiatives, which have recorded some successes, primarily of raising awareness, but have not led to a major change in the appointment of diverse tribunals.

I have also alluded to the fact that this is not a problem of lack of supply but one of demand. Because of time, I do not intend and will not discuss where the fault lies, with the disputing parties, their legal advisors, institutions, etc.

I will now move on to suggestions of actions each of us can take as part of our contribution to changing this narrative. I will mention four actions:

1. **For appointors:** when you have the opportunity to nominate individuals for appointment (in whatever capacity) who do you populate your list with? All men? All women? All individuals from one ethnic or generational group?

Can you commit to yourself to change your practice?

2. **Supporting younger colleagues:** do you mentor younger colleagues?

If No, can you commit to actively seek out diverse members of our community to mentor and support?

If Yes, can you do a mental check of the gender and nationalities of your mentees? Can you commit to diversifying these?

3. **Conference speaking slots:** do you organise conferences/webinars? Who are your panellists and keynote speakers? Do you actively seek out male and female speakers? Can you commit to ensuring that all your panels will always include men, women, younger practitioners etc?

4. **Recommending names for any role in arbitration:** can you commit to ensuring that your list will be diverse?

Conclusion

In conclusion, my urgent call to our community is that desiring change is not enough; and it is not for others to bring about this change but for each of us within our sphere of influence and as we have opportunities under any role relevant to arbitration, to act inclusively. A very happy International Women's Day to all the ladies in the room.

Thank You.

Prof Emilia Onyema