

5. Gender, race, or both? The need for greater consideration of intersectionality in international arbitration

Kabir A.N. Duggal and Rekha Rangachari¹

1. INTRODUCTION

It is common knowledge nowadays – or at least it should be – that international arbitration faces a diversity issue, as does most, if not all, of the corporate world. The issue of diversity takes varied forms in international arbitration. For example, there is a dearth of women in leading positions, insufficient consideration for people with disabilities, a taboo on conversations involving LGBTQ+ representation, English as the dominant language acting as a barrier to entry, and onwards. In international arbitration, arbitrator appointments are often reserved for the ‘westernized, white, old men’, or the proverbial ‘male, pale and stale’ – the prevailing status quo.²

Although there is increased awareness today, many scholars and panelists have addressed the lack of diversity in international arbitration, whether on

¹ The views expressed herein are personal and do not reflect the views of NYIAC, Arnold & Porter, or its clients. The author reserves the right to change position particularly with a view towards increasing diversity. The authors also disclose that they are both involved in several of the diversity initiatives discussed in the article including ArbitralWomen, Equal Representation Pledge, Racial Equality for Arbitration Lawyers (REAL) among others. The authors acknowledge with gratitude the excellent research assistance by the following students from Columbia Law School: Elora Neto Godry Farias, Ankita Sangwan, and Cagatay Ersoy.

² Joseph Mamounas, ‘Does “Male, Pale, and Stale” Threaten the Legitimacy of International Arbitration? Perhaps, but There’s No Clear Path to Change’ (Kluwer Arbitration Blog, 10 April 2014) <<http://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-does-male-pale-and-stale-threaten-the-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/>> accessed 17 November 2021.

appointments or legal teams.³ Arbitral institutions are in parallel playing a critical role to address the talent pipeline and build awareness around diversity. While these steps are welcome, an issue that merits further consideration is intersectionality: the combination of one or more diverse attributes (e.g., a woman of color who grapples with both gender and race issues).

Issues relating to diversity are complex and can involve several different dimensions in the context of international arbitration, including: (i) gender; (ii) race, ethnic, linguistic, or national origin; (iii) age; (iv) disability; (v) sexual orientation; (vi) socio-economic factors; and (vii) educational and professional background.⁴ These diversity elements must then be considered under an intersectionality lens. We therefore focus this chapter on intersectionality, particularly gender and race, to tease out how we can incorporate intersectionality in the oft-cultivated diversity discussions now in session.

We begin by defining the terms ‘diversity’ and ‘inclusion’ (Section 2) and examine the current debate regarding gender, ethnic minority and racial representation (Section 3I). We then unwrap intersectionality and its corollary issues (Section 4) and present recommendations and efforts for integrating intersectionality into diversity and inclusion initiatives, through awareness and introduction of a ‘diversity matrix’ in workplace standards for hiring and promotion (Section 5). We conclude by appreciating that there is still much to do to move the diversity needle for future generations (Section 6).

³ See, e.g., Andrea K. Bjorklund, et al., ‘The Diversity Deficit in International Investment Arbitration’ (2020) 21 J. World Inv. & Trade 410 <<https://perma.cc/JKF4-5PH6>> accessed 6 October 2021; Susan D. Franck, et al., ‘The Diversity Challenge: Exploring the “Invisible College” of International Arbitration’ (2015) 53 Colum. J. Transnational 429; Ricardo Dalmaso Marques, ‘To Diversify or Not to Diversify. Report on the Session Who Are the Arbitrators’ in Albert J. van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* (Kluwer Law International 2015); Maria R. Volpe et al., ‘Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field’ (2008) 35 Fordham Urb. L.J. 119, 139; Ingrid A. Müller, ‘Diversity and Lack Thereof Amongst International Arbitrators – Between Discrimination, Political Correctness and Representativeness’ (2015) TDM 4.

⁴ Kabir Duggal and Amanda Lee, ‘A 360-degree, kaleidoscopic view of diversity and inclusion or the lack thereof in international arbitration’, *American Review of Int. Arb.* (forthcoming).

2. DIVERSITY AND INCLUSION IN INTERNATIONAL ARBITRATION

Our inquiry starts by broadly defining diversity, a ubiquitous term with many hues.⁵ Anchored in simple terms, diversity is ‘variation’.⁶ Variations or differences may be based on several factors including gender, race, age, sexual orientation, nationality, social and economic class, among others. Diversity emerges by identifying these differences in a particular field, group, or organization.⁷ Allied in conversation with diversity, ‘inclusion’ presents another facet, distinct but within the same orbit. Andrés Tapia famously defined the distinction as ‘Diversity is the mix, inclusion is making the mix work’.⁸ Mary-Frances Winters also discussed this distinction:

[D]iversity is about counting heads; inclusion is about making heads count. Another way to distinguish between diversity and inclusion is to define diversity as a noun describing a state and inclusion as a verb or action noun, in that to include requires action. Expanding on these ideas, I define inclusion as creating an environment that acknowledges, welcomes, and accepts different approaches, styles, perspectives, and experiences, so as to allow all to reach their potential and result in enhanced organizational success. Perhaps the most salient distinction between diversity and inclusion is that diversity can be mandated and legislated, while inclusion stems from voluntary actions.⁹

Inclusion is thus a way to create sustainable diversity. For international arbitration to thrive and maintain legitimacy, it must create avenues for diverse lawyers to succeed. Another layer to this debate is the recognition that diversity cannot be seen in simple categories but requires deeper and more thoughtful introspection. For example, discussions on arbitrators from the western world might ignore considerations of lawyers of color or other

⁵ Chris Taylor, ‘Diversity and inclusion’ (2020) 36(3) Parks Stewardship Forum 432.

⁶ ‘Diversity’, Merriam-Webster <<https://www.merriam-webster.com/dictionary/diversity>> accessed 28 October 2021 (‘the condition of having or being composed of differing elements: VARIETY’).

⁷ Andrea K. Bjorklund, et al., ‘The Diversity Deficit in International Investment Arbitration’ (2020) 21 Journal of World Investment & Trade 410, 415 <<https://perma.cc/JKF4-5PH6>> accessed 6 October, 2021.

⁸ Mary-Frances Winters, ‘From Diversity to Inclusion: An Inclusion Equation’, in Bernardo M. Ferdman and Barbara R. Deane (eds), *Diversity at Work: The Practice of Inclusion* (Jossey-Bass 2014).

⁹ Ibid.

minority lawyers in the western world, inclusive of the challenges that they face. Professor Bjorklund noted:

People are multifaceted – and their unique attributes, especially in regard to differences in decision-making, cannot always be reduced to simple categories such as geographic region. Thus nationality, ethnicity, race, educational attainment and experience, legal training (common and/or civil law expertise, Islamic law expertise, etc.), age, work experience (government, private sector, or both of these), social and economic class, development status of the arbitrator's home State, repeat appointments by either investors or host States, religion, disability, and language proficiency are other factors that can be used to signal and define diversity and inclusivity in adjudicative decision-making.¹⁰

We begin with the current debates surrounding diversity in international arbitration, focusing on gender and race. We also explore how the international community has risen to the challenge of including diversity as a chief topic of concern and attention, though much work is still needed to improve the system. When we see diversity from multiple lenses, intersectionality can come to the forefront – the different elements of an individual's identity that can be discriminated against, and in turn lead to different and more acute kinds of discrimination – and allow for meaningful, all-knowing change.

3. CONSIDERING GENDER AND RACIAL REPRESENTATION IN INTERNATIONAL ARBITRATION

Before delving into the issue of intersectionality, let's begin with an overview of issues surrounding gender and racial representation in international arbitration.

3.1 Gender Representation in International Arbitration

The scarcity of women as international arbitrators is a systemic problem abutting principles of party autonomy and party choice in their decision maker. Stakeholders of international arbitration have taken efforts to address this lack of representation. For example, in 2015, the arbitration community adopted a pledge to act on the under-representation of women in international arbitra-

¹⁰ Andrea K. Bjorklund, et al., 'The Diversity Deficit in International Investment Arbitration' (2020) 21 *Journal of World Investment & Trade* 410, 420 <<https://perma.cc/JKF4-5PH6>> accessed 6 October 2021.

tion.¹¹ Since then, leading arbitral institutions annually publish data on gender representation in the appointment of arbitrators. This step has been a welcome metric on inclusion, providing visibility and tracking as the system evolves. For example, the data confirms that the number of female arbitrators has increased, albeit incrementally, over the past few decades.¹² Notwithstanding, we are still far from the goal of gender parity. For example, in analyzing data released by leading arbitral institutions, a leading international arbitrator, Professor Lucy Greenwood, concluded that female arbitrator appointments were less than 20% of the total number in 2016. Looking at more recent statistics from 2016 to 2019, there has been a limited increase in the number of women arbitrators appointed to cases.¹³ The London Court of International Arbitration's (LCIA's) 2017 data confirms 24% of the total appointments were women, a mere 3% increase from 2016.¹⁴ While institutions are doing a commendable job in collecting and publishing data, international arbitration will only improve where more stakeholders embrace efforts to move the needle.

One of the main reasons for the 'pipeline leak'¹⁵ is that arbitrators are usually senior professionals in the field – senior partners in leading law firms, well-known law school professors or scholars. Female representation in the upper echelons of these fields is still limited because women (and other minorities) face difficulties in sustaining and reaching the upper ranks in their fields. While a significant number of women and minorities join big law firms on graduation from law school, they leave their careers at different stages due

¹¹ ArbitralWomen, 'Launch of the Equal Representation in Arbitration (ERA) Pledge' (Arbitralwomen.org, 30 May 2016) <<https://www.arbitralwomen.org/launch-of-the-equal-representation-in-arbitration-era-pledge/>> accessed 12 October 2021.

¹² Samaa A. F. Haridi, 'Towards Greater Gender and Ethnic Diversity in International Arbitration' (2015) 2 Bahrain Chamber for Dispute Resolution International Arbitration Review 305, 306 ('Comparing figures reported by the International Chamber of Commerce Court of International Arbitration ("ICC") in 1990 to estimated figures in commercial cases in 2012, the percent of female arbitrator appointments has increased by a staggering 700%. As a result of this remarkable increase, many representatives of the "old guard" in the field congratulate themselves on the well-achieved equality').

¹³ ICCA, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (2020) ICCA Reports No.8 117–119 <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf> accessed 6 October 2021; Kabir Duggal and Amanda Lee, 'A 360-degree, kaleidoscopic view of diversity and inclusion or the lack thereof in international arbitration', *American Review of Int. Arb.* (forthcoming).

¹⁴ The London Court of International Arbitration, *Facts and Figures* (Casework Report, 2017).

¹⁵ Samaa A. F. Haridi, 'Towards Greater Gender and Ethnic Diversity in International Arbitration' (2015) 2 Bahrain Chamber for Dispute Resolution International Arbitration Review 305, 312.

to a variety of reasons. A recent report from the National Association for Law Placement (NALP) reflects how the number of female partners in the United States has increased slowly, from 12.27% in 1993 to 24.17% in 2019.¹⁶ But it is still difficult for women to reach the upper ranks of their fields, termed a ‘pipeline leak’ by commentators to highlight how inclusion practices at workplaces have not corrected the attrition rate of women leaving their careers.¹⁷ Similar issues exist across transnational legal systems, where the representation of women in the upper ranks remains low.¹⁸ The international arbitration community (and the legal profession) needs to look inward and give critical consideration to how we can create better structures for women to both enter the profession and rise through the ranks.

Another reason for the limited number of female arbitrators is the role of bias, conscious and unconscious. Parties tend to nominate arbitrators from a small, limited pool which emphasizes subjective bias through repeat appointments. As scholars have noted, international arbitration can be viewed as a ‘gated’ community – since the proceedings are often confidential, there is limited access to information and consequently fewer networking opportunities.¹⁹ Business often happens behind closed doors, making it difficult for women and other minorities to penetrate this wall.²⁰ Moreover, there is a tendency for outside counsel to hire from the ‘old boys network’, selecting those similar to themselves. Along this line of reasoning, if counsel and arbitration teams are predominantly men, it is not surprising that men are predominantly

¹⁶ National Association for Law Placement, ‘2019 Report on Diversity in U.S. Law firms’ (Nalp.org, 2019) <https://www.nalp.org/uploads/2019_DiversityReport.pdf> accessed 17 November 2021.

¹⁷ Samaa A. F. Haridi, ‘Towards Greater Gender and Ethnic Diversity in International Arbitration’ (2015) 2 Bahrain Chamber for Dispute Resolution International Arbitration Review 305, 312.

¹⁸ Andrea de Palatis, ‘The battle for diversity is far from won’ (Legal 500) <<https://www.legal500.com/fivehundred-magazine/diversity-and-inclusion/the-battle-for-diversity-is-far-from-won/>> accessed 17 November 2021.

¹⁹ Maria R. Volpe et al., ‘Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field’ (2008) 35 Fordham Urban Law Journal 119, 139 (‘ADR is perceived as a “gated” community. The field seems closed to outsiders since many ADR activities occur behind closed doors, and it is hard to see what is going on inside. Because of the barriers related to career paths and access to information about the field, the walls around the field seem impenetrable for all, and especially for young individuals in underrepresented racial and ethnic groups who might be interested in pursuing a career in the field’).

²⁰ Ibid.

nominated as arbitrators.²¹ There may be no malice or ill will in such reflexive, gut instincts, but it demonstrates the need to be aware of unconscious bias throughout the arbitral process if the system is to improve.

3.2 Racial Representation and Ethnic Minorities in International Arbitration

Like gender, lack of racial representation is another serious issue in international arbitration. Unlike gender, however, arbitral institutions do not often release data on racial representation in arbitration appointments, instead focusing, if at all, on nationality. Racial representation has two dimensions: first, most arbitrators tend to come from certain western countries, and second, there are countries that have multiple ethnic and racial minorities that are often not identified separately. Racial representation requires conscious consideration of both factors.

In a recent survey by Queen Mary University of London and White & Case, respondents noted their disappointment with a lack of progress in ethnic diversity and stated that more opportunities are needed for growth that provides a level playing field and greater visibility.²²

While the same tensions that exist for gender exist within the race context (e.g., pipeline issues and bias), many leading arbitral institutions headquartered in Europe focus resources on administering a broad range of arbitral disputes across target regions including Africa and Asia.²³ In parallel, international arbi-

²¹ Samaa A. F. Haridi, 'Towards Greater Gender and Ethnic Diversity in International Arbitration' (2015) 2 Bahrain Chamber for Dispute Resolution International Arbitration Review 305, 314 ('The appointment process also permits subconscious bias to influence who becomes an arbitrator. For example, many acknowledge the existence of an "old boys club", and the tendency of outside counsel is to appoint arbitrators who are similar to them. If the makeup of the top arbitration teams is 89% male, it is hardly surprising that male arbitrators are predominantly selected').

²² White & Case, '2021 International Arbitration Survey: Adapting arbitration to a changing world' (White and Case, 2021) <<https://www.whitecase.com/sites/default/files/2021-06/qmul-international-arbitration-survey-2021-web-single-final-v2.pdf>> accessed 17 November 2021 ('Ethnic diversity, in particular, continues to be an area where respondents feel there is a distinct need for improvement. As in our 2018 survey, the statement that recent progress has been made in relation to ethnic diversity had the least agreement among the five listed aspects of diversity, with only 31% of respondents agreeing. Some interviewees expressed their frustration and dismay at the lack of progress in this area. One perception was that, unless there is a level playing field in terms of opportunities for engagement and visibility within the arbitration community, it is difficult to see how greater diversity can be achieved in arbitral appointments').

²³ Andrew Mizner, 'African Adversity in International Arbitration' (ICLG, 21 February 2018) <<https://iclg.com/alb/7968-african-adversity-in-international-arbitration>> accessed 17 November 2021.

tration is at a turning point with the rise of local and regional arbitral centers supported by their governments (e.g., the Mauritius International Arbitration Centre).²⁴ Government-supported dispute resolution programs are also vying to gain popularity and expand the visibility of their centers – to bolster a local venue for international arbitration (e.g., in Kenya and Rwanda).²⁵ Other organizations have passed policies to spotlight leading talent in regions and demonstrate the under-representation of arbitrators akin to ‘African Promise’.²⁶

To continue building meaningful progress, the international arbitration community needs to focus on collecting research that accurately differentiates between geography and race in parallel with identifying pathways for diversity and inclusion initiatives to endure, succeed and change the international law landscape for the better.

4. A NEW FRONTIER IN INTERNATIONAL ARBITRATION: THE ISSUE OF INTERSECTIONALITY IN INTERNATIONAL ARBITRATION

This section addresses the concept of intersectionality and the issues encountered by people with multiple aspects of diversity. These terms are then aligned to the larger diversity issues in international arbitration.

To illustrate the need for conversations about intersectionality, NALP published a 2019 report on diversity in US law firms. We saw from those numbers that some progress has been made regarding female representation in law firms. But the report acutely focused on women as partners in law firms – representing 12.27% in 1993 – and omitting any mention of women of color as partners. The 2019 statistics demonstrate growth of female practitioners, 24.17% of female partners with 46.77% female associates. In contrast, only 3.45% of these partners and only 14.48% of these associates were women of

²⁴ Ibid.

²⁵ Herbert Smith Freehills, ‘Commercial Arbitration in Africa: Present and Future’ (Herbert Smith Freehills, 1 February 2017) <<https://www.herbertsmithfreehills.com/latest-thinking/commercial-arbitration-in-africa-present-and-future>> accessed 17 November 2021.

²⁶ Jack Ballantyne, ‘African Promise aims to promote diversity on tribunals’ (Global Arbitration Review, 8 October 2019) <<https://globalarbitrationreview.com/diversity/african-promise-aims-promote-diversity-tribunals>> accessed 17 November 2021 (‘The “African Promise”, which was launched last month, asks signatories to commit to improving the profile and representation of African arbitrators, especially in arbitrations connected to Africa. Its authors believe Africans be appointed as arbitrators on an equal opportunity basis’).

color. ‘Intersectionality’ exists at the annulus, demonstrative in the attorney who is both female and of color, a hyphenated identity.

In international arbitration, this lack of representation and limited accounting looks similar, amplifying issues present in domestic contexts with international power structures. Consider these questions: Are women arbitrators being hired from only western countries? Are the women arbitrators mostly white? Where are the women arbitrators of color? These questions and resulting lack of representation can be extended to LGBTQ+ women of color, LGBTQ+ men of color, disabled lawyers who are non-native English speakers, and the like – categories of intersectional diversity broadly defined.

4.1 What is ‘Intersectionality’?

In 1989, Professor Kimberlé Crenshaw coined the term ‘intersectionality’ in her work entitled ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies’.²⁷ She brought attention to the double discrimination faced by black women from a race and gender perspective and the lack of measures being adopted to address this issue. For instance, there are anti-racist laws which protect black men and there are anti-sexism laws which protect women, but there are no laws protecting black women as a different minority category. Black women have a different lived experience with different needs of protection compared to white women.²⁸ As Professor Crenshaw stated: ‘Racial and gender discrimination overlapped not only in the workplace but in other arenas of life; equally significant, these burdens were almost completely absent from feminist and anti-racist advocacy.’²⁹ Intersectionality was, therefore, an attempt to make feminism, anti-racist activism, and anti-discrimina-

²⁷ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies* (University of Chicago Legal Forum 1989, no. 1).

²⁸ Ibid.

²⁹ Kimberlé Crenshaw, ‘Why intersectionality can’t wait’ (2015) (Washington Post, 24 September 2015) <<https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait/>> accessed 22 October 2021. As Professor Crenshaw explains, intersectionality extends beyond just black women: ‘Intersectional erasures are not exclusive to black women. People of color within LGBTQ movements; girls of color in the fight against the school-to-prison pipeline; women within immigration movements; trans women within feminist movements; and people with disabilities fighting police abuse – all face vulnerabilities that reflect the intersections of racism, sexism, class oppression, transphobia, able-ism and more. Intersectionality has given many advocates a way to frame their circumstances and to fight for their visibility and inclusion.’ Ibid.

tion law ‘highlight the multiple avenues through which racial and gender oppression were experienced so that the problems would be easier to discuss and understand’.³⁰

Intersectionality focuses on the double/multiple barrier faced by women of color (and other lawyers who possess more than one diverse attribute) where their identities encompass different categories of minorities and, thereby, they can become targets of double/multiple disadvantages.³¹ These perspectives are often omitted from efforts to tackle discrimination.³² Intersectionality discusses all potential blocks in parallel and comprehensively – acknowledging that while each disadvantage exists on its own, the same person can be subject to multiple forms of prejudice.³³ Put a different way, intersectionality acknowledges that different forms of discrimination may intersect with each other and result in overlapping and reinforcing barriers to access and opportunity.³⁴

Intersectionality recognizes that there are people within the same minority group who face different barriers (for example within women, women of color or LGBTQ+ women). As Ritesh Rajani, the Human Resources Diversity and Engagement Partner at IBM for the Asia-Pacific region, stated:

It’s not always that every aspect of a person’s identity is on the oppressed side – it is a mix of oppressions and privileges. I am privileged to have a high level of education, and to have grown up in a metro city, in an English-speaking family and school. As an LGBT+ person, there was a phase I was oppressed when it came to my sexual orientation – oppression in terms of not being able to talk about my sexuality for a long time and remaining silent. However, my privileges eventually made up for it, and I can express myself differently now. For example, if someone were to harass me today, my reaction might be completely different from an LGBT+ person from a smaller town, from a different economic class, perhaps who (*sic*) in the closet. While drafting policies for an organisation on reporting same-sex harassment, I have to be cognisant of the fact that not everyone is in a position of privilege

³⁰ Ibid.

³¹ The term ‘double jeopardy’ was introduced in the early 1970s by Beale to characterize discrimination based on race and gender: F. Beale, ‘Double jeopardy: To be black and female’, in T. Cade (ed.), *The Black Woman* (New York: New American Library 1979) 90.

³² Community Business, ‘Intersectionality and Multiple Identities’ (Community Business, 29 March 2018) <<https://www.communitybusiness.org/latest-news-publications/intersectionality-and-multiple-identities>> accessed 22 October 2021.

³³ Bridie Taylor, ‘Intersectionality 101: what is it and why is it important?’ (Woman Kind, 24 November 2019) <<https://www.womankind.org.uk/intersectionality-101-what-is-it-and-why-is-it-important/>> accessed 22 October 2021.

³⁴ The Opportunity Agenda, ‘Ten Tips for Putting Intersectionality into Practice’ (The Opportunity Agenda, 2017) <<https://www.opportunityagenda.org/explore/resources-publications/ten-tips-putting-intersectionality-practice>> accessed 22 October 2021.

and influence and feels that they could report/speak out about same-sex harassment due to the intersections of their identities.³⁵

Another key concept of intersectionality is that it connects individual and group experiences of discrimination to broader systems of privilege and lack of privilege. As explained by Shreya Atrey, Professor of Law and international human rights advocate:

There is no essential core to the positions of difference (of Black men, white women, Black women etc.); instead the core is of complexity in the relationships of power between people. Seen this way, there are no pure categories of difference but only patterns of relationships defined both in terms of privilege and disprivilege. Furthermore, these patterns are seen not in identarian terms alone, as a form of positive or negative attribution of qualities of characteristics, but in structural terms. Identity politics in the intersectional frame is thus interested in individual experience because it tells something useful about how people experience the systemic nature of racism etc.³⁶

4.2 Intersectionality in International Arbitration

Often when a discussion on discrimination in the field of international arbitration goes live, the focal topics are gender and race.³⁷ Notwithstanding, groups represented by other distinct diversity categories should have equal space at the table. At a baseline, we focus on the dominant themes of gender and race to highlight the robust role intersectionality needs to play in diversity and inclusion efforts. Where the international community has looked at diversity from a single lens, diversity efforts ignore the role of hyphenated identities and are thereby insufficient, failing to provide equal opportunities to groups like women of colour, etc.³⁸

Organizations such as ArbitralWomen and the ERA Pledge have done commendable work to promote greater representation of women in international

³⁵ Community Business, 'Intersectionality and Multiple Identities' (Community Business, 29 March 2018) <<https://www.communitybusiness.org/latest-news-publications/intersectionality-and-multiple-identities>> accessed 22 October 2021.

³⁶ Shreya Atrey, 'The Humans of Human Rights: From Universality to Intersectionality' (SSRN, 26 March 2020) <<https://ssrn.com/abstract=3542773>> accessed 21 October 2021.

³⁷ Tania Gupta, 'Intersectionality in Appointment of Arbitrators: The "Grey" Approach to Highlighting Invisibilities in Feminism' (RMLNLU Arbitration Law Blog, 21 July 2020) <<https://rmlnluseal.home.blog/2020/07/21/intersectionality-in-appointment-of-arbitrators-the-grey-approach-to-highlighting-invisibilities-in-feminism/>> accessed 18 November 2021.

³⁸ See Section 2 of this chapter.

arbitration. However, when we look at the statistics on gender, while the arbitral community is moving towards the appointment of more female arbitrators, there is little attention paid to the backgrounds of the women being appointed. The international community therefore avoids opining on the comprehensive definition of people with multiple diversity definitions (e.g., ethnic minority women, white lesbian women, black gay men) who face greater barriers to entry. Professors Karton and Polonskaya from Queen's University note that between 2012 and 2017, a total of 951 appointments were made in ICSID; only three appointed arbitrators were female, non-white, and from a developing state.³⁹ Furthermore, they were members of annulment committees and all three were administratively appointed by ICSID.⁴⁰ The research failed to find appointments to ordinary ICSID panels, and no arbitrators with similar characteristics were appointed by parties or by other arbitrators. Out of 951 appointments in Professor Karton's data set, only 106 (11%) were female arbitrators, and of these, 53 appointments were directed to Arbitrators Brigitte Stern and 15 to Gabrielle Kaufman-Kohler, both white and European. Only 38 appointments (4% of the total) went to other female arbitrators.⁴¹

Intersectionality must play a greater role in international arbitration with a push for more empirical research in international commercial arbitration to track and define the problem. Where intersectionality issues are present in domestic systems, these issues translate and are reflected with greater dimension on the global stage of arbitration – where arbitrators often come from the western world and are law firm partners, college professors, etc. The NALP data shared in previous sections reaffirms that women of color formed a small part of women partners in US law firms. The limited data available charts a story about access broadening, even shifting, from white men to white women without achieving broad and enduring equality for women of colour and other minority groups. This is especially important because efforts taken to include white women in the field might not be the same efforts needed to include black women where a difference of experience may be in play. If we continue ignoring intersectionality, we ignore the varied and kaleidoscopic definitions of diversity that then fail to enter mainstream conversation – exacerbating diversity issues and affecting the legitimacy of the arbitral process. Data, critically missing on intersectional diversity in international commercial

³⁹ Joshua Karton and Ksenia Polonskaya, 'True Diversity is Intersectional: Escaping the One-Dimensional Discourse on Arbitrator Diversity' (Kluwer Arbitration Blog, 10 July 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/>> accessed 22 October 2021.

⁴⁰ Ibid.

⁴¹ Ibid.

arbitration, is the main path towards defining the problem, tracking progress, and evolving the system of international disputes.⁴²

Another root of the problem with intersectionality may be due to affinity bias, the often unconscious tendency to gravitate towards those who are like us, whether in appearance, background, beliefs, or otherwise.⁴³ Perhaps when parties are being counseled by white women, these same women appoint candidates with similar characteristics through their affinity bias. According to Amanda Lee: 'If the outcome of the gender diversity revolution is a generation of leading pale, "stale" and female arbitrators, we may try to blame a lack of access, lack of opportunities and affinity bias. We will only have ourselves to blame'.⁴⁴ She then suggests that we should embrace and celebrate intersectionality by acknowledging our privileges and challenging this affinity bias. She also notes that sometimes female arbitrators are well-known in their home jurisdiction but somehow cannot overcome the entrance barrier to international arbitration, and thus, it is up to the arbitral community to play a role in recognizing and promoting talent no matter where it is found.⁴⁵

The arbitral community has made progress when it comes to gender inequality, but a lot is yet to be done to achieve true gender equality. By ignoring race and other minority definitions of diversity, we substitute one problem for another and forever leave someone behind (e.g., non-white females).⁴⁶ Thus, intersectionality must go hand in hand with any conversation on diversity.

5. EFFORTS FOR CREATING AN INCLUSIVE ENVIRONMENT

The past decade has shown that the discussion of diversity and inclusion in international arbitration has gained increasing importance and with active

⁴² Tania Gupta, 'Intersectionality in Appointment of Arbitrators: The "Grey" Approach to Highlighting Invisibilities in Feminism' (RMLNLU Arbitration Law Blog, 21 July 2020) <<https://rmlnluseal.home.blog/2020/07/21/intersectionality-in-appointment-of-arbitrators-the-grey-approach-to-highlighting-invisibilities-in-feminism/>> accessed 18 November 2021.

⁴³ Lean In, '50 Ways to Fight Bias, Lean In' (Lean In Org, 2021) <<https://leanin.org/education/what-is-affinity-bias>> accessed 22 October 2021.

⁴⁴ Amanda J. Lee, 'Children of the Revolution: Boldly Going Towards New Gender Diversity Frontiers in International Arbitration', in Stavros Brekoulakis (ed.), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (Kluwer Law International 2021, Volume 87 Issue 3) 404.

⁴⁵ Ibid.

⁴⁶ Andrea K. Bjorklund, et al., 'The Diversity Deficit in International Investment Arbitration' (Brill, 22 June 2020) <<https://doi.org/10.1163/22119000-12340177>> accessed 22 May 2022.

steps taken by key stakeholders. While a valiant start, we need to focus now on intersectionality. We offer below suggestions to create more meaningful progress, intersectionality top of mind alongside diversity and inclusion.

5.1 Focus on Inclusion: Why Inclusion Matters

As discussed previously, the terms ‘diversity’ and ‘inclusion’ are used interchangeably,⁴⁷ but are two separate concepts. We understand ‘diversity’ through social categories that identify and differentiate between human beings. On the other hand, ‘inclusion’ is ‘the act of including or the state of being included’⁴⁸ and is ‘the extent to which each person in an organization feels welcomed, respected, supported, and valued as a team member’.⁴⁹

Consequently, although diversity and inclusion are distinct concepts, they are closely associated and inextricably linked. It is therefore not enough to stress having diversity in international arbitration. People must also feel that they are included in the international arbitration community. ‘There needs to be a culture of belonging.’⁵⁰ Otherwise, despite all efforts, the current situation – being diverse but not inclusive – will remain unchanged. We cannot get the benefit that a diverse environment brings (e.g., more informed and creative decisions, faster problem-solving, and legitimacy) without inclusion.⁵¹

⁴⁷ Spark Team, ‘Diversity And Inclusion: What’s The Difference, And How Can We Ensure Both?’ (ADP, 2019) <<https://www.adp.com/spark/articles/2019/03/diversity-and-inclusion-whats-the-difference-and-how-can-we-ensure-both.aspx>> accessed 18 November 2021 (‘People sometimes use these terms interchangeably, but they are quite distinctly different. . . . You can certainly hire in diversity – whether it’s more women, more Latinos or African-Americans – but if your culture does not embrace different perspectives, you will not be able to retain diversity. Inclusion requires that everyone’s contributions be valued, that individuals, regardless of the diversity dimension, have the opportunity to do their best work and advance’).

⁴⁸ ‘Inclusion’ (Merriam-Webster) <<https://www.merriam-webster.com/dictionary/inclusion>> accessed 18 November 2021 (defining inclusion).

⁴⁹ ‘Diversity and Inclusion’ (SHRM) <<https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/introdiversity.aspx>> accessed 18 November 2021 (defining inclusion).

⁵⁰ Mohamed Sweify, ‘Reflections on Diversity of ADR: Insights from the New York Arbitration Week’ (*NYSBAR*, 1 December 2019) <http://nysbar.com/blogs/ResolutionRoundtable/2019/12/reflections_on_diversity_of_ad.html> accessed 18 November 2021.

⁵¹ Hanna Roos, ‘Diversity Checklist For International Arbitration (Part one)’ (*Practical Law Arbitration Blog*, 2 July 2021) <<http://arbitrationblog.practicallaw.com/diversity-checklist-for-international-arbitration-part-one/>> accessed 18 November 2021.

5.2 Ways to Improve Diversity and Inclusion for Intersectional Identities

Although there has been progress within diversity in the international arbitration community, these developments will only have lasting, self-sustaining change where intersectionality is readily emphasized and incorporated. Following the path of ‘progress is progress’ has resulted in the visible inclusion of women on arbitral panels, but the problem of achieving parity across intersections of gender and other aspects of diversity remains.⁵² In order to provide solutions, we have to fully embrace the idea of *intersectional* representation in *international* arbitration. We therefore have to (a) make the community aware of the intersectional issue, (b) collect data on intersectional issues, and (c) integrate intersectional solutions into existing diversity and inclusion initiatives.

We propose that we must first start with bringing the intersectionality discourse into the mainstream.⁵³ In the international arbitration context, intersectionality is not widely known and is therefore overlooked.⁵⁴ For it to be implemented in practice, arbitral institutions, parties, and practitioners have to appreciate its importance. Intersectional diversity on tripartite panels enables (if not ensures) unique perspectives distinct from colleagues with a singular diversity characteristic.⁵⁵ Intersectional identities may also face different obstacles to ‘entry points’ in the field than candidates with singular diversity

⁵² Tania Gupta, ‘Intersectionality in Appointment of Arbitrators: The “Grey” Approach to Highlighting Invisibilities in Feminism’ (RMLNLU Arbitration Law Blog, 21 July 2020) <<https://rmlnluseal.home.blog/2020/07/21/intersectionality-in-appointment-of-arbitrators-the-grey-approach-to-highlighting-invisibilities-in-feminism/>> accessed 18 November 2021.

⁵³ Ksenia Polonskaya, ‘Diversity in the Investor-State Arbitration: Intersectionality Must Be Part of the Conversation’ (2018) 19(1) Melbourne Journal of International Law 259 <<http://classic.austlii.edu.au/au/journals/MelbJIL/2018/9.html#fn163>> accessed 19 November 2021.

⁵⁴ Ibid (‘This paper argues that the current discourse on diversity in investment arbitration is incomplete. The existing discourse is driven by some aspects of diversity such as, for example, gender or nationality, but seems not to examine the way these categories overlap. Accordingly, the existing studies can be considered a starting point to further our understanding and appreciation of diversity in the context of international investment arbitration. In particular, the current discourse on diversity does not take into consideration intersectionality in evaluating diversity in investment arbitration panels’).

⁵⁵ Ibid (‘While both possibilities are entirely plausible, they do not diminish the importance of intersectionality at the arbitral bench because candidates with overlapping characteristics (1) may bring a unique perspective to the bench distinctive from candidates with a singular diversity characteristic...’).

characteristics.⁵⁶ Keeping this in mind, it is important for the community to realize that the issues of diversity and intersectionality go together, and the debate must progress on this topic. Law schools, organizations and arbitral institutions can help by hosting more conferences and panel discussions on this issue (e.g., staged by Young Arbitral Women Practitioners⁵⁷ and the Asian International Arbitration Centre (AIAC) in collaboration with Racial Equality for Arbitration Lawyers (REAL)).⁵⁸

Once intersectionality gains prominence, we must generate data to understand the extent of the problem. We can see from above that we have valuable data from the leading arbitral institutions but rarely do the metrics reveal insight on intersectional diversity.⁵⁹ Leading arbitral institutions have been a driving force behind female arbitrator appointments and mapping data of gender-based and geographic appointments. In turn, with the community's emphasis on intersectionality, these institutions can also lead the way in collecting more data to chart the role of hyphenated identities. While data collection is a hard task dependent on arbitrators and stakeholders,⁶⁰ confidentiality

⁵⁶ Tania Gupta, 'Intersectionality in Appointment of Arbitrators: The "Grey" Approach to Highlighting Invisibilities in Feminism' (RMLNLU Arbitration Law Blog, 21 July 2020) <<https://rmlnluseal.home.blog/2020/07/21/intersectionality-in-appointment-of-arbitrators-the-grey-approach-to-highlighting-invisibilities-in-feminism/>> accessed 18 November 2021.

⁵⁷ Steve Adams, 'Intersectionality of Race, Culture and Gender in International Arbitration: Lessons from Interdisciplinary Scholarship' (Global Arbitration News, 3 November 2021) <<https://globalarbitrationnews.com/event/intersectionality-of-race-culture-and-gender-in-international-arbitration-lessons-from-interdisciplinary-scholarship/>> accessed 19 November 2021.

⁵⁸ Asian Arbitration International Centre, 'Diversity in Arbitration Week 2021: Charting the Way – Tackling Intersectionality and Beyond – #LetsGetReal' (Asian Arbitration International Centre, 9 July 2021) <<https://www.aiac.world/events/551/Diversity-in-Arbitration-Week-2021--Charting-the-Way---Tackling-Intersectionality-and-Beyond--->> accessed 19 November 2021.

⁵⁹ Joshua Karton and Ksenia Polonskaya, 'True Diversity is Intersectional: Escaping the One-Dimensional Discourse on Arbitrator Diversity' (Kluwer Arbitration Blog, 10 July 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/>> accessed 22 October 2021 ('Just bringing intersectionality into the discourse on arbitrator diversity would be a step forward. But we can do even more to reform the arbitrator appointment process. First, any reforms must be empirically based. Addressing both the obstacles that intersectional candidates experience in seeking arbitral appointments and the perspectives that intersectional arbitrators bring to the deliberations requires more data than we currently have').

⁶⁰ Kabir Duggal and Amanda Lee, 'A 360-degree, kaleidoscopic view of diversity and inclusion or the lack thereof in international arbitration', *American Review of Int. Arb.* (forthcoming).

may play an important role (and provide apt security) to unearth more about the arbitral process – towards getting it right.⁶¹

Allied with awareness and data, we need concrete actions. One step may be for law firms and practitioners to maintain internal reports on their diversity initiatives (e.g., internal diversity and inclusion committees that closely and regularly monitor inclusion efforts) – ensuring that inclusion issues are recognized, monitored, managed, and mitigated. They may also monitor the progress of existing or newly formed subgroups and provide answers to crucial intersectionality and inclusion questions (e.g., whether black female arbitrators are appointed less often than white female arbitrators or whether promotions are limited for women who speak English as a second language).

Acknowledging entry-level barriers, another issue is the selection and promotion to mid-level and senior positions. Diversity and inclusion internal committees can also serve as a necessary, countervailing force to ensure that hiring and promotion standards consider intersectionality.

Finally, utilizing a ‘diversity matrix’ concept in law firm hiring and promotions and arbitral appointments may best integrate intersectionality in the diversity debate. This initiative was introduced by US investors to enhance diversity on corporate boards. As explained and first proposed by Ksenia Polonskaya:

The petition made by the Public Fund Fiduciaries to the US Securities and Exchange Commission proposes the introduction of the so-called ‘matrix’ approach to disclosure. The proposal requests the Commission to introduce a provision that will require ‘registrants to indicate, in a chart or matrix, each nominee’s gender, race, and ethnicity, in addition to the skills, experiences, and attributes described above’. Cross-fertilisation of experiences may be useful in the context of investment arbitration. Of course, in investment arbitration, claimants are often one-time litigants. Accordingly, such a requirement imposed on parties is unlikely to induce systemic benefits for diversity candidates. Instead of imposing a ‘diversity matrix’ on the parties, it may be more appropriate to require a legal counsel to fill in the diversity matrix. Of course, such a requirement will have to be implemented by ICSID or United Nations Commission on International Trade Law (‘UNCITRAL’). In particular, it may be required that law firms or individual practitioners disclose information about candidates as per a ‘diversity matrix’ framework that they recommend to their clients for each case. Such disclosure can be made to AIs and published after the completion of the dispute. If law firms do not recommend diversity candidates to the parties, they must explain why.⁶²

⁶¹ Ibid.

⁶² Ksenia Polonskaya, ‘Diversity in the Investor-State Arbitration: Intersectionality Must Be Part of the Conversation’ (2018) 19(1) *Melbourne Journal of International Law* 259 <<http://classic.austlii.edu.au/au/journals/MelbJIL/2018/9.html#fn163>> accessed 19 November 2021.

This proposal mitigates the single-lens approach to diversity, considering all differences. This approach can also create a positive, upward stream in the selection process for and by stakeholders – where counsel come from various backgrounds, they will choose and appoint arbitrators from various backgrounds.

While there is still much work to be done, we have seen remarkable progress in recent years, giving hope that true diversity can be achieved in its myriad definitions. Together we can take concrete steps to solve the multifaceted problem of diversity, inclusion and intersectionality.

6. CONCLUSION

While many efforts have been made towards decreasing the gap in the lack of diversity within international arbitration – publication of data by arbitral centers, pledges taken by the arbitral community, inclusive measures adopted by law firms – the time has come to address intersectionality. Are we really moving forward towards gender equality or are we creating a new problem, i.e., celebrating white female appointments and ignoring women of color in the process? Should we be content that any change is being made at all, or should more drastic actions be taken? Unfortunately, we do not attempt to answer all questions. Any positive change is better than no change, but the goal remains not to substitute one problem for another. In order for intersectionality to have a role, we as a community must focus on it and then address it in open conversation and debate. We can begin with grassroots organizing to create curated, safe spaces that in time unearth the variety of intersections of identity. Once mapped, we can create the pipelines and pathways toward systemic change across all stakeholder classes – from law students, to those entering the practice, to upward mobility and selection as an arbitrator.

We must think outside the box and strive to create change in our small spaces, locally and regionally, before we jump to international efforts – mapping along the way key strategies and data to build an ever-revolving wheel of impact. These will be the key take-aways for future conversations and generations. Stay tuned.

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Is it time to call last orders?

HOW THE PERVERSIVE DRINKING
CULTURE IN INTERNATIONAL
ARBITRATION THREATENS TO
UNDERMINE THE CAUSE OF DIVERSITY





Is it time to call last orders?

There's a big drinking culture in international arbitration. But what if you don't or can't consume alcohol? Dr Kabir Duggal C.Arb FCI Arb and Amanda J. Lee FCI Arb consider this question

Political pollsters seeking to measure candidate popularity often ask what is known as 'the beer question': with which candidate would you rather have a beer? The answer is regarded as a barometer of likeability, authenticity and collegiality. As such, the beer question continues to be posed in the hiring context.

Alcohol is both a crutch on which the arbitration community leans and the common thread and social lubricant used by many to facilitate the formation of professional connections. In the bar, at the golf course or *après ski*, bonds are frequently forged over beer or cocktails.

And with the exception of breakfast briefings, it is rare to find an arbitration event in the West that

is alcohol-free. It is also customary for arbitration weeks to begin with a kick-off cocktail reception.

This emphasis on drinking culture in international arbitration – a field that places a high premium on the importance of networking and visibility – is therefore a potential barrier for those who abstain from alcohol (on which more later).

Meanwhile, two studies suggest that drinking is often embraced by lawyers as a potential solution to mental health challenges. A 1990 study of 1,200

For those who do not drink, every alcohol-fuelled networking event may give rise to awkward questions

lawyers conducted by Benjamin et al revealed that 18% of those surveyed engaged in problematic drinking. This figure exceeded problematic drinking rates for the wider population, a finding that was mirrored by a 2019 study conducted by the American Bar Association (ABA) with the assistance of the Hazelden Betty Ford Foundation, which concluded that: “attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations”.

Of the respondents to the ABA’s survey, 22.6% reported problematic use of alcohol or other substances at some stage of their life, with 20.6% achieving scores consistent with problematic drinking. Notably, 36.4% – more than a third – achieved scores consistent with hazardous drinking indicative of possible abuse or dependency. Although research published by the International Bar Association in 2021 indicates that only 10% of lawyers resort to alcohol as a coping mechanism to manage their mental health, that survey acknowledges the role of social desirability bias in such outcome. This statistic is significant when contrasted with previous studies.

Drinking culture versus diversity in arbitration

Alcohol both unites and divides. While there is nothing wrong with the responsible consumption of alcohol per se and the authors do not intend to demonise those who choose to drink, the clear potential for the pervasive nature of drinking culture in international arbitration to undermine the cause of diversity is noteworthy. Mindful of the international nature of the field, it is incumbent on responsible community stakeholders to take pragmatic steps to address the adverse implications of drinking culture in the field.

There are many reasons why members of the arbitration community may choose not to drink. All are valid. Colleagues may temporarily abstain from alcohol consumption due to pregnancy, fertility treatment or while breast-feeding. Those receiving treatment with antibiotics are encouraged to refrain from drinking alcohol to avoid adverse reactions. Whether abstinence is a cause for celebration or sympathy, the decision to disclose any aspect of one’s medical history is sensitive and may have significant career implications.

The consumption of medication to facilitate the management of long-term or chronic medical conditions, such as ADHD, angina, anxiety, arthritis, depression, diabetes, epilepsy, high blood pressure, psychosis and other conditions, whether physical or mental, may also preclude drinking. Practitioners who are dealing with mental health challenges

or managing conditions brought on by chronic stress may be reluctant to disclose why they are not drinking for fear of stigma. Those in recovery from alcohol-use disorder or with a family history of addiction may choose to responsibly exclude themselves from events at which alcohol is being consumed.

For those who do not drink, every alcohol-fuelled networking event may give rise to awkward questions. By choosing to prioritise health and wellbeing, take steps to properly manage medical conditions or otherwise exercise personal choice, individuals may miss out on potential opportunities to connect with peers, benefit from career advancement and be fully embraced as members of the arbitration community if they do not attend.

Mindful that arbitration is an international field, cultural and religious considerations merit particular attention. The consumption of alcohol is condemned or prohibited by numerous religions, including Buddhism, Islam, Jainism, Mormonism and Sikhism. Those who do not drink alcohol for religious reasons may find themselves marginalised at events, particularly in the West, or effectively excluded from or made to feel uncomfortable at team building, networking or other professional opportunities because of edicts of their faith.

Research has identified a rising tide of sober curiosity. Data collected by Drinkaware in the UK and Gallup in the US is indicative of a shift in attitude by Gen Z and Millennials, with those under the age of 35 statistically less likely to drink alcohol than their older peers. As time passes and the needs and expectations of arbitration practitioners change, arbitration networking

Alcohol is both a crutch on which the arbitration community leans and the common thread and social lubricant used by many to facilitate the formation of professional connections



culture is likely to evolve, but any such evolution will be slow.

There is accordingly significant potential for the existing emphasis on alcohol-fuelled networking to have a disproportionately negative impact on practitioners who come from numerous underrepresented groups. Alcohol-based networking is unavoidably less inclusive of and attractive to pregnant or nursing practitioners, sober curious younger (or more senior) colleagues, those who are practising members of numerous faiths and those managing certain disabilities and health challenges. And not just because such events are routinely accompanied by a glass of warm orange juice served from a carton.

Best practices for inclusive event planning

Mindful of the key role played by networking in achieving success and visibility in the profession, the arbitration community can and must do a better job of developing inclusive networking practices. As demonstrated by the 'Stress, Drink, Leave' research supported by the California Lawyers Association and the D.C. Bar, permissive attitudes towards alcohol in the workplace are associated with risky drinking. Proactive leadership is accordingly required if attitudes are to change.

Members of the arbitration community wishing to promote inclusive behaviour at arbitration events, and to better support and accommodate non-drinkers, should keep the following in mind:

- Plan a variety of events to better cater for potential delegates. Breakfast seminars, coffee mornings, garden parties, barbecues (with vegetarian and vegan options available), networking walks and hikes, and evening events that offer refreshments, but which are alcohol-free, are welcome and inclusive alternatives to cocktail receptions and wine tastings.
- Prioritise shared experiences. Hold an arbitration-themed quiz to encourage healthy competition, organise a competitive debate to identify talented speakers or arrange speed-networking or mentoring to give delegates an excuse to connect over points of substance rather than a glass of Pinot Grigio.
- Offer appealing non-alcoholic beverages to delegates at all arbitration events. Non-alcoholic cocktails, cordials and non-citrus juices, alongside still and sparkling water, are a welcome alternative to carbonated and caffeinated beverages that are high in sugar, and citrus juices, which may cause stomach problems.
- Make sure that non-alcoholic beverages are as accessible to delegates as alcoholic beverages. Prominence is typically given to alcoholic



ABOUT THE AUTHORS

Dr Kabir Duggal C.Arb FCIArb is an Attorney at Arnold & Porter, focusing on international arbitration and public international law matters. In June 2023, he delivered the Roebuck Lecture on 'International Arbitration Versus Human Rights, Armed Conflict and the Environment: Why should I care?'. **Amanda J. Lee FCIArb** is an Arbitrator and Consultant at Costigan King, London. She is the Founder of Careers in Arbitration and ARBalance.

beverages, which are routinely offered to delegates on trays as they enter event spaces. Do not hide water and non-alcoholic beverages at the back of the room where they may be difficult to reach.

- Be sensitive to non-drinkers. The decision to abstain is a private one and should not be the subject of speculation or interrogation.
- When organising and attending business dinners, do not expect non-drinkers, particularly those who are funding hospitality personally rather than drawing on the deep pockets of Big Law, to take equal financial responsibility for the alcohol consumption of those who choose to drink.
- Cater for different tastes at arbitration events. While no one can reasonably expect every preference to be accommodated, it is important to recognise that beverage and dietary preferences are as diverse as the arbitration community.
- Avoid holding alcohol-themed competitions and giveaways at arbitration events. More inclusive prizes include vouchers, gadgets, books or small gifts other than food or drink.
- Ensure that team networking events, particularly those organised to give aspiring practitioners the opportunity to impress, are not alcohol-based. Provide opportunities to connect and learn from colleagues in alcohol-free environments to avoid excluding or 'othering' team members.

By being more mindful when planning events, the arbitration community can help to ensure that those who do not drink do not have to choose between awkward participation and exclusion from valuable opportunities to build their professional networks, identify mentors and develop professional opportunities.

After all, it is 'the 4am question' that really counts in international arbitration: with which candidate would you rather be stuck in the office at 4am on the day of a filing?

The emphasis on alcohol-fuelled networking has a disproportionately negative impact on practitioners who come from numerous underrepresented groups



Kluwer Arbitration Blog

In Search of Civilization – Uncovering Overlooked Manifestations of Homogeneity in International Arbitration: Accent and Language

Kabir A.N. Duggal (Columbia Law School) and Amanda Lee (Costigan King) · Monday, January 16th, 2023

Civilization is a progress from an indefinite, incoherent homogeneity toward a definite, coherent heterogeneity.

Henry Spencer

International arbitration professionals are a strikingly homogenous population, as our [recent 360 degree overview](#) demonstrated. The demographic markers typically used to arrive at this conclusion are age, race, gender and national origin. While these fundamental indicators merit continued interrogation and attention, additional factors that have received less attention in the diversity discourse to date provide further insight into the social structure of the international arbitration practitioner population. Expressions of homogeneity that are less frequently discussed but may nevertheless constitute significant barriers to entry include language, accent, academic background and lifestyle. They are but some of the many different factors that contribute to the unconscious bias against members of our community that perpetuates homogeneity in international arbitration.

The Lingua Franca of International Arbitration

Despite the linguistic diversity of international arbitration stakeholders, the available statistics overwhelmingly identify English as the *lingua franca* of international arbitration, in both investor-State and international commercial arbitration proceedings. In [2022](#), 64% of ICSID cases were conducted in English, 7% in Spanish and 2% in French. Mindful that parties are permitted to select the language of arbitral proceedings, as well as the fact that investor-State arbitration by its very nature brings together parties of different nationalities, the dominance of English is noteworthy.

This becomes even more striking when viewed in conjunction with the regional distribution of parties, particularly mindful that it is possible to accommodate multiple languages within arbitral proceedings. Notably, the PCA records in its [Annual Report](#) for 2021 that the hearing in *Mason*

Capital LP and Mason Management LLC v The Republic of Korea was conducted in both English and Korean, with interpretation.

The 2022 ICSID annual report notes that “[t]he largest share of cases registered in FY2022 involved States in South America (22%), followed by States in Eastern Europe and Central Asia (20%). New cases were evenly spread among Central America and the Caribbean, the Middle East and North Africa, and the Sub-Saharan Africa regions (12% each). South and East Asia and the Pacific region, and Western Europe accounted for 8% each. A further 6% of newly registered cases involved States in North America.” Therefore, the parties’ expression of language preference is not necessarily consistent with the regional identities of the arbitrating parties. This can be attributed to a variety of factors, notably to English being the vehicular language in international transactions, where parties routinely have different mother tongues.

On the commercial arbitration front, ICC statistics for 2020 show that 80% of awards were rendered in English. The HKIAC’s 2021 statistics reveal that of arbitrations commenced in 2021, 78.7% of arbitrations were conducted in English, with 5.5% conducted in both English and Chinese, and the balance of 15.8% in Chinese. Further, the SCC’s 2021 statistics indicate that English was the language of the arbitration in more than 40% of cases, with the balance conducted in Swedish. Regrettably, numerous other major arbitral institutions are silent on the language of the arbitration in relation to their respective caseloads. Absent such data, it is impossible to obtain a fuller picture.

The importance of English in international arbitration should also be seen in the context of the general spread of English – described by Tsedel Neeley in the *Harvard Business Review* as the “fastest-spreading language in human history” – across the globe. However, languages are not neutral and each is accompanied by its own cultural baggage. The dominance of English in international arbitration is important because of its affinity with the common law. A preference by parties and tribunals for the use of English in arbitral proceedings may translate into a preference for a common law style of advocacy and pleadings, for example. Promoting linguistic heterogeneity may therefore encourage the emergence of different styles of advocacy. This in turn may boost diversity amongst international arbitration professionals by changing perceptions of the desired profile of an international arbitration professional.

Navigating the Accent Hierarchy

The spread of English arguably reflects the cultural and political hegemony of a number of anglophone countries. This becomes apparent when looking at intra-language discrimination. Polish linguist Anna Wierzbicka describes the internal cultural baggage of English and the coexistence of what she coins “Anglo English”, i.e. American English, British English and Australian English, as well as other varieties of English: Nigerian English, Indian English and Singaporean English. Notably, she argues that “*English as a language of international communication is closer to Anglo English as opposed to the latter varieties.*”¹⁾ Wierzbicka, Anna, ‘The “Cultural Baggage” of English and Its Significance in the World at Large’, *English: Meaning and Culture* (New York, 2006; online edn, Oxford Academic, 1 Sept. 2007), Section 9.6 English in the world Today.

The dominance of the English language in international arbitration is accompanied by a hierarchy

of accents in which such English is spoken. Discriminating against an international arbitration practitioner on the basis of their accent may be characterised as a form of national origin discrimination, and may therefore be considered to contribute to the uneven distribution of arbitration practitioners and arbitrators across nationalities. Anecdotally, certain accents are perceived by tribunals and parties as more authoritative and legitimate than others, and there seems, unsurprisingly, to be a preference for native English speakers. But what does a native English speaker sound like?

The social capital of a number of anglophone countries effectively translates to a preference for an American, British or Australian accent over an Indian or Nigerian one, despite English being a widely spoken official language in the latter countries. In other words, even when spoken by speakers with the same level of fluency, certain accents are deemed crude while others are perceived as refined. This phenomenon has been described, in a different context, by [Economic Times](#) columnist Sandip Roy, who observed that “*if ‘rock-star economist’ Thomas Piketty spoke with a heavy Gujarati accent instead of a sexy French one, his literature festival appearances would be far less packed.*”

Further, discrimination on the basis of accent is not confined to accents from a specific country. Taking British English as an example, research by Levon, Sharma and Ilbury on behalf of The [Sutton Trust](#) identified a “*hierarchy of accent prestige*”, with the so-called ‘Queen’s English’ or ‘BBC accent’ remaining dominant. Accent is regarded as a key indicator of socio-economic status and numerous social factors, including age, gender, sexuality, and more. Specifically, working class accents and ethnic minority accents were the lowest ranked accents among research responders, with 25% of professionals reporting that they had been mocked, criticised or singled out in work settings due to their accent.

These are but two of the many elements that may be viewed as impediments to diversity in international arbitration. However, the purpose of our publications on this topic is not simply to list sources of discrimination. Rather, it is to advocate for viewing diversity in international arbitration more holistically and encourage arbitral institutions to engage in the collection of further data to better inform the diversity debate. Focussing on specific forms of diversity, while extremely important, may by necessity lead to other forms of diversity being overlooked. As a result, a significant degree of homogeneity persists amongst practitioners despite attempts to improve diversity by targeting specific facets of diversity.

The answer to this problem is not to create a series of separate initiatives focussing on different variables. Rather, the answer lies in understanding diversity in intersectional terms. By developing awareness of lesser known forms of potential discrimination and challenging the perception that there is a fundamental preference for certain ‘ideal’ arbitration practitioners or arbitrators, we can reframe the diversity debate along broader lines. By creating parameters based on parties’ actual requirements, ideally informed by data – as opposed to vague and loaded ideas of reputation and competence – we can create a more robust discourse on the need for diversity. Only by doing so can we hope to reach civilization.

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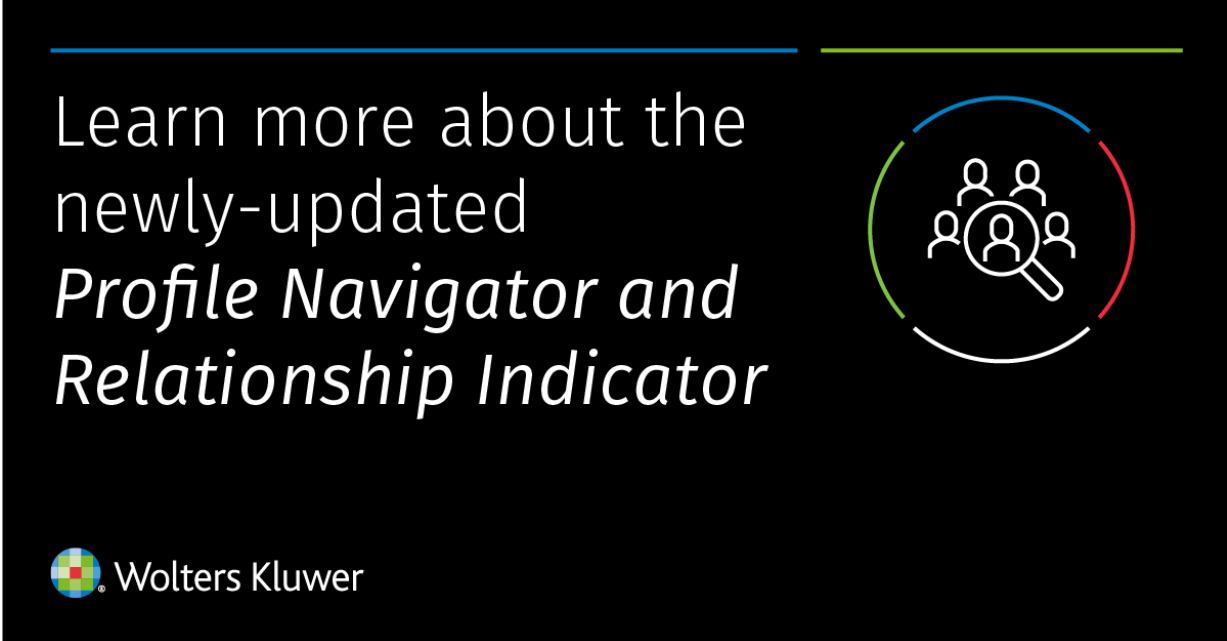
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