Women in disputes: what can be done about the leaky pipeline?

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International arbitration expert Lucy Greenwood provides a view on how the under-representation of women in international arbitration can be addressed.

For those studying science, technology, engineering and mathematics (STEM) subjects, the leak starts just after grade school, whereas in the law, we are arguably more fortunate: the rate at which women and men attend law school is roughly the same.

In some jurisdictions in fact more women than men take up training contracts at law firms. But in all jurisdictions the leak starts inexorably at around two years after the individual qualifies as a lawyer. And it never stops. From parity upon joining the profession to less than 20% by the time a lawyer reaches the senior levels, to around 15% of arbitral appointments going to female arbitrators, the leak is relentless, insidious and all-pervasive.

The disproportionate rate at which women leave the profession, or ‘pipeline leak’, is probably the major cause of the under-representation of women in the senior ranks of the international arbitration world.

All the major law firms have policies in place to stem the flow of women out of the profession, but there has been limited success reported as a result of these policies. For years, law firms resisted putting targets in place before they reluctantly did so. Now there are more headlines about missing targets than there are about meeting them.

The reasons behind pipeline leak are complex and difficult to address. They include diverse issues such as office climate, difficulties in managing dual careers, lack of female role models and mentors, lack of flexible work options and attitudes to flexible working, differential in earnings between spouses and discrepancies between the treatment of male and female associates.

It is the last issue that is one of the most challenging to address; research has shown that we react differently to three-month-old babies if we know their sex. From the time they are walking, small children of different sexes are given different toys, different clothes, different opportunities and different messages. While these messages have an early impact on girls turning their backs on STEM subjects after grade
school, they have a delayed impact on our selection of who we choose as our arbitrator – whether we know it or not.

This is due to the influences we are all subjected to as we grow up and, increasingly, in the media and online. There is a strong argument that gender divisions have become even more marked in the last 20 years, through the ‘pinkification’ of toys and the constant reinforcement of gender stereotypes. Even the most ardent feminist is likely to correlate men with leadership and women with family, simply due to the pervasive influence of unconscious bias upon their thought process.

Just as it is impossible not to visualise an elephant when you read these words, it is almost impossible, without conscious effort, to picture a figure skater and for that figure skater to be male; or to visualise a female construction worker without making an effort to do so.

Similarly, when we consider who to appoint as arbitrator we use language such as ‘needs gravitas’, ‘must be influential’ or ‘must take control of the proceedings’ without realising that in using this language we are rewarding our subconscious and confirming our bias towards appointing a man. This language is more subtle than the use of ‘he’ in arbitration agreements or conversations (that has largely gone these days) but the impact is just as significant.

So how can we address this issue? The Equal Representation in Arbitration Pledge was the first global initiative to address the underrepresentation of women in international arbitration which gained traction within the community. Launched in 2016, not only did it chime with growing dissatisfaction with the status quo, but it was also backed by sufficient resources to garner support on a global scale.

Signatories to the Pledge commit to increase, on an equal opportunity basis, the number of women appointed as arbitrators, with a view towards reaching the goal of full parity. Specifically, signatories promise to take steps to ensure that, whenever possible, a number of goals are met.

These goals include, for example, that committees, governing bodies and conference panels in the field of arbitration include a fair representation of women; that lists of potential arbitrators or tribunal chairs include a fair representation of female candidates; and that entities in charge of arbitral institutions include a fair representation of female candidates on rosters and lists of potential arbitrator appointees and appoint a fair representation of women to tribunals. The success of the Pledge since its launch has been phenomenal.

Yet more can be done, particularly in relation to counteracting the biases we all exhibit. Awareness of biases leads to changes in behaviour, which will affect the retention of women in international arbitration teams and the appointment of women as international arbitrators far more than any arbitrary targets, which simply perpetuate the gender stereotyping which penalises women in this field.

So, we should discuss the influence of bias and seek to be as objective as possible in making key decisions, in particularly when choosing our arbitrator.

For example, when compiling that shortlist of arbitrators to consider, start with criteria, not with names. Be as descriptive as possible in relation to the criteria. Evaluate and weigh the criteria before you even start trying to match the criteria with possible candidates. Use multiple sources to identify possible candidates, and use databases rather than individual recommendations. This will result in a wider pool of possible candidates. Then critically rate the individual against each criterion. Avoid asking for opinions on the candidates without first discussing the relationship between the person you are asking and the candidate. A gender-balanced shortlist should be the norm in all situations in which arbitrators are being considered.

The World Economic Forum announced last week it would take 217 years for disparities in the pay and employment opportunities of men and women to end. Similarly, if women carry on being made partners at the rate they are currently being promoted it will take almost 100 years for there to be parity. A female
arbitrator who has successfully navigated the leaky pipeline should be able to aspire to parity with her male colleagues far sooner than that.

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