



**FOLEY
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**15th Annual ITA-ASIL Conference:
Diversity and Inclusion in International
Arbitration**

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April 4, 2018 Washington, D.C.



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**Defining the Issues
*The Practitioner's Dilemma***



Defining the Issues: The Practitioner's Dilemma

- The Role of the Practitioner in the Selection of Arbitrators
- Defining Diversity and Inclusion
- The Statistics on Diverse Appointments by Parties
- Is the Promotion of Diversity Compatible with the Duty to Client to recommend the “best” arbitrator?



Defining the Issues: The Practitioner's Dilemma

- The Role of the Practitioner in the Selection of Arbitrators
- Key Role
 - Clients listen to the recommendations of their lawyers
- So why is there a dilemma?
 - Perception or reality that clients are more conservative or risk-averse than their counsel when selecting arbitrators?
 - Is this a cultural issue because most counsel come from non-diverse backgrounds?
- What are client and counsel seeking in appointments?
 - Experience/qualifications
 - Track record – substantive
 - Track record – procedural fairness
 - Efficiency



Defining the Issues: The Practitioner's Dilemma

■ Defining Diversity and Inclusion

- Gender is at the forefront of the diversity push today (at least in North America and Europe)
- But at least institutions perceive that users also want regional and cultural diversity
- Query whether ethnic and racial diversity fall within scope of "cultural diversity"
- Regardless, there is at least a feeling, perhaps spurred by the growth of regional arbitration centers, that users of arbitration services are increasingly more diverse (or is it *vice versa*?)
- This growth in diversity of users is both geographically and cultural (Asia and South America as examples)
- Therefore, arbitrators should also better reflect this diversity
- Some statistics . . .



Defining the Issues: The Practitioner's Dilemma – the Statistics

■ ICSID

- In its FY2017 report ICSID indicated that 72% of 93 appointments were by parties or their designated arbitrators
- There were NO appointments of women by Claimants or co-arbitrators
- Of the 14% of women appointed, ICSID and the Respondents appointed 43.5% each and 13% were appointed jointly by the parties
- Of ICSID appointments, 21% were women
- Overall, arbitrators were from 33 different nationalities
- But in 2018 ICSID statistics more than 68% of arbitrators are from Europe and North America while only 12% of cases originate from there

■ ICC

- Similar to ICSID, 75% of appointments are by parties
- Of the total (1,488 arbitrators), 16.7% were women
- The ICC Court appointed 45%, the parties 41% and co-arbitrators 13.7%
- Cases from 142 countries, women appointed from 85 nationalities
- Growth in cases from sub-Saharan Africa, Central and West Asia, LA



Defining the Issues: The Practitioner's Dilemma

- ICC Statistics cont.
 - Largest number of arbitrators appear to be British (219) and French (141)
 - ...
- SIAC
 - Of 263 appointments, 145 appointed by SIAC and 118 by the parties
 - Appointments appear to be from 27 nationalities, 40.8% Singaporean
 - SIAC appointed 43 (29.7%) women, no data on women appointed by parties
- LCIA
 - 496 appointments in 2016
 - The Court appointed 39.7%, the parties 44.2% and co-arbitrators 16.1%
 - Of these 102 (20.6%) were women
 - Approximately 36% from Western Europe and the United States (16.2% UK origin)



Defining the Issues: The Practitioner's Dilemma

- So- Why is there a dilemma?
 - From these statistics there would appear to be plenty of qualified women and culturally/ethnically diverse arbitrators
 - Perhaps the issue is one of access to information about diverse potential arbitrators?
 - Or is there a problem in the way counsel select arbitrators ("objective" assessments such as experience and track record)?
 - Given the diversity of user (client) base (mostly non-western), is the practitioner's dilemma a false one?
- A note on ISDS and questions of the regime's legitimacy