ISSN : 1875-4120
Issue : Vol. 12, issue 4
Published : July 2015

This paper is part of the TDM / ArbitralWomen special on "*Dealing with Diversity in International Arbitration*" edited by:

Rashda Rana SC
39 Essex Street
President ArbitralWomen

Louise Barrington
Independent Arbitrator and Director Aculex Transnational Inc

ARBITRALWOMEN
The International Network of Women in Dispute Resolution

Transnational Dispute Management
www.transnational-dispute-management.com

Keeping up Appearances: the Diversity Dilemma

by K. Claussen

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Keeping up Appearances: the Diversity Dilemma

Kathleen Claussen[1]

This article, the first of two, takes a brief look at the importance of appearances in international arbitration. Both articles examine the constitution and composition of arbitral tribunals in international investment arbitration and State-to-State disputes: the first, in respect of diversity among arbitrators, and the second, in respect of challenges to the appointment of arbitrators premised on the arbitrators' past decision making. In short, both articles are concerned with appearances of and within the international arbitration system and how those appearances have an impact on the legitimacy of that system.

This first piece takes a preliminary look at calls for "diversity" in different types of international arbitration, particularly demands for more participation by women as arbitrators in international investment arbitration and State-to-State disputes. One need not take the time here to explore whether there is, in fact, a lack of gender diversity among arbitrators in international arbitration. As a result of empirical studies that have laid bare the repeat-player phenomenon in this field[2] and the obvious absence of women,[3] arbitrators themselves have recognized this issue as a problem. These studies and arbitrators can confirm that the numbers of women are too low and progress, if one may call it that, too slow.

Another way to frame this debate is to ask whether it is a problem *per se* to have the same (or same-looking) arbitrators deciding most international disputes. On this point, it is widely acknowledged that new arbitrators – whether younger, women, or minorities – are needed to be able to build the community as the repeat-players age or as they become too busy to take on more appointments. If we look at the current state of affairs – that is, the same 15 arbitrators deciding 55 percent of the cases -- and if we also consider the typical profile of such an

[1] The views presented here are those of the author only and are offered in her personal capacity.

[2] According to statistics reported at the International Council for Commercial Arbitration (ICCA) Congress in April 2014, 15 arbitrators have decided 55 percent of international investment arbitration cases.

[3] It was reported at the 2014 ICCA Congress in Miami that 10 percent of sitting arbitrators at the LCIA were women. It was also reported by an ICC representative that five percent of recent appointments at the ICC were women. In the 40 publicly known cases at the PCA pending in 2014 or 2015, four women appeared as arbitrators. Of the 120 possible arbitrator opportunities created by those 40 cases, only seven were filled by those four women.

arbitrator, especially his age, there is no doubt that now is the time to add new members to the arbitrator pool.

Two fundamental issues stand out. First, despite recognition of a noticeable absence of women, the international dispute resolution community has not articulated why gender diversity matters in international arbitration.[4] Second, a lack of consensus as to how to change the status quo, and specifically who should be responsible for ensuring more women enter the pool, paralyzes the discussion. Thus, while some arbitral leaders comment on the importance of adding more women, or new voices generally, to the arbitrator pool, none of the relevant actors takes steps to make changes.

Taking these barriers on, I analyze first whether gender diversity should be a consideration in this area. Arbitration poses unique challenges in its natural selection biases; that is, without an appellate or other control mechanism, arbitration remains what it was set-up to be: an individualized ad hoc dispute resolution system. The single-bite-at-the-apple approach to dispute settlement makes getting the "best" chairperson or the "right" party-appointed arbitrator a critical element in determining the outcome of the dispute. For this reason, arbitrators with track records are preferred and the barrier to entry into the community is nearly insurmountable. Fear of an unfavorable outcome and of the unknown on the part of those selecting the arbitrators constrains the pool.

This fear brings us back to the discussion of whether a diverse pool of arbitrators should be important in international arbitration. While this article argues that the answer to that question must be yes whether out of recognition of diversity as a public value or out of acceptance that new decision makers are needed for the survival of the system, it acknowledges that the road may be even longer than anticipated as a result of barriers unique to this specialized system.

[4] Nienke Grossman has taken the lead in exploring the same problem in international courts, however. *See, e.g.*, Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts*, 12 CHICAGO J. OF INT'L L.647 (2012).

I. Should Diversity Matter in International Arbitration?

Other articles have discussed the paucity of women in international arbitration.[5] They accept as a basic premise that there should be more women in international arbitration decision making and they explain why they believe the discrepancy has developed. They do not explain, however, why there should be more women arbitrators. The topic was broached in at least two sessions at the 2014 International Council for Commercial Arbitration (ICCA) Congress in Miami – the overall theme of which was "Legitimacy: Myths, Realities, Challenges," a topic to which I will return shortly.

This part considers in brief some pros and cons of gender diversity. It starts by asking whether diversity should be or is important to the international arbitration community. The next part asks the harder question of whether a diversity strategy, a deliberate effort to take steps to getting more women into arbitrator positions, should be considered.

I noted at the outset that arbitrators appear to agree, without necessarily articulating why,[6] that adding more women is important to international arbitration. This common feeling may be reflective of a general recognition of the importance of including women in spheres where they have been often excluded. Diversification of the bench in domestic judiciaries is not a new phenomenon. Over the last several decades, a noticeable effort is and has been underway in the United States, the United Kingdom, and in other parts of the world to diversify the bench with respect to gender and often other criteria at least at the federal or national level.[7] The same trend has occurred in the business community such that women are increasingly present in the C-suite. Without going into a comprehensive study here of comparative diversity efforts, suffice it to say that whether examining government initiatives or international business, diverse groups of

---

[5] *See, e.g.*, Lucy Greenwood and C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 ARB. INT'L 653 (2012); Benjamin G. Davis, *American Diversity in International Arbitration 2003-2013*, unpublished paper (2013); Lucy Greenwood, *Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals*, 42 INT'L L. NEWS (2013); Gus van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, 59 Columbia FDI Perspectives, No. 59 (2012); Michael Goldhaber, *Madame La President – A woman who sits as president of a major arbitral tribunal is a rare creature. Why?*, 1 TDM 2004.

[6] This was the view expressed during the ICCA Congress at the panel "Who Are the Arbitrators." Well known arbitrator V.V. Veeder has at least called it the "right thing to do" in his remarks on the panel.

[7] *See, e.g.*, Barbara Graham, *Diversity, Impartiality, and Representation on the Bench: Toward an Understanding of Judicial Diversity in American Courts*, 10 MICHIGAN J. OF RACE & L., 153 (2004).

decision makers are nearly universally seen as welcome.[8] The rationales are slightly different, however, for each sector.

In the United States, for one, the importance of adding more women and minorities to the judicial bench is framed often in terms of remedying past systemic discrimination in judicial selection, as well as in terms of ensuring more voices are involved in the decision making process.[9] In the business sector, research has shown that a gender-diverse group of decision makers is better able to cope with problem solving and produces more creative outcomes.[10] Put differently, in the judiciary, the importance of adding women is frequently framed as a modern democratic value, whereas in business, the advantages are seen to be stronger, more profitable outcomes.

Does either of these considerations, or any other, have relevance to international arbitration? Where does the international arbitration community – a blend of both public and private actors and entities – fit?

I propose three possible rationales for including more women in international arbitration. First, adopting the business reasoning, we may believe outcomes would be improved with a more diverse arbitrator pool. Second, along the lines of the U.S. judiciary, we might think that diversity is a public value that is inherently important to any public or quasi-public system. Third, we may believe in the prominence of appearances for purposes of legitimacy and public confidence. That is, to preserve trust and reliability of the regime, we may think it important that the system appears to be representative of the general population. None of these rationales ought to be considered alone – indeed, they are in some respects inextricably linked -- but I will elaborate upon each briefly in succession.

A. Focus on outcomes

[8] In the business community, increased diversity may be seen as a competitive advantage for a business that may spark innovation on particular projects.

[9] *See* Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NORTHWESTERN U. L. REV. 587 (2011).

[10] *See, e.g.*, Sylvia Ann Hewlett, Melinda Marshall, and Laura Sherbin, *How Diversity Can Drive Innovation*, HARV. BUS. REV. (December 2013).

To determine whether making an effort to add women to arbitral panels would change or even improve outcomes is, to put it one way, a challenging exercise. Such an exercise has not been undertaken and is likely impossible to accurately assess.[11]

What does it mean to have an improved outcome in arbitration? The business rationale would suggest that having more diverse backgrounds at the decision table would improve problem solving.[12] If we take the perspective of the average litigant in an individual case, like in business, arbitration for each litigant is often about winning the case and perhaps collecting damages, or put in business terms, improving one's bottom line. To achieve that outcome, rather than consider adding diverse thinkers to the ranks, one must choose the "right" candidate. What makes someone the "right" candidate has nothing to do with their gender, race or age, and has everything to do with their views, though of course those may be informed by their gender, race, age, or any other factor. For example, States often select former government officials as their party-appointed arbitrator because they believe those individuals understand how government decision making is carried out, and may best understand the situation. Clearly, determining whether an arbitrator reached the "right" outcome is a highly subjective exercise. What one litigant may think is "right," another may think is wrong. Other arbitrators may agree or disagree.

At a systemic level, in the absence of specialized data, it is not possible to attribute certain outcomes to certain arbitrators, especially on the basis of gender. Even examining arbitral decisions at a qualitative level, the absence of a precedential system creates an added challenge to such an evaluation with objective criteria.

As indicated above, because the selection of an arbitrator is largely connected to that which is known about the arbitrator, it is not surprising that the diversification of the arbitrator pool may be seen at odds with the idea of consistent decision-making or a *jurisprudence constante*. The

[11] One recent study shows that women judges are much more likely to rule in favor of jurisdiction in ICSID cases than men. In fact, women never voted against jurisdiction. Michael Waibel and Yanhui Wu, *Are Arbitrators Political?*, ASIL Research Forum *35 (2011).

[12] One may question whether arbitral decisions are engaged in problem solving, as a part of dispute management, or whether they are merely applying the law – that is, adjudication or umpiring?

arbitrators with the most experience and, perhaps, the most expertise, are those that have been selected repeatedly. The busiest arbitrators in investment disputes and also in State-to-State disputes have established practices and procedures.

One may question whether consistency is appropriate, or helpful, in a system that was arguably designed to operate as a series of independent cases without precedential effect. Tribunals have confronted this issue, early on in the development of the system in *SGS v. Philippines*[13] and five years later, in *Saipem v. Bangladesh* in which the tribunal put emphasis on the importance of the "legitimate expectations of the community of States . . . towards certainty of the rule of law."[14] While of course new voices could adopt the consistent interpretation established by those before them, they could also disrupt that consistency with creative interpretations that some would view as a threat to the system. I will return to these considerations in the second article in this short series.

The simple fact is that there is not enough data to determine how women arbitrators fare differently from men. Nor does it behoove anyone to ask such questions. It does not make sense, therefore, to focus on an outcome-oriented rationale for adding more women to a pool for consideration. From an outcome-oriented perspective, we may conclude only that the inclusion of new women arbitrators, like the inclusion of any new arbitrators, is likely to help rejuvenate the pool to make it more sustainable as the repeat players retire or become too busy while demand continues to increase. To exclude women from the system is, therefore, wasteful and irrational.[15]

B. Gender balance as a public priority

Turning to the second proposed rationale, the importance of diversity as a public value: just as with the domestic judiciaries, States might think it important to have both men and women, to

[13] The tribunal stated that "although different tribunals . . . should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State." *SGS v. Philippines*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, para. 97.
[14] *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, June 30, 2009, para. 90.
[15] For this proposition, see V.V. Veeder's forthcoming remarks in the ICCA Congress Series, No. 18.

the extent possible, on arbitral panels. In other words, for the State, participating in an arbitration involves more than just winning. The State's choices ought to be constrained and empowered by public values at least in respect of democratic States. For those States, representativeness may be significant.[16]

The numbers do not bode well, however, for international judicial bodies where States alone have selected the members. There, women make up between 0 percent and 19 percent of judges.[17] These numbers suggest that States may place limited priority on including women in international judiciaries as compared to domestic judicial bodies. Certainly, domestic judiciaries have far greater visibility for the public and engage with individual citizens as litigants, making representativeness highly salient in that context. In the international law setting, gender representativeness may not be the focus and the fact that men make up the vast majority of judges in international courts may be another historical relic.

Some private litigants may also find gender balance to be important whether for their shareholders or others and endeavor to select women for panels. Again, the trouble, however, is the singular nature of the appointment process. Other than those repeat player litigants, it is difficult for parties to an arbitration to prioritize gender representativeness as a public value in their selection processes.

On the contrary, international organizations, particularly those with State members, may be well positioned to realize the value. Diversity as a public value may resonate more with institutions that are intergovernmental organizations, such as ICSID and the Permanent Court of Arbitration (PCA), than with those that are privately owned and organized. Intergovernmental organizations should be guided by the values of their members – States rather than private stakeholders. These organizations play a critical part in the way States interact with the system and therefore how States may choose to shape the future direction of the system. In a system in

[16] In *Federalist No. 39*, for example, one of the founding documents for the U.S. democracy, founding father James Madison opined that a representative government is only deemed legitimate if its institutions draw from all sectors of the population: "It is essential to [a republican] government, that it be derived from the great body of the society, not from . . . a favored class of it . . . ."

[17] Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts*, 12 CHICAGO J.OF INT'L L. 647 (2012).

which individual arbitrators interpret the law, contributing and creating new doctrine, States maintain the ultimate control as to whether the system will be sustained. Intergovernmental organizations work in the interstices of that interaction, cognizant of the concerns and motivations of all participants. Thus, IGOs should be positioned to navigate the muddy waters and imbue the system with State values. In this respect, arbitral institutions can serve as the value-oriented check on the otherwise hybrid system. That said, one does not hear this value-based rationale emanating from most institutions.

C. Keeping up appearances

As I noted at the commencement of the article, the importance of appearances may be another rationale for ensuring that more women enter the arbitrator pool. Making an effort to avoid perpetuation of the status quo is more than just the right thing to do – it is a survival mechanism.

By this, I refer to the concept of legitimacy and how the work of international arbitral tribunals may only be perceived as legitimate if it *appears* to embody rule of law and democratic principles. Thus, by contrast to the preceding factor, in which the public values are accepted as a basis for adding women to the arbitrator pool, this rationale highlights that the legitimacy of the system relies upon the perception of the public values that underlie the arbitral regime.[18] In other words, even if public values are not motivating the inclusion of women, the community needs to add women to maintain its legitimacy.

It was said at the ICCA Congress that "appearance and trust matter in our field."[19] Appearances matter as set out in the rules and governing procedural documents in international arbitration. The "appearance of bias" standard is the basis for evaluating many challenges to the appointment of arbitrators and has received heightened attention in recent months in particular.[20]

[18] *See, e.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy and the Effective Rule of Law*, 30 CRIME AND JUSTICE, 283 (2003).
[19] Statement made by Professor Christophe Seraglini at ICCA Miami in the session entitled, "Who are the Arbitrators."
[20] The setting up of a task force to examine the concept of issue conflict and the controversy surrounding the challenge decision in *CC/(Devas) Mauritius v. Republic of India* is telling in this respect.

This subjective standard is in place for the same reason: to increase and enhance the system's legitimacy.

Moreover, the public international arbitration system is more reliant than domestic systems on legitimacy to secure voluntary compliance. To date, the arbitration community has maintained a good track record of compliance with arbitral awards and not just those facilitated by the New York Convention. This record both contributes to and is dependent on the legitimacy the system is able to maintain.

Interestingly, the calls for diversity in international arbitration have grown in strength simultaneously with calls for transparency, predominantly in international investment arbitration. There is a lot at stake in this process, especially for institutions for whom administering arbitrations is all they do. Those institutions must seek to keep the public's trust such that States continue to participate. To the extent this means that the public must perceive arbitrators as fair, impartial, and representative, institutions may be motivated to include more women on arbitral panels or at the very least to offer choices of women arbitrators to parties engaged in a list procedure selection process. Moreover, just like as in the process of an executive branch official appointing a member of the national judiciary, an appointing institution can afford the "risk" of selecting a newcomer given that the relationship between the institution and the arbitrator is not as direct as it is for outcome-focused disputants.

If institutions are not reaching that conclusion on their own, the question then becomes: How do we convince institutions or parties that appearances, at the very least, are important? The next part seeks to respond to this important question.

II. How To Increase the Numbers of Women in the Arbitrator Pool

If we conclude that diversity is indeed important in some respect to international arbitration, we may then ask whether an active strategy is appropriate. And if so, how would it work? Given the overly slow process so far, I believe a deliberate effort, even if only a small contribution, is required to change the culture.

Opposition to "diversity strategies" in the domestic judiciary typically is framed in terms of the methodology through which more diverse leadership is achieved. For example, some critics of diversity strategies in U.S. federal judicial circles argue that diversity candidates are less qualified than non-diversity candidates.[21] In arbitration, the problem is more of a "pass the buck" issue. Risk aversion abounds. Attorneys for parties, whether private or public, do not want to pick an arbitrator whose views may be unknown, thus heightening the barrier to entry. At least statistically, States appoint more women than private parties. States may face some pressure to select a woman to the extent they find it important to advance the public value as described above, but that value may not take on as much salience in individual appointment processes where outcomes dominate as compared to, for example, roster-making where representation is important.

Arbitral institutions responsible for selecting arbitrators when parties are unable to agree or where otherwise required to do so are best positioned to take the lead on ensuring women are represented on lists and in tribunals. But, these institutions often opt out of this role and insist that States and private parties have a broader pool from which they can select. This position may result from a different kind of concern about outcomes: competition with other arbitral institutions for the opportunity to administer disputes. As service providers, bringing in new disputes may be the institution's main source of income, and thus maintaining one's reputation is paramount. To propose an "untested" newcomer may be seen as dangerous for an institution as a result.

This approach is not sustainable. If institutions are not convinced of the importance of introducing new voices into the system out of concern for their own reputations, then they should be convinced on the basis of an even more basic need: survival and success of the system. Such institutions will not be taken seriously if they do not produce tribunals or at least lists of possible arbitrators that are representative and credible. Institutions need to take a systemic view because institutions rely on the existence of the system. These words ought to resonate with the business side of such institutions. As diversity becomes a value, like independence and impartiality,

[21] *See* Scherer, supra note 9.

participants can make diversity a basis for competition among the institutions therein incentivizing institutions to overcome the "breakthrough" barrier. The perceived risk for institutions must be outweighed by the advantages to the system.

By changing their approach in this way, institutions may be able to achieve the appearance of diversity for the system, giving it a sort of "symbolic legitimacy" as Grossman has discussed elsewhere.[22] Constituencies – whether States, the general public, or private litigants – may then be able to perceive that the system is simply an extension of the domestic public system with the same safeguards and principles.

It is true that arbitral institutions make far fewer appointments than private parties. ICSID has noted that it makes only about 25 percent of appointments, either through its Secretary-General or through the Chairman of the Administrative Council of the World Bank. In fact, an informal search on the ICSID website suggests that only 10 of 191 pending cases included appointments made by the Secretary-General herself.[23] Still, only one of those 10 arbitrators was a woman.

Jan Paulsson has expressed doubt about the ability of some institutions to carry out this role, referring to their inability to "convince disputants that their selection process is untainted by undue influence . . . . [T]he organizations that call themselves arbitral institutions need to look at themselves and ask why it is that they are so exposed to suspicions of poor selection of arbitrators and maybe even worse: cronyism and other forms of corruption."[24]

This article need not go into reforms for each institution that would achieve this outcome, but rather leaves it to each institution to organize a program by which women and other newcomers regularly appear on lists and in appointments.[25] And as for States, there should be consistency between domestic and international dispute settlement – the same values should apply. This

[22] Nienke Grossman, *Normative Legitimacy of International Courts*, 86 TEMPLE L. REV. (2013) (citing Tom R. Tyler, et al, *Legitimacy and Criminal Justice: International Perspectives*, in TOM R. TYLER, ED, LEGITIMACY AND INTERNATIONAL CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES 9, 10 (Russell Sage 2007)).
[23] Search run on May 1, 2015 at https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx
[24] Jan Paulsson, *Moral Hazard in International Dispute Resolution*, TDM 2 (2011), p. 20.
[25] Gus van Harten, meanwhile, has advocated the use of a roster system. *See* Gus van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, 59 Columbia FDI Perspectives, No. 59 (2012)

again will help build public trust in the system as the public sees the system as an extension of the public apparatus rather than a private, uncontrolled, undemocratic initiative.

III. Conclusion

Arbitration, with its unique quasi-public features, relies heavily on perception. For this reason, this article has focused on appearances. Just as challenges to arbitral appointments are decided using an appearance of bias standard, so too will the system be evaluated in critical moments by domestic publics. Thus, for the international arbitration system to maintain legitimacy in the eyes of those publics, the appearance of representativeness must be preserved. Paulsson makes this point: "The process will be rejected if it is perceived that . . . the power to decide [is] reserved to mandarins or high priests operating in a few dominant cities."[26] To have legitimacy, the constituencies of international arbitration have to be able to see arbitration as reflective of their domestic regime.

To achieve such representativeness, emphasis must be placed on addressing barriers to entry. Even if institutions do not make the majority of appointments, their persistent hindrance to the furtherance of diversification is not sustainable or desirable to those who believe international arbitration is a public good. Institutions should recognize that their very existence is premised on the system's legitimacy and the perception that arbitration is an extension of a public system with public values. Whether new voices enhance outcomes is irrelevant when one considers the necessity of State engagement and public acceptance through the keeping up of appearances.

[26] Jan Paulsson, *The Alexander Lecture at the Chartered Institute of Arbitrators: Universal Arbitration-What We Gain, What We Lose* (November 29, 2012).