**Fringe Watercooler Conversation to Key Business Priority: Reassessing the Role of Women in Arbitration.**

* Saksham Shukla and Aayushi Singh[[1]](#footnote-1)

[Jay-Z (Shawn Carter)’s request for a stay over arbitration proceedings due to the overwhelmingly “white” roster of arbitrators at the American Arbitration Association](https://sites.psu.edu/arbitrationlawreview/2019/04/22/arbitration-an-old-white-boys-club/) (“***AAA***”) was accepted. Though the motion was withdrawn by Carter due to [AAA’s promise to diversify its roster](https://globalarbitrationreview.com/diversity/jay-z-settles-aaa-dispute-triggered-diversity-debate), the Supreme Court of New York’s stay reinforced the stereotype that arbitration persists to be an old (white) boys’ club, hence structurally impairing more generationally and culturally diverse appointments.

“Not all inequality is created equal.” Therefore, diversity in arbitration must be analyzed from an intersectional feminist lens as it creates an analytical framework that recognizes the overlapping social experiences of women at various levels of society, such as – race, ethnicity, gender, and sexuality. These factors can potentially be discussed at length individually; however, intersectionality would lend a more cohesive understanding of the issues at hand. A woman could be Asian or Hispanic or Black or indigenous or young or old and thus lies the justification for our analysis.

There have been two watershed moments in the history of ‘diversity in arbitration.’ The first one was the birth of [ArbitralWomen](https://www.arbitralwomen.org) in Paris, in 1993 and the second was the ‘Equal Representation in Arbitration Pledge’ in 2016. The global arbitration community committed to an increment in the number of women in arbitration based on equal opportunity. Institutions are leading the charge in creating diverse pools of arbitrators. The [ICCA Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings](https://www.arbitration-icca.org/icca-reports-no-8-report-cross-institutional-task-force-gender-diversity-arbitral-appointments-and) reported that the average percentage of total appointments of women in arbitral institutions increased from 12.2% in 2015 to 21.3% in 2019. However, the percentage of increase in party-appointed female arbitrators has been relatively slower – from 8.5% in 2015 to 13.9% in 2019. The study by [Karton and Polonskaya](http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/) highlighted how out of 951 ICSID appointments, only three appointed arbitrators were female, non-white and from a developing state – all three being ICSID appointees and part of the annulment committees. Remarkably, no party-appointed arbitrators matched these characteristics. Historically, women have faced more barriers than men and while in the past few years, the world has witnessed a slow, albeit steady growth in the appointment of women in arbitration panels, much still needs to be done in the areas of ethnic and racial diversity.

There are several roadblocks to achieving the aims of diversity –

* **Pipeline ‘Leaks’ and Pipeline ‘Plugs’** – The pipeline to success in arbitration is plagued with supply and demand-side problems. The supply-side problem is what is termed the ‘leak.’ While the number of women in the legal field is quite high, not many women make it to the top positions of the firm. This is due to factors such as work conditions, lack of female bosses, harassment issues at the workplace and lack of flexible working hours. This leak is better appreciated with the Asian example. While there is a humongous amount of untapped talent in Asia, the sociological and cultural attitude prevents women in several ways. [Women in Asia find themselves in the lower echelons of the law firm, working on things their male counterparts think are best for them](https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/79.4/AMDM2013065) - further increasing the problem of invisibility. Thus, women drop from the pipeline and very few make it to the top.

The demand side of the problem is what Lucy Greenwood has termed the [pipeline ‘plug’.](https://static1.squarespace.com/static/57fe4d37c534a5c932910b78/t/586fd78a2e69cf728dbfe2ce/1483724683686/Unblocking+the+Pipeline_...pdf) Even when women make it to the senior-most positions, they suffer from an unconscious bias that prevents them from being listed on international rosters. Predominantly, big international arbitrations are composed of men, most of whom are repeat appointments owing to the familiarity of either the parties or their counsels. Confidentiality further exacerbates this problem as there is no record of the quality and performance of arbitrators which results in repeat appointments. Lucy Greenwood points out that several people ‘equate diversity with a reduced quality.’ When men and women stand for the same job, preference is always granted to men, thereby creating the pipeline ‘plug’. Since these decisions may be made implicitly and subconsciously, it becomes imperative that efforts are made to unclog the pipeline.

The first step in addressing the pipeline problem is to acknowledge the leak and the plugs. Since it is an implicit bias, a conscious effort must be made to sensitize the global arbitration community and create policy frameworks for weeding out such unconscious biases. Efforts must also be made to create records of the arbitrator’s performance and such information must be provided to parties before the appointments are made. A qualified female candidate would lend legitimacy and efficiency, while providing varied perspectives which would further foster the growth of the legal system.

* **Systemic bias or the old ‘white’ man problem** – There is unrest among parties, especially people of colour, that most arbitration panels consist of an overwhelming majority of Anglo-European men. For instance, an arbitration between two African parties, which sits in the USA or Europe, arbitrated upon by a majority of Anglo-European men, may not necessarily provide a truly unbiased decision in the matter. Now, let us assume one party is African and the other is American, such arbitration has a high chance of tilting in the favor of the white counterpart. As already discussed, this bias may also be unconscious but it remains a systemic bias against other ethnicities. (Re- Jay-Z’s arbitration). When you put a woman in this matrix, the problem multiplies (for reasons mentioned above).
* **Generational diversity** – There is a constant hesitation in appointing first-timers and young lawyers for arbitrations. This problem is not gender specific. When multiplied with several other biases, it is certainly a bigger problem for women. Parties in an arbitration prefer experienced arbitrators and are less willing to take a risk with someone new. However, these decisions do not reflect merit necessarily. This may be countered with institutional appointments of younger arbitrators.

The struggle, however, lies not just with a lack of generational or racial diversity. Despite the quest for parity and ascending number of groups aiming to create equality in designating women arbitrators, an incredibly [small percentage of women](https://www-kluwerarbitration-com.opj.remotlog.com/document/kli-ka-de-la-jara-2020-ch38?q=diversity%20in%20arbitration) are being appointed as arbitrators - depicting a strange [diversity paradox](http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators/) that (almost) refuses to resolve. A large number of female candidates graduate from prestigious law schools, but only a meagre proportion makes it to the top – this has been dubbed the infamous “[pipeline leak](http://arbitrationblog.practicallaw.com/will-the-pipeline-leak-be-mended-in-2017/).” The underlying factors behind this leak are more deep-rooted and may potentially be categorized as ***(i)*** sociological and psychological indicators and ***(ii)*** structural barriers.

* ***Sociological and psychological indicators.***

Data related to arbitral institutions suggests that [women have been promoted to higher positions](https://library.iccwbo.org/content/dr/BULLETINS/BULL_0069_Message.htm?l1=Bulletins&l2=ICC+Dispute+Resolution+Bulletin+2017+No.+3). However, law firms and practice, unfortunately, [do not depict a similar story](https://www.mckinsey.com/~/media/mckinsey/featured%20insights/gender%20equality/women%20in%20law%20firms/women-in-law-firms-final-103017.ashx). On the professional front, inflexible working arrangements and ample instances of harassment and bullying further worsen women's retention. Unconscious bias has been touted as the key reason for lower retention [in several reports](https://www.law.ox.ac.uk/sites/files/oxlaw/advocating_for_change_-_international_women_in_law_report.pdf) where female professional performance may not be rewarded competitively (the infamous gender pay gap). Implicit bias due to lack of mentorship and support frameworks also subsists and runs in tandem.

* ***Structural barriers.***

The ***lack of information*** about commercial arbitrations due to confidentiality makes it difficult to assess the past performance of arbitrators. Thus, [most parties resort to repeating appointments](https://www.google.com/url?sa=D&q=https://uk.practicallaw.thomsonreuters.com/w-019-5028%3FtransitionType%3DDefault%26contextData%3D%28sc.Default%29%26firstPage%3Dtrue%26bhcp%3D1&ust=1649685000000000&usg=AOvVaw0GD5FI1cys6XqKoagKhBnf&hl=en), which serve as an impediment to younger and newer arbitrator appointments. The lack of objective information about arbitrators often leads to appointments based on habit, gumption, or familiarity. It is noteworthy that arbitrators with variegated skills and experience harness their collective knowledge and parties must operate with the caveat that the [safest choice is not always the best](https://www.lexology.com/library/detail.aspx?g=aca79a5e-4e2c-4a64-b435-f8f2be358533). The [“the solicited feedback loop”](https://static1.squarespace.com/static/57fe4d37c534a5c932910b78/t/59cbf91c8fd4d2a3c9a1a431/1506539805617/Tipping+the+Balance.pdf) reinforces bias against diverse candidates. Anecdotal or personal narratives, even though more humane, discount the objectivity of quantifiable data about arbitrators and their previous appointments. Outside word of mouth and recommendations, [publicly accessible resources](https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF) are one of the key sources to acquire information about potential arbitrators. ***Directories*** such as Legal 500 and [Chambers and Partners have been scrutinized](https://www.law.com/international-edition/2019/10/16/mayer-brown-partner-to-chambers-include-more-women-or-leave-me-out-378-124000/?slreturn=20220310144842) for underrepresenting women. If women are not represented adequately in such directories or databases, the plausibility of locating a well-equipped female candidate is also significantly reduced.

[ArbitralWomen's database](https://www.arbitralwomen.org/Find-Practitioners/) provides recommendations for female candidates across jurisdictions and practice areas. [WWA Latam](https://wwarb.org) also strives to increase the visibility of female Latin practitioners. Similarly, the [ERA Pledge Search Committee](http://www.arbitrationpledge.com/arbitration-search) accepts input from litigants regarding qualifications sought in arbitrators and matches the entered information with lesser-known candidates. Practically, it is debatable whether these toolkits and search engines are used sporadically or heavily since legal counsels often appoint arbitrators on behalf of parties and the usage of such databases may seldom be deliberated.

A key barrier is that diversity is not a priority for most parties and they are happier in leaving [the business of gender equity largely to the institutions](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF). ***Institutions***, often acting as repositories of awards and appointing authorities are best equipped to disseminate statistics on the gender balance of their tribunals, redacted awards, plausible appeals, time is taken to complete proceedings and finer details. In the battle for transparency, the [ICC](https://iccwbo.org/media-wall/news-speeches/icc-begins-publishing-arbitrator-information-in-drive-for-improved-transparency/) and [HKIAC](https://www.hkiac.org/about-us/statistics) have published details about arbitral tribunals, albeit in a limited manner. Institutions may strive to furnish details of arbitrators akin to [ArbitratorIntelligence](https://app.arbitratorintelligence.com) to facilitate better decision-making by parties during arbitrator appointments.

Psychologically, people have more faith in a legal system that resonates with their perspective. Thus, a more diverse panel of arbitrators will naturally elicit and promote legitimacy – making parties feel more “heard.” Many national judiciaries have also striven to ensure that their systems emulate the population they adjudicate, alluding to [“diversity on the bench” campaigns](https://www.courts.wa.gov/committee/pdf/Diversifying%20the%20Bench%20Guidebook.pdf). In investment arbitration, where burgeoning concerns related to the public interest are wound up, it would be wiser to have tribunals that seem diverse and more “representative” of developing states as well.

***Does the problem contain the solution?***

Several of the above-mentioned problems have started disentangling due to the impact of the ERA Pledge and [the institutional increase in female appointments](https://www.google.com/url?sa=D&q=https://www.kluwerarbitration.com/book-toc%3Ftitle%3DICCA%2520Reports%2520No.%25208:%2520Report%2520of%2520the%2520Cross-Institutional%2520Task%2520Force%2520on%2520Gender%2520Diversity%2520in%2520Arbitral%2520Appointments%2520and%2520Proceedings&ust=1649942400000000&usg=AOvVaw2BPWoHEEjjCcQNVaLyzI1Y&hl=en). However, more efficient solutions are required which would target the root of the problem.

* **Superdiversity** or ‘Diversification of Diversity’ may prove helpful in providing equal opportunity to both the underrepresented and the majority community within them. It is also important that diversity is also discussed beyond the binary of gender and every person who does not adhere to the binary also gets that equal opportunity.
* **Promotion of women in educational enterprises**– Efforts must be made to encourage female participation in moots, mediation and other activities in law school. Adequate scholarship and funding opportunities are very encouraging – [ArbitralWomen’s initiative to fund Vis East and Vis Vienna teams](https://www.arbitralwomen.org/moot-funding/) from emerging economies with little financial and academic assistance is a very welcome move.
* **Role of law firms and organizations:** Further, institutions and law firms should provide internship opportunities to women to train them for higher positions in the future. [**WILEF** (Women In Law Empowerment Forum)](https://wilef.com) is an organization dedicated to advancing women in law firms and corporate legal departments. Shearman and Sterling provide mentorship, awareness and professional development to their female employees through [WISER (Women's Initiatives for Success, Excellence and Retention) Inclusion Network](https://www.shearman.com/about-us/womens-initiatives?accordion=developing-talented-women). The [DISn/ERA Pledge Gender Champion](https://theimpactlawyers.com/news/gender-equality-meet-the-initiative-that-unites-law-firms) initiative works to cultivate awareness and law-firm or organization-appointed “Gender Champions” strive to liaise with DIS and collect anonymous statistical data regarding the appointment of female arbitrators by co-arbitrators, parties and institutions. Orrick, Clyde and Co, Linklaters, and Clifford Change among other law firms have supported this initiative. [Women in Arbitration](https://www.hkiac.org/women-arbitration-wia) was launched by HKIA to promote female practitioners in China.
* **Commitments by parties/counsels:** ​​The [JAMS Diversity and Inclusion Rider](https://www.jamsadr.com/news/2018/jams-introduces-inclusion-rider-promotes-diversity-initiatives-in-adr) is a rider where parties can commit to promoting gender diversity in arbitrator appointments. Counsels or parties could consider potential arbitrators using standardized CVs without identifying gender or racial identity information.

Lack of diversity and visibility in law firms are reasons why pipeline leaks are extensive and thus, there has been a visible shift from firms to individual practice. Women who have established themselves in the industry have started flying solo with their independent arbitration practices. While institutions have consciously tried to promote diversity, it is now upon law firms to take the reins and steer the practice in the right direction. The question only remains, will they?

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