

Improving diversity in international arbitration



Laura Abrahamson|Mark Smalls - 22/09/2021 ([CDR](#))

Action on diversity requires vision and commitment, write Laura Abrahamson and Mark Smalls of JAMS.

Recent studies by *The Wall Street Journal*, **McKinsey & Company** and the *Harvard Business Review* have proven that diverse teams achieve better outcomes. This is also true in international arbitration. Arbitrators of different gender identities, racial and ethnic backgrounds, and sexual orientations should have a seat at the table. There are tangible benefits of diversity, including navigating various nuances and understanding certain diverse viewpoints.

Unfortunately, international arbitration as a discipline has historically lacked diversity, but there have been some recent improvements. The 2020 [report of the International Council for Commercial Arbitration's Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings](#) showed an increase between 2015 and 2019 of women as a percentage of appointments across ten different international arbitral institutions from a range of 3.7%-17% to a range of 16.4%-29%.

There are several reasons for the relative lack of diversity in international arbitration. But perhaps the most critical reason is the 'chicken and egg' conundrum. That is, it is difficult to get international arbitration appointments without experience, and one cannot obtain experience without being appointed as an international arbitrator. Some aspiring arbitrators do circumvent this conundrum by obtaining experience as tribunal secretaries in more complex arbitrations, but these opportunities are few and far between, and are often only available to more junior lawyers at the law firm or chambers the tribunal chair is affiliated with. For most other aspiring international arbitrators, the only clear path is to serve as counsel to parties in international arbitration, and gain additional exposure by participating in arbitral institution committees and speaking at conferences.

Recently, members of various arbitral institutions, including **JAMS**, have brainstormed solutions to address the lack of diversity in international arbitration. One idea, which perhaps represents low-hanging fruit, is to increase the pipeline of diverse practitioners by securing commitments from law firms and other relevant entities to offer 50% of all summer associate positions and internships in international arbitration to diverse candidates.

Another idea — also perhaps relatively easy to execute — is to persuade organizers of international

arbitration conferences, webinars and similar events to ensure that 50% of all speakers and panelists are members of traditionally underrepresented groups. This serves multiple purposes; providing additional perspectives in panel discussions, raising the profile of diverse arbitrators, and allowing diverse younger practitioners to see someone like themselves. One way to support this goal is to urge law firms, arbitral institutions, other legal organizations and even event participants to insist on diverse speaking panels. For example, if a law firm were to sponsor an event or a keynote speaker were to agree to deliver an address, they could stipulate that the 50% diversity requirement be met.

The most innovative idea to emerge from a recent webinar, and the only one geared towards solving the experience gap was proposed by **Amanda Lee**, an international arbitrator and founder of Careers in Arbitration: a shadowing program for aspiring arbitrators. Lee's vision is for arbitral institutions to set up a program which would match aspiring diverse arbitrators with arbitral tribunals and allow them to be silent observers. Participants would have to meet all the necessary conflict checks and abide by confidentiality restrictions, but it would allow them to "be in the room where it happens." This would enable diverse practitioners to gain unparalleled access and experience by observing tribunals doing everything from organizing a procedural hearing to addressing discovery disputes and running merits hearings. It would also enable them to listen to how arbitrators think about and analyze their cases.

Interestingly, Lee developed her idea in 2018. But she shelved it, both because she thought it might be too radical and because of practical limitations in terms of the costs of someone shadowing in-person hearings. Prior to the Covid-19 pandemic and the transition to virtual proceedings, these costs may have contributed to disproportionate access to shadowing programs, with those living in wealthier jurisdictions having greater ability to shadow arbitral tribunals and potentially hindering the intended goal of diverse participation.

Although Covid-19 has clearly had an enormous negative impact, especially on members of underrepresented groups, the normalization of virtual hearings has been one of the bright spots. As international arbitrators have been forced to get comfortable with virtual and hybrid hearings, and with participants located across the world, it no longer seems to be such a stretch to suggest they allow a shadow arbitrator to dial in and observe proceedings. It also removes the practical, logistical hurdles—now, it's no longer necessary for participants in a shadowing program to spend time and money traveling to an international arbitration hearing halfway around the world, for several days or even weeks in order to gain experience. Now, they can simply dial in from their own desk, whether that desk is in New York, New Zealand or New Guinea.

Of course, it's one thing to share ideas to improve diversity. It's another to implement them — an effort that to be successful will require careful coordination and cooperation among arbitral institutions, law firms and clients alike. As a first step, these entities must affirm their commitment to the cause. Then it's a matter of rolling out a pilot program to test the waters. During this phase, it's important not to let the perfect be the enemy of the good. That is, don't attempt to address every potential pitfall prior to putting the pilot program in place. Otherwise, it'll never get launched.

Accelerating progress in this important area will require boldness, plus real effort from all stakeholders. Whether the motivation behind improving diversity in international arbitration is better outcomes or simply doing the right thing, by working together we can ensure that qualified international arbitrators have not only a seat at the table, but have a real chance at being selected to arbitrate a range of disputes.

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