

REPORT ON THE DIVERSITY ROUNDTABLE AT VIENNA ARBITRATION DAYS 2018

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Abstract

On the occasion of Vienna Arbitration Days 2018 which took place on 19-20 January 2018, I was invited to be a Roundtable moderator for the second day, organized as a World Café of several tables with trendy topics that are much debated and considered nowadays actual and of interest for the arbitration community. I proposed that my Roundtables' topic to be about diversity in arbitration as the international arbitration community has to adapt to serve users in new fields of arbitration and is facing an increasing influence of new technologies. These developments have made it even more decisive for arbitral tribunals to be diverse, as this will allow them to dare into these new fields and take advantage of the new tools and technologies, increase the productivity and ensures high quality decisions.

This paper presents the report of the discussions made by the participants to the Roundtable in the three sessions allocated and tries to summarize the current perception of diversity in order to be able to propose better solutions to respond to the call for diversity in arbitration. We all have a responsibility to prioritize diversity, and we all have something to gain from increasing diversity in international arbitration.

Key words: Arbitration, Diversity, Vienna Arbitration Days 2018, Arbitrator

JEL Codes: K19, K29, K38, K41, M14

1. Introduction

One of the hot topic considered to be discussed at the Vienna Arbitration Days (VAD) 2018¹ - organized in the second day of this international conference as World Café - was diversity among appointed arbitrators, on considerations related to the principles of efficiency, fairness and equality in arbitration proceedings. The

¹ <http://www.viennaarbitrationdays.at/>.

diversity topic is rather broad in scope as we are facing challenging times, considering certain developments and the rising of new sectors to be settled by arbitration. It is common fact that the world faces a continuous and progressive evolution and revolution. We all are struggling how to promote a sustainable international arbitration system for the future. In the last decade, international arbitration is confronted more and more with new areas of interest – and it should be, to keep up with the users' requests, one of them being the call for diversity. In the light of this year conference title "Venturing into New Fields and New Ways of Arbitration", the topic of diversity, especially among arbitrators, was considered to be a significant one to be discussed during a Roundtable at the World Café..

The lack of diversity becomes an issue that is tackled by all the players in the arbitration field² and steps to achieve the goal of a wider diversity are encouraged and already achieved by many. The arbitral institutions' endeavors to assure transparency to meet nowadays users' requests is a step for the most part already accomplished. However, available statistics tend to support the view of apparent under-representation – the number of appointments obtained by young, female and other types of marginalized (minority) arbitrators is very low compared to arbitrators from western regions. Institutions are often more progressive than counsel but they account for only a fraction of all arbitrator appointments. The role of institutions in achieving greater diversity should concentrate in appointing diverse arbitrators to give them visibility and thus facilitate future appointments by counsel (included in-house counsel). Berwin Leighton Paisner's (BLP) international arbitration survey 'Diversity on Arbitral Tribunals, Are We Getting There?' launched in January 2017 confirmed that practitioners and users of international arbitration across the world are aware and committed to issues of

² Oger-Gross, Elizabeth. (2015). Gravitas: Persuasion and Legitimacy (or why calling on parties and their counsel to appoint more diverse arbitrators may be wishful thinking) in "Dealing with Diversity in International Arbitration", *Transnational Dispute Management*, 4, 1.

"It is no secret for anyone regularly involved in international arbitration that older, white men, usually from Western Europe or North America, are nominated as arbitrators much more often than others. Diversity is clearly lacking. Women are usually considered to account for significantly fewer than 10% of arbitrators in international arbitrations, and very few women appear to account for a very significant percentage of that already small number. Most arbitrators are from Europe or North America, and most are 'senior in age and experience.' Outside of the US context, race does not seem to have been considered, but it seems clear that the great majority of nominations in international arbitration go to Caucasians."

Several surveys have been made available and arbitral institutions have taken steps to ensure the richness of the tribunals as a whole. Another initiatives push forward the diversity call and scholars started to be more preoccupied on the topic (see also Florescu, Cristina. 2017. Promoting Diversity To Efficiently Manage Arbitration. *Corporate Dispute* Jul-Sep 2017, Financial Worldwide 2017, 40-44, <https://www.corporatedisputemagazine.com/promoting-diversity-to-efficiently-manage-arbitration/>, and Florescu, Cristina. 2017. Brief Overview On Unconscious Bias In Arbitration. *Legal and Administrative Studies* 1, ProUniversitaria Publishing, 118-129.

diversity. The Equal Representation in Arbitration (ERA) Pledge, launched in May 2016, had massive progressive influence in determining signatories to consider appointing appropriately-qualified women in forming tribunals or selecting counsel/experts.³ We all have a responsibility in respect of diversity, and an interest to gain from improving diversity in international arbitration. However, change will not happen without decisive action from all players, as LCIA's Director General Jackie van Haersolte-van Hof said in 2015 on diversity; why it matters and what we can all do about it. The importance of diversity was also recently emphasized in another field, by the International Olympic Committee President Thomas Bach at the opening ceremony of the 2018 Winter Olympic Games, where he stated "United in our diversity we become stronger". Therefore it became very clear that change can only ensue when all players in the arbitration field initiate and take further steps towards increasing efficiency, diversity and transparency.

2. Why towards diversity in arbitration?

Diversity is about bringing together collective knowledge,⁴ wisdom and comprehension, born from an array of skills and experiences, in order to ensure a high-profile quality of the decisions to be respected and followed. The diversity benefits reflect on team-work, productivity and decision-making process of an arbitral tribunal and through all the stages of the proceedings.

A positive argument for diversity could be that widening the pool of arbitrators and increasing transparency will further ensure legitimacy of the process, give greater choice and fewer conflicts, ensure a better quality of the award and its reasoning, remove the imbalance in information potentially available to the parties, (in light of the greater competition for appointment) encourage greater efficiency and improve performance throughout the entire proceedings. A diverse tribunal will bring something valuable to a tribunal's management and determination of a dispute, the different perspectives and experiences contributed by arbitrators with "non-standard" ethnic or regional backgrounds and moreover a diverse tribunal may be better prepared, more task-orientated, and more attentive to the parties' arguments than a non-diverse tribunal (BLP Survey). Inclusive, balanced and diverse panels are more likely to be effective tribunals, better able to understand their parties and counsels and to benefit from fresh perspectives, new ideas, vigorous challenge and broad

³ Trevelyan, Lucy. (2017). International arbitration: a time of change, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=aeef2580-8dfc-4d90-8639-8605de0f346a>.

⁴ Franck, S., Freda, J., Lavin K., Lehmann T., & van Aaken, A. (2015). The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration. *Columbia Journal of Transnational Law*, 496.

experience. This in turn leads to better decision making.⁵ A diverse group of arbitrators is essential for serving a diverse group of parties and their counsels, and as the modern workplace becomes more gender-diverse, so too will the arbitration community.

The purpose of our Table was to be able to bring broader perspectives and a greater willingness to recognize, engage with, learn, and demonstrate solidarity with all our diverse arbitration members. Also the Table intended to find initiatives to redress the lack of transparency and diversity to ensure arbitration remains a viable option for disputes.

3. The Roundtable proposals for discussion

The Roundtable moderator (I was the moderator and I was assisted by a Viennese colleague assigned by the organizers as secretary) proposed a more active and free of perceptions debate to encourage and welcome any new and trendy idea or suggestion that could lead to a practical support of reaching diversity.

⁵ ICC Secretary General puts the business case for gender diversity (2014), <https://shop.americanbar.org/PersonifyImages/ProductFiles/262739281/8-Gender%20Diversity.pdf>.

[Haridi, Samaa A. F. \(2015\)](#). Towards Greater Gender and Ethnic Diversity in International Arbitration. *International Arbitration Review*, 2, 305-316.

See also [Kidane, Won. \(2017\)](#), Does Cultural Diversity Improve or Hinder The Quality of Arbitral Justice?, <http://arbitrationblog.kluwerarbitration.com/2017/03/31/does-cultural-diversity-improve-or-hinder-the-quality-of-arbitral-justice/>; [Živković, Patricia. \(2017\)](#). Diversity in International Arbitration: Where Do We Stand? – An Overview of a Berwin Leighton Paisner Survey, <http://arbitrationblog.kluwerarbitration.com/2017/02/09/diversity-in-international-arbitration-where-do-we-stand-an-overview-of-a-berwin-leighton-paisner-survey/>; [Giorgetti, Chiara. \(2017\)](#). Latest Chairman Designations to the ICSID Panels Substantially Increase Diversity,

<http://arbitrationblog.kluwerarbitration.com/2017/11/05/latest-chairman-designations-icsid-panels-substantially-increases-diversity/>; <https://www.cpradr.org/news-publications/articles/2015-03-03-old-white-and-male-increasing-gender-diversity-in-arbitration-panels>; [Simson, Caroline. \(2017\)](#). Changes Afoot, But Work Remains For Diversity In Arbitration, <https://www.law360.com/articles/909771/changes-afoot-but-work-remains-for-diversity-in-arbitration>; [Drahozal, Christopher R. \(2016\)](#), Diversity and Uniformity in International Arbitration Law, <http://law.emory.edu/eilr/content/volume-31/issue-3/essay/diversity-uniformity-international-arbitration-law.html>; [Sheehan, Natalie. \(2017\)](#). Diversity in international arbitration initiative marks one-year anniversary, <http://risk.freshfields.com/post/102e8uc/diversity-in-international-arbitration-initiative-marks-one-year-anniversary>; <https://www.pressreader.com/nigeria/thisday/20170620/281921658042788>.

[The diversity discussion in arbitration turned to be not so new, as from 1991 the specialist were concerned](#): [Goodman-Everard, Rosabel E. \(1991\)](#). Cultural Diversity in International Arbitration – a Challenge for Decision-Makers and Decision-Making. *Arbitration International* 7 (2), 155–164, <https://doi.org/10.1093/arbitration/7.2.155> or <https://academic.oup.com/arbitration/article-abstract/7/2/155/206656?redirectedFrom=PDF>.

We have proposed and listed a few points to be debated together with the attendees:

- The institutions' endeavors to assure transparency: to meet users' requests, institutions are now much more transparent on gender statistics.⁶ However, there are only few statistics on minority ethnic and ethnic/racial representation on tribunals. We invited the participants to share their views on the role the institutions play in achieving greater diversity.

- What roles do parties, counsel and arbitrators play? What is holding counsel back from appointing more diverse candidates and how can these fears be addressed?

- The role of co-arbitrators in appointing the president – should co-arbitrators be more mindful to include proposals from a more diverse pool of colleagues?

- Different types of diversity: nationality, gender, age, ethnicity, experience etc. What are participant's perceptions about the demographics of the majority of arbitrators? There has been an increased awareness of this issue in recent years, particularly in relation to gender imbalance. However, the diversity debate does not begin and end with gender. We invited women and men to participate in our discussions and to share their experiences and ideas for actions to be taken.

- ArbitralWomen - a recent initiative (launched in May 2016): ERA Pledge by which signatories commit to take active steps designed to facilitate the increased transparency about the number of women appointed as arbitrators. In some jurisdictions there are still cultural and religious barriers to the appointment of women, but even there some change can be detected due to these efforts. There are fewer initiatives in relation to other under-represented groups (Young Arbitrators Forums – ICC, VIAC, and other groups focused on developing the next generation of the arbitration community etc.). The ERA Pledge contains 10 resolutions, thus providing signatories with concrete steps they can take to increase awareness and diversity in arbitrators.⁷

- Arbitrator Intelligence (AI) of Catherine Rogers is also a platform dedicated to encourage diversity. Parties and their counsels are urged to complete an Arbitrator Intelligence Questionnaire at the end of each arbitration, then Arbitrator

⁶ ICC (2017) - of the total number of female arbitrators appointed in 2016, 46% were appointed by the ICC Court, while 41% were appointed by the disputing parties and the remaining by the co-arbitrators as presidents or by another appointing authority; LCIA (2016) - in 2016, of the 496 arbitrator appointments, 102 were of female arbitrators and a majority, i.e. 78.4%, were selected by the LCIA Court. In contrast only 22 of the appointments came from the parties themselves or their nominee arbitrators; SCC (2017) - in 2016, when the arbitrator appointments were to be made by the SCC, women made up 22.5% of the appointments, as compared to the parties where they made up only 11% of the appointments.

⁷ [My 10 Pledges Resolutions: https://daks2k3a4ib2z.cloudfront.net/58a4313f62641fda6d995826/5a4fa11e325b0d0001c43f28_06875_PG_DR_ERA%20pledge%20new%20year%20e-card%20D3paths.pdf](https://daks2k3a4ib2z.cloudfront.net/58a4313f62641fda6d995826/5a4fa11e325b0d0001c43f28_06875_PG_DR_ERA%20pledge%20new%20year%20e-card%20D3paths.pdf).

Intelligence will compile the collected information about arbitrators, analyze it, and assemble it into AI Reports on individual arbitrators.⁸

- The Alliance for Equality in Dispute Resolution is an initiative focused on addressing the lack of diversity in relation to ethnicity and geography in international arbitration, as well as the under-representation of women in the field.⁹

- Other platforms: are there other platforms which provide information on arbitrators as tools to provide visibility to more diverse candidates and possible proposals on such enterprise? (Such as GAR ART, arbitrationlaw.com, iaiparis.com (IAI Arbitrator Tool available on KluwerArbitration), search tool provided by several institutions etc.).

- The role of psychology in international arbitration (see also a book edited by Tony Cole at Kluwer), the unconscious biases and shortcuts which the participants to the Table can identify in their behavior and how they can be addressed.

- The several stages in proceedings when diversity plays a role in arbitration: from the selection of arbitrators, during the proceedings and especially during the decision making process, dissenting opinions related to diversity issues.

- Barriers to entry in the profession due to the lack of diversity - how can these be overcome (“unlocking the pipeline”)?

- Blind scenario nomination of arbitrators - is such a mechanism necessary and is this approach to be supported by our Table? Or can we propose another revolutionary mechanism?

- More surveys conducted on various issues related to this topic - suggestions from the audience of questions to be formulated.

4. Discussion Report

Nonetheless the points provided for and proposed by the moderators, the participants raised and preferred only some of them or diverted the debate to other

⁸ Rogers, Catherine A. (2017). *The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence*, <http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators/>.

Also see Benton, Gary L. (2018). *Let’s Stop Talking About the Arbitrator Diversity Problem*, <http://arbitrationblog.kluwerarbitration.com/2018/01/14/post/>.

All panels should include at least one woman or other diverse practitioner and panels that do not are “Defective Panels.” (monotony is not the norm)

Regarding recent post on Kluwer arbitration blog about calling ‘defective tribunals’ of those which lack diverse practitioners, we think the solution is not to overreact but to put the problem in the right manner and to enlighten on the possibility and right to enjoy a more diverse composition of tribunals, as the real world is.

Supportive does not mean being against or moreover becoming aggressive towards other more traditional and old school approach, but to promote understanding, tolerance, avoidance of unconscious bias and not to be afraid to stand for the right of diversity in international constitution of tribunals (and not only).

⁹ <https://www.allianceequality.com/>.

collateral aspects which put more value on the topic. Due to the time restrictions it was not possible to address some of the points or discussed them in depth. The following report is based on the contribution of the participants which were diverse, of different ages, genders, and nationalities, included experienced arbitrators, experts, representatives of arbitral institutions and in-house counsels, as well as party representatives. Their ideas were at the boundary between tradition and contemporaneity. The variety and quality of ideas generated during our discussions is owed to the great diversity of participants and served by itself as an illustration of the diversity potential benefits.¹⁰

4.1. First Session (Round)

As a first remark, we were happy to welcome a full table composed of men and only another one woman (besides the 2 female moderators). The support of men in the promotion of gender diversity is a more than welcomed success and we thank the brave ones which had the courage to express themselves and contribute to a lively, open and creative debate.

Therefore, the more experienced expert Mrs. Ludington started emphasizing the importance of “skill diversity on the panel, as arbitration started as a peer process” and warning that arbitration is using “too much legal solutions to solve non-legal problems”. Therefore a more diverse panel will increase the depth of the decision (also because of other types of diversity). The discussion slipped on track of the still existence of a stereotype how an arbitrator look like and that the picture of the perfect arbitrator still is Caucasian men of advancing years. Mrs. Ludington shared that when she was interviewed years ago for an expert position, she was told that no lawyer would let anyone under the age of 35 testify but no lawyer would ever let any women testify (regardless of age); in the expert field that changed and when she stepped into the field of arbitration they were years behind.

Everybody agreed that “the best choice is not necessarily the safe choice” anymore and selecting the same people is not ensuring a good quality for every case, as each one is different from the previous one. Counsels usually tend to go with the safe choice because they are afraid they could mistake in selecting another arbitrator and they are not willing to take the burden of the risk and liability for a possible unsatisfactory result which is not in favour of their client. On the other hand, even if the counsel and their clients have the picture of the perfect arbitrator, the arbitrator may not act the way they expected. Thus, maybe “you should not take the safe bet but should look for what you need and the quality you are looking for” Mr. Wegmüller said. Mr. Kaufman completed stating that “when a client appoints you as counsel, they trust you, so when you propose diverse

¹⁰ Specials thanks to all the participants who were attending and sharing their views at the Diversity Roundtable VAD 2018.

arbitrators and explain why they are the best options, the client will follow your recommendation.”

The counsel needs to take the responsibility even if its nature is to be risk averse. Women become visible through talking on panels, it is good what institution’s do, but until practitioners change their practice, we cannot achieve the change.

Mr. Kaufman told the story when he has experienced appointing a much younger person to a tribunal and while at first the client was hesitant when he appeared at the hearing very casually dressed, the client was nervous at first but then the arbitrator started asking questions and it became clear that he was the right choice and he really knew what he is doing and was in control of the process.

Reverting to the age diversity, Mrs. Ludington made the statement that young on the panel can change the dynamic of the discussion and bring new ideas.

It turned out that the question to be raised is how do you change the dynamic to make people more aware that the best choice is not necessarily the safe choice? It seems that the answer could be that the change will come from the practitioners.

Mr. Bielez came with the proposition to push one step further the institutional approach in promoting diversity and offer a list where should be half women. Then Mr. Loidl announced that there is an institution where one out of three suggestions must be a women. No matter how proactive are the institution Ms. Förstel noted, there is only a limited number of arbitrators they nominate and some practitioners might be hesitant to let the institution nominate an arbitrator precisely because of that.

Mr. Jordan pointed out that usually the lawyers choose from a list given by the institution.

The main idea, Mr. Kaufman stressed, is that “You don’t chose the arbitrator because they are young or a women, but you choose them because you think they see the case in the way you want the outcome to be.” And that is the basis of the safe choice, usually young arbitrators are e.g. faster or better willing to accommodate the parties need and be efficient in the proceedings. Mr. Kaufmann had had better experiences with younger arbitrators.

Mr. Bielez made the suggestion that to improve diversity is to increase transparency to make it easier for the average lawyer to pick someone that might be a better fit for your case. Mrs. Ludington precised that when Mr. Kaufmann picked someone out of the box (a diverse candidate), it was not off a list but because he had personal knowledge of someone! “Pool of personal knowledge is valuable but is limited.” So databases that give you more information about potential arbitrators could and should be built to be better fit to accommodate the users’ needs searching for several skills and capabilities of a person to be nominated as arbitrator. Lists that do not provide detailed information about the proposed candidates don’t do much good because there is mentioned just a name.

Therefore, how to promote a diverse pool of candidates in such databases and the criteria to be taken into consideration by the ones developing those tools are significant aspects for a person who want to be listed in these catalogs.

Mrs. Ludington observed that many institutions do keyword searching when they do the list. However Mr. Bielez raised another question: "who puts in the data, because if the information is not verified then that decreases the value of the database." Indeed, reply Mr. Jordan, some institutions just accept everyone but there are institutions which pick the circle of arbitrators. Age diversity is the most important one to be promoted. There is value to experience. In order to acquire the experience and to develop the arbitration's skills the interested people need to invest in this profession, even is not a regulated one. To be more visible, Mr. Kaufman emphasized that people need be more out there, publish articles, participate to events in the field and there need to be also a web presence, because in the end nobody is comfortable just choosing someone from the list without verifying their competence. Solutions comes from changing the mindset of the practitioners. Change will accelerate. All that emphasized the importance of the personal network of arbitrators.

Summary: The following opinions emerged from the discussion of the first session: age diversity is a significant aspect on the way towards encouraging the broadening of the arbitrators' pool - just giving chances to more younger practitioners that will make them to be able to improve and evolve themselves to become right arbitrators; the need for the development of better equipped databases¹¹ to respond to the users' needs and facilitate their right choice in order to increase diverse arbitrators' visibility; the arbitrators' selection is made not because they are of diverse choice, you present them because they are the best option and this goes back to the problem how to facilitate that choice and visibility, but so far it seems that the personal contact is the best option.

Also another interesting point was developed around the idea of the parties and their counsels' fears, what is holding counsel back from appointing more diverse candidates and how these fears can be addressed. Parties and their counsels will very often have to fall back on the benchmark of how many appointments a candidate has had. This is not necessarily a good indicator of ability, efficiency or diligence but is an inherent "comfort factor" for in-house or external counsel when they make a recommendation to their client. The counsel need more courage to entrust also their nomination to other diverse candidates and not to follow only the usual route.

¹¹ See also Philippe, Mirèze. (2016). One Step Further after the Launch of the ERA Pledge: A Search Service for Female Arbitrators Appointments. <http://kluwarbitrationblog.com/2016/09/08/one-step-further-after-the-launch-of-the-era-pledge-a-search-service-for-female-arbitrators-appointments/>.

Question that remains: How and what can be done to facilitate the process to achieve this goal?

4.2. Second Session (Round)

Not mirroring the first round, it was the time for the women to dominate the table, and two men to join our journey in finding new views on our topic.

Following the results of the first session and due to the necessity to discuss further the already approached points to move to the next level of interaction, the moderators decided the discussion to be continued with the second round of participants by freely facilitating the brainstorming around the idea of not just how to promote but already to achieve diversity.

As among the attendees was also Prof. Eric Bergsten¹² - the developer and President of W. C. Vis International Commercial Arbitration Moot Vienna, owner of such an overwhelming experience of working with a diverse pool of people interested in arbitration, from young students to those working in the institutions and also to all kind of counsels and arbitrators from all over the globe - he was invited to be the first speaker and he raises the issue of underrepresentation of black people and people from Sub Saharan countries in arbitration, as they are also underrepresented in the VIS Moot.

Continuing with the question how and why do people get appointed as arbitrator, the answer was that they have worked in arbitration, they have been counsel, they became known by other colleagues and players in the field and then they can consider to move to the next step, becoming an arbitrator. The general opinion was that getting hired now in the Western world is not particularly a problem, but when you become a mother (as only women can do it!) the children need to be taken care of and it only works if there are very supportive grandparents or understanding employer or partners in the law firms or other kind of assistance. Mrs. Cermak noticed that the topic of children should not be a women's issue, but it is always presented as such in the discussions.

Accordingly, before we get to the question of women being eligible to be arbitrators, it is an issue of how many get into the pool of being eligible. This is a well-known discussion about 'unblocking the pipeline'¹³, but as Mrs. Knieper spell

¹² First recipient of ICCA Award for Lifelong Contribution to the Field of International Arbitration, see also <http://law.pace.edu/faculty/eric-e-bergsten>

¹³ Greenwood, Lucy. (2016). Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals, https://static1.squarespace.com/static/57fe4d37c534a5c932910b78/t/586fd78a2e69cf728dbfe2ce/1483724683686/Unblocking+the+Pipeline_...pdf; Hughes-Jennett, Julianne & Abdulai, Rashida. (2015). Barriers to entry--the lack of diversity in international arbitration, https://www.hoganlovells.com/~/_media/hogan-lovells/pdf/publication/barriers-to-entry--the-lack-of-diversity-in-international-arbitration_pdf.pdf; <http://www.shb.com/news/2016/06/paulsson-addresses-gender-inequity>; Stone, St Philips. (2017) Will the pipeline leak be mended in 2017? <http://arbitrationblog.practicallaw.com/will-the-pipeline->

out “there are these competent women out there, just look at the panelists yesterday; at the UN there is an internship program and 80% of arbitrations are from Western Europe”. Even she tries to take people from different region there are too few applications from other different regions of the world, because Mrs. Montinieri pointed out that “It is a cost issue to advertise in other countries”.

Searching an idea on how to promote more diverse arbitrators, Mrs. Klochenko came with the suggestion to invite more in-house lawyers to conferences like this, so that “in-house lawyers learn about the criteria that are important besides informing them about what is the purpose of appointing the arbitrator. Also depends on whether you are the first one to nominate the arbitrator, gives you a chance to balance the panel out in terms of experience.”

She recommended to nominate an experienced women because “they are very detail-oriented, it is not about just having one women and one black person on the panel, you need to be aware of the criteria of what the case demands.”

The general view was that teaching and sharing the opinions, mentoring and not forgetting to be supportive to other colleagues is to be encouraged.

Reverting to the point of institutions’ role in nominating arbitrators, Mrs. Cermak stipulated that “there is one institution where you have to have a list of arbitrators that you recommend and the list has to recommend at least one female candidate and if that is not the case, the list is dismissed and the next list is women only.” Promptly, Mrs. Klochenko asked “How about not putting the age in the lists?”, as the role of the institution is important in nominating the president of the panel.

Prof. Bergsten very well intervened remembering the audience that the most important thing is to get the first appointment! “If you perform well, then at least the institution knows; aside from the formal role of appointing, the institutions have an important role in their suggestions.”

Here jumped in at our Table Mrs. Alice Fremuth-Wolf (promoter of diversity, she came with the idea of Roundtables on a World Café mode at VAD and current Secretary General of VIAC, co-organizer of this conference) which reported that

[leak-be-mended-in-2017/](https://www.khaleejtimes.com/legalview/why-are-women-sidelined-in-arbitration/) ; Kotb, Sally. (2017). Why are women sidelined in arbitration?, <https://www.khaleejtimes.com/legalview/why-are-women-sidelined-in-arbitration/>; Greenwood, Lucy. (2016). Diversity and Inclusion, It's a numbers game, <http://globalpound.org/2016/10/25/its-a-numbers-game-diversity-and-inclusion-in-international-dispute-resolution/>; Mulcahy, Carol. (2017). Diversity on Arbitral Tribunals: Are we getting there?, <http://www.blplaw.com/expert-legal-insights/articles/diversity-on-arbitral-tribunals-are-we-getting-there/>; Turner, Caley. (2015). “Old White Male”: Increasing Gender Diversity in Arbitration Panels, <https://www.cpradr.org/news-publications/articles/2015-03-03--old-white-and-male-increasing-gender-diversity-in-arbitration-panels/>; Vasani, Sarah. (2016). Inspired Arbitrator Choices Addressing International Arbitration’s Diversity Deficit. *Young Arbitration Review* 23, 4-9, <http://arbitragem.pt/conselhos/deontologia/doutrina/internacional/inspired-arbitrator-choices-addressing-international-arbitration-s-diversity-deficit--sarah-vasani.pdf>.

“These first appointments are a real obligation of the institutions but it is also a responsibility of the young people to make themselves known, speaking, and publishing.” It is as a ‘regional obligation’ at least to know people and whom they can trust.

Regarding participation to the VAD or conferences like this, Prof. Bergsten reminded that maybe for Austrian practitioners it will be fine, but what about people from Eastern Europe or other corners of the world? The reply was of Mrs. Cermak who stated that those in the better position are obliged to help those in a less fortunate position: e.g. more experienced women could take mentorship over younger women, internships, etc.

Also we are of opinion that organizers may provide for special fees according to the participants needs and position (some of them are already applying these reduced rate for different affiliation, but for the one in need is not enough).

Continuing Mrs. Fremuth-Wolf intervention, she remarked that it is important to change the perception of what is or not a ‘good arbitral tribunal’, because a tribunal of three males over 60 is not perceived anymore as a good tribunal. A good tribunal has to be a diverse tribunal, and similarly with the picture of what is good leadership – stereotypically male characteristic, these unconscious or conscious bias should be overpassed and then the rest will follow.

Therefore, as a conclusion, the solution is to change the general perception of what is an effective tribunal, but not to change the perception as a woman: she don’t need to become a man, she need to preserve her special and specific female characteristics and to used them at best bringing a constructive and positive advantage in the panel.

Finally, Mr. Psodorov led the discussion to the conclusion that everything starts at the domestic stage, at home country, where the first appointment usually take place, because that is where you one get to be known. Therefore the counsels should not appoint somebody who everybody appoints, but to give other diverse candidates chance and then after local appointments one can pursue to move to the international field. ‘Keep throwing the ball once you are in the game.’

Summary: The second session debated the issue of gender diversity, the status of being a woman in international arbitration along with the age diversity issue; the selection criteria of an arbitrator and the institution obligations to consider also diverse candidates by knowing the people they can nominate; the need of younger to be more assisted, taught, motivated and the obligations of the more experienced from the arbitration community to share opinion, mentor, promote young people and women for higher positions, engage in internship, grant special fees to facilitate their participation and/or contribution to the events; changing the general preconception of a good tribunal.

It is normal to take time to manage the traditional habits and override the unconscious bias, but it is important to maintain the right path. It is necessary to speed up the process to meet the ever-evolving demands and concerns of its users on the diversity issue that has remained stubbornly stagnate for too long and just in the last few years it made a few steps forward.

Question that needs more practical solutions: How do you get to your appointment?

4.3.Third Session (Round)

In reverse mirror to the first session, the last one had only one man participant and the rest were women.

This being the last session, even if several ideas were already shared so far on the subject of how to address the arbitrations' diversity deficit and especially how to become an appointed arbitrator (if you are from an under-represented minority), the moderators decided to invite participants to further try to elaborate on the question that remained still open after the previous session.

It was the general consent that the qualification to become an arbitrator is a long process and for women is even harder to get in a leading position (again the request of unblocking the pipeline), but when aroused the question whether the women appoint women, the women answer was 'not necessarily', as everyone is looking first if the possible candidate is qualified, experienced and available.

Mrs. Sesser started by noticing that at the moment "there is a lot of awareness about the diversity issues and there are a lot of programs and the sensitivity is out there. The problem is earlier, the qualification progress for an arbitrator is very long so the percentage of qualified women is less than 20% so a lot of women drop out before they would get appointed. So one should make an effort to make it more appealing to women to stay in the business and along the path."

An interesting point related to the Russian Court of Arbitration was raised by Mrs. Tarnovskaya reporting that the main arbitral institution is at the Russian Chamber of Commerce and the chair is always appointed by the institution and they have a closed list of arbitrators (at least that is the standard approach) and the co-arbitrators need to be chosen from the list, and on this list in Russia a big percentage are women. During the Soviet times there were a lot of women who were professors and people who are appointed are mainly from academia or former judges.

Nonetheless, Mrs. Karollus-Brunner was of the view that the first look is still qualification and availability but if there is the same level of experience and qualification then she would rather appoint a women. "You look at the number of previous appointment, if you have a small case then you don't want the big names because for them it will not be important enough. About 5 appointments would be enough for me to appoint someone." To get information about previous

arbitrations a possible solution is to ask the potential arbitrators (especially for availability). At VIAC you can find the information, or call the institution and similarly is for other institutions. For the counsel to convince its client to accept the nomination of a diverse candidate you can tell the client that “the big names are unlikely to be available and the arbitration takes longer, then the clients are very open to the idea to appoint somebody else.”

At this moment, Mr. Nowaczyk mentioned the personal relationships sensitive aspects but from a different angle, of an experienced arbitrator involved many years in several kind of international panels. He shared his knowledge and he was telling stories and described several possible situations related to the personal relations between the members of the panel and tips of how to select the arbitrators to avoid possible conflicts between them and with the counsel (or experts), not forgetting that everyone is a distinct and special person. A lot of interesting examples of complicated situations were presented that illustrated how intricate and tense some relationships could be if the bigger picture of a good panel is not considered in due time (from the beginning). From the perspective of avoidance paying mutual debts and even more, he was considered also the role of the co-arbitrators and their selection of the president and then the role of the president in dealing with the co-arbitrators when conducting the proceedings, deliberating and making the award.

Mr. Nowaczyk expressly mentioned that when selecting an arbitrator “you only think about your own choice but the real issue is the composition of the tribunal and your choice might have been good but terrible when seen in the light of the others appointments which happen simultaneously.”

Therefore, Mr. Nowaczyk proposed four criteria to be taken into consideration when a young lawyer faces the selection of an arbitrator. First, one issue to be very careful with is the availability, and it depends on what other commitments the arbitrator has, such as managing partners, being a professor, a president of an institution or other kind of special positions that require other time consuming duties. The number of pending arbitrations could be an indicator but is not necessarily conclusive. Second, be very careful with the learned professors, they are always ‘available’ if they feel like it is a good case. However, they are not available for multiple days of hearings because of the lectures they are giving. Or no hearings during exam period. Third, if you have these professors you must be very careful whether they are not conflicted with another arbitrator who might be a professor of another University or a former student. Usually the professors are appointed by their students. If one party appoints a professor the other party should appoint a practitioner. Fourth, you have to match the level of aggression or education, the arbitrators caliber e.g. if one is a professor, the other co-arbitrator should not be an assistant to the professor. And that besides the independence

from the other arbitrators as well. Mr. Nowaczyk very well concluded stating that “three solo singers might not compose a nice choir”.

Reverting to the counsel’s fears of selection diverse candidates, Mrs. Tarnovskaya pointed out that “if you are a claimant, you likely go for a big shot because you don’t know what the other party will do and you might want to be safe. But if we put a big name for a big case it might not be what the client wanted, so how do you navigate that?” It seems that it is not a recipe of how the counsel should act or react to different situations when compel to make the best and also the right selection of an arbitrator to meet the client needs.

Summary: The third session focused more on the arbitrator’s process to become more visible to those in charge with the selection and the appointment and it resulted that the requirements are mainly qualification, availability and experience, regardless diversity. Seeking for guidance in selecting an arbitrator could be reverting to institutions. Also trying to contact the envisaged person may get results. The central idea was the composition of the panel, the necessity of a good choice and mixture of co-arbitrators and the president in order to get an effective tribunal. But also the bigger picture seems an aspect not enough contemplated as getting back to the personal relationships to avoid conflict of interests is always important to be checked.

5. Conclusion

The essential challenges of this modern age lead to an unprecedented growth in number and variety and the goal is to promote diversity without sacrificing quality. The general idea is that one is looking to find the best person equipped with best skills and experience for the particular case and only then is maybe looking for other factors, as diversity. The users are already aware that the best choice is not necessarily the safe choice but this implies courage and a confident attitude to create chances also for others. The arbitration community is called to respond to the questions of how and what can be done to facilitate the process of finding the right person and in the same time to achieve the diversity call in general and to look for ways to accelerate progress towards gender parity. The mainly recommendation was to offer more opportunities to create and strengthen an infrastructure for the international arbitration’s future: creating more search tools tailored for the specific users’ needs.

Parties are motivated by fear of risk to select arbitrators that either maximize the likelihood of their preferred result in a given case or minimize the possibility of a negative result. Likewise, parties may wish to appoint known-qualities in their arbitration counsel and arbitrators and thereby decrease the risks outcomes

generated by untested arbitrators. These incentives place new international arbitrators at a disadvantage.

As the core group of international arbitrators (and counsel) continues to age, it is worthwhile investing in a new generation of arbitrators and counsels to ensure that know-how and capacity is not lost over time. Efforts to support young practitioners and mentoring programs in the field may offer beneficial solutions to address this gap. Bringing younger individuals into the potential pool increases diversity and the span of ideas and experiences, and could benefit the community as a whole. The benefits of diversity go beyond age.¹⁴

It seems that we are still lost in individuality, the world adores the stars and the ones with an already formed reputation, without giving others the chances to prove themselves and demonstrate their skills. The world is still preoccupied with money, because even if you are talented, without a person who supports you to bloom, without protection and smoothing the road there are only few chances to get to the top. Everybody needs to learn new things and to keep in developing himself/herself but the community and especially the ones from the top should support you and give you chances in order to succeed. The diversity challenge for women appears to relate to obtaining initial access (unblocking the pipeline) or breaking through the 'glass ceiling.' The arbitration world should consider itself to and be a community in which its members should help each other to strengthen its image and inspire confidence to its users.

The path for becoming an arbitrator is a long and difficult one and for that the following propositions emerged (one of them applicable for all, one for the prospective arbitrators and others for those in top-position): to facilitate access to knowledge, education and experience; to strive for continuing professional formation to be better prepared; to consider mentorship, teaching, sharing opinions, more possibilities for internship; to grant special facilities for young and different nationalities participants at the conferences and other kind of events in the field; to offer/ to struggle for better exposure and visibility; to participate to /organize moots; to try to be more visible and present by self-promotion, participating to all kind of events and socializing with the other attendees, publishing opinions and papers; to change the mindset of practitioners of what can be a good arbitral tribunal (see the defective tribunals proposition¹⁵).

In composing an arbitral tribunal, sometimes getting back to personal relationships and knowledge could be a savior solution but all the time a more wider and liberal approach should be encouraged to let loose the segregation habits and unconscious bias which we have been tributary to for so long. The

¹⁴ Franck, S., Freda, J., Lavin K., Lehmann T., & van Aaken, A. (2015). The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration. *Columbia Journal of Transnational Law*, 498.

¹⁵ See footnote no. 8, <http://arbitrationblog.kluwerarbitration.com/2018/01/14/post/>

biggest incentive towards diversity is to be able to make inspired arbitrator selections from a representative pool, and for that we need to celebrate the human spirit valences in space and time, become and then remain open minded and nonetheless cherish our arbitration community which is expanding beyond its legendary boundaries due to the new technologies and new area of interests.

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