

Investor-State Mediation: Who Will Be At The (Top) Table?

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Interest is growing in the use of mediation for investor-state disputes. Recent webinars on investor-state mediation (including SIDRA's [recent webinar](#)) have explored ICSID's [new investor-state mediation rules](#), the role of the Singapore Convention for investor-state mediation and the need for further domestic legislation on mediation. Discussions at these virtual conferences have also emphasised the importance of who is at the table, noting that with disputes involving states it can be time consuming and difficult to identify those who have the requisite authority to agree to a resolution. A topic which seems to have received less attention, though is also of fundamental importance, is who in terms of the mediators will be at the investor-state mediation table. That is the focus of this post.

I have listened keenly to comments made in recent virtual conferences on the importance of building trust in mediation. With the significant public interest and impact of investor-state disputes, the outcomes of which can have significant implications for both the public purse and company finances, it is a wide audience from whom trust must be earned. The confidential nature of mediation makes this trust-building task more challenging. While the growing body of mediation rules, regulations and institutions will play a significant role in fostering such trust, a key role will also be played by the composition of the group of mediators which will represent investor-state mediation. Trust in investor-state mediation will depend significantly on how the public perceive that group.

Given that the growing interest in the use of mediation for investor-state disputes has, in part, been fuelled by some disenchantment with the use of arbitration for such disputes, are there any lessons which mediation can learn from arbitration's experience?

Lessons from investor-state arbitration

Empirical research on investor-state arbitration "suggest[s] an extreme gender imbalance"[fn]Sergio Puig, "Social Capital in the Arbitration Market" (2014) 25(2) The European Journal of International Law 387, 404.[/fn], depicting the investor-state arbitrator network as a "small, dense and interconnected group" which "remains male-dominated."(Puig 2014[fn] Sergio Puig, "Social Capital in the Arbitration Market" (2014) 25(2) The European Journal of International Law 387, 418 & 419.[/fn], and see also the later prize-winning article by Langford, Behn and Lie[fn] Malcolm Langford, Daniel Behn & Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration" (2017) 20 Journal of International Economic Law 301.[/fn]). As Puig has noted, "The over- or under-representation of a particular demographic of arbitrators is an issue of constant concern among most critics and many supporters of arbitration."[fn]Sergio Puig, "Social Capital in the Arbitration Market" (2014) 25(2) The European Journal of International Law 387, 401.[/fn]

More broadly, beyond the investor-state context and in international arbitration in general, extensive work has been done to identify, and address, the under-representation of women (see, for example, the work of Lucy Greenwood[fn] See, for example, Lucy Greenwood, "Tipping the Balance - Diversity and Inclusion in International Arbitration" (2017) 33 Arbitration International 99.[/fn] and the recent report by The International Council for Commercial Arbitration (ICCA) Cross-Institutional Task Force's [Report on Gender Diversity in Arbitral Appointment and Proceedings](#) (see here for an excellent summary of this report). Measures include the [Equal Representation in Arbitration Pledge](#) and the [ArbtralWomen](#) database.

There appears to be less research and data on diversity in mediation, though attention is increasing. CEDR's [recent research on diversity in commercial mediation in the UK](#) found that: "The commercial mediation profession is lacking in diversity" with "significantly fewer women (33.6%) working in commercial mediation than men (66.4%)." In the "top" tiers of the profession, the under-representation is more prominent. Back in 2015, on [this blog](#), Bill Marsh highlighted the paucity of women in the lists of "top" commercial mediators, noting that "women seem to be grossly under-represented in its top echelons." Fast forward five years and little seems to have changed: in the [WWL Thought Leaders Global Elite 2020](#) 1 out of 6 of the Global Elite Thought Leaders is a woman and in the latest [Legal 500 Hall of Fame of mediators](#) 13 out of 64 mediators listed in the "Hall of Fame" are women (that's roughly 1 in 5).

As the institution of investor-state mediation grows, given the role which diversity plays in the legitimization of justice systems (Von Bogdandy & Venzke, 2014),[fn] Armin Von Bogdandy and Ingo Venzke, *In Whose Names? A Public Law Theory of International Adjudication* (OUP 2014) 162.[/fn] an issue which must not be overlooked is the composition of the investor-state mediator network. Building a network of mediators which reflects the diversity of societies which investor-state mediation will serve is an important foundation upon which to build trust in investor-state mediation, and indeed its legitimacy. As the scientist and legal academic, Dr Rachel Cahill- O'Callaghan, has emphasised in her [pioneering work](#) on values in the UK Supreme Court "an overtly unrepresentative institution may result in a lack of confidence and ultimately a lack of democratic legitimacy." (Cahill-O'Callaghan, 2020),[fn]Rachel Cahill-O'Callaghan, *Values in the Supreme Court: Decisions, Division and Diversity* (Hart 2020) 180.[/fn]

So what can be done?

As Hon. Timothy Lewis wrote in his excellent article on promoting diversity in mediation, "we will do as well as we choose to do in levelling the playing field."[fn]Timothy Lewis, "Promoting Diversity in Mediation" (2018) 36(6) *Alternatives to the High Cost of Litigation* 81.[/fn] Much more work, and importantly more interdisciplinary work, needs to be done to identify effective ways forward. There is little space left in this post to offer suggestions so I will use the space which remains to offer just a couple of preliminary ideas and to invite more ideas.

More data

In a recent conference on investor-state mediation, the suggestion was made for a database on mediators involved in such mediations. There was no discussion on the type of data which might be recorded in such a database and, while I am mindful that "not everything that counts can be counted" (Einstein), this is certainly a point which we should explore further. A starting point to effect change is an increased awareness of the number, and sources, of appointments. On the use of data to increase diversity, inspiration can be found in the remarkable work of Professor Catherine Rogers who founded, and recently launched, [Arbitrator Intelligence](#), a not-for-profit which provides information on international arbitrators. The contribution of Arbitrator Intelligence to tackling the lack of gender diversity in arbitral tribunals has recently been recognised in the ICCA Cross-Institutional Task Force's [Report on Gender Diversity in Arbitral Appointment and Proceedings](#).

Preparing the pipeline

Lucy Greenwood coined the terms "[pipeline leaks](#)" and "[pipeline plugs](#)" to describe, respectively, the lack of women in the senior tiers of the arbitration profession and the impediments to arbitral appointments for senior female arbitration professionals. Of course, the pipeline for mediation charts a different course (though there will be some similarities given that the legal profession serves as a key gatekeeper to the arbitration and mediation professions). CEDR's [research](#) has identified various barriers (such as the lack of relevant role models and the lack of access to a network of contacts) and recommendations to address these barriers (including, more assistant mediator opportunities, the use of transparent criteria in the selection of mediators and the provision of on-going training to junior mediators). More research, building on CEDR's work, needs to be done, including research with the users of mediation and research in other jurisdictions, in order to explore further the leaks and plugs in the mediation profession.

It could be argued that the lack of formal barriers to entry to the mediation profession means that any leaks and plugs in the mediation pipeline might be easier to address. But what about informal barriers to entry? In the arbitration context, significant attention has been paid to the impact of [unconscious bias](#) on progression and appointments. What are the potential unconscious biases which may be particularly relevant to the mediation context and how might their impact be lessened? (That's for another possible post).

As the infrastructure of investor-state mediation continues to be built, rather than patch the leaks and remove the plugs at a later date, further research and work is needed now in order to do our best to prepare a leak- and plug-proof pipeline.

Closing words

I have been thinking of writing a post on diversity in mediation for some time. Procrastination, and other writing deadlines, got in the way. Reading about the remarkable life and fortitude of the late Ruth Bader Ginsburg provided a much-needed nudge.

"Women belong in all places where decisions are being made. It shouldn't be that women are the exception."
Ruth Bader Ginsburg

And mediation is no exception. With the increasing interest in the use of mediation for investor-state disputes, it seems like a good time to make some progress and in a category of disputes which, in the dispute resolution field, is regarded with particular prestige. Why not start at the "top"?