ISSUE 3: INTERNATIONAL ARBITRATION

FEATURING:

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EQUAL REPRESENTATION IN ARBITRATION

International Women’s Day

#BalanceforBetter
In 2015 members of the arbitration community drew up the Equal Representation in Arbitration Pledge, in recognition of the under-representation of women on international arbitral tribunals. The initiative seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as possible, with the goal of full parity.

In the third of our Women in Focus series, Managing Director, Ania Farren talks to Jackie van Haersolte-van Hof, Director General at the London Court of International Arbitration and Sylvia Noury, London Head of International Arbitration at Freshfields Bruckhaus Deringer about the success of The Pledge to date and the important role that it has played in encouraging diversity in international arbitration.
Ania: The Pledge, which was drawn up in 2015, has had so much success in focusing on the under-representation of women on international arbitration tribunals. You were both very involved in getting the Pledge off the ground. Can you tell me a little about how the idea came about?

Jackie: The idea, or at least my part of the idea came up in 2014, when I was asked to speak on a diversity panel at ICCA Miami. I came up with the idea of a pledge in arbitration, for which I found inspiration in earlier initiatives, and in particular, an idea launched a couple of years before when large corporates in the US began to insist on inclusive teams when they were instructing law firms.

I was also inspired by an initiative in a different industry, the media in the Nordics, where a practice was developed where people refused to take on engagements when their panels, for example on a TV show, were not sufficiently diverse.

This willingness to lead by example, even if it meant losing out on a work opportunity, I found appealing and impressive. Many people talk the talk, but not too many walk the walk. Translating this into arbitration means potentially refusing (attractive) appointments or speaking engagements if there is insufficient diversity.

In a way this was the easy part: I had an abstract idea which Sylvia (Noury) then implemented and transformed into action. I am firmly of the view that the concreteness of the Pledge has made it such a success. People can refer to a basic and tangible standard, which they can invoke to justify different behaviour.

I’ve also accepted that, whereas my initial idea was not limited to gender but was directed at diversity, the most effective way to make real change in the short term was to focus on gender first.

Sylvia: I did not give much thought to diversity in my early career. While I naturally observed the glaring absence of women around me, I’m afraid I was too busy ensuring that I earned my own place at the male dominated table to concern myself with the problem. But, after a decade in the field, I began to notice, with increasing disquiet, the constant all-male arbitrator lists and became ever more disenchanted with the novelty of being the only female speaker on every panel.

I became a partner at Freshfields and then had my first child in quick succession. It was on my return from maternity leave in 2013 that I really began to focus both on the scale of the issue and the responsibility I (along with everyone else in the arbitration community) bore to do something to fix it. In particular, I recall sitting at a dinner at the V&A arranged by our female partners for female clients between Jackie and Jo Cross (of BP), shortly after Jackie’s ICCA speech, where we discussed the gender imbalance in our field and how it should no longer be tolerated.

In 2015, I resolved to take action. The first step was to organise a dinner in London gathering a cross section of the arbitration community to focus on the issue. My main objective for that dinner was that something concrete should result from it, not just navel gazing or platitudes. So, I started work before the dinner on a draft of the “Pledge” – shamelessly stealing Jackie’s idea – that we could collectively promote. Happily, the attendees enthusiastically embraced the initiative. Over the next year, to ensure global reach and buy-in, similar dinners were held by my partners in Freshfields offices across the world. By 2016, a Steering Committee (which I co-chair alongside Wendy Miles QC) comprising of members drawn from a variety of arbitral institutions, firms, chambers, corporations and regions was established, and the text of the Pledge finalised with their help.

The Pledge was launched in May 2016, with around 300 signatories. Today, signatories number well over 3,000, including most of the major arbitral institutions as well as a significant number of high-profile organisations and corporates. The time was manifestly right for such an initiative and all of us who have formed a part of it are incredibly proud of its success.
Ania: The Pledge clearly outlines the importance of diversity – do you believe that it also impacts the quality of decision-making?

Jackie: Yes, I genuinely believe it does. Not only is there objective research supporting this proposition, but I’ve seen this in practice. Different people do things differently, and by incorporating different perspectives you avoid tunnel vision and ensure that issues are considered holistically. Of course, you should avoid fragmentation and inefficiency, but it is important not to be insular. In international arbitration this is especially relevant.

I also firmly believe, and have seen in practice, that having inclusive tribunals leads to greater buy-in and acceptance from parties and stakeholders more generally. I often give the example of a case I did several years ago when I sat on a tribunal with two men, and one side had a team consisting of a female barrister, female solicitor and female CFO. An all-male tribunal would have been obviously nonrepresentational. Another example is seniority: while experience is obviously relevant and sometimes essential, at the same time one needs decision-makers who are willing to immerse themselves in the facts and the files.

Sylvia: They say that three heads are better than one, but if all are thinking in the same way then that benefit is lost. Diversity brings a different perspective, which is important to avoid “group think” and keep everyone honest. This matters as much in arbitration as it does in the real world.

That said, I have not advocated for diversity on this basis alone. For me it’s a way of tackling some of the failings of the arbitral system we complain of so regularly: lack of availability of arbitrators, lack of preparation, delays in awards, entrenched views, lack of legitimacy. While diversity of arbitrators is not a panacea, it certainly provides a response to those complaints. Starting with gender diversity: there is no question that a large pool of very qualified women exists to provide the additional resource required. I met many of the excellent female English QCs whose names don’t seem to make it on to “black-letter English arbitrator” lists at a Pledge event we organised in 2017 for that purpose. Until we draw on the pool of quality that exists among our top women, we are diluting the excellence of our arbitral system.
What has historically been the obstacle to more women being appointed as arbitrators?

Jackie: At heart, the problem is a lack of women in the profession and in the more senior positions in the profession in particular. While the influx of women is increasing and the overall representation is improving, the pool of available senior candidates is still limited. This problem is compounded by the fact that people appoint candidates resembling themselves.

Certainly in the United Kingdom (as a result of the process for selecting members of the judiciary) there has been a dearth of female judges and while the judiciary is very conscious of this problem and proactively working on improving numbers, this means that the number of potential female, senior, arbitrators is further eroded as they are snapped up by the judiciary.

Ultimately, we need to create more understanding that what is needed is true diversity, not only of gender but also a mixture of more and less seniority, sector versus legal expertise, cultural, racial and all other forms of diversity.

Sylvia: It is true that at the very senior “bet the company” level, there are more “qualified” male candidates than female. Although it must be said that the subjective judgement involved in who is “qualified” is often riddled with unconscious bias - starting from the mental picture we all have of an arbitrator with the requisite “stature” to go toe-to-toe with a formidable (and likely male) Chair. As Jackie once said, no one ever got fired for appointing Johnny Veder.

But at the junior level that is no longer true. Both on the ICC UK Appointments Committee and the SCC Board, where I have the honour of serving, we are churning out qualified female candidates for the lower value cases – and I know the same is true at the LCIA. Let’s hope that these incredibly talented women stay the course and the Arbitrator Powerlists of the future have more than two women on them.

What might hold them back? From my own perspective at the intermediate level, I see that as time goes by, male candidates often develop a higher profile, or a louder voice. Speaking at that one conference or sitting on that one committee may get someone their first appointment. And so starts the (vicious) circle of appointments – you need experience of one to get another. Visibility is a part of what the Pledge seeks to address; and I have certainly noticed a marked uptick in the last three years in the number of women speaking on panels and being appointed to positions of influence.

Ania: Have you seen a shift in attitudes, and an increase in practice of appointments of female arbitrators?

Jackie: Yes, absolutely. You will forgive me if I proudly provide some LCIA numbers. Last year some 43% of arbitrators selected by the LCIA were female, bringing the overall number of female appointments to 29%. This is a significant increase compared to only a few years ago. Sadly, it shows that a lot of work still needs to be done and in particular when it comes to party nominated arbitrators and arbitrators selected by the co-arbitrators.

These numbers are especially striking if you realise that the LCIA appoints proportionately more sole and presiding arbitrators than other arbitral institutions. This is because it is the arbitrator with the requisite “stature” to go toe-to-toe with a formidable (and likely male) Chair. As Jackie once said, no one ever got fired for appointing Johnny Veder.

But also, we need to continue to work on the pipeline. As I mentioned before, much improvement has been made but we are far from there. Both within law firms and at the bar the structure of the profession complicates gender parity at all levels. Hopefully pressure from outside will help to ensure that the necessity of inclusiveness is recognised and essentially a premium is placed on diversity.

Sylvia: As Jackie says – everyone needs to walk the walk. Don’t just add one or two token diverse candidates to your arbitrator list. Make the effort to find out who the really good but lesser known arbitrators are and appoint them.

There is also much more to be done in terms of other forms of diversity – not just gender. While the ERA Pledge focuses on gender, we hope that by opening the eyes of the arbitration community to how we routinely end up with panels of three senior white men, and encouraging everyone to cast the net more broadly, this will benefit all minorities.

Ania: What more can be done in your view?

Jackie: This ties into the previous point. As we approach gender parity for institutional appointments (at least for the LCIA) we need to work on the other stakeholders. They too need to walk the walk. This touches on an important issue which is not entirely straightforward. The ability to influence the identity of arbitrators is often quoted as an advantage of arbitration. In reality, however not all parties and their advisers are as well-equipped to steer this selection process as others. We can work on improving for example the available information about potential candidates. At some time, I believe we should recognise that institutions will continue to play an important role in identifying good, including diverse, candidates.

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Ania: You have both reached very senior positions. Do you see it as part of your role as leaders to pave the way for other women?

Jackie: Yes. I see this as a personal and professional challenge. I should say that I’m also very keen to promote young male professionals, as well as members of other interest groups. This goes to the wider point that broader inclusiveness is not only important but is in my view the solution to addressing the challenge of gender diversity.

In my institutional capacity it is obvious that I’m interested in inclusiveness, if nothing else to ensure a sustainable pool of arbitrators. In my personal capacity fairness is a big driver. People should not be discriminated based on gender. It is morally wrong as well as short-sighted.

Sylvia: Yes. Not by promoting women who do not have the necessary qualities to succeed. But by ensuring those who are not overlooked, as can sometimes be the case.

Ania: What advice do you give more junior women wanting to succeed in arbitration? Is it different for them than for their male colleagues?

Jackie: Yes and no. I do think women often need to work harder, but I don’t want to suggest that men necessarily have an easy time. I do think men are often helped by the fact that traditional role patterns allow them to flourish where women struggle. Choices which are seen as normal and laudable for men, are often criticised and questioned for women. Then again, women need to help themselves. How they can help themselves and how we can help them varies. Female networks will work for some, mentoring or seeking a mentor for others. I personally believe in connecting with peers, i.e. men and women of one’s own generation and developing strong networks based on shared interests.

Sylvia: It depends on the woman – and the man. But in general, I encourage more junior women to find their voice and have the confidence to project it. And to focus on the big picture rather than keeping their heads down. Most of all, I try to act as a role model, as a mother of two children who remain at all times my most important clients, to show that – however imperfect my balance might seem – it can be done.
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