

A 360-DEGREE, KALEIDOSCOPIC VIEW OF DIVERSITY AND INCLUSION (OR THE LACK THEREOF) IN INTERNATIONAL ARBITRATION

*Kabir Duggal and Amanda Lee**

Diversity is being invited to the party. Inclusion is being asked to dance.
—Verna Myers

I. INTRODUCTION

It is said that beauty is in the eye of the beholder, but in the field of international arbitration, the beauty of many forms of diversity is frequently out of sight and, regrettably, out of mind. Over recent decades, international arbitration's reputation as "pale, male, and stale"¹ has led to growing calls for greater diversity and inclusion. Perhaps the starkest reminder of the lack of diversity in the field is the repeated appointment of arbitrators from a limited pool dominated by one gender, a certain region, a particular age group, and little ethnic variation.²

Diversity must be kaleidoscopic. Any commitment to address the lack of diversity in the field must go hand in hand with a commitment by stakeholders to address structural issues present at every level of the profession.

* Kabir Duggal is a Lecturer-in-Law at Columbia Law School and an SJD Candidate at Harvard Law School. Amanda Lee is an International Arbitrator, Consultant at Costigan King, and Founder of Careers in Arbitration. The views expressed herein are personal and do not reflect the views of any institution. The authors reserve the right to change the positions stated herein especially towards a view to including other underrepresented groups in international arbitration. The authors are both involved in several of the diversity initiatives discussed in the article including ArbitralWomen, the Equal Representation in Arbitration Pledge, and Racial Equality for Arbitration Lawyers (REAL) among others. The authors acknowledge with gratitude the excellent research assistance provided by the following students from Columbia Law School: Elora Neto Godry Farias, Ankita Sangwan, and Cagatay Ersoy.

¹ Joseph Mamounas, *ICCA 2014. Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change*, KLUWER ARB. BLOG (Apr. 10, 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/> ("On Monday, 7 April, at the 2014 ICCA Miami Conference, the international-arbitration community gathered to address the question, 'Who are the arbitrators?' The answer, panel attendees were told, was 'male, pale, and stale' – that is, a large majority of the individuals chosen to serve as international arbitrators are male, from North America or Western Europe, and generally quite senior."). The authors note that while this term is frequently used in international arbitration, the reference to older arbitrators as "stale" is itself a pejorative term.

² Andrea K. Bjorklund, et al., *The Diversity Deficit in International Investment Arbitration*, 21 J. WORLD INV. & TRADE 410, 410–40 (2020), <https://doi.org/10.1163/22119000-12340177> (discussing the lack of diversity in ISDS).

This article provides a 360-degree overview of the main issues regarding diversity and inclusion in international arbitration.³ We begin by explaining why diversity is needed in international arbitration and exploring existing barriers that hamper progress in the field (Section I). We will contextualize such barriers by addressing the intersectional nature of diversity⁴ and its implications for international arbitration (Section II).

We will then explore the status quo surrounding specific diversity issues, including: (1) gender; (2) race; (3) age; (4) disability; (5) sexual orientation; and (6) socio-economic factors in Sections III to VIII. We hope to explore other forms of diversity, such as professional background, in the future. We will discuss possible solutions in Section IX, before concluding our overview in Section X.

A. *Why Do We Need Diversity?*

The arbitration community is united in calling for greater diversity. Commentators have noted that the need for adjudicative diversity is rooted in the need for legitimacy.⁵ This is true for any form of adjudication. For example, while arguing for female representation in the judiciary, Sally Kenney concludes that “[a]ll-male juries, just like all-white juries, are illegitimate. The same is true for the judiciary.”⁶ The same holds true for arbitral tribunals.

Professor Nienke Grossman posits that “sex unrepresentativeness can still harm perceptions of legitimacy”⁷ because “those affected by decision-making should play some role in the making of those decisions,” and such representation is an important democratic value that justifies the “exercise of that authority.”⁸

³ See 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> (“Diversity is the ‘what’; inclusion is the ‘how.’ Diversity focuses on the makeup of your workforce—demographics such as gender, race/ethnicity, age, sexual orientation, veteran status, just to name a few, and inclusion is a measure of culture that enables diversity to thrive.”).

⁴ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (Crenshaw used this term to describe overlapping social injustice regarding race and gender; she drew attention to the double discrimination faced by black women—race and gender—and the lack of measures being adopted to address this issue. For instance, we have anti-racist laws protecting black men, anti-sexism laws protecting women, but no laws protecting black women in a different category.).

⁵ See generally Susan D. Franck, et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429 (2015) (explaining that diversity is an important factor for the legitimacy of international arbitral bodies).

⁶ SALLY J. KENNEY, *GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* (Routledge, 1st ed. 2013), p. 21.

⁷ Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 VA. J. INT’L L. 213, 219 (2016).

⁸ *Id.* at 279.

This therefore raises the question: how “international” is “international arbitration” if the majority of tribunals are composed of Caucasian men from the Western world?

These legitimacy issues are of particular relevance in international commercial arbitration because parties are expected to comply with awards issued by tribunals.⁹ Such deference to tribunal decision making is directly related to the parties’ trust and faith in both the arbitrators and the arbitral process itself. Enforcement of awards by State courts reflects their recognition of the utility of arbitration—any perceived lack of legitimacy may weigh heavily on the award itself.¹⁰

Professor Andrea K. Bjorklund notes that legitimacy concerns in international arbitration are primarily “normative or sociological. The normative critique focuses on whether arbitral tribunals are justified in exercising the authority they do. The sociological critique focuses on perceptions about the exercise of that authority.” Diversity—or the lack thereof—is accordingly an important sociological critique.

Professor Bjorklund along with other scholars further posits that “perceptions about fairness and bias [are] most evidently weakened by a lack of diversity and inclusiveness in the pool of Investor-State Dispute Settlement (‘ISDS’) arbitrators.”¹¹ On this point, they note that “[t]here has been a great deal of concern that ISDS tribunals are biased against developing States, and even though some empirical work casts doubt on those perceptions, or at least shows that the perceptions are not very nuanced, they nonetheless persist and are exacerbated by the extent to which arbitrators are perceived as outsiders.”¹²

The authors further observe that parties in International Centre for Settlement of Investment Disputes (“ICSID”) cases are less likely to seek an annulment if the presiding arbitrator is from a developing State and the respondent State is a developing State. In other words, “if the presiding arbitrator is from a developing country, the decision of the ICSID tribunal is more likely to be accepted by both investors and host States.”¹³

Diversity is therefore key for the symbolic legitimacy of the arbitration process since there is a perception that the “pale, male and stale” profile may be

⁹ Alexander J.S. Colvin, *The growing use of mandatory arbitration*, EPI (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

¹⁰ Susan D. Franck, et al., *International Arbitration: Demographics, Precision and Justice*, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES 33, 96 (Albert J. van den Berg ed. 2015) (“Some jurisdictions have historically expressed a ‘judicial hostility’ to arbitration, and others have perceived arbitration as an unwarranted intrusion into state authority. States permit and honor arbitration proceedings, in part, because of their perceived utility; and should those actors believe that ICA is illegitimate or problematic, courts retain the capacity to re-absorb those cases into judicial dockets.”).

¹¹ Andrea K. Bjorklund, et al., *The Diversity Deficit in International Investment Arbitration*, 21 J. WORLD INV. & TRADE 410, 420 (2020),

¹² *Id.*

¹³ *Id.*

encouraging a certain world view of disputes. Diverse tribunals would accordingly promote public trust in the arbitration process. As important as it is for justice to be done, we are reminded of the aphorism that “justice must also be manifestly seen to be done.”

A 2013 study led by economist Sylvia Ann Hewlett concluded that diversity also ensures innovation.¹⁴ Diverse panels benefit from different perspectives and experiences. While speculative, greater representation during the deliberation process may produce better awards as diverse perspectives may better equip the tribunal to obtain a comprehensive understanding of parties’ positions and related evidence.¹⁵

Despite clear reasons to support diversity, progress towards parity and true representation on multiple diversity fronts remains regrettably slow (even though there is incremental improvement). The “male, pale, stale” appointment status quo persists. Further, diversity raises inclusion issues. While these terms are often used interchangeably, it is important to note their differences. As Andrés Tapia puts it, “[d]iversity is the mix, inclusion is making the mix work.”¹⁶ The question in international arbitration is not just permitting underrepresented groups to enter the system but creating opportunities for them to thrive.

B. *Reasons for Lack of Diversity*

The current diversity crisis is attributable to myriad structural and social/institutional bias. The ability of parties to choose arbitrators is one of the cornerstones of arbitration. However, historical party reluctance to appoint diverse arbitrators persists. There are many reasons for this, including: (1) the supposed lack of exposure and/or the availability of insufficient information about diverse arbitrators; (2) the impact of unconscious bias; and (3) the confidentiality of many arbitrations.

Arbitral proceedings, including awards, remain overwhelmingly confidential. Parties are left to choose arbitrators on the basis of background, experience and word of mouth—perhaps not the fairest basis for appointment.¹⁷ Practitioners often emphasize the importance of experience on the basis that an experienced

¹⁴ See Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, HARVARD BUS. REV. (Dec. 2013), <https://hbr.org/2013/12/how-diversity-can-drive-innovation> (defining diversity as including at least three inherent diversity traits—e.g., race, ethnicity, gender, and sexual orientation—and at least three acquired diversity trait or traits acquired through experience with diverse individuals).

¹⁵ Franck, *supra* note 5, at 498 (“Having greater representation of different perspectives during deliberation could aid a more comprehensive appreciation of parties’ positions and underlying evidence.”).

¹⁶ ANDRÉS TAPIA, *THE INCLUSION PARADOX: THE OBAMA ERA AND THE TRANSFORMATION OF GLOBAL DIVERSITY* 12 (Hewitt Associates ed. 2009).

¹⁷ See generally *Diversity on Arbitral Tribunals Background Note*, BCLP LAW, https://www.bclplaw.com/images/content/1/5/v1/150202/Diversity_on_arbitral_tribunals_-_background_note.pdf.

arbitrator is likely to be better prepared to conduct proceedings and produce a satisfactory award.¹⁸ This emphasis on experience makes it challenging for new entrants to gain traction in the market.

Specialized subject knowledge and the benefits associated with having diverse viewpoints are given less weight by parties, counsel, and arbitral institutions. Increased focus on the value of acquiring or possessing specialist knowledge may, for example, allow aspiring arbitrators to increase their chances of receiving appointments by specializing. New market entrants would offer fresh perspectives. It is not, however, easy for arbitrators to break into the market. Structural and institutional issues directly impact and influence the composition of arbitral tribunals. Becoming an arbitrator itself is a difficult process. Consequently, arbitral tribunals are usually composed of senior professionals (an issue that we discuss further below), with age equated with experience.

The profile of a “typical” arbitrator is accordingly closely linked to that of a “typical” senior professional in academia, industry, or law firms. Lack of diversity at senior levels—a legacy of historical inequality—is reflected in the arbitrator pool. Until we see greater representation of women and other underrepresented groups in senior roles, this is unlikely to change.

Taking gender representation as an example, in most legal systems, women are not yet sufficiently represented in the upper echelons of the legal profession. A 2016 survey found that while women occupy over 50% of junior roles when starting their legal careers, only 14% of lead partners are female.¹⁹

Nominated arbitrators are often partners at renowned international firms or professors at prestigious schools, often in the global north. Fewer women than men hold such senior roles in international arbitration teams across the globe because women face greater obstacles when seeking to advance. The pool of potential male nominees is larger.

The issue here is, therefore, not just a lack of diversity, but law firm cultures and systemic practices that exclude women or make it more difficult for them to enter the potential pool. Until women occupy leadership roles in greater numbers, the “pool” will remain the same. Only by making lasting and effective changes that promote diversity and inclusion at all levels of career progression can we hope to positively influence the makeup of arbitral tribunals in the medium to longer term.

In a 2008 study, Volpe stated that:

¹⁸ Ricardo Dalmaso Marques, *To Diversify or Not to Diversify. Report on the Session Who Are the Arbitrators*, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES 579, 582 (Albert J. van den Berg ed. 2015) (“Professor Seraglini himself pointed out that experience is and should remain a crucial element of the threshold in the selection of arbitrators. An experienced and knowledgeable arbitrator would most likely be better prepared to conduct the proceedings appropriately and to render a satisfactory arbitral award (as to its enforceability and qualitative content).”).

¹⁹ ACRTAS DIVERSITY REPORT, UNCOVERING THE POSITIVE IMPACTS OF A FULLY DIVERSE LEGAL TEAM 10 (2016), https://cdn.ymaws.com/www.albanycountybar.org/resource/resmgr/events/cle/acrtas_diversity_report_may.pdf.

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

Business in international arbitration happens behind closed doors, with limited access available to new participants.²¹ Preventing aspiring arbitrators from entering the market benefits only those who seek to preserve the *status quo*. Mentoring programs, the growth of communities that support the next generation of arbitrators, and shadowing schemes have the potential to have a positive impact, but the market must evolve to allow the next generation to rise.

The diversity-and-inclusion dilemma is thus a complex one. Addressing the social and institutional problems that underpin the present diversity paradigm requires conscious rethinking.

II. DIVERSITY: AN INTERSECTIONAL PROBLEM

International arbitration has long faced diversity issues: the lack of female representation, the predominance of the “white westernized senior man,” an absence of transparency in relation to LGBTQ+ identities, the impact of economic barriers on those seeking to enter the field, and so on. It may even be suggested that discrimination against specific marginalized classes exists within the arbitration field.

However, we cannot look at issues of discrimination through a single categorical lens. There are protected classes within marginalized classes, whose experiences are not limited to sexism or racism. In other words, debates about diversity in the field must center on the issue of “intersectionality.”

Intersectionality acknowledges that our social system is complicated, and multiple prejudices may be present at the same time.²² In other words, intersectional theory asserts that people are often disadvantaged by multiple

²⁰ 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*, 35 FORDHAM URB. L.J. 119, 139 (2008).

²¹ *Id.*

²² *What is intersectionality, and what does it have to do with me?*, YW BOS. BLOG (Mar. 29, 2017), <https://www.ywboston.org/2017/03/what-is-intersectionality-and-what-does-it-have-to-do-with-me/> (YW Boston is an organization that helps individuals and organizations change policies, practices, attitudes, and behaviors with the goal of creating more inclusive environments where women, people of color, and especially women of color can succeed).

sources of oppression: their race, class, gender identity, sexual orientation, religion, and other identity markers.²³

Professor Kimberly Crenshaw, defining intersectionality and illustrating its impact on Black women, stated that “[b]ecause the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”²⁴ Only by acknowledging the multifaceted nature of diversity can we fully appreciate and hope to address the barriers.

A case in point, as discussed below, the number of women receiving arbitrator appointments has been increasing slowly. However, such an increase in opportunities has not been noted for women of color and LGBTQ+ persons.

Intersectionality explores diversity holistically, fostering the understanding that while a member of an underrepresented group may face specific disadvantages, the same person may be subject to multiple forms of prejudice if they are a member of multiple underrepresented groups.²⁵ For example, black women, Asian women, and female lawyers from developing states will face different struggles to enter the field.²⁶

Further, it would be remiss of the international arbitration community to ignore the impact that living and working with such struggles has on those who face adversity on multiple fronts. The International Bar Association’s 2021 Report, “Mental Wellbeing in the Legal Profession,” specifically noted the importance of recognizing intersectionality and the deep-rooted issues that arise out of it.²⁷

To date, the arbitration community has largely focused on finding solutions to address one “disadvantage” at a time: conferences on gender inequality, networks to support specific underrepresented communities, the publication of statistics on arbitrator nationality, diversity committees to promote inclusion within law firms and so on. While this is important, it is time for the international community to better recognize the multifaceted nature of diversity. While the topic of intersectionality requires its own separate paper, no discussion of diversity is complete without acknowledging the limitations of adopting simplistic

²³ *Id.*

²⁴ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

²⁵ Bridie Taylor, *Intersectionality 101: what is it and why is it important?*, WOMANKIND WORLDWIDE (Nov. 24, 2019), <https://www.womankind.org.uk/intersectionality-101-what-is-it-and-why-is-it-important/> (explaining the concept of intersectionality and its importance).

²⁶ Joshua Karton & Ksenia Polonskaya, *True Diversity is Intersectional: Escaping the One-Dimensional Discourse on Arbitrator Diversity*, KLUWER ARB. BLOG (July 10, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/> (on gender issues and its correlation with intersectionality under ICSID cases).

²⁷ *Mental Wellbeing in the Legal Profession: A Global Study*, INTERNATIONAL BAR ASSOCIATION (IBA) (Oct. 2021), <https://www.ibanet.org/document?id=IBA-report-Mental-Wellbeing-in-the-Legal-Profession-A-Global-Study>.

categorizations. We must work towards a more nuanced and complex understanding of what diversity is if we are to develop a more systematic understanding of why representation is lacking.

III. GENDER REPRESENTATION: A MAN'S WORLD?

The lack of gender parity in international arbitration is appalling. Nevertheless, the need to address gender representation has given rise to several key initiatives. Nearly thirty years have passed since ArbitralWomen was founded.²⁸ More than five (5) years have passed since the launch of the Equal Representation in Arbitration Pledge (the “Pledge”) gave the arbitral community the opportunity to promise to act to address the underrepresentation of women in international arbitration.²⁹ In 2016, the Court of Arbitration of the International Chamber of Commerce (“ICC”) began to release statistics on gender appointments,³⁰ leading other arbitral institutions to do the same. In this section, we will explore the status quo. Regrettably the goal of gender parity is still a distant dream even though women’s participation in law schools has equalled that of men for at least two decades in the United States.³¹

The Lack of Female Arbitrators and Practitioners in International Arbitration: A Problem That Is Evolving Slowly

As noted above, gender parity is still a distant dream in international arbitration. In research undertaken in 2016, Lucy Greenwood, a leading arbitrator, analyzed the appointment practices of leading arbitral institutions—the ICC, the International Center for Dispute Resolution (“ICDR”), the London Court of International Arbitration (“LCIA”), the German Arbitration Institute (“DIS”) and the Hong Kong International Arbitration Centre (“HKIAC”)—and concluded that less than 20% of arbitrators appointed that year, whether by an institution, the parties, or co-arbitrators, were female.³²

The ICC first released its data on gender diversity among arbitrators in 2016, which demonstrated that parties were less inclined to appoint women arbitrators than the institution itself.³³ In 2017, the LCIA published its numbers: 24% of

²⁸ See ARBITRALWOMEN, <https://www.arbitralwomen.org/>.

²⁹ See EQUAL REPRESENTATION IN ARBITRATION, <http://www.arbitrationpledge.com/>.

³⁰ See, e.g., INTERNATIONAL CHAMBER OF COMMERCE, *Full 2016 ICC Dispute Resolution statistics published in Court Bulletin* (Aug. 31, 2017), <https://iccwbo.org/media-wall/news-speeches/full-2016-icc-dispute-resolution-statistics-published-court-bulletin> [hereinafter *ICC Dispute Resolution Statistics 2016*].

³¹ See Women in the Legal Profession, American Bar Association, <https://www.abalegalprofile.com/women/> (“A majority of law school students in the United States are women: 54.1% in 2020. That’s up from 48.4% in 2000.”).

³² See generally Lucy Greenwood, *Tipping the balance—diversity and inclusion in international arbitration*, 33 ARB. INT’L. 99 (2017).

³³ ICC *Dispute Resolution Statistics 2016*, *supra* note 30.

nominations (97 out of 412) were of women, a 3% increase compared to 2016.³⁴ Data released by the Swiss Chambers' Arbitration Institution in 2016 revealed that while 47% of institutional nominees were female, only 5% of party-appointed arbitrators were.³⁵

In 2019, the International Council for Commercial Arbitration ("ICCA") published the "Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings." The Report noted an increase in the number of appointments of female arbitrators in the period 2015 to 2019, with the average percentage of appointments of female arbitrators rising from 12.2% in 2015 to 21.3% in 2019.³⁶ Although these statistics are limited to ten institutions and present an incomplete geographical picture, we can conclude that slow but steady progress is being made.³⁷

Table 1. Women as a percentage of total arbitral appointments, 2015-2019⁴⁵

Institution	2015 (%)	2016 (%)	2017 (%)	2018 (%)	2019 (%)
CAS	13 (3.7)	43 (8.7)	7 (1.9)	8 (5.4)	2 (25.0) ⁴⁶
DIS	40 (13.4)	33 (12.4)	50 (15.2)	29 (12.4)	33 (17.5)
HKIAC	16 (9.7)	19 (12.1)	27 (14.4)	32 (12.7)	51 (18.0)
ICC	136 (10.4)	209 (14.8)	249 (16.7)	273 (18.4)	312 (21.1)
ICDR	140 (17)	180 (16)	246 (22)	229 (22)	213 (24)
ICSID	21 (11.4)	21 (13.2)	37 (18.9)	55 (23.8)	37 (19.3)
LCIA	71 (15.8)	102 (20.5)	97 (24)	102 (23)	163 (29)
PCA	6 (12.5)	4 (10.5)	5 (15.2)	9 (19.6)	5 (20)
SCC	39 (14)	41 (16)	46 (18)	69 (27)	52 (23)
VIAC	8 (14.3)	12 (17.1)	7 (16.7)	15 (24.6)	11 (16.4)
<i>Average %</i>	<i>12.2</i>	<i>14.1</i>	<i>16.3</i>	<i>18.9</i>	<i>21.3</i>

Despite the reasons for the lack of diversity noted above, the marked rate of acceleration in the appointment of female arbitrators is grounds for cautious optimism. This is, in no small part, attributable to the spotlight on the issue of gender diversity shone by organizations such as ArbitralWomen and the impact of community initiatives such as the Equal Representation in Arbitration Pledge. Thirty years ago, diversity was barely a part of the arbitration dialogue—the

³⁴ THE LONDON COURT OF INTERNATIONAL ARBITRATION, FACTS AND FIGURES, 2017 CASEWORK REPORT (2017).

³⁵ See *Arbitral Institutions Respond to Parties' Needs*, White & Case Press Release (Apr. 10, 2017), <https://www.whitecase.com/news/press-release/arbitral-institutions-respond-parties-needs>.

³⁶ ICCA, ICCA REPORTS NO. 8: REPORT OF THE CROSS-INSTITUTIONAL TASK FORCE ON GENDER DIVERSITY IN ARBITRAL APPOINTMENTS AND PROCEEDINGS 117–19 (2020), <https://www.arbitration-icca.org/icca-reports-no-8-report-cross-institutional-task-force-gender-diversity-arbitral-appointments-and>.

³⁷ Table provided by the ICCA Task Force on Gender Diversity in Arbitral Appointments and Proceedings, *id.* at 17.

ongoing conversation at conferences, in law firms, at arbitral institutions and in scholarship, is a testament to how far we have come as a community.

Further, a multitude of networks now exist that embrace some of the intersectional nuances of gender representation. For example, Woman Way in Arbitration LatAm³⁸ was founded by a group of Latin American women in international arbitration. The HKIAC's Women in Arbitration, launched in 2018, is an example of a gender diversity initiative led by an arbitral institution.³⁹

It is also noteworthy that aspiring female arbitrators have a plethora of high-profile role models to emulate. Women hold leadership roles at the highest levels of the field, with Claudia Salomon's appointment as the first female President of the ICC Court,⁴⁰ Lucy Reed's appointment as the first female President of the Singapore International Arbitration Centre (SIAC) Court of Arbitration,⁴¹ and Gabrielle Kaufmann-Kohler's appointment as the first female ICCA President, as but three examples.⁴² Similarly, Jacomijn van Haersolte-van Hof has been the Director General of the LCIA since 2014.⁴³

However, change on the ground remains slow, with notable difficulties including the challenges presented by the so-called "leaky pipeline," the limited number of party-appointed female arbitrators and the lack of women in senior roles at law firms. There remains significant room for improvement. There is also a greater need to include more women of color, LGBTQ+ women, and other underrepresented women.

IV. RACIAL AND ETHNIC REPRESENTATION: A WESTERN WORLD?

International arbitration has a reputation as a "dense white, male club."⁴⁴ In this section, we explore why the field is overpopulated by white Europeans and North Americans, who receive repeat arbitrator appointments as members of a limited pool.⁴⁵

³⁸ See WOMAN WAY IN ARBITRATION LATAM, <https://wwarb.org/mision.php>. (last visited Oct. 28, 2021).

³⁹ WOMEN IN ARBITRATION, HKIAC <https://www.hkiac.org/women-arbitration-wia> (last visited Oct. 28, 2021).

⁴⁰ See *Claudia Salomon becomes President of ICC Court*, ICC, <https://iccwbo.org/media-wall/news-speeches/claudia-salomon-becomes-president-of-icc-court/> (last visited Oct. 29, 2021).

⁴¹ See *Lucy Reed Appointed as President of the SIAC Court*, ARBITRALWOMEN, <https://www.arbitralwomen.org/lucy-reed-appointed-as-president-of-the-siac-court/> (last visited Oct. 29, 2021).

⁴² See *Gabrielle Kaufmann-Kohler Takes Office as ICCA President*, Lévy Kaufmann-Kohler, <https://lk-k.com/developments/gabrielle-kaufmann-kohler-takes-office-as-icca-president/> (last visited Oct. 29, 2021).

⁴³ See Professor Jacomijn van Haersolte-van Hof's Biography, LCIA, <https://www.lcia.org/jvh> (last visited Oct. 29, 2021).

⁴⁴ Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. OF INT'L L. 387, 387 (2014), <http://www.ejil.org/pdfs/25/2/2495.pdf> ("[S]ome characterizing this group as a dense 'white, male' group.").

⁴⁵ See *generally Diversity on Arbitral Tribunals Background Note*, BLP LAW, https://www.bclplaw.com/images/content/1/5/v1/150202/Diversity_on_arbitral_tribunals_-_background_note.pdf.

Critics have argued against considering the rise of international arbitration solely in commercial and investment terms.⁴⁶ Anne Charlotte Martineau examined the development of international arbitration through the dispute resolution system set up by the Spanish crown and its concessionaries pertaining to the transatlantic slave trade in the 16th to the early 18th century.⁴⁷

Other scholars, like Kate Miles, theorize that international investment arbitration has roots in colonialism and imperialism. She states that the:

. . . emergence of international investment law is not, in fact, a separate story from that of international law more generally. Rather, the current international law framework and its constituents have a shared history in evolving out of the creation, and then practice, of modern states, the theorizing of scholars in the 16th to 19th centuries, the language of international law, and the commercial and political expansionism embodied in formal colonial acquisition of territory and the more informal approach of imperialism.⁴⁸

This suggests that there has always been an implicit racial differential in how arbitration developed. Moreover, the lack of diverse racial representation in international arbitration became widely publicized in recent years when Jay-Z, a North American recording artist, complained about the lack of African American arbitrators proposed on a shortlist provided by the American Arbitration Association (AAA). He ultimately refused to arbitrate until the list of arbitrators included a significant number of African Americans from which to select.⁴⁹

Unfortunately, this issue is not unique to arbitration and is pervasive across markets in various fields.⁵⁰ With the increase in cross-border business, we see

⁴⁶ Anne-Charlotte Martineau, *A Forgotten Chapter in the History of International Commercial Arbitration: The Slave Trade's Dispute Settlement System*, 31 LEIDEN J. OF INT'L L. 219, 221 (2018) ("In this article, I want to add to the ongoing efforts to write the history of international arbitration in commercial and investment matters by including this missing dimension of entanglement (sovereignty/property).").

⁴⁷ *Id.* at 221 ("What is much less known is the dispute settlement mechanism that pertained to the slave trade. I will show that the transformation of *asientos de negros* from limited royal contracts to large-scale monopolies awarded to foreign chartered companies during the course of the sixteenth, seventeenth and early eighteenth centuries was accompanied by the creation of an international commercial arbitration system.").

⁴⁸ Kate Miles, *History and international law: Method and mechanism—empire and 'usual' rupture*, in INTERNATIONAL INVESTMENT LAW AND HISTORY, FRANKFURT INVESTMENT AND ECONOMIC LAW SERIES 136, 143 (Stephan W. Schill et al. eds. 2018).

⁴⁹ Jonathan Stempel, *Jay-Z wins fight for African-American arbitrators in trademark case*, REUTERS (Jan. 30, 2019, 5:22 PM), <https://www.reuters.com/article/us-people-jayz-lawsuit/jay-z-wins-fight-for-african-american-arbitrators-in-trademark-case-idUSKCN1P032T2>.

⁵⁰ OXFORD ECONOMICS, THE GLOBAL DIVERSITY REPORT: AN ANNUAL GUIDE TO MEASURE GLOBAL EMPLOYEE DIVERSITY (2011) (presenting a study that provides an

increased participation from stakeholders across regions. International arbitration has diversified. It is thus puzzling that slow strides are being made to shine a spotlight on talented arbitrators based in emerging jurisdictions.

In a recent 2021 survey undertaken by White & Case, respondents noted their frustration about the lack of progress in achieving ethnic diversity in the field. Respondents suggested that unless and until there is a level playing field providing better opportunities and visibility, there is limited scope for growth.⁵¹ There is accordingly much to be done at the grassroots level to create an environment in which non-white counsel and arbitrators can develop their skills and thrive.

Inadequate Data: Focus on Geographical Representation Rather than Targeted Research on Ethnic and Racial Representation

There is a dearth of reliable empirical data that tracks ethnic and racial representation in international arbitration. Some statistics are, however, available to show a lack of diversity in this regard.

In 289 closed ICSID cases from January 1972 to May 2015, tribunals that were entirely composed of Anglo-European arbitrators formed nearly half of the cases (45%).⁵² Further, in 84% of cases, the tribunal consisted of either an Anglo-European sole arbitrator or tribunals composed of two or more Anglo-European arbitrators. Only 11 cases (4%) were arbitrated by entirely non-Anglo-European tribunals.⁵³

Taking arbitrators from Africa as an example, only 16 arbitrators from Sub-Saharan Africa were appointed by parties, and only 20 by ICSID. Contrasting this situation with the 565 party-appointed and 220 ICSID-appointed arbitrators from Western Europe, and the 304 party-appointed and 55 ICSID-appointed arbitrators from North America, there is stark lack of regional representation in ICSID arbitrations.⁵⁴

international benchmarking system to rank employee diversity across 50 global economies, 14 industrial sectors, and 9 occupational categories).

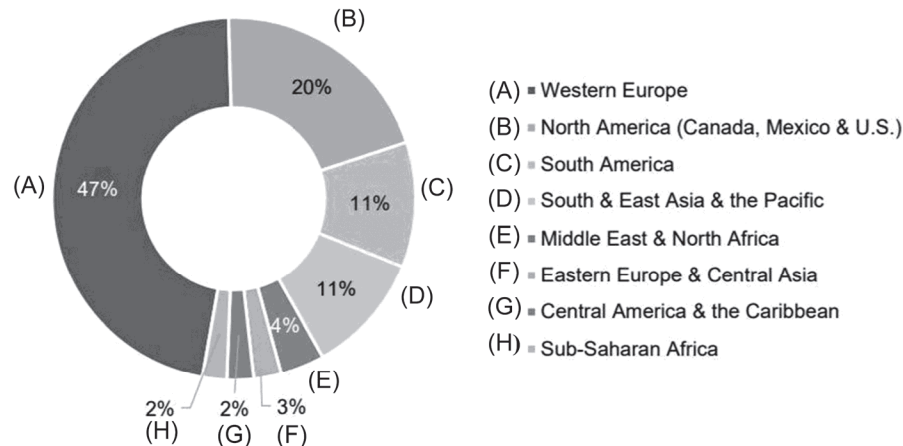
⁵¹ 2021 *International Arbitration Survey: Adapting Arbitration to a Changing World*, WHITE & CASE LLP 16 (2021), <https://www.whitecase.com/sites/default/files/2021-06/qmul-international-arbitration-survey-2021-web-single-final-v2.pdf> [hereinafter *White & Case 2021 International Arbitration Survey*] (“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.”)

⁵² *Diversity On Arbitral Tribunals Background Note*, BRYAN CAVE LEIGHTON PAISNER LLP 3 (Oct. 18, 2016), https://www.bclplaw.com/images/content/1/5/v1/150202/Diversity_on_arbitral_tribunals_-_background_note.pdf.

⁵³ *Id.*

⁵⁴ *Id.*

The most recent ICSID statistics for 2020 show limited progress, with most arbitrators hailing from Western Europe (47%). A complete breakdown of appointments per region appears below:⁵⁵



For further context, 1,277 arbitrators from Western Europe and 557 arbitrators from North America received appointments. A mere 59 arbitrators from Sub-Saharan Africa received appointments.⁵⁶

The ICC's 2020 statistics similarly show that both counsel and arbitrators were primarily from developed states. A mere 0.4% of arbitrators were from Africa and 10% from Asia.⁵⁷ In the latest report released in 2020, the ICC noted that the most represented nationalities among arbitrators appointed were the UK (14.5%), USA (10%) and Switzerland (8.9%).⁵⁸

This data highlights the receipt by arbitrators from the Western world of the greatest number of ICC appointments. The ICC statistics for 2016 to 2019 record significant consistency in the top six nationalities of appointed arbitrators. Data released by other leading arbitral institutions as discussed below is likewise notably consistent. Unless and until we see a greater number of appointments from emerging jurisdictions, there will be no true geographical representation.

As discussed in Section I.B, party appointments play a key role. The LCIA's 2020 statistics recorded an increase in the number of UK arbitrators appointed, from 51% in 2019 to 63% in 2020. The majority of arbitrators (65%) were party-appointees or appointed by co-arbitrators. Arbitrators from 40 different countries

⁵⁵ Diagram provided by *The ICSID Caseload – Statistics, 2020* INT'L CTR. FOR SETTLEMENT OF INV. DISPS. 17 (Aug. 13, 2020), <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf>.

⁵⁶ *Id.*

⁵⁷ Susan D. Franck, et al., *International Arbitration: Demographics, Precision and Justice*, 18 ICCA CONG. SERIES 33, 50 (2015).

⁵⁸ INTERNATIONAL CHAMBER OF COMMERCE, ICC DISPUTE RESOLUTION 2020 STATISTICS (2020).

received the balance of appointments, with the highest numbers being from Canada, the United States, Ireland, Germany, and Mexico.⁵⁹

While statistics record a marginal increase in geographical representation, most arbitrators continue to hail from the West. Regrettably, the data available does not distinguish between geography and race. Many countries have complex racial make-ups and as such, it is impossible to measure racial representation on the basis of region alone. More targeted data is required to identify the full extent of the problem. Until such time, minority ethnic and racial representation will remain fragmented, and progress unquantifiable.

The international arbitration community is, however, attempting to address the historical underrepresentation of racially diverse arbitrators and counsel. Steps in the right direction include initiatives like Racial Equality for Arbitration Lawyers (“REAL”)—“a group of global lawyers working in international arbitration striving to achieve racial diversity for underrepresented groups,”⁶⁰ the American Bar Association (ABA)’s Racial Equity in the Justice System” website⁶¹—a central repository of resources and information focusing on racial justice, and Diversity Labs’ “Mansfield Rule”⁶²—a partnership with leading law firms across the United States measuring whether law firms affirmatively consider women and lawyers of color for leadership roles.

The “African Promise,” a pledge that aims to tackle the underrepresentation of African arbitrators, especially in Africa-related arbitrations,⁶³ was also much needed to highlight the extent of the problem. Lists have also been published, including the *African Arbitration Atlas*, which includes a ‘Directory of African International Arbitrators,’⁶⁴ and the “List of Arbitrators of African Descent with a US Nexus.”⁶⁵ Indeed, we need more data and more proactive steps to address the lack of non-white representation at all levels of international arbitration.

⁵⁹ THE LONDON COURT OF INTERNATIONAL ARBITRATION, 2020 ANNUAL CASEWORK REPORT (2017).

⁶⁰ See REAL, <https://letsgetrealarbitration.org/#>.

⁶¹ ABA launches new racial justice resources website, ABA (June 15, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/racial-equity-in-the-justice-system/>.

⁶² 64 Law Firms Announced as Mansfield Rule 2.0 Certified, DIVERSITY LAB, <https://www.diversitylab.com/pilot-projects/mansfield-rule-2-0/>.

⁶³ Jack Ballantyne, *African Promise aims to promote diversity on tribunals*, GAR (Oct. 8, 2019), <https://globalarbitrationreview.com/diversity/african-promise-aims-promote-diversity-tribunals> (“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 should be appointed as arbitrators on an equal opportunity basis.”).

⁶⁴ AFRICAN ARBITRATION ATLAS, <https://africanarbitrationatlas.org/arbitrator-directory/> (last visited Oct. 28, 2021).

⁶⁵ Nancy M. Thevenin & Katherine Simpson, *Arbitrators of African Descent*, USCIB (Aug. 2020), <https://www.uscib.org/uscib-content/uploads/2021/06/Arbitrators-of-African-Descent-August-2020-Final.pdf>.

V. AGE AND ARBITRATION: IS EXPERIENCE ONLY MEASURED THROUGH AGE?

We define life by age. Many things can only be accomplished after a certain age: getting a driver's license, voting, getting married, and the like. In the international arbitration context, age acquires particular significance.⁶⁶ Acting as an arbitrator is perceived by many to be a second career of sorts. As such, many "young" practitioner groups welcome those aged 40 or under 40, with a few outliers considering those aged 45 and under to be young.

Nonetheless, the scope of age inequity is broad; people of all ages are subjected to age inequity. Aspiring arbitrators find it difficult to enter the market, while some older arbitrators are written off. As noted by Lee elsewhere, "[o]f the 27 arbitrators classified as 'Band 1' by Chambers & Partners in its annual list of 'Most in Demand Arbitrators' in the Global Market rankings, approximately 70% are over 70 and 18% are over 80."⁶⁷

Further, age diversity issues attract less attention because absent the disclosure of, as a minimum, year of birth, it is difficult to measure the age of arbitrators.⁶⁸ Despite this difficulty, the available statistics are noteworthy, and in this section, we will discuss both the available data on age and issues faced by arbitrators across the age spectrum.

The Importance of Age for Arbitrators

Recent research on age diversity in international arbitration shows that the "gray hair factor" remains valid.⁶⁹ It is an inevitable fact that age plays an important role in the selection of arbitrators.⁷⁰ However, age and experience are often linked, because one requires time to acquire experience. The average international arbitrator will have significant experience, usually as counsel and thus, is traditionally older.⁷¹

⁶⁶ White & Case 2021 International Arbitration Survey, *supra* note 50, at 16 ("[H]ow age diversity can be statistically measured in the absence of agreement as to how to define it in the first place.")

⁶⁷ Amanda J. Lee, *Outrunning the Shadows: The Arbitrator Shadowing Proposal*, 33 Am. Rev. Int'l Arb. __ (forthcoming).

⁶⁸ *Id.*

⁶⁹ Ingrid A. Müller, *Diversity and Lack Thereof Amongst International Arbitrators—Between Discrimination, Political Correctness and Representativeness*, TDM 4 (2015), <https://www.transnational-dispute-management.com/article.asp?key=2238#citation> ("It also addresses the 'gray hair factor', i.e., the fact that age (and not just experience) plays an important part in the choice of arbitrators.").

⁷⁰ *Id.*

⁷¹ Joseph Mamounas, *ICCA 2014. Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change*, KLUWER ARB. BLOG (Apr. 10, 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/> ("[a]n international arbitrator is senior in age and experience.").

Although the need for experience is not surprising, Professor Franck's survey of ICCA Congress participants found that the median international arbitrator was fifty-three years old, even though the median counsel was forty-six.⁷²

The ICC's statistics indicate that the average age of arbitrators sitting in ICC arbitrations in 2019 was 56.7—only 34% of arbitrators were under the age of fifty.⁷³ In specialized fields such as maritime arbitration, the average age may be even higher and the perception in investor-state arbitration is that arbitrators are much older. In short, available data would suggest that there is a lack of age diversity in international arbitration.

Sitting as an arbitrator requires experience, but mindful that arbitrations come in a range of sizes, with different levels of complexity, it should not be necessary

Descriptive Statistics of Gender and Age for All ICCA Subjects, the Subset of those Working as Arbitrators, and the Subset of those Working as Counsel

Variables	All	Arbitrators	Counsel
Subject Gender:			
Percentage (Frequency)			
Women	25.5% (n=134)	17.6% (n=46)	24.0% (n=99)
Men	74.5% (n=392)	82.4% (n=216)	76.0% (n=314)
<i>Total number of subjects</i>	<i>100% (n=526)</i>	<i>100% (n=262)</i>	<i>100% (n=413)</i>
Subject Age:			
Mean	48.5	54.4	48.0
Median	47.0	53.0	46.0
Minimum	24.0	29.0	24.0
Maximum	85.0	85.0	85.0
Standard deviation	12.7	11.7	12.3
<i>Total number of subjects</i>	<i>514</i>	<i>253</i>	<i>406</i>

to reach the age of fifty to gain sufficient experience to be capable of sitting. Most aspiring arbitrators are well placed to acquire adequate experience through professional practice, supplemented by practical training such as that offered by the Chartered Institute of Arbitrators ("CIArb"), before the age of forty. As a result, we should re-evaluate the relationship between age and experience, recognizing them as distinct concepts.

⁷² Franck, *supra* note 5, at 430 ("The median international arbitrator was a fifty-three-year-old man who was a national of a developed state reporting ten arbitral appointments; and the median counsel was a forty-six year old man who was a national of a developed state and had served as counsel in fifteen arbitrations.").

⁷³ Table provided by the INTERNATIONAL CHAMBER OF COMMERCE, ICC DISPUTE RESOLUTION 2019 STATISTICS 14 (2019), <https://globalarbitrationnews.com/wp-content/uploads/2020/07/ICC-DR-2019-statistics.pdf>.

Although arbitrators over the age of fifty receive the lion's share of appointments, they, too, face forms of age discrimination, such as parties seeking their disqualification based on perceived notions of physical or mental ability. This issue became the focus of much commentary when one of the parties tried to disqualify Swedish arbitrator Sigvard Jarvin as president of the arbitral tribunal in an ICC case in 2018.⁷⁴ The respondent argued that Mr. Jarvin, who was seventy-six years old at the time of the dispute, was incompatible with the proper conduct of a complex arbitration.⁷⁵ We must be mindful of the risk of ageism as we consider diversity and inclusion.

Consequently, age inequality in international arbitration is a multifaceted problem and as such requires a multi-pronged solution. Historically, arbitral institutions have taken the lead in addressing this issue. There are myriad young practitioner organizations affiliated with institutions that support and seek to develop the next generation of counsel and arbitrators. By way of example, the ICC's Young Arbitrators Forum ("YAF"), a global network with over 10,000 members, hosts more than 100 educational and social events every year.⁷⁶ Young ICCA, as well as other groups, offers both mentoring and educational programming.⁷⁷

Practitioners have also become increasingly proactive. The Rising Arbitrators Initiative was founded in 2020 with a view to supporting arbitrators and aspiring arbitrators under the age of 45 who have either had their first appointment or have a minimum of seven years of experience in practice.⁷⁸ Regional initiatives include the Association of Young Arbitrators, which brings together young African arbitration practitioners under the age of 40 and runs the successful African Arbitration Academy.⁷⁹

Arbitral institutions have also a role to play. For example, the International Institute for Conflict Prevention and Resolution ("CPR") has incorporated a "Young Lawyer Rule" into its arbitration rules, giving tribunals the discretion to permit junior lawyers to examine witnesses and present arguments if lead counsel and the client agree.⁸⁰ This provides junior practitioners with valuable

⁷⁴ Matteo M. Winkler & Mikaël Schinazi, *No Longer "Pale, Male, and Stale"? Approaching Diversity and Inclusiveness in International Arbitration*, SSRN, 9 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3776738.

⁷⁵ *Id.*

⁷⁶ See Young Arbitrators Forum, ICC, <https://iccwbo.org/dispute-resolution-services/professional-development/young-arbitrators-forum-yaf/> (last visited Oct. 29, 2021).

⁷⁷ See Young International Council for Commercial Arbitration, <https://www.youngicca.org/> (last visited Oct. 28, 2021).

⁷⁸ See *About Rising Arbitrators Initiative (RAI)*, RISING ARBITRATORS INITIATIVE, <https://risingarbitratorsinitiative.com/page/about-us.htm> (last visited Oct. 28, 2021).

⁷⁹ See Association of Young Arbitrators, <https://youngarbitratorsng.org> (last visited Oct. 28, 2021).

⁸⁰ CPR, *2018 CPR Non-Administered Arbitration Rules*, Rule 12.5 (2018) ("In order to support the development of the next generation of lawyers, the Tribunal, in its discretion, may 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. The Tribunal, in its discretion, may permit experienced counsel to

opportunities to make their mark. Lee has proposed elsewhere that individual arbitrators may provide similar encouragement.⁸¹

Unfortunately, despite all these efforts and initiatives, less than a third of respondents to the Queen Mary University 2021 International Arbitration Survey agreed that there has been progress in recent years in terms of age.⁸²

VI. LGBTQ+ REPRESENTATION: AN INVISIBLE REALITY?⁸³

Unlike gender, race, and age, there is limited data available on the sexual orientation of members of the international arbitration community. No leading arbitral institution has released any data on the sexual orientation of those sitting as arbitrators. Due to the sensitivities surrounding disclosure of sexual orientation, it is difficult to gain an accurate picture about LGBTQ+ representation in the field. However, strong LGBTQ+ role models in the field are just as welcome as female, ethnically diverse, and young role models for those seeking to progress. This section will explore the *status quo* and the potential for progress in achieving greater representation.

Is the Discussion Still in the Closet in International Arbitration?

As Justin D’Agostino MH recognized when commenting on the ICC’s plans to create a LGBTQIA network, the ICC, like international arbitration itself, “operates in jurisdictions where the legal, social or cultural context can be hostile towards LGBTQIA people.”⁸⁴ In light of the real risk that might exist to members of the LGBTQ+ community, the community has perhaps not even attempted to delve deeply into these issues, even when it comes to scholarly research.

One of the few sources of statistical data available is a survey conducted by Professor Benjamin G. Davis, which focused on, among other diverse categories, LGBTQ American lawyers. Of the 34 arbitration practitioners who responded, only five reported having “experience with LGBTQ American lawyers in

provide assistance or support, where appropriate, to a lawyer with significantly less experience during the examination of witnesses or argument. Notwithstanding the contents of this Rule 12.5, the ultimate decision of who speaks on behalf of the client in an arbitration is for the parties and their counsel, not the Tribunal.”).

⁸¹ Amanda Lee, *Championing the Junior Arbitration Advocate: What Can Arbitration Learn from Domestic Courts?*, AM. REV. OF INT’L ARB. BLOG (Feb. 10, 2022) <http://blogs2.law.columbia.edu/aria/championing-the-junior-arbitration-advocate-what-can-arbitration-learn-from-domestic-courts/>

⁸² *White & Case 2021 International Arbitration Survey*, *supra* note 50, at 15 (2021).

⁸³ We have chosen to use the acronym LGBTQ+ rather than one of the available alternative acronyms as the use of + is intended to be inclusive of all underrepresented sexual orientation minorities. The acronym LGBTQIA, which we use herein with reference to an ICC initiative, is used to refer collectively to those who are lesbian, gay, bisexual, transgender, queer (or questioning their sexual identity), intersex, and asexual/aromantic/agender (or allies). This abbreviation is used for ease and is intended to include people of all sexual identities and preferences.

⁸⁴ International Chamber of Commerce, *ICC Court to Build LGBTQIA Network* (July 30, 2021), <https://iccwbo.org/media-wall/news-speeches/icc-court-to-build-lgbtqia-network/>.

international arbitration.” Respondents had knowledge of three LGBTQ American lawyers who had been appointed as arbitrators, one who had served as lead counsel and three others who had been team members.⁸⁵

Initiatives to support LGBTQ+ practitioners are limited but beginning to become more visible. In 2020, the CPR released a “Diversity & Inclusion Model Clause” that allows parties to pre-commit to the selection of a diverse neutral in a three-person tribunal, including not only women and people of color, but also members of the LGBTQ+ community.⁸⁶ In 2021 the ICC announced its intention to establish an LGBTQIA network for ICC Court members.⁸⁷ Its objectives include “supporting members’ personal and professional development, sharing best practice and building understanding” of the LGBTQ+ community.

In the private sector, many law firms have taken steps to promote diversity by establishing diversity committees that focus on ensuring respect and promoting an inclusive work environment.⁸⁸ Such committees are a step towards inclusion. However, mindful of the sensitivities surrounding the disclosure of sexual orientation in an international field, where such disclosure may be dangerous in some jurisdictions, finding LGBTQ+ role models in arbitration can be difficult.

We noted above that various studies have concluded that diversity is essential for a myriad of reasons: legitimacy, innovation, better decision making, and more. Indeed, when delivering the CIARB’s Alexander Lecture in 2018, Ambassador Huebner noted that his views on diversity and inclusion had been shaped by the vantage point provided by aspects of his life, including his “neutral practice as a matter-of-factly out gay man in an interracial marriage.”⁸⁹

Data on the sexuality of arbitrators is not presently published by arbitral institutions. However, by collecting such information, which arbitrators may be asked to provide on a voluntary and strictly confidential basis, arbitral institutions can play an important role in measuring representation. This would give the arbitral LGBTQ+ community a means to quantify representation achieved to date, foster community awareness of LGBTQ+ practitioners, and provide insights into

⁸⁵ Benjamin G. Davis, *American Diversity in International Arbitration 2003-2013*, 25 AM. REV. INT’L ARB. 255, 262 (2014).

⁸⁶ See International Institute for Conflict Prevention & Resolution, Diversity Commitment Clause, <https://www.cpradr.org/resource-center/model-clauses/arbitration-model-clauses/diversity-focus>.

⁸⁷ Alison Ross, *ICC Court to build LGBTQIA network*, GAR (July 30, 2021), <https://globalarbitrationreview.com/icc-court-build-lgbtqia-network> (talking about ICC’s new network launch that comes with Claudia Salomon’s first month as president of said Court).

⁸⁸ In 2016, the Mexican but international firm Von Wobeser y Sierra, S.C created a Diversity Committee to directly attack the issue of diversity. In December 2019 and 2020, the firm obtained the recognition of LGBT Best Place to Work, a certification of the *Human Rights Campaign Foundation* (Fundación Campaña de Derechos Humanos) of Mexico. See <https://www.vonwobeser.com/index.php/our-firm/diversity> Many offices had followed the same steps.

⁸⁹ Lucy Greenwood, *Alexander Lecture 2018*, CIARB NEWS (Nov. 20, 2018), <https://www.ciarb.org/news/alexander-lecture-2018/>.

the success of initiatives such as the Diversity & Inclusion Model Clause, discussed above. Voluntary confidential disclosure is a worthwhile place to start.

VII. DISABILITY AND MENTAL HEALTH: STILL TABOO?

In July 2021, the ICC announced that it was creating a new task force on disability inclusion in international arbitration and welcomed expressions of interest from members of the arbitration community who wished to participate.⁹⁰ This is an important first step by a leading arbitral institution to make a meaningful commitment towards the inclusion of members of the arbitration community with disabilities and mental health issues in the wider diversity debate.

Practitioners have criticized the historical silence of the arbitral community on the representation of disabled practitioners.⁹¹ Following the ICC Task Force announcement, arbitration practitioner Simon Maynard shared his personal experience with issues of disability in international arbitration.⁹² Maynard noted that the ICC task force is the first time that lawyers with disabilities have been recognized in the diversity debate. He makes a number of recommendations to facilitate the inclusion of disabled practitioners in international arbitration, such as making reasonable adjustments for lawyers with disabilities in model procedural rules, relaxing dress codes, and the like. Maynard was subsequently appointed as one of the co-chairs of the ICC Task Force. It is to be hoped that the ICC Task Force will adopt many, if not all, of these recommendations in due course. We must also be mindful of mental disability and other forms of disability that might not be visible to the naked eye.

Need for More Reliable Data for Us to Appreciate the Full Extent of the Issue

There is very limited data presently available on the participation of people with disabilities, both physical and mental, in international arbitration. As noted above, it is important to recognize the stigma that still surrounds many “invisible disabilities,” particularly those relating to mental health, and the potential impact of such stigma on willingness to disclose disabilities.⁹³ The extent of this perceived stigma is exposed by the IBA in its recent report.⁹⁴

⁹⁰ See *ICC Court issues call for disability task force candidates*, ICC (July 7, 2021), <https://iccwbo.org/media-wall/news-speeches/icc-issues-call-for-disability-task-force-candidates/>.

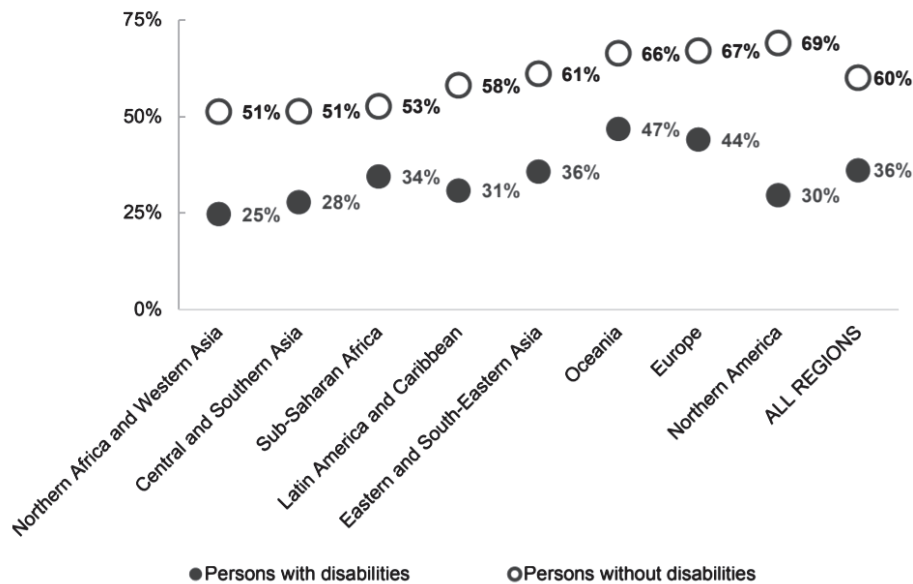
⁹¹ *Don't leave us out of the conversation: a personal perspective on disability inclusion*, GAR (Aug. 20, 2021), <https://globalarbitrationreview.com/diversity/dont-leave-us-out-of-the-conversation-personal-perspective-disability-inclusion> (“In the international arbitration community we are talking more and more about the importance of diversity, and rightly so. But, from my standpoint at least, there is often a vital perspective missing from those conversations – that of lawyers with disabilities.”).

⁹² *Id.*

⁹³ INVISIBLE DISABILITY PROJECT, <https://www.invisibledisabilityproject.org> (last visited Oct. 28, 2021) (Invisible disabilities are defined by the Invisible Disability Project as “any physical, mental, or emotional impairment that goes largely unnoticed. An invisible disability can include but is not limited to: cognitive impairment and brain injury;

Professor Davis's study, discussed above, notes that only one respondent reported having experience with a disabled American international arbitration lawyer.⁹⁵

We can however learn from other studies that have addressed disability. For example, a 2019 United Nations study concluded that people with disabilities have fewer employment opportunities than people without disabilities.⁹⁶ The study found that the employment-to-population ratio for persons without disabilities aged 15 years and older across eight geographical regions is 60%. In contrast, the ratio for persons with disabilities is 36%. This figure is broken down in the below diagram from the study:



The above figures are based on data from 91 countries and regions, for the period 2006-2016.⁹⁷ The study notes that people with mental health issues are denied access to education, employment, and other opportunities.⁹⁸

the autism spectrum; chronic illnesses like multiple sclerosis, chronic fatigue, chronic pain, and fibromyalgia; d/Deaf and/or hard of hearing; blindness and/or low vision; anxiety, depression, PTSD, and many more. We understand the body as always changing, so disability and chronic illness may be unstable or periodic throughout one's life.”).

⁹⁴ IBA, *Mental Wellbeing in the Legal Profession*, *supra* note 27 (“A stigma around mental wellbeing remains. Nearly half of all legal professionals surveyed indicated that a fear of the impact on their career would put them off discussing their mental wellbeing with their firm or organisation.”).

⁹⁵ Davis, *supra* note 83.

⁹⁶ UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *DISABILITY AND DEVELOPMENT REPORT, REALIZING THE SUSTAINABLE DEVELOPMENT GOALS BY, FOR AND WITH PERSONS WITH DISABILITIES* 152 (2018).

⁹⁷ Table provided by the United Nations, *id.* at 153.

⁹⁸ *Id.* at 211.

Moreover, the private sector, which underpins the international arbitration community, must address this issue collectively. One such initiative which has seen successful participation is the Global Business and Disability Network set up by the International Labour Organization, which provides a network for both local and global businesses to exchange ideas and practices on inclusion of people with disabilities.⁹⁹ This initiative is based on the principle of business-to-business support and peer-to-peer learning on disability issues. It also aims to highlight the business benefits of employing people with disabilities and their contribution towards the business.

The arbitration community may seek to develop similar networks, alongside identifying and implementing reasonable adjustments and collecting valuable data on representation, to address the issue of diversity and inclusion of people with physical and mental disabilities.

ARBalance, a new initiative that will produce programming and resources to promote wellbeing and support arbitration practitioners, aims to reduce stigma, and promote understanding and inclusion.

VIII. SOCIO-ECONOMIC FACTORS: A PRIVILEGED WORLD?

Socio-economic factors underpin a multitude of diversity deficits.¹⁰⁰ International arbitration is fiercely competitive, and many obstacles must be overcome if one is to both enter and succeed in this field. Those who do not come from wealthy or privileged backgrounds, those based in emerging jurisdictions, and those based outside leading arbitral seats face additional challenges that may be invisible and are difficult to measure.

Scholars have noted that the limited number of arbitrators from emerging jurisdictions who have made a name for themselves on the international stage have profiles that are very similar to those of the “grand old men” of arbitration: prestigious professional experience and appointments; academic accolades from Western institutions; well-received publications; international status and reputation.¹⁰¹ The sole difference: the need for arbitrators from emerging jurisdictions to “find access to and credibility with the center,” namely the center of the arbitration world, which focuses on major Western arbitral seats.¹⁰²

⁹⁹ See UNITED NATIONS, INTERNATIONAL LABOUR ORGANIZATION GLOBAL BUSINESS AND DISABILITY NETWORK 2020 ANNUAL REPORT (2020), <http://gbdn2020annualreport.altervista.org/ar-english-version.html>.

¹⁰⁰ Amanda J. Lee, *Children of the Revolution: Boldly Going Towards New Gender Diversity Frontiers in International Arbitration*, 87 ARB.: THE INT’L J. OF ARB., MEDIATION AND DISP. MGMT. 404, 418 (2021) (“Socioeconomic factors underpin every aspect of diversity, and compound historical inequalities.”).

¹⁰¹ YVES DEZALEY AND BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 25 (1998).

¹⁰² *Id.*

In this section, we will assess the current situation and discuss the challenges that aspiring arbitrators and counsel from different socio-economic backgrounds face.

Marble Ceiling in International Arbitration?

No empirical studies on socio-economic diversity in international arbitration are available for comparative analysis. The impact of socio-economic factors often differs by jurisdiction. For example, pursuing a poorly paid internship in a jurisdiction where higher education is free or heavily subsidized may be economically viable; moving abroad to do so while servicing significant education-related debt may be unmanageable.

The true impact of socio-economic factors is difficult to measure. Those who have succeeded in entering the field may carefully conceal having faced such challenges in the first place. Data about the income and profession of this elite group is of limited assistance; information about education, opportunities, nationality, language, jurisdiction and much more is required to paint a complete picture.

Today's practicing and aspiring practitioners are the counsel and arbitrators of tomorrow. For many, particularly aspirants based in emerging jurisdictions, absent a wealthy background, their options may be severely limited. Economic disadvantages may render even the strongest and brightest aspirants unable to pursue further academic study or accept positions that they have been offered. Even entry-level positions in the field are competitive. To distinguish between applicants, firms and organizations often focus on those who have undertaken specific qualifications, such as a Master of Law ("LL.M.") degree or participated in an international mooted competition.

Internships are often seen as a first step to practice. Aspiring counsel may intern at law firms, arbitral institutions, or non-governmental organizations ("NGOs") to gain practical experience. However, many internships are unpaid or badly paid.¹⁰³ Absent the means to finance living expenses and accommodation, aspirants must choose between debts and their professional dreams.

Simply put, socio-economic factors limit access. We cannot achieve true diversity until we address the socio-economic entry barriers that have been erected.¹⁰⁴

¹⁰³ See myArbitration, Amanda Lee on Arbitration Careers and Socio-Economic Diversity | Victoria Pernt, YOUTUBE (Mar. 12, 2021), <https://www.youtube.com/watch?v=VjnYFEBgr5I&t=100s>. See also Amanda J. Lee, *Children of the Revolution: Boldly Going Towards New Gender Diversity Frontiers in International Arbitration*, 87 ARB.: THE INT'L J. OF ARB., MEDIATION AND DISP. MGMT. 404, 415 (2021) ("Many internships are unpaid. Many more are badly paid.").

¹⁰⁴ See myArbitration, Amanda Lee on Arbitration Careers and Socio-Economic Diversity | Victoria Pernt, YOUTUBE (Mar. 12, 2021), <https://www.youtube.com/watch?v=VjnYFEBgr5I&t=100s>.

IX. RECOMMENDATIONS AND SOLUTIONS

To promote diversity and inclusion, we must focus on three (3) areas: (1) accurately measuring the status quo; (2) identifying who is responsible for taking steps towards progress; and (3) determining what steps must be taken. At every stage we also need to acknowledge our implicit and unconscious biases.

From our review of the available data, there is a dearth of available data about certain diversity and inclusion categories. It is helpful for the arbitration community to collect data in all areas of diversity to accurately measure where things stand and enable us to keep track of the impact of initiatives to address different aspects of diversity. Without data, it is difficult to tell how much further progress is needed. The inclusion of some forms of diversity in the annual reports of many arbitral institutions allows us to track progress and heightens the sense of shared responsibility. Data on gender, nationality, language, and age is useful, but the intersectional nature of diversity must not be forgotten.

Arbitral institutions are ideally placed to collect, analyze and release data on a broad range of diversity metrics. It is important to acknowledge the limitations of data collection, mindful that arbitrators may be unwilling or unable to disclose information about their sexual orientation or mental and physical disabilities. However, there may be greater willingness to disclose data about age, ethnicity, language, professional background, and other key demographic information, should details be requested after appointment.

The use of appropriate safeguards, such as confidential data submission and anonymization, may provide sufficient comfort to some arbitrators and permit more sensitive personal data to be collected. The greatest value is to be derived from intersectional datasets, enabling institutions to identify, for example, how many men and women of color under the age of 50 have been appointed in any given year.

As for who is responsible for taking steps to achieve positive change, the answer is both simple and complex—all stakeholders in the arbitration community are responsible. Such stakeholders are both the problem and the solution.¹⁰⁵ We must recognize that significant progress has been made on some diversity fronts—particularly in the promotion of gender diversity awareness—but there is still work to be done. Arbitral institutions, parties, arbitrators, counsel, law schools, special interest groups representing sectors of the community and more can play a part.

¹⁰⁵ Chiara Giorgetti, *Who Decides in International Investment Arbitration*, 35 U. PA. J. INT'L L. 431, 454 (2014) (“The international investment arbitrator selection system appears straightforward and effective from afar. Certain problematic issues become more apparent on closer scrutiny, however. First, some practitioners and experts have criticized the idea of the party-appointed arbitrator because of the possible built-in biases in favor of the party that appointed him or her. Second, critics have focused on the fact that a very small number of individuals make up the vast majority of arbitrators and that arbitration panels include too many repeat appointments and lack diversity.”).

As to what can be done, one of the challenges lies in empowering parties and institutions to appoint diverse arbitrators in greater numbers. Party autonomy is key in international arbitration. One of the key reasons why parties choose arbitration is because they have a choice in appointing the arbitrator. Efforts to promote diversity that impede on party autonomy are likely to be met with opposition from some quarters.

The first barrier that therefore needs to be broken is that of unconscious bias.¹⁰⁶ We must recognize our tired preconceptions and reformulate our views of what is normal and acceptable. The tendency to “equate the pale, male and stale profile with quality and qualification,”¹⁰⁷ needs to be actively reconsidered. Instead of only aiming to appoint those who have experience, parties should be educated about the benefits of diverse panel decisions making prompted by counsel and by institutional shortlists to consider and choose tribunals that are more diverse and include at least one woman and/ or some minority representation.

Arbitral institutions must continue to promote the value of diversity and educate users on the value of having diverse panels. Panels that continue to be “male, pale and stale” will, over time, come to be seen as defective, as they do not reflect the composition of society in a broad sense.¹⁰⁸ Where appointments are being made by arbitral institutions of prospective arbitrators, they should propose a more diverse list of arbitrators. Co-arbitrators engaged in choosing a presiding arbitrator should likewise broaden the pool of arbitrators that they consider for selection.

It is easy to forget the other stakeholders in this debate that also have a responsibility: law schools, law firms and academics. As gateways to the arbitration field (and law in general), law schools are well-placed to provide tools to diverse applicants to address and raise awareness of the effects of implicit and explicit bias in law. One such tool is mentoring opportunities.¹⁰⁹ Law schools

¹⁰⁶ *Id.* at 454.

¹⁰⁷ Samaa A. F. Haridi, *Towards Greater Gender and Ethnic Diversity in International Arbitration*, 2 B.A.H.R. CHAMBER FOR DISP. RESOL. INT’L ARB. REV. 305, 315 (2015) (“The problem is recognizing our subconscious tendency to equate the pale, male and stale profile with quality and qualification and to actively fight that tendency.”).

¹⁰⁸ Mirèze Philippe, *Redressing the Balance: The Path Ahead for Gender and Generational Diversity on Arbitral Tribunals*, KLUWER ARB. BLOG (Oct. 31, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/10/31/redressing-the-balance-the-path-ahead-for-gender-and-generational-diversity-on-arbitral-tribunals/> (“‘Pale, male and stale’ does not reflect the composition of society, and there lies the problem. Everyone bears a responsibility in cultivating diversity. Promoting the talents in dispute resolution should be the main objective, and this clearly includes women and young practitioners who are often excluded.”).

¹⁰⁹ Haridi, *supra* note 105, at 315–16 (“As the most common entrance to the arbitrator pipeline, change needs to begin in law schools. While nearly half of law school graduates are women, law school faculty, the source of students’ early mentors who help them determine whether a field like arbitration presents a viable career path, is still heavily male, with limited racial and ethnic diversity. Law schools should make an effort to ensure that diverse students have the same mentoring opportunities that white male students enjoy.”).

should ensure that women, students of color and other diverse students have the same access to mentorship opportunities that white male students have. This would help them to build a support network to support their future careers.

Law firms also have an equal responsibility in this regard and must ensure that diverse lawyers are given the same opportunities as their counterparts including the ability to make mistakes and learn from them. As discussed above, arbitral tribunals are usually composed of senior professionals. If firms are not promoting their lawyers equally, the chances of being in the spotlight and securing partnership will not be equal. Having a good support network is also key to securing one's first arbitration appointment.¹¹⁰ Law firms are in key positions to provide that support network and other networking opportunities that are usually restricted to the "pale, male and stale" profile.

Diversity cannot be achieved without action to promote inclusivity. For example, increased emphasis has been placed on the need for conference panels to better represent the diversity of the international arbitration community, with pressure being placed on organizers who do not include women to do so. The publication of data allows progress to be tracked and analyzed. The normalization of such practices is an important step forward.

Some stakeholders have gone further. Judicial Arbitration and Mediation Services, Inc ("JAMS") offers a model clause enabling parties to contractually commit to promote diversity in arbitrator appointment.¹¹¹ Diversity commitment clauses are also being promoted by organizations like the CPR, allowing parties to demonstrate a commitment to fair representation.¹¹²

X. CONCLUSION

Although progress has been and continues to be made, a diversity crisis remains that strikes at the heart of the arbitral process. The available data presents an incomplete picture. Gender diversity continues to dominate the international arbitration diversity dialogue, with hard-won progress towards parity remaining

¹¹⁰ *How women thrive in international arbitration*, GAR (Mar. 8, 2016), <https://globalarbitrationreview.com/london-how-women-thrive-in-international-arbitration> ("A good support network is particularly important in gaining your first arbitrator appointment, it was noted.").

¹¹¹ *JAMS Introduces Inclusion Rider, Promotes Diversity Initiatives in ADR*, JAMSADR (May 29, 2018), <https://www.jamsadr.com/news/2018/jams-introduces-inclusion-rider-promotes-diversity-initiatives-in-adr#:~:text=JAMS%2C%20the%20first%20major%20ADR,fair%20representation%20as%20soon%20as>. ("[t]he 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.").

¹¹² *See* International Institute for Conflict Prevention & Resolution, Diversity Commitment Clause, <https://www.cpradr.org/resource-center/model-clauses/arbitration-model-clauses/diversity-focus>.

slow. A pressing need for more data about women who are being appointed remains—absent such information, it is difficult to draw conclusions about the success of initiatives promoting intersectional gender diversity across the globe.

For other areas such as race, the available data focuses on the geographic representation of parties and arbitrators. To see through the looking glass, we need to know more about the ethnicity of stakeholders. The situation is similarly opaque with regard to the true extent of age diversity, the influence of socio-economic factors and professional background, and the extent of disabilities.

Absent further reliable data, the view through our diversity kaleidoscope remains frustratingly out of focus. In this regard, it is important to acknowledge that meaningful representation may look different for different types of diversity. In particular, the establishment by Western and international law firms of diversity committees and communities supporting LGBTQ counsel, may provide support to LGBTQ+ members of the international arbitration community seeking to progress in the field, but sexuality remains a topic of significant sensitivity.

We have come a long way. The pre-2016 dearth of data has been replaced with a steady, albeit limited, stream of statistical information on appointments by gender, nationality, language, and sometimes age. However, more data is needed: we cannot tackle the “glass ceilings, sticky floors, and bottlenecks” that remain unless and until we can appreciate their scope.¹¹³

For parties, inserting diversity commitment clauses in arbitral agreements demonstrates a meaningful commitment to fair representation. For arbitral institutions, greater acknowledgement of the intersectional nature of diversity when collecting and publishing data would be welcome. For law firms, addressing bottlenecks in the counsel and arbitrator pipeline, educating parties on the benefits of diverse tribunals, and providing adequate support for diverse practitioners are worthwhile goals.

Although we have cast the net wide in this article, there remain other important diversity frontiers to be explored, including professional background and language, to name but two. Every member of the international arbitration community has a role to play in addressing the diversity crisis. Only by continuing to work towards positive change can we hope to bring our kaleidoscope into focus.

¹¹³ Prof. Adam Grant, Speech at the 12th Annual LCLD Membership Meeting (Oct. 19, 2021).

