D&B/TALK

THE ADR MOSAIC

Moving the Conversation Beyond Raising Awareness of Diversity

by Theodore K. Cheng

EVERYONE SEEMS TO AGREE THAT, OVER THE LAST SEVERAL YEARS, THE ADR COMMUNITY HAS SUCCESSFULLY RAISED THE ISSUE OF THE LACK OF DIVERSITY IN THE FIELD IN A NUMBER OF DIFFERENT WAYS.

There have even been some noble attempts to have individuals and companies sign on to "pledges," committing themselves and/or their organizations to support diversity policies. For example, several years ago, the CPR Institute (cpradr.org), an independent, non-profit organization that helps businesses and their counsel prevent and resolve commercial disputes more effectively through the promotion of ADR, promulgated a Commitment on Diversity, calling upon companies and law firms to "include qualified diverse neutrals among any list of mediators or arbitrators they propose." This pledge not only raised awareness, but also identified those companies and law firms who were willing to make a tangible, public commitment to expand their search criteria to consider and, ultimately, select diverse arbitrators and mediators for their commercial disputes.

More recently, the arbitration community has focused on the under-representation of women on international arbitral tribunals. A pair of Law.com articles from 2016 sets out vastly different statistics for the U.S. federal courts (where, for example, in excess of 30% of judges are women) and for ADR (where, in cases involving disputes over $500,000, less than 30% of selected neutrals are women, and for international disputes, well under 20%). In 2015, members of the arbitration community drew up the Equal Representation in Arbitration Pledge (arbitrationpledge.com) to address the lack of women arbitrators on international tribunals. The Pledge "seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon practically possible, with the ultimate goal of full parity." In its preamble, the Pledge notes that the arbitration community is "committed to improving the profile and representation of women in arbitration" and "consider that women should be appointed as arbitrators on an equal opportunity basis." To achieve this objective, the Pledge outlines specific steps to ensure that, for example, wherever possible, committees, governing bodies, and conference panels in the arbitration field include a fair representation of women, and that lists of potential arbitrators or tribunal chairs include a fair representation of female candidates. As of July 2018, the Pledge has collected nearly 3,000 signatories, many hundreds of which are corporations, law firms, and other organizations, including a growing list of U.S. firms, institutions, and companies.

These initiatives are commendable and should be continued, if only to maintain a vigilant awareness about the lack of diversity in the ADR field and to insist that companies, law firms, providers, and other organizations strive to make demonstrated commitments to increase diversity. But we can do more. We can move the conversation forward by focusing the dialogue on developing helpful, practical tools that would be readily accepted and easily implemented to address the underlying diversity problem. Let me tell you about three such tools.

The first tool attacks the diversity problem long before any dispute has even arisen. This past May, JAMS (jamsadr.org) – a major, well known ADR

provider – became the first provider to include an optional rider in its portfolio of sample dispute resolution clauses to support the business community's diversity efforts when selecting an arbitrator or arbitration panel:

The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.

As you can see, the rider is modeled after the language found in the Pledge, which JAMS took in 2016, becoming one of the first major American ADR provider signatories.

Notably, consideration of this voluntary and optional rider attacks the diversity problem at the critical time when the underlying commercial contract is being negotiated by the business, legal, and other transactional professionals. By raising and addressing diversity at a moment when the parties are willing and interested in consummating a deal – before any dispute between the parties has arisen – it reaffirms and elevates the importance of diversity as a shared and legitimate (albeit not sole) criterion upon which the later selection decision(s) will be made. As JAMS CEO Chris Poole stated, this rider will "empower organizations who value diversity in their business initiatives, including their dispute resolution processes."

The second tool addresses the diversity problem after the dispute has arisen, but, again, before the selection process. At last year's annual meeting of the College of Commercial Arbitrators, during my panel presentation on diversity and ADR, my friend and colleague Stephen Gilbert (spgadr.com) proposed the idea of making available to ADR providers and court ADR program administrators a one-page slipsheet to hand out to parties and their counsel about the benefits of having a diverse panel of arbitrators:

Diversity.

What does that word mean?

In your arbitration, it could mean quite a lot.

Sound research proves the substantial benefit of having a diverse panel making the decisions.

Intrigued? Puzzled? Skeptical?

It then provides outtakes from a pair of authoritative business and scientific sources on how diverse groups outperformed more homogeneous groups and, more generally, the benefits of diversity. It ends with the following:

Please let us know how we can help you. Who serves on your panel is one of the most important decisions you will make in your arbitration.

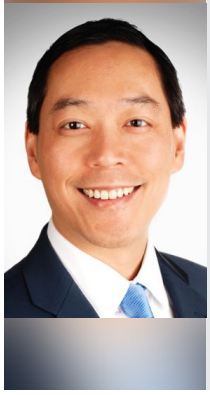
Because the sheet is given to the entities and individuals actually engaged in making those selections before any list of potential arbitrators is provided to them, it prompts them to think about diversity as a criterion (albeit not the only or even the principal criterion). It relies on the neurological principle of "anchoring" in decision-making – an individual's cognitive bias of relying heavily on an initial piece of offered information to make subsequent judgments – to lay the groundwork for diversity immediately preceding the time period when selecting the arbitration panel is to take place. It can, of course, be customized to better fit the particular provider, court program, or end-user.

It has since been championed by an organization I helped co-found in early 2017 called the ADR Inclusion Network (adrdiversity.org), which comprises representatives from stakeholders in the ADR field who are committed to increasing the awareness of, use, visibility, availability, and selection of diverse neutrals within New York State in all aspects of the ADR field. We have informally called this tool the "mindbug" sheet, naming it after the term coined by Professors Mahzarin R. Banaji and Anthony G. Greenwald (creators of the Implicit Association Test, available at projectimplicit.com) in their book, "Blindspot: Hidden Biases of Good People," to refer to implicit associations/biases.

The last tool also addresses the diversity problem after the dispute has arisen, but, this time, impacting the course of the arbitration proceeding itself. In March of this year, CPR became the first arbitral institution to promulgate a "Young Lawyer" Rule in its revised Rules for Non-Administered Arbitration of Domestic and International Disputes, which affords discretion to the arbitration tribunal to "encourage lead counsel to permit more junior lawyers with significantly less arbitration experience than lead counsel to examine witnesses at the hearing and present argument," while also permitting "experienced counsel to provide assistance or support, where appropriate, to a lawyer with significantly less experience during the examination of witnesses or argument." The rule also makes clear that "the ultimate decision of who speaks on behalf of the client in an arbitration is for the parties and their counsel, not the Tribunal."

The rule is modeled after similar rules and standing orders established in the federal courts, which, as noted by CPR President & CEO Noah J. Hanft, "have reported that it has indirectly but naturally increased the opportunities for women and people of color" because it "helps to create a culture where such critical opportunities are encouraged, and the mechanisms are put into place so all stakeholders feel comfortable following through." CPR expects to incorporate the new rule into its other rules for both domestic and international administered arbitrations.

So let's put our thinking caps on and move the conversation beyond merely raising awareness about the diversity problem. As the above tools illustrate, we can strive to spark a dialogue over finding innovative and creative ideas for real, practical tools to move the needle towards increasing diversity.



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Theo Cheng is an independent, full-time arbitrator and mediator and serves on the rosters of the American Arbitration Association, the CPR Institute, FINRA, Resolute Systems, and several federal and state courts, focusing on commercial/business, intellectual property, technology, entertainment, and labor/employment disputes. He has over 20 years of experiencing handling intellectual property and commercial litigation matters.