



## Columbia FDI Perspectives

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### **The Equal Representation in Arbitration Pledge: two comments on its scope of application**\*

by  
John Gaffney\*\*

The Equal Representation in Arbitration Pledge (Pledge) was announced in May 2016.<sup>1</sup> It commits its signatories, mainly comprised of law firms, arbitral institutions and individuals, to improving the profile and representation of women in arbitration, including the appointment of women as arbitrators on an equal opportunity basis.

Action on gender diversity is required. Women are underrepresented in international arbitration. But diversity is not confined to gender. Diversity includes ethnicity, race, color, functional diversity, culture, geography, political beliefs, age, religious beliefs, sexual orientation, and socio-economic status. International arbitration has failed to achieve diversity in the fullest sense. For example, while 32% of parties to International Chamber of Commerce (ICC) arbitration in 2013 were from Africa, Asia and the Pacific, less than 3% of arbitrators appointed in ICC arbitrations that year were African and less than 12% from Asia and the Pacific.<sup>2</sup> In 2015, there were 221 Arab parties involved in ICC cases, but there were only 54 Arab arbitrator appointments.<sup>3</sup> As of June 2016, only 4% of ICSID cases were arbitrated by entirely non-Anglo-European tribunals.<sup>4</sup>

The inclusion of individuals of varied racial, ethnic, gender, and social backgrounds in international arbitration only ought to enhance the legitimacy of the system. There should be sufficient diversity so that parties “view the tribunal as representing a cross section of the business world” (or at least, a “cross section of an idealized business world that is modern, creative and diverse”).<sup>5</sup> A party from a diverse background appearing before a panel where at least one member shares that background will be more likely to perceive that its arguments have been received and considered.<sup>6</sup> A more diverse panel of arbitrators will also provide a wider range of perspectives and experiences that are often lacking among arbitrators who have had life experiences that differ greatly from those of the parties.<sup>7</sup>

The lack of diversity in international arbitration and in the legal sector generally is not new. The American Bar Association, for instance, has sought for some years to “eliminate bias and

enhance diversity” through “[p]romot[ing] full and equal participation in the Association, our profession, and the justice system *by all persons*.”<sup>8</sup>

The Pledge thus does not go far enough in its coverage of a limited category of persons.

And yet, while the Pledge’s scope of application is too limited at present, it may potentially be too wide in another respect. Its signatories promise, “where they have the power to do so... [to] appoint a fair representation of female arbitrators.” It’s not clear from the Pledge whether this duty extends to law firm signatories. If it does, it raises questions of how such firms are to balance their duty to their clients and their commitments under the Pledge.

Parties want to select the most well-known, experienced arbitrators. They are interested in winning their case—not changing the world.<sup>9</sup> Outside counsel’s duty is to appoint an arbitrator in the best interests of the client, not necessarily in the best interests of diversity. This is not to suggest that the two are mutually exclusive. However, I suggest it is a role best reserved to the Pledge’s arbitral institution signatories when performing their appointment role. As Emmanuel Gaillard observed, “anecdotal evidence shows that institutions actively seek to appoint newcomers and promote diversity. It is the parties who resist change.”<sup>10</sup>

Aside from the unique role that arbitral institution signatories can, and should, play in the foregoing respect, all Pledge signatories should focus on implementing systematic and effective use of mentorship, pro bono, tribunal secretary, and networking opportunities, in an effort to achieve greater diversity. In addition, law firm signatories should actively suggest to clients more diverse candidates for appointments in arbitration cases, and refrain from relying exclusively on the same pool of usual appointees. These sound, practical steps will go some way to helping ensure fair representation, by creating awareness on the part of non-signatory parties of a more diverse pool of suitably-qualified arbitrators, whilst respecting their autonomy to make the final decision as to whom they wish to appoint.

The Pledge is a laudable step in the journey toward increased diversity in arbitration. The next step must be to expand the Pledge’s scope of application whilst ensuring it does not overreach.

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<sup>1</sup> Alison Ross, “The Pledge,” *Global Arbitration Review*, May 18, 2016, <http://globalarbitrationreview.com/article/1036332/the-pledge>.

<sup>2</sup> Julianne Hughes-Jennett and Rashida Abdulai, “Barriers to entry—the lack of diversity in international arbitration,” Jul. 15, 2015, <http://blogs.lexisnexis.co.uk/dr/barriers-to-entry-the-lack-of-diversity-in-international-arbitration/>.

<sup>3</sup> “We lag behind on diversity, Ziadé warns,” *Global Arbitration Review*, Nov. 18, 2016, <http://globalarbitrationreview.com/article/1076415/we-lag-behind-on-diversity-ziade-warns>,

<sup>4</sup> ICSID, *The ICSID Caseload: Statistics* (2016, 2nd issue), p. 30.

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<sup>5</sup> Samaa A. F. Haridi, “Towards greater gender and ethnic diversity international arbitration,” *International Arbitration Review*, vol. 2 (2015), p. 308.

<sup>6</sup> *Ibid.*, p. 311.

<sup>7</sup> Sasha A. Carbone and Jeffrey T. Zaino, “Increasing diversity among arbitrators,” *NYSBA Journal*, vol. 84 (2012), pp. 33-37.

<sup>8</sup> ABA, “Goal III report: the state of racial and ethnic diversity in the American Bar Association,” 2012, [http://www.americanbar.org/content/dam/aba/administrative/racial\\_ethnic\\_diversity/REG3Rpt12\\_finalweb\\_updated\\_3\\_13\\_12\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/REG3Rpt12_finalweb_updated_3_13_12_authcheckdam.pdf) (emphasis added).

<sup>9</sup> Monika M. Gonzalez, “Arbitration pledge for diversity met with skepticism in South Florida and Latin America,” *Daily Business Review*, Jun. 29, 2016, <http://www.dailybusinessreview.com/id=1202761330219/Arbitration-Pledge-for-Diversity-Met-With-Skepticism-in-South-Florida-and-Latin-America?slreturn=20161128084204>.

<sup>10</sup> Emmanuel Gaillard, “Sociology of international arbitration,” *Arbitration International*, vol. 31 (2015), p. 16.

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