

Tuesday, 4 November 2014

4:00 – 5:30 PM

Diversity and Inclusion in International Arbitration Appointments

Rapporteur:

Amy Park, Georgia State University College of Law, Atlanta, Georgia

Program Chair:

Benjamin G. Davis, Professor, University of Toledo College of Law, Toledo, Ohio

Panelists:

Rachel Clarke, Deputy Director, Arbitration & ADR, North America, ICC International, Court of Arbitration, New York, New York

Ike Ehiribe, 7 Stones Commercial & IP Chambers, London; Officer, LCIA African Users' Council, London

Calvin A. Hamilton, Hamilton Abogados, Madrid, Spain

Richard W. Naimark, Senior Vice President, International Center for Dispute Resolution (ICDR)/American Arbitration Association (AAA), New York, New York

Adedoyin Rhodes-Vivour, Doyin Rhodes-Vivour & Co., Lagos, Nigeria

Summary:

The panelists shared their insights regarding diversity and inclusion in International Arbitration Appointments with a focus on the lack of female and African appointments to arbitral panels. They identified emerging trends and discussed ways to facilitate more female and African appointments. In particular, the panelists emphasized the importance of establishing mentor-mentee relationships and the need to provide opportunities to both female and African lawyers to tackle issues of diversity and inclusion.

I. Gender Issues in International Arbitration

a. Introduction by **Dr. Ben Davis**

To begin the discussion on diversity and inclusion in the International Arbitration community, Dr. Davis highlighted gender issues. He shared his experience of when he first started working at the ICC in 1986. He remembers that at that time all five counsel were men. Eventually, the question of whether women would also be able to participate in international arbitration emerged. Davis asked, "Is talking about gender damaging?"

b. **Adedoyin Rhodes-Vivour**

Ms. Rhodes-Vivour stated that because there were not many women being appointed to important international cases during the 1980s, she started the organization called Arbitral Women. She felt women were being discriminated against and noted that even now the percentage of women in this field is low. She cited that the percentage of women being nominated or acting on panels is below 10%. Some places have lower than 2% female participation.

c. Calvin Hamilton

Mr. Hamilton spoke highly of Arbitral Women and suggested if any person is looking for a role model that she should look to that organization.

d. Richard W. Naimark

Mr. Naimark stated that historically, European and North American men worked on these kinds of cases. He also noted that most arbitral appointments are made by parties and not by institutions. At the AAA and the ICDR, virtually all are appointed by parties. Naimark said that the promotion of women as arbitrators will take time but identified that in the past five or six years, the locus of power has shifted rapidly to Asia and the Middle East. He believes this change will continue to create a completely different dynamic in the way people are being appointed as arbitrators, so now is the right time to be talking about these issues.

e. Rachel Clarke

Ms. Clarke emphasized the importance of encouraging parties to promote more women appointments, so that women can build name value and experience for themselves. She suggests that arbitrators could identify those who are underrepresented or could go to other countries to network and to establish a name for themselves, which would have the beneficial effect of sensitizing local judges so arbitration would be more friendly.

II. The Rise of Female Appointments to Arbitral Panel

a. Dr. Ben Davis

Davis next identified the issue that women were not being chosen for arbitral panels. He noted that qualified women were being struck from lists right away and he asked the panelists what steps women could take to overcome the vicious cycle of not getting picked for lack of experience.

b. Richard Naimark

Mr. Nairmark stated that the pattern will change very soon, because international law firms have more experienced women handling cases and getting exposure in the system. There is a class of women who are rising in seniority.

c. **Ike Ehiribe**

Mr. Ehiribe stated that as a practitioner in England, he also believed gender issues are changing. In addition, African institutions are making a conscious effort to involve more women in the arbitral process. He suggested that there is progress in the right direction.

d. **Adedoyin Rhodes-Vivour**

Ms. Rhodes-Vivour stated that there are both explicit and implicit biases against women and emphasized the importance of guarding against those biases. She suggested that one way to combat those biases include mentorship relationships and the value of sponsoring women to attend various events.

Mr. Nairmark provided statistics: Only 16% of commercial dispute panels consist of women and only 16% of arbitration appointments go to women.

e. **Rachel Clarke**

Ms. Clarke recognized that 90% of the time, a woman's first appointment is made by institutions so there is a way to address this issue. Clarke noted that there is no "one-size fits all" rule because of regional and cultural differences. Clarke suggested that a quota or requirement may be another step towards addressing the issue of gender inequality.

f. **Calvin Hamilton:**

Mr. Hamilton stressed the importance of a changing mindset. For example, in Switzerland and France women professionals are always present in the selection process and are frequently appointed. Hamilton reiterated that a part of the gender inequality issue also comes from the fact that it was a group or "old club" of European and American men who traditionally handled these cases, so it will take time to make changes.

g. **Possible Solutions for Gender Inequality Issue from Audience Members**

One participant stressed the importance of having experienced female arbitrators to act as mentors and sponsors for women new to the field.

Another participant suggested that there is a need to track and publish information about which countries are appointing women. This would provide law firms with additional incentive to train and support women in high-stakes, international cases.

III. Arbitral Appointments in Africa

a. **Ike Ehiribe**

Mr. Ehiribe characterized African arbitral appointments as a “dire situation.” He stated that for proceedings requiring a tribunal, African states did not appoint an African arbitrator 81% of the time. In addition administrative bodies do not choose African arbitrators, either. Rather, African states choose to appoint international lawyers, which he characterized as an African problem.

b. **Adedoyin Rhodes-Vivour**

On that point, Ms. Rhodes-Vivour noted that Nigeria has made lots of progress and there is a trend where African arbitrators are being appointed.

An audience member also commended the Nigerians for their progress and their continued representation at conferences around the world.

c. Suggestion from audience member:

Conference participant stated that the best way to tackle the issue of appointing African arbitrators was to encourage African states to engage early and appoint counsel early. He cited a study that suggested where the state acts early, the African arbitrators had a higher success rate.

IV. Emerging Trends in Africa: Opportunities for African Arbitrators

a. **Calvin Hamilton**

While acknowledging that African countries can be very discriminatory to each other, Mr. Hamilton said that the nationality or gender will not matter if the arbitrator is the best person for the matter at issue under the circumstances. He stressed that as long as that person has knowledge and ability, then he or she should be appointed. He emphasized the need to set up a system where qualified African arbitrators could be put on the radar for potential appointments.

b. **Ike Ehiribe**

Mr. Ehiribe agreed that experience trumps nationality and gender. He emphasized the need for Africans to invest time, resources, and expertise in developing African arbitrators and to encourage initiatives with the government or private entities to develop that individual capacity. He also stated that young lawyers must have the chance to observe, learn, and be involved in cases alongside the international law firms. If such opportunities are provided, African arbitrators will then be empowered.

c. **Suggestion from Audience Member**

Audience member expressed that from a law firm perspective, he would have no objection to bringing on an African lawyer to observe and assist with cases; however, he noted that the issue was financial. He suggested that perhaps Bar Associations could set up funds to underwrite expenses for foreign lawyers to come to the firms to assist in the cases.

d. **Calvin Hamilton**

Hamilton highlighted the importance of a mentorship or training program. He suggested that young lawyers should develop their own strategy and seek opportunities through groups or law firms to gain experience and meet potential mentors.

V. **Recommendation to encourage Diversity and Inclusion**

The panelists agreed that it would be a good idea to have institutions publish “score cards” that indicate the kinds of people who are being appointed.

- a. Question from audience with regards to diversity and inclusion of lawyers who may face discrimination based on any and all of the following classifications: race, gender, religion, disability.

i. **Rachel Clarke**

Ms. Clarke stated that in terms of being an individual who may be a part of multiple underrepresented groups, it is essential for the individual to recognize that those unique qualities are resources. They allow the individual to draw in support from many different groups. The benefit of finding a mentor, preferably somebody who shares some of your own experiences or characteristics, is that it allows you to see that the end goal is possible.