

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



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ARBITRALWOMEN

The International Network of
Women in Dispute Resolution

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Increasing Diversity among Arbitrators and Mediators: The Magic Bullet by B. Leon

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.

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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.

Increasing Diversity among Arbitrators and Mediators: The Magic Bullet

While many corporations and law firms are committed to diversity, both internally and externally, few have brought that commitment to their selection of arbitrators and mediators.

An increasing number of corporations require, or at least encourage, their professional firms to have diverse teams. Also an increasing number of corporations globally have diverse boards of directors. However, when selecting an arbitrator or mediator for their disputes, often there is no consideration of diverse neutrals.

Why are corporate counsel not instructing their outside legal counsel that when an arbitrator or mediator is being selected, they are *required* to consider seriously at least one diverse candidate?

The answer often given quickly is “we want the best arbitrator or mediator for our case.”

Corporations also want the best boards of directors, the best executive team, the best managers, and the best legal teams on their matters. In fact, often they see a diverse team as a stronger team. Yet they do not seem to appreciate that the lack of consideration of women and minority arbitrators and mediators is inconsistent with their stated – and often their practised – commitment to diversity.

Writing in one of Canada’s national newspapers, National Post, on increasing gender diversity on corporate boards of directors, Thomas Mathews advocated the approach used by the National Football League (“NFL”) in the United States to increase diversity among coaches and managers in U.S. professional football:

The NFL had the problem that a majority of its players were black, yet the head coaching and general manager positions throughout the league were predominately filled by whites . . .

Dan Rooney, owner of the Pittsburgh Steelers . . . [and] chairman of the league’s diversity committee, developed a rule that the NFL adopted in

December 2002, mandating that all teams be required to interview at least one minority candidate for any available head coaching or senior football operations position, including the general manager position. There are provisions ensuring that the interview is a serious one . . . While the “Rooney Rule” . . . maintains the right of a football organization to ultimately select their preferred candidate . . . [t]he policy has been successful, with minority head coaches and general managers rising significantly throughout the NFL.

The Rooney Rule may be the Magic Bullet to increasing diversity among the arbitrators and mediators who are retained in business disputes, whether domestically or internationally. It is easy to administer, it is fair, it is simple, and there is a high probability that it will work.

CPR International Institute for Conflict Prevention & Resolution is one of the organizations that has been at the forefront of the diversity in ADR issue by creating a Task Force on Diversity in ADR¹. The Task Force’s mission is to devise practical strategies to increase the participation of women and minorities in mediation, arbitration and other ADR processes. Among its initiatives are a mentoring program and an apprentice program; raising awareness of the diversity in ADR issue among corporate counsel and outside counsel through articles in various publications and speakers at gatherings of corporate counsel and outside counsel; cooperating and coordinating on the issue with several other organizations, including minority bar association; and perhaps most significantly, developing a written commitment to diversity for corporations, law firms and others to sign, based on the model of the highly successful “CPR Pledge” to consider ADR before suing.

Since the CPR Pledge was introduced in the 1980s, over 4,000 companies and 1,500 law firms have signed, committing to consider ADR before suing. The Pledge has been highly successful in increasing the use of ADR. CPR’s hope is that a Diversity Commitment will yield similarly successful change.

The Diversity Commitment is simple and direct. For corporations:

¹ <http://www.cpradr.org/PracticeAreas/NationalTaskForceonDiversityinADR.aspx>

“We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of mediators or arbitrators they propose. We will do the same in the lists we provide.”

Company: _____ Signatory: _____
Position: _____

The lack of diversity in most types of arbitration and mediation is clearly visible – just look at the composition of organizations and at gatherings of mediators and arbitrators.

The good news is that diversity in ADR is starting to get traction, although slowly.

We need programs, seminars and workshops on diversity in ADR to discuss why it matters to corporate counsel and their companies and how they expect their outside counsel to respond. These sessions need to be convened at the direction of corporate counsel who are in the position to make it happen.

Without:

- a clear direction within corporations from the General Counsel to all in-house counsel who manage disputes, and
- a clear direction from those corporate counsel to their outside disputes counsel,

there will be a concern about being criticized for doing what is needed. There will be a concern that someone will ask “why did you include a person who is less known and has less of a reputation?”

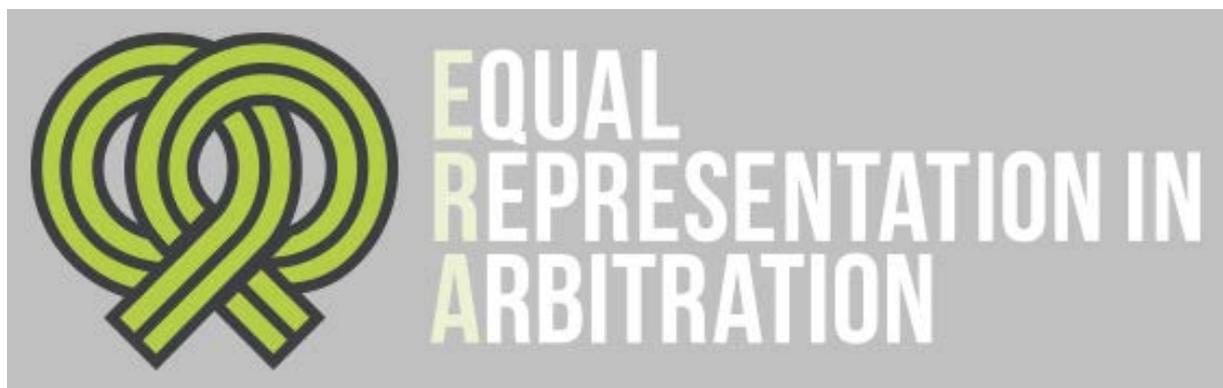
The answers to those questions need to be available — there need to be reasoned answers such as “because I have a recommendation from an in-house counsel at another major corporation who I know and trust”, “because I’ve seen the person speak at a conference and then had a discussion with the person”, “because an arbitrator/mediator for whom I have the highest regard has put in a ‘good word’ for the person”, or answers comparably compelling.

What can be done next by corporate counsel, and litigation/arbitration counsel?

A significant first step for corporations and law firms would be to follow the NFL's lead by signing – and abiding by – CPR's Diversity Commitment.

Who will take the lead?

Barry Leon is the Commercial Court Judge in the High Court of the Eastern Caribbean Supreme Court, in the Territory of the Virgin Islands. Prior to his appointment to the Court in March 2015, Justice Leon was a Partner and Head of the International Arbitration Group at Perley-Robertson, Hill & McDougall LLP, a leading international arbitration firm based in Ottawa, Canada. Until 2009 he was a Partner with Torys LLP in its Litigation and Dispute Resolution Practice in Toronto, Canada. He is immediate past Chair of ICC Canada and the 2013 recipient of CPR's "Award for Outstanding Contribution to Diversity in ADR".



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