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Summary of Young-OGEMID Symposium No. 16 on "Diversity in International Arbitration" (October - November 2022)

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

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Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Summary of Young-OGEMID Symposium No. 16: “Diversity in International Arbitration” (24 October - 4 November 2022)

Organised and moderated by **Dr. Eva Litina** and **Dr. Piotr Wiliński** (Senior Young-OGEMID Rapporteurs)

Introduction

I am pleased to announce the start of YO's sixteenth virtual symposium. As many of you know, a virtual symposium involves a series of pre-identified panelists who write somewhat detailed posts reflecting different perspectives on a particular issue. The panelists' presentations are sent over series of days so that other listserv members can comment on the various points raised by the panelists and by other listserv members. Although it is often best if people try to respond to the most recent presenter, sometimes a particular email string is so interesting that it inspires continued discussion among the listserv members. In that case, there is no prohibition on referring back to an earlier point. If anyone has any questions about the process, please feel free to contact me offline.

Today's topic: Diversity in International Arbitration

Arbitration has faced considerable criticism for lack of diversity in terms of gender, age, and race. There is a lot of discussion and surveys on lack of diversity in international arbitration, while several initiatives aim to promote the inclusion of women, younger arbitrators and different racial groups in international arbitration. Join us as our experienced international panelists provide useful and novel insights into this important topic.

Panelists:

- Monday 24 October - **Carolyn Lamm & Jennifer Ivers**, *Gender diversity*
- Wednesday 26 October - **Katherine Simpson & Ben Davis**, *Ethnic diversity*
- Friday 28 October - **Victoria Kigen**, *Age diversity*
- Monday 31 October - **Johnny Tan**, *Professional diversity*
- Wednesday 2 November - **Umika Sharma**, *Regional diversity and empirical findings*
- Friday 4 November - **Joshua Karton**, *Wrap up/different dimensions of diversity*

I will provide a more detailed bios on each of their presentation days. However, it is now time to introduce today's speakers.

Today's speakers:

Carolyn B. Lamm: Carolyn is a Partner at White & Case LLP in Washington, D.C., where she regularly serves as lead counsel in high-stakes, cutting-edge cases, successfully resolving significant international arbitrations involving international corporations and sovereign clients. She also serves as lead counsel in arbitration-related litigation. Among other positions, Carolyn is Chair of the ICCA Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings.

Jennifer A. Ivers: Jennifer is a Senior Associate at White & Case LLP in Washington, D.C., where she focuses on international arbitration and litigation. Among other positions, Jennifer is a Member of the ICCA Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings. She previously worked in the Office of the Chief Counsel for International Commerce at the U.S. Department of Commerce. The views expressed herein are her own and are not representative of any employer.

Carolyn and Jen, the floor is yours!

All best,

Dr. Eva Litina, LLM NYU, PhD



Topic 1 - Carolyn Lamm & Jennifer Ivers, *Gender Diversity*

Dear all,

We are thrilled to be part of Young-OGEMID’s Symposium on Diversity in International Arbitration and to post on the important topic of gender diversity.

As Chair (Carolyn) and a Member (Jennifer) of the ICCA Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings (the “Task Force”), we have been privileged to work with representatives of prominent arbitral institutions, law firms, organizations, and initiatives to promote the importance of gender diversity over the last several years. Most recently, in September 2022, the Task Force published a 2022 Update to its original 2020 Report,¹ which expanded its analysis of data on the appointment of women arbitrators from 26 arbitral institutions around the world, and incorporated advice from more than 70 women arbitrators on pathways to success in the field. The Task Force also provided recommendations on how to promote the careers of women in international arbitration, including how young practitioners can gain a foothold in the field and can take steps to obtain their first appointment. We hope that you will find the recommendations to be a useful resource in building your own practice!

Neither the 2020 Report nor the 2022 Update are intended to be a comprehensive record of publications, ideas, or recommendations regarding gender diversity, but instead are intended to highlight and celebrate a range of issues and initiatives. Our hope is that, by compiling such information, we can spur productive conversation – including on forums like Young-OGEMID – about how to promote and elevate the careers of women.

While the 2022 Update contains more data than we could shed light on here, we wanted to flag a few of the Task Force’s statistical findings, in the hopes of spurring discussion during

¹ <https://www.arbitration-icca.org/icca-reports-no-8-report-cross-institutional-task-force-gender-diversity-arbitral-appointments-and>

this present Symposium. As the data reflects, and as shown in the table below, from 2015 to 2021, we have seen a yearly increase in women as a proportion of all arbitrator appointments, rising from 12.6% in 2015, to 26.1% in 2021:

	2015	2016	2017	2018	2019	2020	2021
Institutions	24.9%	26.2%	32.5%	32.6%	35.1%	37.1%	37.9%
Co-arbitrators	10.1%	12.9%	19.6%	20.8%	22.1%	26.4%	27.1%
Parties	7.9%	10.2%	14.9%	15.3%	16.1%	19.4%	17.9%
Overall	12.6%	14.6%	19.7%	20.8%	22.8%	24.8%	26.1%

While the proportion of women appointments has more than doubled since 2015 – thanks in large part to efforts by the institutions and to initiatives such as ArbitralWomen and the Equal Representation in Arbitration Pledge (among many others!) – there is still work to be done. Despite substantial attention devoted to gender diversity, it remains that only slightly more than a quarter of all arbitrator appointments in 2021 were of women, and less than one-fifth of all appointments by the parties were of women in the same year. The progress made to date, moreover, has not always been linear. We note, for example, that the proportion of women appointed by the parties grew fairly steadily on an annual basis from 2015 to 2020, but decreased from 2020 (19.4%) to 2021 (17.9%).

As practitioners in arbitration, are you surprised by any of these statistics? Do you expect the proportion of women appointments to continue to rise, or is it possible that they will reach a plateau and stagnate?

In its 2020 Report and 2022 Update, the Task Force also strove to identify a variety of concrete steps that different members of the arbitration community – including law firms, arbitration institutions, and young practitioners aiming to obtain a first appointment – can take to continue to promote gender diversity going forward. In your view, and based on your own experiences, what are the most effective steps that individuals, institutions, law firms, and other organizations can take, in order to ensure that we continue to make progress in advancing gender diversity in arbitration in the future?

Best regards,

Carolyn Lamm and Jennifer Ivers



Shreya Jain:

Dear Carolyn, Jennifer,

Thanks for a very insightful post.

While I haven't had a chance to read through the ICCA Task Force Report fully, I'd be keen to hear your thoughts on a couple of points:

1. While the absolute progression in diversity is important, these numbers may not present the full picture if they represent the same (narrow) pool of female arbitrators receiving repeat appointments. Is this an issue you encountered while reviewing statistics for the ICCA Task Force Report?
2. As with other areas, the gender diversity gap in international arbitration is far more acute when viewed from an intersectional lens. For instance, geographic diversity amongst female arbitrators still seems to be relatively limited and a majority of the appointments appear to be of American or European origin. For instance, out of the 30 Indian arbitrators appointed in ICC tribunals (based on the publicly available data on ICC's website, which includes information for ICC cases registered as of 1 January 2016), only one was a woman. My colleagues and I had analysed this and other institutional statistics in some detail in a post on Kluwer Arbitration Blog last year.²

I'd be interested in hearing if the ICCA Task Force Report sheds any light on these two factors. Further, in your collective experience, how pervasive are these issues in the industry, and how can we start to tackle them?

Kind regards

Shreya Jain

Principal Associate

Shardul Amarchand Mangaldas & Co



Dr. S.I. Strong:

Dear Carolyn and Jennifer,

Many thanks for this intriguing start to the symposium.

One of the things that some of my fellow female arbitrators and I have discussed over the years is the nature of the proceedings that we are asked to resolve. Certainly in our early years - which appear to last much longer than men's "early years" - we are only appointed on low-value matters or on matters that might not even qualify as commercial. For example, one leading provider consistently appoints us to consumer matters rather than commercial matters, even though we are not listed on a consumer roster. While this is of course merely anecdotal evidence, the question arises as to whether women are being put on panels that are of less value than those of men and/or if women are not being able to progress up the rank to more complex matters, which often carry a higher remuneration rate, either because of the number of hours spent (if

² <https://arbitrationblog.kluwerarbitration.com/2021/09/28/growing-gender-diversity-in-international-arbitration-a-half-truth/>

compensated hourly) or because of the value of the dispute (if compensated based on a percentage of the amount in dispute).

Did your study address these issues, or can you speak about them from your personal experience?

Thanks!

Dr. S.I. Strong,

The University of Sydney, The University of Sydney Law School



Michael Mcilwrath:

Stacie, as for the longer “early years”, there is data on this. Mirèze Philippe (recently retired from ICC and a contributor to the 2020 ICCA TF Report) was the first to systematically track gender in appointments, and she included data on age.

As of 2017, she reported progress in frequency of appointments, but also noted that there remained a ten-year gap between female and male arbitrators, with the average age of 48 for women and 58 for men.

To your point, this likely correlates with the value of disputes, i.e., the average woman is younger because she is being appointed in smaller-sized disputes. As I believe Mirèze explained, this could be seen as a pipeline/career issue. Accepting appointments in lower value disputes is how many people build case management skills and name recognition (and “start small” is even one of the recommendations of the 2020 ICCA TF report). But the reality is that the average 58-year-old male arbitrator was able to start small and begin career building when women were not being appointed with much frequency at all, hence the 10-year gap.

Michael Mcilwrath

PS: Mirèze received the CPR diversity award for her work collecting and reporting this data.



Earvin Delgado, MCI Arb:

Dear Carolyn and Jennifer,

The arbitration community has definitely hit several milestones in terms of improving gender diversity in the appointment of arbitrators albeit at a slow pace.

I do agree that the initiatives of international arbitration bodies, arbitral institutions as well as various arbitration groups have definitely helped in forwarding this cause, but I am curious as to what programs or initiatives are taken on account of the corporate parties themselves.

For instance, among the 5,000+ signatories of the ERA Pledge as of October 7, 2022, the majority of the signatories are law firms and barristers' chambers. How do we encourage corporate parties to appoint more women arbitrators for their respective arbitral tribunals?

Earvin Delgado, MCI Arb



Dr. Eva Litina:

Dear Carolyn and Jen,

Many thanks for your insights.

Further to Shreya's points on how the statistics can present a full picture of diversity in international arbitration, I was wondering whether you also considered the inclusion of data on maritime (e.g. LMAA) and commodities trade (e.g. GAFTA) arbitrations. There is a large number of disputes resolved by arbitration in these associations (e.g. see LMAA Statistics³) and data on diversity would be definitely of interest to the international arbitration community.

I would be interested in the Task Force's views on this.

Dr. Eva Litina



Christian Campbell:

Thank you, Eva, all, for putting on this symposium.

Carolyn and Jennifer concluded with,

“In your view, and based on your own experiences, what are the most effective steps that individuals, institutions, law firms, and other organizations can take, in order to ensure that we continue to make progress in advancing gender diversity in arbitration in the future?”

I don't know, but I would really like to hear some (new) ideas.

³ <https://lmaa.london/wp-content/uploads/2022/03/Statistics-up-to-2021-for-website.pdf>

My experiences are mostly with law students and recent law graduates interested/involved in dispute resolution and international law: at that stage, the “pipeline” is full of smart, well-educated, and hardworking women (“more than half”, I would say).

What happens then?

Christian Campbell

Center for International Legal Studies (CILS)



Sophie Nappert:

Please see below. Is the ICCA Task Force looking at the remuneration gap in international arbitration?

A new report by the Bar Council has revealed that women earned 34% less than their male colleagues at the bar in 2021. Although an improvement on the 2020 stats, which put the pay gap at 39% ... <https://www.legalcheek.com/2022/10/new-report-reveals-34-pay-gap-between-male-and-female-barristers> (*Oct 25 2022*)

Sophie Nappert

Arbitrator, 3VB



Carolyn and Jennifer:

Dear all,

Many thanks to Shreya, S.I., Michael, Eva, Christian, Earvin, and Sophie for your insightful questions and comments. We note at the outset that the observations expressed are only those of Carolyn and Jennifer. We will convey the observations to the Task Force for discussion and consideration, but cannot speak for the Task Force.

Shreya, first, with respect to your question regarding repeat appointments, this is a topic that we were eager to cover in the 2022 Update, as we also were curious regarding women and repeat appointments. The 2022 Update thus includes data for 2020 and 2021 from several arbitral institutions (*see* pages 42-25 of the 2022 Update). We found that, in both years, approximately one-third of all appointments were repeat appointments (33.0% in 2020 and 35.6% in 2021). When breaking the numbers down by gender, we found that, in 2021, 37.0% of women arbitrator appointments were repeat appointments (reflecting 356 repeat appointments that year), while 35.2% of appointments of men as arbitrator were repeat appointments (reflecting 964 repeat appointments that year). The data reported is that as collected by the arbitral institutions.

We do recognize, however, that one limit of the collected data is that it does not identify whether an individual was appointed more than twice in any given year. The LCIA, however, has published such information, which provides some additional insight. In 2021, 58.5% of all arbitrators appointed in LCIA arbitrations were appointed only once during the calendar year; 20% of arbitrators were appointed twice; 7% of arbitrators were appointed three times; and 4.5% of arbitrators were appointed four or more times in that year. According to the LCIA, such repeat appointments are due in part to appointments in related cases, and largely are nominated by the parties and by co-arbitrators. (See LCIA Annual Casework Report, page 20).⁴ We hope to see more data like this from other institutions going forward.

Second, we completely agree with you that much work is left to be done with respect to intersectionality – the Task Force in fact cited to your post on Kluwer Arbitration Blog to highlight the importance of intersectional analysis! (See 2022 Update, page 5). With the 2022 Update, we started to gather information about the nationality of women arbitrators (see pages 66-68 of the 2022 Update); however, such data is not collected by most institutions. On the basis of the data available, we reported that, among the 590 appointments of women arbitrators in 2021, nearly half (45.4%) of those appointments were of women holding nationalities from Western Europe and the United Kingdom. Women holding nationalities from Asia (18.1%), Latin America and the Caribbean (12.9%), and the United States and Canada (11.2%) made up the majority of the remainder, with smaller proportions of women holding nationalities from Australia and New Zealand (4.1%), Africa (2.5%), and the Middle East (1.9%).

The data, of course, is necessarily confined by the limited number of institutions that collect such data, differences in defining each region, and whether and how to account for dual nationalities (which we were unable to do here). Assembling such data is beyond the current scope of work for the Task Force. Substantial work would be required to continue to collect such intersectional data, not only with respect to gender and nationality, but also with respect to geography, race, religion, age, and sexual orientation – we look forward to seeing more analysis by you and others on these topics!

Eva, thank you again for hosting us and for your comment. The Task Force's current analysis does not include data with respect to maritime and commodities trade, such as the LMAA or the GAFTA. We agree that this would be a fascinating perspective to take in the future, in particular, to consider whether there are differences in the appointment of women in those specialty areas.

S.I. and Michael, it is lovely to get your views as well. Mirèze also is a member of the Task Force, and we applaud the truly fantastic work on gender diversity she has accomplished over the years. We were privileged to get her input on the 2022 Update as well.

The value of disputes is certainly a consideration in appointments. As Michael noted, and as is discussed in the 2022 Update, many of the women arbitrators who responded to our survey noted that they were able to obtain their first and even subsequent appointments by taking on

⁴ <https://www.lcia.org/LCIA/reports.aspx>

smaller-value cases; they then grew their practice as an arbitrator from there, obtaining larger appointments over time. The key lies in being able to subsequently obtain appointments of higher value of disputes – and it often is difficult to “break into” the high-value or high-profile cases. Doing so requires gaining a stellar reputation (both in appointments to the smaller-value cases and in all of your other work as counsel or otherwise), networking throughout the field, and continuing to promote your skillset.

Christian, thank you for raising the point about issues with the “pipeline” of women arbitrators. There are numerous factors that lead to fewer women at the top of the profession and who act as arbitrators, despite near-parity in the numbers of men and women graduating from law schools.

The Task Force looked at both limits on the availability of sufficiently experienced women to act as arbitrators (so-called “leaks” in the pipeline) and impediments to the appointment of already-experienced women arbitrators (so-called “plugs” in the pipeline) (*see* pages 89-117 of the 2022 Update). With respect to leaks in the pipeline, one significant issue is the retention of women in the legal profession generally, including in particular the retention of women in law firms. Relatedly, the lack of flexible working arrangements may trigger further attrition of women lawyers at law firms, and the more frequent travel in international arbitration – for client meetings, hearings, business development, and networking – may also cause women to step back. The impact of unconscious bias, as well as harassment and bullying, also contribute to fewer women from advancing in the profession.

Once women do reach high levels of the profession, moreover, there remain obstacles to obtaining arbitrator appointments (the “plugs” in the pipeline). Among other things, women may not be included in the lists of arbitrators considered for appointment, in particular, those considered by the parties for appointments. This in part may be because, at the initial stage of compiling such lists, there is less publicly-available information about qualified women candidates, as compared to men. Another barrier is an aversion to appointing someone with no prior experience as an arbitrator, which makes it difficult for any individual to receive their first appointment – a problem that may be compounded for women due to issues such as unconscious bias.

Earvin, you bring up an important point – corporate parties have significant influence over the approach taken in selecting arbitrators. Corporations can commit to doing more by making public statements or signing existing open letters that support diversity, including with respect to their approach to retaining and working with outside counsel at law firms. Corporations may, for example, require the representation and promotion of women in their legal counsel teams, and can take proactive approaches to developing relationships with the more junior, diverse women on their counsel teams.

As you noted, the ERA Pledge is one such pledge that is open to corporations for signature. In December 2020, the Corporate Sub-Committee of ERA Pledge published Corporate Guidelines for Implementation of the ERA Pledge, which are intended to provide corporate signatories with a framework for concrete steps to implement the diversity aims of the

Pledge.⁵ Raising awareness of the ERA Pledge and the Corporate Guidelines is essential to moving the needle on this – and hopefully attracting more corporations to sign and implement the Pledge in upcoming years.

Other initiatives and ways in which corporate parties can contribute to advancing gender diversity are detailed in pages 141-151 of the 2022 Update.

Sophie, pay disparity is another key issue that can cause women to leave a private law practice for other positions, and contributes to the problem of retention of women in the legal profession. The Task Force unfortunately did not have capacity to review this issue in detail in its 2022 Update, but we certainly will flag it for consideration in the future.

Thank you all again for your comments thus far – we are so pleased to see such interest in the important topic of gender diversity!

Carolyn and Jennifer

Topic 2: Katherine Simpson & Ben Davis, *Ethnic Diversity*

Dr. Eva Litina:

Dear all,

After a fascinating initial discussion, it is time to introduce our second panelists, who will focus on issues relating to **ethnic diversity in international arbitration**. You are of course welcome to continue the discussion on the first string - we welcome parallel analyses!

Dr. Katherine Simpson, FCI Arb. is an attorney, arbitrator, and expert witness based in Ann Arbor, Michigan (Simpson Dispute Resolution) and London, U.K. (33 Bedford Row Chambers). She is a Fellow of the College of Commercial Arbitrators. Dr. Simpson got her start in international arbitration in 2010 as Tribunal Secretary to Prof. Karl-Heinz Böckstiegel. She was hooked after her first high value oil and gas arbitration, and expanded into a boutique offering Tribunal Secretary services to several leading arbitrators. She returned to the U.S. in 2015 and began serving as arbitrator in international and domestic commercial disputes. She is currently expanding her practice to serve in labor matters (which inspired how the Iran-US Claims Tribunal operates), and was recently added to the Federal Mediation and Conciliation Services (FMCS) panel. Dr. Simpson has been involved in some of the most influential cases of the past decade, including ICC 15416 (shortlisted as GAR’s 2012 “Most Influential Damages Decision”), ICSID Case No. 13/35, UP v. Hungary, (GAR’s 2019 “Most Important Award”), and ICSID Case No. 14/21, Bear Creek v. Peru, where a lawfully granted mining concession became unusable, owing to the failure of a “social license.”

⁵ <https://www.arbitralwomen.org/launch-of-the-era-pledge-corporate-guidelines/>

Dr. Simpson is currently Vice Chair of the Ray Corollary Initiative (RCI) – a non-profit organization that aims to improve ADR’s legitimacy by increasing the number of diverse neutrals that are appointed to resolve cases. To accomplish this, the RCI encourages those who appoint arbitrators to ensure that at least 30% of every short list (or slate) is made of up “diverse” neutrals. Dr. Simpson’s other diversity initiatives include “CETA – Where are the Women”, which proved that there are instances where women are simply not given the same opportunities to obtain arbitral appointments as their male counterparts, despite being equally qualified. This project prompted the European Commission to sign the Equal Representation in Arbitration Pledge, and to create a new roster of neutrals for trade and investment cases. Dr. Simpson co-authored the “The New List - Arbitrators of African Descent”, which is now available as the “Directory of Black Arbitrators” on Arbitrate.com.

Benjamin Davis, Emeritus Professor of Law was a faculty member since 2003, tenured since 2008 and Full Professor since 2015 of the University of Toledo College of Law from which he retired in January 2021. Visiting Professor of Law at the University of Illinois Chicago School of Law in the Fall 2021 and a Visiting Professor of Law at Washington and Lee University School of Law in the Spring 2022 and the Fall 2022 and Spring 2023. Visiting Professor of Law at the University of Toledo College of Law in the Fall 2022. Prior to joining the University of Toledo faculty, Associate Professor at Texas Wesleyan University School of Law (now Texas A & M School of Law) 2000-2003.

Professor Davis teaches in the areas of Contracts, Alternative Dispute Resolution, Domestic and International Arbitration, Public International Law, Commercial Law and International Business Transactions. Graduate of Harvard College (BA 1977) and Harvard Law School and Harvard Business School (JD-MBA 1983). Articles Editor of the Harvard International Law Journal.

Between 1983 and 1986, worked in Paris, France as a Development Consultant in West Africa, and as a Strategic Business Consultant with Mars and Co in Europe. In 1986, became American Legal Counsel at the International Court of Arbitration of the International Chamber of Commerce in Paris, France. Supervised directly over 1000 international commercial arbitration and mediation cases, made filings before courts around the world on behalf of the ICC, assisted with the drafting of arbitration laws in countries such as India and Sri Lanka, and led conferences in Eastern and Western Europe, North America, and Asia. In 1996, promoted to Director, Conference Programmes and Manager of the Institute of World Business Law where he organized training sessions on international contracts, dispute resolution, project finance, and electronic commerce, turned around the Institute, and conferences on electronic commerce and other topics.

Creator of fast-track international commercial arbitration in 1991 and the creator of the International Competitions for Online Dispute Resolution (ICODR) (2000-2005) by which students from around the world competed in online negotiation, mediation, arbitration and litigation.

Has given numerous presentations and speeches around the world. He was a contributing editor at Jurist. He has published dozens of articles on topics related to international and domestic arbitration, online and offline dispute resolution, and international law including diversity in international commercial arbitration. Regular contributor to the Think Tech Hawaii podcast every two weeks.

Prepared an amicus curiae brief to the US Supreme Court in the GE v/ Outokumpu international commercial arbitration case in 2020. Retired member of the New York Bar and the Supreme Court of the United States Bar. Chevalier, Ordre des Palmes Academiques of the Republic of France.

Katherine and Ben, the virtual floor is yours!

Dr. Eva Litina



Dr. Katherine Simpson, FCI Arb.:

Thank you, Eva, for getting us started!

Dear YO,

One of the more difficult truths in the discussion about DEIB is that the arbitration profession has been unwilling and, therefore, unable to effectively use all of the talent that is available to it.

Some will argue that this is not really a problem, and I disagree. Arbitration and DEIB should be having their day in the sun – the “court” of arbitration was the only court that was open and solving cases for the entire pandemic. Yet, even with increasing caseloads, institutions are slowly divulging that, following publication of the ICCA Report, the appointment of at least female neutrals decreased in the last fiscal year. I wonder whether the appointment of racially diverse neutrals suffered as well.

The current flight from the Energy Charter Treaty and the activities of others seeking to dismantle ISDS in favor of permanent panels (where people are appointed following applications and based on skills and not on who-you-know) might be the result of this long-term unwillingness to engage “diverse” neutrals. Eventually, the parties – yes, the same parties who bear the ultimate responsibility for appointments, even when they are advised by counsel – vote with their feet when arbitration does not live up to its promises.

So, what can we do to save arbitration from itself?

Why not diversity?

We all like the idea of merit-based appointment. And we find the idea of excluding someone because of a “diverse” characteristic to be repulsive.

Why not recognize that there is no intellectual, experiential, training, or academic scarcity or deficiency that explains the under-appointment of women or people of color?

(While there are certainly differences in the prejudices faced by different groups, the silo-ing off of different diversities is not always helpful. For example, some imagine that an imbalance in the upper echelons of the legal profession translates to an imbalance in arbitration... but if that were accurate – and it is not – then that scarcity fails to account for the under-appointment of women and people of color who are under 45, as compared to white male arbitrators! When one silos off the diversity discussion, one misses the whole picture and - with it - an opportunity for myth-busting.)

I hope that we can use our time together over the next 2 days to think about ways that we can improve arbitration by increasing and expanding the opportunities that diverse neutrals have in arbitration.

Dr. Katherine Simpson, FCI Arb.



Emeritus Professor Ben Davis:

Thank you, Katherine, for your excellent introduction to this topic of ethnic diversity and thank you to Young-OGEMID for this opportunity to engage.

First, let me note that I understand Young-OGEMID has a focus on persons under 40. In this field that would seem to describe the persons in this group as being junior associates, senior associates, and maybe junior partners at law firms. Also relatively young barristers or solicitors. Also, relatively young professors some pre-tenure and some tenured. Also, counsels and secretariat leadership at arbitration institutions. Also, possibly secretaries of arbitral tribunals. There may also be students studying in the field here I would guess.

If I have somehow not captured the universe of Young-OGEMID please enlighten me.

Second, I am 66 years old and a has-been. No interest in being a mediator, arbitrator or counsel so take what I write for what it is worth.

Third, reiterating what Katherine wrote, breaking down diversity into silos is something of a problem for me. Gender, ethnicity, race, age, sexual orientation, disability, nationality, religion etc can all be found in the same person and focusing on one aspect exclusively and the burdens related to that specific aspect for discussion feels a bit artificial. It is important to break down silos and see the whole person.

Fourth, so let us break down silos a bit. If you are in one of those roles I described above is where you work a place where there is ethnic and other diversity? At the entry, mid, and higher levels or not? It is very possible that the lawyers where you work are not ethnically

diverse as some work by Dr Katherine Simpson demonstrated on American law firms in international commercial arbitration (Katherine Simpson, International Commercial Arbitration Diversity: The Numbers Are Askew, JURIST – Professional Commentary, June 17, 2020).⁶

If the lawyers where you work are not ethnically diverse, ask yourself why? Do you really think that there are no ethnically diverse candidates out there who could do the work where you are? What about the other types of diversity that may be found in a candidate? Do you really think that the lack of diversity where you work is normal?

International commercial arbitration does have as its hallmark a capacity to do what I use to call cultural gymnastics: being comfortable dealing with clients of many backgrounds and tribunals made up of persons of different national and experiential backgrounds. How does where you work shape up in terms of having people with that capacity? Is it a bit monochromatic?

If you are considered the « ethnically diverse » person where you work, ain't it grand! I have been that person most of my career. Ask yourself whether there have been others before and how have they fared in making progress in that place that you work. Notwithstanding all that you may hear or see in official statements, is there a glass ceiling for people like you? Why?

Fifth, think of the last time (if it has happened) you were tasked at helping make an arbitrator selection - maybe coming up with a list of candidates with due diligence done about them. Was it truly a task or a fool's errand? Did your list consist of only old or older white men? If your list included candidates who were diverse on gender, race, nationality etc, when you submitted your list to the senior associate or junior partner or senior partner what happened to those candidates in the selection of who to recommend to the client as a possible candidate for being a co-arbitrator, sole arbitrator, or Chair of an arbitral tribunal? What was said to include or exclude those candidates? Was it an honest task or did you see your effort was a fool's errand? And what did you learn from that experience?

With the client, how did they communicate what they wanted in the arbitrator selected?

Have you heard comments made at your work that show a disdain for certain « kinds of » people? Please do not expect me to be naive. I once was informed by a boss that there are certain types of people that you don't need to worry about having their respect. I once was told when I first went to Hong Kong to beware because, you know, Chinese people hate black people. I asked the white person in disbelief, « all 1.4 Billion Chinese people! Really? » Same story was told to me when I went to India the first time. Same answer from me. « All 1.1 Billion Indians? Really? ». Hope you see my complete discounting of the prejudice being expressed by that person to « help » me.

It is a kind of insanity really to be working in international commercial arbitration where you are required to do cultural gymnastics on the one hand. Yet, at the same time to have such a working environment that is monochromatic in its vision.

⁶ <https://www.jurist.org/commentary/2020/06/katherine-simpson-international-arbitration-diversity-part2/>

Sixth, there is an old adage that many know that a fish rots from its head. How are the leaders where you work in terms of being open minded in the sense of being gate openers or closed minded in terms of being gate keepers against ethnically diverse candidates? Do they have a « we have to keep out the barbarians » type of attitude that I once heard the late US Supreme Court Justice Scalia summarize as what he was doing. Who are the barbarians?

Seventh, it is sometimes said it is very normal to think of being comfortable to work with people who are like you. But, does not that question beg the question of what do you mean by « people like you »? Is there something beyond having a passion for the work that makes someone « like you » in a way someone else is « not like you? »

Are you building your capacity to deal pleasantly with people who are different from you on some metric of what is diverse? Is that something really encouraged where you work? In your life?

Are you expanding the type of persons with whom you are comfortable or staying in the same traces or rut?

Finally, everything or at least most of what you hear about pipelines and all that is to me just a rationalization by those at the top about why they stay at the top. Don't get me wrong. People have to prove themselves. But, in my experience, there are vast numbers of people of diverse backgrounds however defined and including race capable of doing this kind of work, but there are mind games played by those who are at the top to rationalize why they do give opportunities only to some in their « in group » as opposed to others.

If a person of color is being considered, do you immediately think they are an « affirmative action or positive discrimination » candidate used in a disparaging way? Did you think that about the new Prime Minister of the United Kingdom? If you did not, then why are you thinking that way about this other person?

In closing, to all - but especially to the underrepresented - own your brilliance as I say to my students and make your way. Do not let the limitations of those around you limit your sense of what you can accomplish and should strive towards. Those are their mind games, do not internalize their mind games.

Look forward to interacting with any and all today. Please note that my approach is full contact in that I welcome any comment and am happy to engage with anyone. If by some happenstance, I hurt a feeling here or there, ask yourself why possibly would my words cause you such hurt.

So with that introduction taking a famous line from a Captain America movie, « Before we start, would anyone like to leave? »

Emeritus Professor Ben Davis



Dr. Katherine Simpson, FCI Arb.:

I just had a wonderful conversation in response to Ben and my prompts.

The path to the U.S. federal judiciary used to be entirely “who you know.” The result, in addition to nearly all judges being white and male, was that many judges didn't know what they were doing – they were great at knowing the right people, but not so great at case management. Judgments were oftentimes unintelligible, and delays in civil cases were so great as to raise constitutional concerns!

The problem was described by Griffin B. Bell as follows:

"A person could not expect to be considered for one of these positions unless he or she knew a senator personally, knew someone who did, or was owed some political favor by that senator. Exceptions from this mold were few. Notwithstanding, many excellent judges and US attorneys have emerged through the years from just such a process. Its deficiencies have been largely that the pool of potential candidates has been very limited and that there has been a general unevenness in the quality of candidates." (For more on that, see *The Diversity Dividend*, 52 University of Toledo Law Review 447 (2021)).⁷

One might see a strong parallel in the appointment of arbitrators. While many talented arbitrators have made it, the “who-you-know” appointment process is not one that guarantees that the “best” arbitrator reaches the parties (though some may get lucky).

President Carter changed this, and this - his "other human rights record", by requiring an application process to ensure the merit-based selection of judges. The result was that Carter appointed only people who knew what they were doing, and that he also appointed more women and more people of color than had all prior presidents combined.

There are some arbitral institutions and public institutions that seem to carry on in this tradition. Obviously, they have an interest in arbitration living up to its promises, and they have application processes to ensure that only the best arbitrators will be admitted. They also offer or require coursework to ensure that all on their roster of arbitrators have the requisite skill.

While I have seen this in the public sector and at arbitral institutions (who have the best record in diverse appointments), I've not seen it among private firms. Are there any firms that similarly vet their candidates?

How are your firms selecting arbitrators? How do arbitrators get onto your firm's radars?

⁷ https://05822ab2-040d-4ab2-b655-01eb3b695887.filesusr.com/ugd/09cd0f_10fc0a862f1544198bcdba07d6fa971b.pdf

Is there something in your arbitrator selection or the way that arbitrators get onto your firm's radars that makes it more or less likely that a diverse candidate will be appointed?

Dr. Katherine Simpson, FCI Arb.



Dr Lucas Clover Alcolea:

If I might go on a slight tangent, I had a few thoughts about the statement that “The current flight from the Energy Charter Treaty and the activities of others seeking to dismantle ISDS in favor of permanent panels (where people are appointed following applications and based on skills and not on who-you-know) might be the result of this long-term unwillingness to engage “diverse” neutrals. Eventually, the parties – yes, the same parties who bear the ultimate responsibility for appointments, even when they are advised by counsel – vote with their feet when arbitration does not live up to its promises”

The reasons as to why Investment Law, or more properly ISDS, is in crisis are complex and multi-faceted. At most diversity (in the sense in which I believe it is used here) is one of those facets and I do not think it could even be considered the most important one. The fundamental problem is, in my view, ideological. Sornarajah would have called it neoliberalism and I think he is pretty much on the money. Appointing X arbitrators from Y developing countries would not, on that view, help the situation unless those arbitrators did not have the same ideology as all the other arbitrators. That is not at all guaranteed as there are plenty of supporters of neoliberalism and the current investment law system from developing countries, particularly Latin America (consider in the political/economic context the ‘Chicago Boys’ and their successors). In consequence, if one accepts that the investment law system has a problem and that that problem is ideological, the fix is ideological diversity, not necessarily diversity based on other characteristics (though that may also help it need not necessarily).

Now you could make the argument that developing states are chronically underrepresented and better representation would lead to a system that reflected their concerns (Sundaresh Menon alluded to this in his Lalive lecture back in 2021), as well as a more general point that those from X country (wherever that might be) are better suited to understand the public policy concerns in what, according to Menon, has become a transnational form of public law. However, I think this is heavily subject to qualification re ideology, appointing someone who has the same ideology as many other arbitrators will not help change the system. The solution then might be appointing more people outside the ‘club’ wherever they might be from. Speaking from experience I know many specialist programs in investment law (e.g. LL.Ms, certificate programs etc) are very diverse but what they teach is, in general, the same (I would argue) pro-investor investment law as anywhere else and that, with a few honorable exceptions, is the same in the law firms that graduates from these programs intern and, eventually, work in. In other words, they become members of ‘the club’. I am unsure that

appointing such individuals would necessarily solve the ideological crisis of investment law, unless of course they (and some do) hold views different from what they were taught.

Complicating this of course is that flight from the ECT is, in my view, ultimately driven by developed states deploying many of the same arguments that they rejected developing states deploying vis-a-vis state sovereignty, the importance of host state control etc... This might be because investment flows are now not necessarily one way so that we now live in a multipolar world, but it surely also has something to do with ideological change.

Dr Lucas Clover Alcolea

University of Otago | Te Whare Wānanga o Otāgo



Earvin Delgado, MCI Arb:

Thank you for your discussions, Dr. Simpson and Prof. Davis!

While I do agree that merit-based appointments are ideal, there is still a lot of imbalance. For instance, the acquisition of these merits itself would be a challenge. The majority of the training for arbitrators would be based in North America or Europe. An arbitrator from a Global North country could access these, but one from a Global South country would face more challenges to even have his/her/their foot at the door. The same can be said for educational attainments, bar qualifications, and more.

I have also observed that there is unspoken pressure on non-white arbitrators and arbitration professionals, especially the up-and-coming ones, to successfully assimilate themselves into the predominantly white arbitration sphere. This not only manifests itself in the classic "working twice as hard" mentality but also in aiming for qualifications that are deemed impressive by Western standards. These include finishing their degrees in top Western schools (e.g. Ivy Leagues, OxBridge, renowned arbitration programs in continental Europe, Australia, North America, etc.), and aiming for qualifications easily identifiable by their Western counterparts.

I hope to learn more as the discussion continues!

Earvin Delgado, MCI Arb



Emeritus Professor Ben Davis:

Dear Mr. Delgado,

Thank you for your comments.

The acquisition of these merits is difficult.

As to the training, as you well know, there are hierarchies in the law and hierarchies in paths of work in the law. What those are in each country I do not know but I have seen them in the US and France up close.

Getting an advanced degree at one of the places you describe does get you to be a member of a certain club which in turn may make someone more interesting to those lawfirms that select for those markers.

Those Global South persons who demonstrate their excellence at home also have the opportunity to create approaches to being in the field.

Those Global South persons who do come to the Global North firms etc are under pressure to imbibe the hierarchies there in order to get ahead. My worry is for that person working “twice as hard to get half as far” being damaged by that inordinate oppression on their psyches, their families, and their lives. It is sick in my view.

As to trainings, I would point out that next week there is Cyberweek at ODR.info run by the National Center for Technology and Dispute Resolution of the University of Massachusetts. If you look at the Fellows, you will see persons from all over the world working on the use of technology and dispute resolution - working on it for over 30 years.

And it is free and it is online.

There are people like Alberto Elisavetsky in Argentina and ODRLatinoamerica which have been doing far more remarkable work than any in the Global North or at least at the same level.

I also think of Global East and Global West as other visions that might help us see the same world but in a different way.

Hope that helps.

Emeritus Professor Ben Davis



Dr. S.I. Strong:

Thanks, Earvin. As you talked about the assimilation point, I also remembered the issue of asking people from underrepresented groups (be it gender, race, nationality, whatever) to sit on committees and boards to offer "the diverse" perspective (as if there were only one, but that's a different issue). The thing that concerns me is that this is often unpaid/unbillable work, and the people who are being asked to do these things are already suffering from having to work twice as hard, as you say.

Any thoughts from our panelists on how to ensure the diverse perspectives without overworking the individuals in question? Of course the easy answer is to hire more diverse individuals so that the work is evenly spread, but what to do until then?

Dr. S.I. Strong,



Emeritus Professor Ben Davis:

Stacie,

It is unpaid work that is usually not rewarded by the hierarchies as compared to other unpaid work.

On the other hand, given the time we are in and the place we are at in terms of diversity it is a burden that diverse people carry in any space they are in. Just try to wear it lightly and not as a burden. I am of the first generation of some modest number of black lawyers going through historically white institutions.

As to a “diverse perspective”, one advantage of diversity is improving the thinking rather than being stuck in certain group thinks. Imagining and making happen a fast-track international

Commercial arbitration back in 1991 as an example. It can make for better decision making. If it is heard, which is another whole discussion.

Emeritus Professor Ben Davis



Dr. Katherine Simpson, FCI Arb.:

Dear Stacie,

I think that this unpaid work is actually expert work where companies should be hiring diversity consultants. Just like no one should expect me to be an expert in "all things white woman" based only on the fact that I was born that way, no one should expect anyone else to be able to represent all views from their demographic. And on that - not all people think the same (and there is no singular "Black view" or "Woman view") or should be assumed to have the best interest of everyone in their demographic in mind when making decisions. A diversity consultant, however, can be paid to have those interests in mind and to be aware of the different cross-cutting views that exist.

Mariana Strategies is very good: <https://www.marianastrategies.com/>

One's views and advocacy also need not be limited to their demographic - one can see and fight against racism while being white.

Here is one way that Black attorneys are addressing discrimination against Black hair: <https://www.arlnow.com/2022/10/26/legal-minds-are-convening-in-arlington-to-tackle-discrimination-against-black-hair-at-top-firms/>

Dr. Katherine Simpson, FCI Arb.



Dr. Katherine Simpson, FCI Arb.:

Racial discrimination is like throwing away all of the timely applications that arrive on a Tuesday, simply because one secretly hates Tuesdays. Sure, it cuts the number of applications that one has to read and some justify it with notions of efficiency, but you might be throwing the best CV in the bin for a reason that has nothing to do with the abilities of that person.

You could cut the inventor of fast-track arbitration from your applicant pool that way.

Dr. Katherine Simpson, FCI Arb.



Dr. Katherine Simpson, FCI Arb.:

Dear All,

Thank you for your responses this morning. Let's get to the topic of racism, ethnocentrism, and racial discrimination and what you are doing within your companies to address it.

Today's responses barely touch on the actual issue – namely, that fully (and highly!) qualified Black and Brown (non-white) neutrals are being overlooked and underappointed, despite their credentials and abilities.

I note that many of the responses are full of “thought-terminating clichés” (short, conclusory statements that impede critical thought about an issue and undermine or avoid further discussion of a topic. (More on thought-terminating clichés in arbitrator appointments, and busting the “pipeline” myth⁸)

For example, “the arbitrators are all part of a club”-cliché avoids discussion of whether there is a club, how one becomes a member of the club, the merits of the club, breaking away from a club, and “if there is a club that has so many old white men and so few women and so few people of color in it, how does one not recognize that it is not a club, but a rally and that one needs to go home right now!” Countries are voting with their feet, i.e. “going home right now”, rather than attempt to appoint more diverse neutrals.

⁸ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4051922

The response related to a lack of educational opportunities also, for me, missed the mark. It is a comforting cliché that the training opportunities are not available. I say it is “comforting” because, if it were true, it would mean that there is no racism, and all we have to do to end inequality is invent a few scholarships. No change in behavior would be required – appointments would just solve themselves. The argument, however, assumes that racial minorities are not as trained as white arbitrators, which is simply not true. Despite at least equal training, Black and Brown arbitrators are under-appointed, and there is no lack, absence, or deficiency in training or experience that explains this underappointment.

I recall the educational conversation being identically presented when I was in studying. What’s changed since then, is that we have had a pandemic that forced all of this training online. If you want the CIArb credentials, you can now earn them online. Oxford? Online. (But, further – few leading arbitrators have actually been trained in arbitration. Sort of makes you wonder why more young people who have been so trained aren’t being hired or appointed and whether some of this training is even "necessary").

Looking forward to more today - hoping to hear about how your organizations are making plans to hire and appoint diverse neutrals.

Dr. Katherine Simpson, FCI Arb.



Topic 3: Victoria Kigen, *Age Diversity*

Dr. Piotr Wiliński:

Dear All,

Many thanks for all the speakers for their interventions and for the audience engaging in a discussion so far!

Today's theme is 'Age diversity in International Commercial Arbitration'. As Eva mentioned, do not hesitate, however, to continue a discussion on the previous strings as well!

The topic of age diversity will be introduced by **Victoria Jeruto Kigen**, a Kenyan licensed attorney with over 6 years’ experience in dispute resolution, is currently a Case Counsel at the Nairobi Centre for International Arbitration (NCIA). Victoria is responsible for handling NCIA administered proceedings.

She is involved in cutting-edge International Arbitration projects driven by the African Arbitration Academy (AAA), among other Arbitral Institutions and investment regimes (i.e., AfCFTA) in Africa. She has also served as a counsel and adviser in commercial and construction arbitrations under domestic and foreign arbitral regimes as well as ad hoc arbitrations under UNCITRAL and other procedural rules. She is lauded as a young and upcoming arbitration practitioner in Africa and is listed in the Arbitrators of African Descent

with a US Nexus list August 2020 issue. She is an Executive Committee member of the Rising Arbitrators Initiative (RAI) and an ambassador of Racial Equality for Arbitration Lawyers (R.E.A.L).

Victoria holds an LL.B. from the Catholic University of Eastern Africa (CUEA), Kenya, Post-graduate Diploma in Law from the Kenya School of Law (KSL) and the White & Case International Arbitration LL.M. from the University of Miami School of law, USA. She is also published in the field of Arbitration and ADR. She is fluent in English, Kiswahili, and Kalenjin.

Dr. Piotr Wiliński

Assistant Professor, Erasmus University Rotterdam



Victoria Kigen:

Dear YO,

In the recent years, there has been growth of numerous organizations seeking to promote age diversity and inclusivity, Young-OGEMID being one of them. While acknowledging that indeed experience comes with age, we also need to be cognizant of the fact that experience may not be acquired without being given a platform to learn. The dialogue surrounding age diversity has been about closing the age gap in the practice of international commercial arbitration between the more experienced and older arbitrators and their counterparts who are getting into the field or are already in the field but still gaining “experience,” so to speak. The question is then, how old is “old” and how young is “young” in the practice of international arbitration?

Should age matter? It seems like it does, as it appears that there is a general concurrence that young and upcoming arbitrators need support with the development of organizations/forums that provide young and upcoming arbitrators a platform for growth in both experience and knowledge. In addition to young-OGEMID, I could name but just a few organizations, and in no particular order of preference just to give you a feel of their existence; Rising Arbitrators Initiative, Young ICCA, CIArb – Young Members Group, Association of Young Arbitrators in Africa, ICC Young Arbitrators Forum, and Young ICSID, among others. I truly applaud these organizations for providing to young arbitrators not only a platform for growth but also a voice in the practice of International Commercial Arbitration.

The common purpose of these organizations has been to encourage professional development of young and upcoming arbitrators, create a support network and encourage best practices in arbitration. Most of these organizations have required that a young and upcoming arbitrator be under age 45.

Having mentioned the general perception that a young arbitration is considered to be under age 45, have you ever considered how this age requirement came about? Does it mean that if

you are under 45 you are young?, and what are the implications of being within that age gap in the practice of international arbitration?

Most of us will agree that dialogues surrounding age diversity emanates from general acknowledgment that there is a gap not only in appointments of arbitrators but also appearing as counsel in international arbitration fora. Are you convinced that this gap truly exists?

For purposes of this discourse, reference is made to the ICC Dispute Resolution Released Statistics from 2017 – 2020 (4 years) that provides a statistical overview of age diversity in the appointment of arbitrators.

The 2020 Report⁹ indicates that, “**the average age of arbitrators confirmed or appointed by the ICC Court was 56 years. In total, 37% of the individuals confirmed or appointed as arbitrators were under the age of 50.** Arbitrators appointed by the ICC Court (directly or following a proposal by an ICC National Committee) were, as in previous years, approximately six years younger than the global average (50.5 years). The average age of women acting as arbitrators in ICC Arbitrations was 49 years. Women appointed by the ICC Court were approximately three years younger (46 years)”

In 2019 the Report¹⁰ equally showed that, “**the average age of arbitrators confirmed or appointed by the ICC Court was 56.7 years. In total, 34% of the individuals confirmed or appointed as arbitrators were below the age of 50.** Arbitrators appointed by the Court (directly or following a proposal by an ICC National Committee) were, as in previous years, approximately five years younger (51.5 years). The average age of women acting as arbitrators in ICC Arbitrations was 50.5 years, and women appointed by the Court were approximately five years younger (46.7 years).”

The 2018 Report¹¹ also provided that, “**the average age of arbitrators confirmed or appointed was 56 years.** Arbitrators appointed by the Court (directly or following a proposal by a National Committee) were, as in previous years, approximately five years younger. **In total, 35% of the individuals confirmed or appointed as arbitrators were below 50.**”

Finally, the 2017 Report¹² revealed that, “**the average age of arbitrators confirmed or appointed was 56 years.** Arbitrators appointed by the Court (directly or following a proposal by a National Committee) were, on average, five years younger. **Eight percent of the individuals confirmed or appointed as arbitrators were below 40**”.

At first glance to the aforementioned statistics, there seems to be a consistent average age of arbitrators confirmed or appointed as 56 years. There also seems to be a rise in the percentage of appointment or confirmation of arbitrators below 40 years from 8% in 2017 to a range of between 34%- 37% from the year 2018-2020 when appointing individuals below 50 years.

⁹ <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/>

¹⁰ <https://www.icc.fi/wp-content/uploads/ICC-Arbitration-2019-report.pdf#:~:text=International%20Chamber%20of%20Commerce%20%28ICC%29%20-%20Dispute%20Resolution,and%2018%20under%20the%20ICC%20Appointing%20Authority%20Rules.>

¹¹ https://library.iccwbo.org/content/dr/STATISTICAL_REPORTS/SR_0041.htm#TOC_BKL1_2_3

¹² <https://iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf>

Are you surprised by these statistics? Do you suppose that there will be an improvement or none thereof, within the coming years?

Indeed, several arbitral institutions have taken their commitments in encouraging diversity seriously evidenced by their dispute resolution reports. However, countable reports have provided statistics on age diversity, rather, a major focus has been statistics on geographical and gender diversity. We need more statistics to gauge where we are and what we should do to close the age diversity gap.

As evidenced above, numerous platforms that provide young arbitrators not only avenues for growth but also a voice in the practice of International Arbitration already exist. There is more to be done to reduce the age diversity gap in arbitrator appointments as well as counsel representations. Discussions surrounding age diversity should be encouraged, ranging from providing statistics on such appointments, continuous dialogues such as this, amongst other avenues.

In your view, and based on your own experience – what are the most effective ways to ensure that there is a close in age diversity gap in the appointment of arbitrators or selection of counsel representing a client before a tribunal?

Victoria Kigen



Joseph M. Matthews, P.A.:

Dear Victoria, Piotr and All,

I hesitate to post first after Victoria's excellent opening on this critical subject, but here goes.

Assuring that young lawyers (and other professionals) have opportunities to develop early in their careers is part of the professional obligation of every lawyer, as a member of the profession. That has been my view since I benefited from the commitment of several senior lawyers who were my mentors and made certain that I had opportunities in the earliest years of my practice development. I am eternally grateful for the roles they played more than 40 years ago in my professional development.

This individual obligation of all lawyers who achieve a certain level of success is essential, but not nearly sufficient given the diversity of practice settings for our profession broadly. Even in the world of international commercial arbitration, if junior practitioners must depend on the elite multinational firms that have dominated the practice to develop their skills, it will never be enough. Those firms do a spectacular job of training brilliant young lawyers in my view, but they can never do that on a large enough scale.

In the trial bar in the United States (and also in the bars of common law jurisdictions that have independent bars) I spent more than 30 years trying to fulfill my personal obligation and also trying to address structural problems that restrict the opportunities for young lawyers and barristers to develop the trial skills needed to become accomplished barristers and trial lawyers. There, I believe the primary hurdle was created by the ever increasing cost of providing civil justice in most modern judicial systems. I know the old saying that no case is small to the client, but there needs to be a large number of disputes with modest amounts involved capable of resolution by younger professionals and the cost of providing counsel in those cases needs to be low enough to make sure they are available for younger lawyers to handle. In the U.S., we have labeled it the “disappearing jury trial” for the last quarter century and the statistics are undeniable there. There have been some modest successes with experiments such as “summary jury trials.”

To directly answer Victoria’s question, “...what are the most effective ways to ensure that there is a close in age diversity gap in the appointment of arbitrators or selection of counsel representing a client before a tribunal?” I offer the following observations:

International Commercial Arbitration is at a very different stage with respect to growth and opportunities, both domestic in most countries and internationally, than most developed civil justice systems. Until the pandemic taught us that we have to move significant portions of dispute resolution online, it was not uncommon or incorrect to observe that international commercial arbitration was never intended to serve as a cost effective alternative to domestic litigation or arbitration. It was an expensive process from the beginning, intended to serve the interests of mostly wealthy transnational businesses. But now that we know remote proceedings can be conducted fairly and produce results that are acceptable to the parties, I hope that international arbitral institutions will all work to promote less expensive and more readily available online procedures that will hopefully attract many more disputes to resolution in such forums. If that happens, there should be hundreds of thousands and maybe millions of new disputes involving smaller amounts of money and these will hopefully provide more opportunities for younger lawyers to develop the skills needed to serve as counsel and arbitrator in international commercial arbitration. The skills required to act as counsel on behalf of a small business seeking to obtain a \$100,000 arbitral award it can then enforce under the New York Convention are the skills required to serve the most sophisticated parties in transnational arbitral disputes. There just aren’t enough of them to give thousands of young practitioners their chance.

International Commercial Arbitration and the institutions that serve it, need to treat the attraction of smaller disputes as part of their essential mission if the necessary number of cases to give thousands of younger professionals a path to a successful career in international commercial arbitration is to exist.

On a personal note, I am enormously proud of Victoria, who obtained her LLM in International Arbitration from the White & Case LLM program at my alma mater, the University of Miami School of Law. She is an example of how one international law firm, and its leader, Carolyn Lamm, have helped develop young practitioners in the field of international commercial arbitration well beyond those who work directly for the firm. White & Case is not alone in that regard, but even those efforts will not be sufficient for the thousands of young arbitration practitioners.

Joseph M. Matthews, P.A.



Victoria Kigen:

Dear Joe, Dear All,

I truly appreciate your comments emanating from the vast experience you have garnered in this field. Your personal testimony of having benefited from mentorship in your earliest years of development truly attests to the fundamental nature of mentorship to arbitrators in their early years of practice. The benefits of good mentorships ring close home as I can credit my development thus far to mentorship from many experienced practitioners in the field, including you, Joe. Indeed, the White and Case International Arbitration LL.M. program boosted my skills and provided a platform to a then young, and eager practitioner with a hope of getting into the field of International Arbitration - I can say that the skills and mentorship gained still remain invaluable.

For a young practitioner, it is always beneficial to start small, and learn the ropes as Joe has explained in detail - I couldn't agree more.

Going digital during pandemic and post-pandemic has truly been a game changer as Joe has mentioned. I can give an example of my experience as a Case Counsel at the Nairobi Centre for International Arbitration (NCIA). Since most cases are now conducted either fully virtual or in a hybrid of physical and virtual platforms, I have seen an influx of young counsels successfully appearing as lead counsels - this has been quite fascinating to watch and it is a hope that more of such opportunities will continue being given to young practitioners to help them hone their skills and experience.

Victoria Kigen



Dr. S.I. Strong:

Dear Victoria,

Thanks for this interesting start to this segment of the symposium. A few years ago, I conducted a multifaceted empirical study (international survey, semi-structured interviews and coding of arbitral awards and judicial decisions), studying how judges and arbitrators analysed commercial disputes. Though the primary purpose of the study was to measure any differences across the judicial-arbitral, national-international and common law-civil law divides, I also asked questions in the survey and interviews about the extent to which participants changed their reasoning style over time. My goal was to see whether the preference for more senior arbitrators in arbitration was justified.

My study showed quite clearly that the vast majority of people do not change their reasoning style over time, suggesting that a discriminatory bias in favor of senior individuals is misplaced. This is not to say that people straight out of law school should become arbitrators, but that a 35 year old with 10 solid years experience could be as good as a 55 year old with 30 years experience and perhaps even a 65 year old with 40 years experience. There may very well be other elements that can and should be tested, but the concept of a change or maturation of reasoning style is not borne out empirically. For those who are interested, a link to the book shows below:

<https://global.oup.com/academic/product/legal-reasoning-across-commercial-disputes-9780198842842?cc=au&lang=en&>

Dr. S.I. Strong



Daniel Pakpahan:

Dear Victoria,

Thank you for your enlightening post. I find it fascinating to see students and young lawyers increase their own visibility by establishing networks across the different age groups within the 'young' (under 45) spectrum (Very Young Arbitration Practitioners, Paris Baby Arbitration, etc.) which helps in addressing the growing demand for networking and mentorship. Indeed, finding a good mentor is always crucial in propelling one's career since a young age.

As alluded elsewhere in this symposium, there is certainly a disparity of access to premier training and education in arbitration law, which limits many young people from getting exposed to working with highly-qualified practitioners in the field. This affects the availability of access to mentors. In addition, not all mentors are equal, not all have the time to invest in the development of their mentees. The question is

therefore what do you think are the key traits of a good mentor, and is there a tip to spot a good mentor early on?

Furthermore, do you think that virtual mentorship programmes and social media sufficiently bridge this gap between the age groups? Perhaps you have tips on how one could get the best out of such programmes, during or after the mentorship period.

Many thanks for engaging in this discussion.

Daniel Pakpahan, Young-OGEMID Rapporteur



Victoria Kigen:

Dear Daniel,

Thank you for your comments and questions. As you have rightly pointed out, finding a good mentor is always crucial in propelling one's career. The key traits of a good mentor include but are not limited to; availability, enthusiasm, ability to give feedback, accessibility, possession of expertise in the practice, and most importantly must be passionate in offering mentorship. Tips I could give for identifying a mentor will be from my personal experience.

As I had previously mentioned, I have had several mentors in my career journey and one common thing I have noted about them is their accessibility is unquestionable. You can easily see this through their participation in mentorship fora, for example Young ICCA Mentoring Program which I highly recommend, having benefited from the program and I still maintain contact with my mentor. Additionally, you may consider attending arbitration conferences and socializing with more experienced practitioners who may eventually end up being your mentors. I could easily say that there is more than one avenue - the greatest tip is for a young practitioner to put themselves out there, be willing to learn and most of all be confident.

The world is truly becoming a global village with the development of technological modes of communication. COVID 19 escalated the need to do more things virtually, and virtual mentorship has not been left out. Having experienced the Young ICCA mentorship program virtually in 2018, I must say it was one of the best mentorship programs I was in. My mentor was based in the US, and co-mentees were from different nationalities. I was able to make friends whom I have maintained to date and my mentor has always been available to provide advice and guide me through my career path. I would say virtual mentorship helps to close the age gap as it provides an opportunity to meet mentors who you may not have been able to meet in person, possibly because of distance or complex scheduling.

To benefit from such virtual mentorships, I would advise to keep in touch, keep asking questions. You may also benefit from meeting in person. You may also offer to do projects with your mentor so that you can learn in practice.

Dear Stacie,

Thank you so much for conducting this great study, I am truly fascinated by the results. I have read with great delight the results of your empirical study suggesting that a discriminatory bias in favour of senior individuals is misplaced. This is quite encouraging to young practitioners that really they have a place on the table.

The fact that people do not change their reasoning style over time is just to say that the foundational training is a core requirement in becoming an expert in this field. Training can be obtained through specialized studies, mentorship, and hands-on practice. These avenues are available and it is for young practitioners to identify and take advantage of them earlier on.

Victoria Kigen



Joseph M. Matthews, P.A.:

Dear Daniel, Victoria, and all,

Daniel's question about the relative value of virtual vs. in person mentoring relationships is a good one. Victoria's experience with the Young ICCA virtual mentoring relationship is common among the people I have asked and is consistent with my own experiences. Her advice is excellent.

There are too many variables and moving parts in these relationships for me to offer my own advice. Instead I will share some specific personal examples that may help you to reach your own conclusions based on your own personal traits:

1. I have had a relationship with another geezer who, like me, sometimes posts on this listserv despite the fact that neither of us qualifies as "Young." Stacie lets us hang around you guys virtually. My friend and I "met" possibly a dozen or more years ago, most likely as the result of our postings on the OGEMID forum. Over the years we have communicated primarily by email, telephone, and Zoom, and we had never met in person. We met last night for the first time at a reception and dinner with many ICC folks who are in Miami for the annual ICC conference here. We both know a fair amount about each other's family, interests, etc. He has certainly benefited my professional career in international arbitration, though he probably does not think of himself as one of my mentors. He qualifies in my book, even though I am significantly older than him. Two observations about our in person meeting last night that address Daniel's question. A) I am 5'6" tall and he

is about 6'5" tall. B) Because I have never been comfortable in large social events where the ambient noise level is high, and that discomfort has increased significantly as I have gotten older, I found myself developing the normal headache and reached the normal conclusion that just as I was getting to an enjoyable part of a one-on-one conversation, either I or the other person was dragged to another semi-conversation with another person in the crowd. It was nice to see people in person, but I left early and we did not have a significant conversation.

2. I have often helped law school moot teams prepare for competitions by serving as arbitrator in practice rounds and then discussing their presentations, all on Zoom. Remote technology has permitted me to do that with about a dozen different teams on 4 different continents. One of those teams was from Mongolia. One of the students on that team is now a lawyer in Ulan Bataar and he is visiting the U.S. He will arrive this week in Miami and we are going to have breakfast together...just the two of us. I look forward to seeing how tall he is.
3. Because publishing is a well-established method for developing a favorable reputation in the world of international arbitration, I have co-authored articles with young lawyers. The earlier ones were face-to-face collaborations, but now they are almost entirely remote. I welcome the opportunities to co-author articles about international arbitration and do not see geographic limits to such collaborations being significant any longer.

These are just a few specific incidents of relationships relating to international arbitration that have both virtual and in person aspects.

The Canadian philosopher and social academic Marshall McLuhan coined the phrase “The Medium is the Message” to describe the idea that new technologies like alphabets, printing presses, and television exert an effect on human cognition, which in turn, affects social organization. He coined the phrase “global village” and predicted the Internet decades before it came into existence. His work identifying “hot” and “cold” media pointed out that the media through which we learn impacts different people different ways, but it impacts everyone and, in his view, was more important than the content of the communication. In 1962, he wrote:

“The next medium, whatever it is—it may be the extension of consciousness—will include television as its content, not as its environment, and will transform television into an art form. A computer as a research and communication instrument could enhance retrieval, obsolesce mass library organization, retrieve the individual's encyclopedic function and flip into a private line to speedily tailored data of a saleable kind.”

Mark Zuckerberg is betting his fortune and company on McLuhan's observation that the next medium may be an extension of consciousness...through the metaverse. I am glad I am not a shareholder.

Thanks for letting me join in the discussion.

Joseph M. Matthews, P.A.



Dr. Katherine Simpson, FCI Arb.:

Dear All,

I think it is good to find panels and rosters that will accept you for appointments as soon as you've completed their or another's required coursework. These institutions - whether its the Chartered Institute's BAS or PDRS, some of the AAA panels, the FMCS, and any institution that accepts completion of the FCI Arb credential as qualifying one to serve as arbitrator - are wonderful for avoiding "young" discrimination and getting real case experience before you turn 40.

(I was admitted to the College of Commercial Arbitrators just this year, on the eve of my 40th birthday. I share that to let you know that, in 2022, it is still possible to be under 40 and have a strong case load.)

Different kinds of arbitration have different mentoring / sponsoring, and one that I have really come to appreciate is the "salon" in labor and employment arbitration. It is a multi-year mentoring program with experiential components that are recognized by different arbitral institutions as relevant for the purpose of getting on their rosters. Mentors go over everything - billing, advertising, networking, award writing, case management, and introduce mentees to potential appointers. Some of that is possible because they do not have double hatting - you can't be a practicing attorney and a labor arbitrator. Mentees accompany Mentors to hearings as "shadow", "apprentice", or "associate" arbitrators. It would be nice to get something similar going for international or commercial arbitration.

(PS - US labor arbitration is where the Iran-US Claims Tribunal got the idea for PO-1 shortly following the case management conference. Different arbitration silos have differences, but also a lot to learn and borrow from one another!)

Dr. Katherine Simpson, FCI Arb.



Joseph M. Matthews, P.A.:

Dear Katie,

I have not heard of the "salon" style of mentoring. It sounds like a terrific idea. The process for certification of mediators in my home state of Florida requires a certain number of observations of actual mediations as a condition of certification, but

nothing as extensive as the mentoring you described. I have limited exposure to labor arbitration.

You also mention an issue I don't think has yet been discussed here. Whether seeking to enter service as an arbitrator without first engaging in significant work as counsel is a viable career path for service as an arbitrator in international commercial arbitration. I confess I have never thought about it, but would be interested to hear if you or others think that might be a viable career path or, if not now, what it might take to create one.

I have written dozens of letters recommending young lawyers for inclusion on various panels or for CIArb and other fellowships, and have always assumed the absence of experience as counsel was something that made it more difficult, not looking for other indicia of relevant experience, such as through a formal mentorship program. Obviously, service in an arbitral institution, like Victoria's service with the Nairobi center, is a great path to both counsel and arbitrators, but again, there are too few such opportunities to help everyone who would like to develop a career in this field. Mentorship programs can certainly be scaled up easier than direct employment.

Maybe I have been wearing blinders that I need to remove.

Joseph M. Matthews, P.A.



Victoria Kigen:

Dear Joe,

I truly thank you for sharing with us your personal experience. Your examples show that there are indeed many avenues for mentorship that young practitioners should consider, and I thank you again for taking your time to share them with us.

Dear Katie,

You have brought up such a pertinent issue - finding rosters and panels that can appoint young arbitrators. Thank you for suggesting several platforms which I am confident YO members will put into consideration.

I have indeed benefited from the discussions and I am hoping that the entire YO membership shares similar sentiments.

Victoria Kigen



Topic 4: Johnny Tan, *Professional Diversity*

Dr. Piotr Wiliński:

Dear All,

Other panels at the symposium remain open, should you consider adding your reflections to one of the previous strings of a discussion.

At the same time, thanking again all the speakers and contributors of the symposium, it is now time to open the floor to discuss yet another facet of diversity in international arbitration, namely the diversity of professionals involved in the process.

I am pleased to invite **Mr Johnny Tan** to share his thoughts on this topic.

Johnny obtained his first degree in Architecture from the University of Western Australia under the Colombo Plan Scholarship. He was a founding partner of LT&T Architects where he practised for almost 30 years.

Johnny practises as an independent arbitrator. He is a Past President of the Singapore Institute of Arbitrators (SI Arb), having served two terms as President from 2007 to 2011. Johnny is on the panel of several arbitration centres including SIAC, AIAC, HKIAC, DIAC, SCIA, and LCIA. He is a member of the Advisory Council to the National Commercial Arbitration Centre, Cambodia. An accredited mediator with SIMI, Johnny is a Principal Mediator with several mediation centres including the SMC, CCPIT/CCOIC Mediation Centre, MHJMC, JIMC(Kyoto), IDDRMI, and SCMC. An accredited adjudicator with the SMC, Johnny also sits on the Construction Adjudicator Accreditation Committee (CAAC) and the Singapore Infrastructure Dispute Protocol Advisory Committee.

Johnny has held various positions in the Singapore Institute of Architects (SIA) and served as its Vice-President from 1998 to 2000. Johnny has been appointed as arbitrator in both institutional and ad hoc arbitration cases. He has also been appointed as adjudicator as well as review adjudicator in several adjudication applications.

Dr. Piotr Wiliński



Johnny Tan Cheng Hye, JP BBM PBM:

Dear Piotr and everyone from Young-OGEMID,

Thank you, Piotr for the introduction.

I have enjoyed reading and following the exchanges on gender, ethnic and age diversity.

Good day and thank you for inviting me to be a panelist on Young-OGEMID's Symposium on Diversity in International Arbitration. I am grateful for the opportunity to share my thoughts on professional diversity. I limit my comments to commercial arbitration as I acknowledge that in areas such as investor state arbitration, there may be fewer opportunity for professional diversity as often such disputes involve complex legal issues.

Introduction – Current state of diversity in international commercial arbitration

1. There has been in recent years a greater consciousness for diversity in all sectors of business including international commercial arbitrations. While there has been some optimism in the progress made in gender, ethnic and age diversity in the appointment of arbitral tribunal, unfortunately, the same cannot be said for professional diversity. For example, the AAA Diversity Committee suggests that diversity encompasses gender, race, ethnicity, age, religion, and even sexual orientation but is silent on professional diversity.

2. This is surprising given that long before laws were established or courts were organised or judges formulated principles of law, men had resorted to arbitration to resolve their disputes.

3. One of the earliest arbitrators was Solomon. Another account of early arbitration is found in the Greek mythology of the royal shepherd, Paris who was called to decide on the dispute concerning the competing claims of Juno, Pallas Athene, and Venus for the prize of beauty. Having exhausted all means of settling the dispute, Paris, by agreement of the parties decided the issue by arbitration.

4. The resolution of disputes through arbitration can be found in most primitive society as well as in modern civilisation. Commercial arbitration was a common practice among the desert caravans in Marco Polo's time as well as amongst the Phoenician and Greek traders. In the Homeric period, chiefs and elders held regular sessions to settle the disputes between parties who chose to appear before them.

5. These are not men trained in the law. In fact, not so long ago, (I say this with the greatest of respect) it was thought that lawyers were not suited for arbitration because by their training and experience it was believed that lawyers were conservative, formalistic and inflexible, wordy, and overly technical.

6. So, why then are so few non-lawyer practitioners (NLPs) such as engineers, architects, accountants, maritime experts, etc appointed in international arbitral tribunals?

Why is professional diversity lacking in international arbitration?

7. It has been argued that the reason why professional diversity on international arbitration tribunals is poor is the lack of transparency in the appointment process. It is probably fair to say that a significant number, if not the majority, of practicing international arbitrators came through the ranks as practicing lawyers acting as counsel in international arbitrations. Thus, it

may be argued that one reason NLPs feature so rarely on international arbitration tribunal is because they do not fall within the pipeline for future international arbitrators.

8. The difficulty in addressing the issue of professional diversity of international arbitral tribunal is there is very little data available at both the quantitative as well as the qualitative level.

9. Another problem faced by NLPs is the arbitrator selection process. Generally, previous appointments are considered as the 'pre-eminent qualification for arbitrator selection'. In fact, most arbitration institutions require a candidate to submit three arbitration awards when seeking to be empaneled. This pre-qualification consideration raises two problems. First, it is a chicken and egg issue for first time arbitrator. Second, even for those who have had previous appointments, his/her track record is confidential and such information is shared and kept within a small group and largely spread by word of mouth.

10. It is also human nature to rely on safety in numbers. Counsels look for validation of their recommendations of arbitrator nominees to their clients knowing that others have appointed the same individuals a certain number of times. It takes courage to convince clients (and indeed their own firms) that a lesser-known NLPs will be able to do a good job. However, while repeated appointments do make the nominees busier but it does not necessarily make them more efficient, fair, or better arbitrators. In fact, it may be argued that candidates with fewer appointments and more time to devote may be more efficient and expedient in the conduct of the arbitration.

11. There is also the unconscious professional bias that lawyers make better arbitrators since most disputes will require the determination of some legal issues and lawyers are best placed to decide on such issues.

12. These are only some of the reasons which have hindered the consideration of NLPs for appointments to international arbitration tribunals.

Do we need professional diversity?

13. Why should there be professional diversity on arbitral tribunals? Is it a bad thing if arbitral tribunals are mostly made up of arbitrators from the legal professions? After all, one could argue that unlike the World Trade Organisation's (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes which states '*Panel members should be selected with a view of ensuring the independence of the members, a sufficiently diverse background and wide spectrum of experience*', there is nothing in the rules of major arbitral institutions that require diversity (gender, ethnic, age or profession) in their panels or in the appointments of arbitrators.

14. Are lawyers more likely than non-lawyers to make sound determinations of disputes particularly in matters involving highly technical non-legal issues? I do not suggest to have a definitive answer but I would venture to suggest that the qualifications of the tribunal should reflect the nature of the dispute and a tribunal with diverse professional skills would have a

better chance of coming to a better determination. [legitimacy, notions of fairness, equal opportunity]

15. Another argument for diversity of arbitral tribunals, is that the lack of diversity in the arbitrator corps adds to the perception of arbitration as an unfair and unbalanced process that is not transparent and geared against “the little guy” particularly when that “little guy” is a woman and/or a member of a minority group and/or non-legally trained.

16. Diversity helps to convince disputants that the arbitral forum is a fair and neutral setting where justice is done and is seen to be done. It is safe to assume that a good arbitrator regardless of gender, race, ethnicity, or professional background does not make decisions any differently from a white, male, legally trained arbitrator. So, if this is the case, then why is tribunal diversity important. It has been suggested that the arbitral process would lack legitimacy if tribunals are not appointed from diverse background. The notion of procedural fairness demands representations from diverse backgrounds.

17. More frequent appearances of diverse arbitrators on arbitral tribunals will likely normalize these less typical arbitrators and ultimately increase the willingness of litigants and general counsel — who are responsible for arbitrator selection — to step outside their comfort zone and select new arbitrators who are not “white, male, matured and legally trained”.

18. Promoters of arbitration have consistently preached that arbitration should be informal and non-technical. Law professors have reminded law students that one of the attractions of arbitration is flexibility. It is therefore ironic that over time, arbitration has become more like litigation with arbitrators functioning like judges. To a great extent all arbitrators must act as a judge for his/her duty is to adjudicate. But it is how an arbitrator conducts the proceedings and comes to his determination that differentiates him/her from a judge.

How can professional diversity be achieved in international arbitration?

19. Several commentators have suggested various means to achieve diversity in arbitral tribunals.

20. Many emphasised the role of appointing authorities and arbitral institutions in promoting diversity. Institutions play an important role in contributing to the diversity of tribunal appointments. Institutions can start by having professional diversity in their panels and nominating and/or appointing suitably qualified NLPs to suit the nature of the disputes.

21. Second, the role played by counsel (including in-house counsel) cannot be overstated. To break the barrier of professional diversity, commitment by counsel to suggest diverse lists of arbitrators to clients would greatly help. This is particularly where the subject matter of the dispute leans heavily on the technical and professional knowledge of specialist professionals or trade practices that lawyers would not have an intimate knowledge or understanding.

22. Finally, NLPs and their respective professional bodies can play their part by increasing the visibility of diverse candidates. This could be achieved through education and promotion

of courses, mentorship programmes for less experienced arbitration practitioners, and speaking opportunities at seminars and conferences for diverse members of the arbitration community. Building visibility is critical as users prefer arbitrator candidates about whom they have some knowledge of or with whom they have had some previous experience. A good professional profile in their own area of expertise gets NLPs noticed when parties are looking for potential arbitrator candidates.

I am sure that many out there would be able to share more ideas on creating more opportunities for NLPs to be noticed and considered for tribunal appointments. I look forward to your contributions.

Johnny Tan Cheng Hye, JP BBM PBM
Independent Arbitrator



Dr. S.I. Strong:

Dear Johnny,

Many thanks for your post. As someone who has also been in practice for about 30 years, I have witnessed something of a shift in thinking about non-lawyers as arbitrators. Back when I started, it was relatively common or at least not unusual to see businesspeople, engineers, chartered surveyors and the like acting as arbitrators in both commercial and construction disputes. As the field has become more legalistic (and perhaps as I have concentrated more on the commercial side), it seems that lawyers have dominated the field. My questions for you are thus:

1. Have you also seen a reduction in reliance on non-lawyer arbitrators over the last few decades, not necessarily among well-established arbitrators such as yourself but perhaps with respect to new arbitrators?
2. Do you see a segmentation of the market for non-lawyer arbitrators? My friends in the construction industry suggest there is still a desire for non-lawyer arbitrators on that side of the practice even if commercial arbitration has moved away from that.
3. Do you think there is a regional or national difference to the use of non-lawyer arbitrators? Though you practice primarily in Singapore, you seem to have connections to both Australia and Cambodia, as well as perhaps other countries in the Australasian region. My experience is primarily in the US and Europe, despite my current residence in Australia, so this is something of great interest to me as I build my regional expertise.
4. I very much appreciate your point that lawyers were for many years considered inappropriate arbitrators due to their training as adversaries. That desire (primarily by parties) for more conciliatory dispute resolution now

seems to be reflected in the rise of mediation. Have you seen non-lawyers being called to serve as mediators in the types of dispute that you used to arbitrate?

I realize these are quite a few questions, but this is a very interesting subject.

Dr. S.I. Strong



Johnny Tan Cheng Hye, JP BBM PBM:

Dear Stacie et. al.,

Thank you Stacie, for raising some very interesting observations for discussion.

1. You are right. There is a very significant reduction in appointments of non-lawyers as arbitrators especially from early 2000s. It has been particularly difficult for younger non-lawyers to get their first appointment. For those in the construction industry, I suggest that they seek appointments as neutral evaluators or adjudicators. Stacie, as you are aware, Singapore like NSW has in place the Security for Payment regime for the Construction Industry. This is where construction professionals may gain experience in resolving disputes as neutrals. Similarly for other non-lawyer professionals, seek out appointments from your respective professional bodies' dispute resolution schemes. These may then be submitted as evidence of your experience in resolving dispute in your areas of specialisation.

2. Segmentation of markets for non-lawyers is not something new. There has always been segmentation. After all, parties appoint non-lawyer arbitrators for the experience and skills that they bring with them in resolving disputes in their own respective areas of expertise. In construction arbitrations having an architect, engineer or quantity surveyor as either sole arbitrator or on the panel would be an advantage particularly if the issues in dispute are very technical in nature. The same applies for those in the marine, financial, IT, and other specialised field.

3. I do not think there is a regional or national difference in the attitude towards non-lawyer arbitrators in our present time. I think that the attitude towards non-lawyer arbitrators is the same regardless of where you come from. It is more a phenomenon of our present times. As you have already observed it used to be easier for non-lawyers to be appointed as arbitrator especially during the 80s and 90s. In my opinion, I believe this is because in many cases, arbitration has become a mirror of court procedures. As we see more lawyer-arbitrators (especially for newer and younger arbitrators) there is

a tendency to rely on procedures which they are familiar with. This is to be expected. Until such lawyer-arbitrators become more experience and confident, they will seek comfort in procedures that are tested and less subject to challenge. We have all heard of “due process paranoia”. Less experienced tribunals fear that their awards may be challenged if they are too robust in their case management approach or adopt a procedure that is not tested. Unfortunately, this “due process paranoia” may be self-fulfilling when tribunals tread too gingerly for fear of a breach of procedural fairness. Tribunals must bring back the robustness into case management to ensure fair, expeditious and cost effective arbitration proceedings that is final and binding. Otherwise, users will seek other alternative forms of dispute resolution that is cheaper and faster.

4. I agree with your observation that there is a move towards a more conciliatory approach to dispute resolution. This is to preserve working relationship as well as consideration of time and costs. Parties know that they may not always get what they want in arbitration or even from the courts. Anecdotally, I have heard from parties and their in-house counsel that there is a preference where possible for a commercial settlement that they can live with and that is acceptable to their management and boards. My view is that mediation will be a more preferred approach to dispute resolution in the future. In the past, the concern with mediated settlement has been one of enforcement. However, as more countries become signatories to the Singapore Convention, I think we will see more disputes resolved through mediation in the interest of time and costs.

Finally, once again thank you Stacie for raising these observations. I look forward to more discussions and welcome views from the others.

Johnny Tan Cheng Hye, JP BBM PBM



Shreya Jain:

Hi Johnny

Thanks for a very insightful post.

1. I'm curious to know if there is any historical data analysing the appointment of NLPs as arbitrators over the years? You (rightly) make the point that while law professors emphasize the flexible nature of arbitration, in practice, it has increasingly progressed to resemble 'litigation' outside the courts. I wonder whether this was all the case or historically it was more common to see NLPs on arbitral tribunals.

2. Your point on suitability of NLPs in specialised disputes is also well noted. In India, for several niche arbitral disputes (e.g. securities arbitrations or stock exchange arbitrations), we often see statutory appointment of a ‘technical member’ as one of the tribunal members. Have you come across any institutional rules which require parties to consider NLP candidates at least for specialised, highly technical disputes?

Shreya Jain



Johnny Tan Cheng Hye, JP BBM PBM:

Dear Shreya,

Like you I was curious to know whether there is any perceptible trend on the appointments of NLPs over the years. Unsurprisingly, I could not find any data. I believe that this may be because even less attention has been paid to professional diversity than to gender and ethnic diversities.

I note your comment that India is seeing statutory appointment of a ‘technical member’ in a 3-member tribunal. However, I have reservations on the merits of statutory tribunal appointments. In the spirit of party autonomy I do not think we should make the appointment of the ‘technical member’ mandatory and worse a statutory requirement. That decision must come from the users and their counsel. But how do we persuade parties and their counsel that it is in their interest to pick a tribunal with the appropriate qualifications for their dispute.

Having a ‘technical member’ on the tribunal will assist the tribunal to better understand, appreciate and analyse the evidence presented by the experts. This will obviate any need for a tribunal appointed expert to assist the tribunal when the experts give fairly persuasive opposing views. A ‘technical member’ on the tribunal will assist the tribunal to better understand and analyse the evidence presented by the experts. He/she will also assist the tribunal during the hot-tubbing. He/she could lead the discussion with the experts to seek clarifications on the differing views presented. In a recent case in which I was involved involving structural collapse and claims for a fairly huge amount of damages, we had five engineering experts to opine on the cause of the structural failure and six quantum experts to deal with the quantum of damages. Counsel had asked for six days to hear evidence from the experts. We hot-tubbed with the tribunal leading the witness conferencing and counsel cross-examination, we were able to deal with all the experts in three days instead of six; a substantial savings of time and costs. Perhaps this may

persuade these parties and their counsel to consider having a diverse tribunal with the appropriate professional qualifications in their future disputes.

I am keen to hear the thoughts and experience from our participants.

Johnny Tan Cheng Hye, JP BBM PBM



Dr. Katherine Simpson, FCI Arb.:

For the US-educated lawyers - does anyone find that their undergraduate education is helpful to them in securing arbitrator appointments? In solving problems that present in an arbitration?

For appointers - when appointing an arbitrator, do you consider the "not law" work or education that an arbitrator has completed?

One unique aspect of the full US legal education is that, in order to enroll in a JD program, one must complete a university degree... and, by default, that degree must be in "not law." I wonder how much that matters for arbitration appointments.

Dr. Katherine Simpson, FCI Arb.



Dr. S.I. Strong:

Dear Katherine, dear all

From one of my empirical studies, I know a number of arbitrators who make a big deal of their engineering or other science-oriented undergrad degrees if they work in patent or construction arbitration (I realize not all countries allow patent arbitration, but some do). Like everything else, that added value becomes known among the relevant regional or professional community and contributes to appointments.

Dr. S.I. Strong



Topic 5: Umika Sharma, *Regional Diversity and Empirical Findings*

Dr. Eva Litina:

Dear all,

While other panels at the symposium remain open, it is now time to open the floor to discuss **regional diversity** in arbitration. You are of course welcome to continue the discussion on the other strings - we welcome parallel analyses!

I am pleased to invite Umika Sharma to share her thoughts and empirical findings on this topic.

Umika Sharma is an NUS Graduate Scholar at the National University of Singapore. She is finishing her PhD thesis (fully funded by the Ministry of Education, Singapore) on diversity in international arbitration. Her thesis looks at gender and geographic diversity as well as the overlaps of various types of diversities amongst international arbitration practitioners. Her work utilises socio-legal methodologies to build an understanding of why international arbitration still has a lack of diversity despite its many diversity focused initiatives. She recently received an honourable mention for her essay titled ‘Invisible Inequality: The Lack of Regional Diversity in International Arbitration’ for the Nappert Prize in International Arbitration. In her essay, she empirically established an invisible and subtle form of inequality for regionally diverse practitioners. It is a first of its kind analysis, where the findings are based on empirical data grounded in statistical analyses of practitioner populations across three prominent international arbitration jurisdictions and thirty-three interviews with leading commercial and investment arbitration practitioners across eight jurisdictions.

Umika has also published a paper titled ‘The Invisible Stigmatisation of Female Practitioners in International Arbitration’ (published in the Journal of International Law in Context by the Cambridge University Press) where she looked at gender-based inequality amongst female arbitrators and counsels.

Umika is a qualified lawyer in India and holds an LLM degree from the Queen Mary University of London. She balances her PhD work with her roles as a tribunal secretary and international arbitration counsel. She regularly speaks at conferences and webinars on the lack of diversity at the echelons of international arbitration.

Umika, the floor is yours!

Dr. Eva Litina



Umika Sharma:

Dear all,

I am excited to be a part of this discussion on diversity. The posts so far have been insightful and have given me a lot to think about.

For today's discussion, I have narrowed down the themes that I have developed from 33 multi-jurisdictional interviews with practitioners at various levels of seniority (partners, senior and junior associates, institutional personnel, and independent arbitrators). I will also discuss some empirical findings on regional diversity and try to brainstorm new ideas with you all, about the future discourse of this type of diversity in international arbitration.

First, let us tackle the complexity of the regional diversity debate and look at how multifaceted this issue can be. We could see a regionally diverse practitioner from the lens of their nationality, ethnicity, or race (or a combination of these factors). Can language skills also represent regional diversity? How about legal training? How do we decide which 'group' a practitioner belongs to if they are of, say, Asian descent, educated at institutions in the United States or the United Kingdom and have spent their entire career somewhere in the West? Will such a practitioner meet our criteria for regional diversity solely because of their racial or ethnic background? Or will their intellectual/ideological leanings impact their 'regional' diversity? This and many other questions add layers of complexity to the discussion on regional diversity. However, for a field such as ours, these are important considerations because it is easy to use one 'diverse' characteristic as a token to represent regional diversity and wash our hands of the issue.

Now, let us peel at another layer of complexity. This one is about the regional identities of practitioners and its interrelationship with their professional ascent as arbitrators and counsels. I have found that a practitioner's nationality has a deep impact on their professional prospects and ascent in international arbitration. Their nationality is an important marker of regional diversity as it could signify their race, ethnicity and, in many cases, their legal training and background. A combination of these factors plays a role in the professional opportunities that are available to regionally diverse practitioners.

Based on the findings of the interviews and the quantitative data (most of which is again focused on nationality), I have concluded that an invisible and subtle form of inequality exists for regionally diverse practitioners. This inequality of professional opportunity manifests in myriad ways. It manifests as an internationalist ceiling, where practitioners from certain nationalities are pigeonholed into disputes from their perceived home jurisdiction (in other words, the country that they often hold a nationality of). For example, an 'X' country (non-Western, developing, not a top international arbitration destination) national despite having spent their whole career in prominent international arbitration jurisdictions, is still perceived to be an 'X' country disputes specialist. Many such practitioners discussed their experience of being slotted into an identity that limits their professional reach and how it directly relates to their regional backgrounds. Whereas practitioners from predominantly Western nationalities are often perceived as 'internationalists' and are considered suitable for disputes from all jurisdictions and not just their home jurisdictions. Thus, expanding the professional opportunities that they might have access to.

Another way in which regionally diverse practitioners experience inequality is the way in which we make appointments of arbitrators. In international arbitration, I have found that many accepted ways of doing things impede the way for regionally diverse practitioners. The merit-based appointment system is one such example. Let me explain why. We use merit in international arbitration as a proxy for expertise, suitability, and experience. Merit is also used to justify the rationale of ‘the best person for the job’ mode of appointments. But I ask, are we as meritocratic as we think we are? Aren’t phrases like suitability and expertise just another way of signifying the social, cultural, and symbolic capital of individuals, who are overwhelmingly of specific Western and racial backgrounds?

The misconception that all arbitrators are appointed based on their skill, suitability, and expertise is rampant in international arbitration. This myth of meritocracy functions on two hidden advantages that practitioners only within an ‘in group’ enjoy. First, the visibility that comes with being a part of the insider group of elite practitioners. Being well known and well tested within the peer group provides only a few arbitrators with valuable social, cultural, and symbolic capital that they can use to gain further appointments. Second, the close network and ties that the ‘in group’ practitioners have within this system feed into further appointments that they receive. Their close connections are another way in which their social and cultural capital, primarily based on their nationality and regional background, operates. A lack of understanding of these hidden advantages has created tall barriers for regionally diverse practitioners and their professional rise within international arbitration.

I will close these initial comments here and welcome your questions and thoughts on this. I look forward to engaging with the YO community on this topic over the next few days.

Umika Sharma



Anne-Marie Doernenburg:

Dear Umika,

Thank you very much for the very interesting introduction. Regional/geographical diversity is indeed a topic that has not yet been much debated. I would be delighted to hear more about the following aspects of your research:

1. What has moved you to look into this aspect of diversity?
2. What were your findings, i.e. which regions appear to be underrepresented?
3. Are there any differences among the jurisdictions you examined?
4. In your view, what are the key obstacles or challenges to more regional diversity in the respective jurisdictions? As you mention, in certain countries, language barriers (particularly lack of English proficiency can be a key contributing factor).

5. Also, how do you see the argument that lack of regional diversity may partly be due to the fact that we assume that each region tends to develop its own arbitration culture and practice, which in turn necessarily relies on specialists from that or with expertise in that specific region or jurisdiction?

Looking forward to your thoughts.

Anne-Marie Doernenburg
Associate, Nishimura & Asahi



Umika Sharma

Dear Anne-Marie,

Thank you for your interesting questions. Here are some thoughts:

1. **What has moved you to look into this aspect of diversity?**

Two things, first, the lack of meaningful empirical research on this aspect of diversity. Second, I used a grounded theory method to make sense of the themes from the interviews with practitioners. Grounded theory is a methodological approach to analysing data where the theory development is anchored in the data collected for the study. For my research, the interviews with practitioners and the many quantitative data sets highlighted regional diversity in international arbitration as a major type of diversity that was still under researched.

2. **What were your findings, i.e. which regions appear to be underrepresented?**

Within the quantitative data, practitioners predominantly from non-Western jurisdictions are underrepresented in arbitrator appointments (no corresponding data exists for counsels). The ICC and ICSID's way of categorising different regions was a helpful way of looking at this data.

For the interview (or qualitative data), I deliberately over-sampled regionally diverse practitioners to try to understand their stories through their lens. Again, the experiences of practitioners with non-Western nationalities compared to the experiences of practitioners of Western nationalities substantially varied in terms of how they talked about their professional growth and opportunities. This is why I concluded that regionally diverse practitioners experience an invisible and subtle type of professional inequality that affects their ascent in the field.

3. Are there any differences among the jurisdictions you examined?

I focus only on elite international arbitration jurisdictions (the Queen Mary Survey lists the most preferred ones) and not on regional players. This ‘eliteness’ is characterised by the volume of international arbitration focused work besides the presence of top international arbitration law firms, thus by extension, a larger presence of international arbitration focused practitioners. In essence, this study does not look at jurisdictional variations but only focuses on professionals engaged in pre-dominantly international arbitration related work in international arbitration focused jurisdictions (a focus on the people and not the places). I did not see any differences in the experiences of these practitioners based on their jurisdictions. I circle back to this in the last question as well.

4. In your view, what are the key obstacles or challenges to more regional diversity in the respective jurisdictions? As you mention, in certain countries, language barriers (particularly lack of English proficiency can be a key contributing factor).

I believe that the key challenges that still exist for regionally diverse practitioners are first, the perception of being a regional specialist solely because of their regional identities. Thus, limiting the pool of disputes that they can potentially get appointed to. This is a way in which inequality of professional opportunities manifests for many regionally diverse practitioners. The same inequality does not seem to exist for Western practitioners based in elite international arbitration jurisdictions. Second, a lack of understanding of the different social capitals that are at play (Sergio Puig has an excellent paper on this titled ‘Social Capital in the Arbitration Market’) and the potentially misplaced idea that the current modes of arbitrator appointments are merit based and not network based is a big hurdle. If we continue to do things the way that they are done, we will not only potentially hinder the entry of new regionally diverse practitioners, but also create barriers for practitioners who are already a part of this field.

5. Also, how do you see the argument that lack of regional diversity may partly be due to the fact that we assume that each region tends to develop its own arbitration culture and practice, which in turn necessarily relies on specialists from that or with expertise in that specific region or jurisdiction?

The most surprising aspect of the findings was the consistency of results across multiple jurisdictions. I think it’s a direct result of my focus on international arbitration practitioners and firms in jurisdictions that handle a large amount of international arbitration centric work. While I noticed many regional variations in how regional diversity was perceived (linked back to the

idea that regional diversity is a complex array of factors), the experiences of practitioners were consistent and did not have any regional variations. The professional barriers that regionally diverse practitioners perceive and experience across a variety of international arbitration centric jurisdictions are essentially the same.

Umika Sharma



Victoria Barausova:

Dear Umika,

Thank you very much for a great introduction to the different layers of the regional diversity debate. I have several questions and would be keen to hear your thoughts:

1. What are potential solutions to address the regional diversity issues that you raised? For instance, the Delos database comes to mind as a project aimed at promoting, among others, regional diversity. Are you aware of other initiatives of this kind? Are there any steps taken by institutions to promote regional diversity in arbitral appointments?
2. In the course of your research, have you noticed any differences in regional inequality between commercial and investment arbitration?

Victoria Barausova

Young-OGEMID Rapporteur



Umika Sharma:

Dear Victoria,

Thank you for asking these interesting questions.

I have previously flagged that a re-think about what we consider meritocratic is a potential long-term solution. In the short term, collecting more data on the issue and bringing regional diversity to the forefront of diversity discussions is a good place to start. There are many interesting initiatives around regional diversity. Racial Equality for Arbitration Lawyers (R.E.A.L) is a good example of focusing on specific issues within the broader umbrella of racial diversity. Similar to the ERA Pledge, the African Promise focuses on tackling the underrepresentation of African arbitrators in Africa related disputes.

The Equity Project by Burford Capital has also recently expanded to include racial diversity of arbitration lawyers into its fold. Regional diversity is also becoming a part of diversity-related conversations at various organisations. ICCA's Diversity & Inclusion Implementation Plan specifically includes regional diversity as a consideration for its conference and events panels and speakers. Their practice guidelines also encourage taking racial and cultural diversity into consideration.

Many arbitral institutions have also engaged in advocacy around various aspects of regional diversity. ICC's Hold the Door Open is an interesting initiative which aims to 'give young arbitration practitioners in Africa an opportunity to gain practical experience by observing arbitration hearings.' JAMS also has a Diversity and Inclusion Clause for Arbitration Agreements and Contracts, which specifically mentions ethnic diversity. I consider an increased focus on the various aspects of regional diversity and initiatives such as the ones I've listed here a practical first step towards better regional representation.

As for your second question, many authors before me have empirically established that investment arbitration's regional diversity problem is acute. The corresponding data that I have collected shows that commercial arbitration's problem is less acute, but there is still a clear Western arbitrator dominance at many prominent international arbitration institutions. For instance, at the ICC (between 2016 to 2020), 66% arbitrators were either Western European or North American.

Umika Sharma



Mark Kantor:

Greetings from the road on my travels. Just a short comment on the topic of developing a reputation in the arbitral community for thoughtfulness and quality, a reputation that will enhance your prospects for eventual appointment as counsel or arbitrator.

Make occasional useful, practical, additional, accurate and very timely posts on Young OGEMID! Your comments will be read worldwide. But make sure those comments are indeed "useful, practical, additional, accurate and very timely." Reporting information that is already well known or that does not add something accurate and useful to the readers will not advance your cause.

I hope this is useful.

Mark Kantor
Arbitrator



Dr. S.I. Strong

Thanks for that note, Mark - as I recall, we discussed both the benefits of speaking up at virtual and in-person events in a past symposium and provided some additional tips on how to do it well, though your pithy suggestion may be sufficient.

I think the earlier discussion was either in the To Do or Not To Do symposium (tips for junior lawyers) or the Sound Off symposium on getting a speaking slot. Reports from both are on our symposium and reports page:

<https://www.transnational-dispute-management.com/young-ogemid/seminars.asp>

Dr. S.I. Strong

Topic 6: Joshua Karton, *Wrap Up/Different Dimensions of Diversity*

Dr. Piotr Wiliński:

Dear All,

We are coming close to an end of the symposium, having one more speaker - prof. Joshua Karton - ready with his intervention about different facets of diversity as evidenced by different panels at this symposium already. As always, feel free to continue a discussion on other strings as well - they remain open.

Dr. Joshua Karton Q.Arb. is a Canadian academic and independent arbitrator. He is an Associate Professor at the Queen's University Faculty of Law and, in 2022-23, the Tsai Wansai Visiting Chair Professor of International Law at the National Taiwan University. He has written or edited four books and dozens of articles on international arbitration and related fields, and has received wide recognition for his research, including most recently as an elected member of the International Academy of Comparative Law. Some of the other hats he wears are as Managing Editor of the *Canadian Journal of Commercial Arbitration*, General Editor of *Kluwer Arbitration Practical Insights*, and Vice Chair of the Institute for Transnational Arbitration's Academic Council. He is a member of the New York bar, and is proficient in French and Chinese.

Josh, thank you for accepting the invitation. Please feel free to start the discussion whenever ready.

Before we continue, please allow me to thank all the speakers and discussants involved in this symposium so far. It was a wonderful learning experience. Finally, I wish to thank Young-OGEMID and its moderators (Anton, Stacie, Mark) for giving the platform for this important debate to take place.

Big round of applause for all!

Also on behalf of Eva,

Dr. Piotr Wiliński



Dr. Joshua Karton:

Hello all,

Thank you Piotr for that kind introduction, and thanks to Piotr, Eva, and Stacie for the invitation to contribute. The last time I did an OGEMID Symposium was a few years ago, and it's great to see how much this community continues to thrive.

As I have read through the various symposium contributions, it's struck me how much diversity occupies an unusual space in the arbitration discourse. There is broad agreement that diversity is a good thing and that the international arbitration community doesn't have enough of it. But at the same time, many of the proposed means to promote diversity are controversial, and opinion remains divided on what diversity even means. In what follows, I will try to put the comments of my fellow contributors into a unified framework. In setting it out, I will answer a key question that often remains implicit: what do we want diversity *for*? As I see it, greater diversity in the field—not just among arbitrators but up and down the whole profession—presents four distinct benefits: fairness within the arbitration profession, fairness to parties, legitimacy of the arbitration system, and quality of arbitral decision-making.

In writing this, I have drawn from a chapter I wrote for this new book: <https://www.e-elgar.com/shop/gbp/diversity-in-international-arbitration-9781803920030.html>. Other symposium participants, as well as our fearless rapporteurs, also contributed chapters.

Diversity in the Service of Fairness Within the Arbitration Profession

The first benefit of diversity gets most of the attention, including in this symposium. Lack of diversity in the field, especially among the ranks of arbitrators, is a reflection of lack of fair opportunities available to those who do not match the demographic characteristics of the dominant group. The benefit of diversity here is that of fairness *within the profession*: providing equitable opportunities to all types of individuals to enter the field, advance within it, and be appointed as arbitrators.

To address this goal of diversity—fairness to the profession—we do not need diversity *per se*; what we need is equity, to break down the barriers that hinder women, people of colour, people from the global south, and other underrepresented groups such as Indigenous peoples from rising within the ranks and assuming leadership roles in the field. To put it differently, the actual diversity of the existing arbitrator pool is of secondary importance (although it still matters so that young lawyers from diverse groups can see people like them among the senior figures so that they are not discouraged or side-lined).

Diversity in the Service of Fairness to the Parties

The users of arbitration are often left out of the diversity discourse, which is both frustrating and curious, since arbitration is literally *for* the parties. Simply put, the parties who use arbitration are entitled to their arbitrators of choice. This means not only that they are entitled to appoint or to negotiate for an arbitrator who is sympathetic to their point of view, but also that they are entitled to define for themselves what that means. Umika wrote about the need for “merit-based appointments”, and of course I agree. But merit in the abstract isn’t the whole story. The diverse users of arbitration may rationally prioritize cultural affinity, subject matter expertise, common nationality, perspective based on professional formation, and other factors that relate to kinds of “merit” different from the way we usually use that word.

In order to serve a diverse world of arbitration users, the field must provide a diverse pool of qualified arbitrators from whom the parties may choose. If parties look into the pool of available arbitrators and see no faces like theirs looking back, they are deprived of the autonomy to appoint an arbitrator of their choice. Lack of diversity thus undermines a core part of the “value proposition” of arbitration over litigation.

More seriously, if *some kinds* of parties can find an arbitrator of their choice but *others* cannot, that is not just an ethical problem of unfairness but also a violation of another core value of arbitration: neutrality. That is, if the arbitration system cannot provide neutral justice between corporations with very different business cultures or in industries that deal with products or services unfamiliar to most “pale, male, and stale” arbitrators, that is a threat to due process in arbitrations.

This is the second benefit conferred by diversity: greater fairness to arbitants, by assuring them a genuine and equal opportunity to find arbitrators who are suited to the particularities of their transaction, their dispute, and their culture. To achieve the goal of fairness to the parties, we need a pool of arbitrators, counsel, experts, and arbitral institutions that matches the diversity of parties and their disputes.

Diversity in the Service of Legitimacy

The third interest served by diversity is the legitimacy of the arbitration system. Arbitration as a system of dispute resolution is dependent on the continued affirmative choice of parties to arbitrate, whether commercial parties or public entities like states. Anyone who makes their living in international arbitration should care about its legitimacy out of self-interest alone.

Much of the focus on arbitrators’ political or cultural attitudes arises in investor-state arbitration—understandably so, since investor-state arbitrations involve issues of broad public interest. But commercial disputes also turn on issues where perspectives differ across legal and national cultures, such as what constitutes commercially reasonable conduct or good faith, or the scope of anti-competitive behaviour, or the enforceability of arbitration agreements against weaker contracting parties. If only a narrow segment of global society provides the adjudicators who decide on these issues, their perspective will become the

benchmark, with any other (perhaps equally valid) perspective seen as an affront to the *status quo*. This is one of the dangers of the “socialization” of arbitration professionals that other symposium contributors have described, the pressure to conform to the career paths and perspectives of the historically dominant communities.

The kind of diversity needed to serve the interest of legitimacy is *representation*. The international community needs to be able to see itself represented in the field. Greater diversity would also help to reduce conflicts of interest within the community by expanding the pool of arbitrators and making it less ‘club-like’.

Diversity in the Service of Better Decision-Making

Anyone involved in arbitration should be concerned about the quality of justice the system provides. The social science evidence is clear that more diverse groups of decision-makers produce better outcomes. Of course, “better” is a broad term with many possible meanings, but it is well-documented that groupthink is a serious risk. Adding even one contrary voice to an otherwise homogeneous group of decision-makers improves outcomes to a measurable degree, not necessarily because the disrupted group *makes better decisions*, but rather because it *avoids disastrous ones*. A diverse voice questions assumptions, provokes second thoughts, and most of all requires others to justify their conclusions.

The kind of diversity that serves this interest is *diversity of perspective*: counsel and arbitrators who think differently from the mainstream. Demographic diversity, the stuff of gender, race, age, and national origin, is often used as a proxy for diversity of perspective. It can be a good proxy, since we are all shaped by our lived experiences, but it is only a proxy. Diversity of perspective is driven more directly by diversity in education, professional background, legal culture, and individual personality.

I hope that this post has provoked you to think more expansively about what we want diversity *for* and what *kinds* of diversity serve those goals. A one-dimensional diversity discourse can blind us to the trade-offs inherent in all social progress. For example, do you think....

- That the different aspects of diversity are inconsistent with each other? That is, does achieving one might make the others harder to achieve?
- That one goal of diversity is more important than the others (and if so, what would you be willing to sacrifice to achieve it)?
- That some measures to achieve greater diversity (mentoring and networking initiatives, pledges, quotas, etc.) are more justified to achieve some goals of diversity than others?
- That some potentially effective measures *aren't* currently being considered but should be adopted?

I look forward to your thoughts.

Dr. Joshua Karton

Associate Professor, Queen's University Faculty of Law



Daniel Pakpahan:

Dear Josh,

Many thanks for your comprehensive and critical observation on the four distinct "benefits" of diversity, and apologies for my late intervention.

1) I am divided on your framing of these as benefits of diversity; in my opinion, they rather illustrate the range of problems resulting from the status quo which is characterized by the lack of diversity, problems which your post and this symposium has rightly exposed. Does couching diversity in terms of presenting "benefits" risk watering down the imperative need for greater diversity in light of other considerations, e.g., allowing parties (users) to choose not to reap the benefits and to compromise on diversity due to costs or convenience (a kind of short-termism, if you will)? Or is your framing more preferable as an advocacy strategy, for the very reason that parties may not deem the problems resulting from the lack of diversity as sufficiently urgent and/or imminent or, put differently, parties need to be persuaded by more incentives? Perhaps I am mistaken for viewing the two perspectives as contradicting each other rather than mutually reinforcing.

2) There may be an overlap and tension between "Diversity in the Service of Fairness to the Parties" and "Diversity in the Service of Fairness Within the Arbitration Profession". As you pointed out, parties' diverse preference of arbitrators may be the impetus for equitable opportunities for marginalized candidates, which should ultimately promote fairness within the arbitration profession. This reminded me of Jay Z's request for stay of an AAA arbitration¹³ prompted by perceived asymmetry in the selection of arbitrators due to lack of African-American candidates, which prompted AAA to address the lack of diversity. Nevertheless, one may question how such party-led initiatives ensure greater fairness within the arbitration profession since the focus may be only on particular groups and exclude other diversity categories. The movement for greater diversity should not therefore be shaped by users' preference alone; it warrants a general and intersectional approach involving multiple stakeholders.

Appreciate your thoughts and thank you again for the wonderful discussion.

Daniel Pakpahan

¹³ <https://www.jdsupra.com/legalnews/jay-z-has-99-problems-and-lack-of-92312/>



Dr. Katherine Simpson, FCI Arb.

Dear Daniel,

There is a stubborn push to prove the benefits of diversity, even though no one is challenged to prove the benefits of the status quo (beyond that it magically proves itself in that it exists). In a recent article (accepted for publication as a Chapter in the Elgar Encyclopedia of International Economic Law), I characterize this as oblique resistance to gender equality - an indirect form of opposition that never directly confronts equality, yet actively undermines it.

It is socially unacceptable to oppose equality. Those who do, however, resist in more subtle ways, like by diverting attention from the central aim of an equality initiative, and replacing a simple and totally achievable purpose (like the elimination of discrimination and the promotion of equal representation) with complex and impossible ideals that resist straightforward engagement, interrogation and critique.

The push to prove the benefits of diversity is, in my mind, one example of that. People find themselves trying to prove the benefits of diversity in different ways. I've found it to be just another errand standing blocking the pathway to equality.

It is an unprovable yet accepted fundamental tenant of economics and sound business practice that diverse teams produce "better" results. Equality advocates, however, are routinely tasked to prove that diverse teams produce "better" results, AND that this theory also holds in the context of arbitral decision making. Given the confidentiality of awards and the limits of statistical science, proving this point is currently impossible. At the same time, while there is consensus on the range of problems faced by arbitration (costs, legitimacy, duration, unpredictability, potential for corruption), no one appears to be challenged to prove - as a precondition to proposing or appointing an all male tribunal - whether the recognized lack of diversity in arbitrator appointments is responsible for any of arbitration's alleged shortcomings, or whether this status quo is superior to a diverse and gender equal alternative.

I'd be very happy to receive your comments on my article:
<https://ssrn.com/abstract=4225138>

Dr. Katherine Simpson, FCI Arb.



Naimah Masumy:

Dear all, dear Prof. Karton,

Thank you so much for your insightful post on different dimensions of diversity. I'd like to elicit your views on the (potential) **lack of diversity in doctrinal sources** in the context of international arbitration. Additionally, I welcome any thoughts on the ramifications of the lack of multiplicity of doctrinal scholarships in the internal deliberations of the international tribunals.

I. The Significant Role of Doctrinal Sources in International Arbitration

Doctrinal scholarships on international arbitration are ubiquitous even though it is still a relatively young field. Yet, this dynamic field has attracted a diverse range of authors; the stakes are high and the relevant applicable laws are sometimes too complex, thus doctrinal sources are central to synthesizing facts, thoughts, and legal principles. The importance of doctrinal scholarship has been echoed in Prof. Paulsson's research, where he dedicated an entire section in his *The Idea of Arbitration*¹⁴ to the prediction of "a resurgent influence of legal scholarship" and linked its role to the legitimacy of the arbitration itself.

Doctrinal sources are largely regarded as auxiliary and supplementary¹⁵ means for the application and development of law. This means that doctrinal sources primarily serve as an optimal remedy to fill in the gap—or be used as a tie-breaker—when the adjudicative bodies are facing critical issues with controversial backdrops. However, the drafters of Article **38 (1) (d) of the Statute of the International Court of Justice** could not attribute a concrete definition¹⁶ to what exactly constitutes doctrinal sources.

The influence of doctrinal sources can be seen in Mr. Helmesron's research,¹⁷ in the 203 ICC awards published in the Yearbook of Commercial Arbitration between 1976 and 2014. It showed that there have been nearly 719 references to "scholarship", averaging 3.5 per award. Additionally, a thorough empirical assessment conducted by Prof. Schultz & Dr. Ridi¹⁸ highlighted this remarkable feature of doctrinal sources in international arbitration that belongs to a small, mostly closed, cohort of scholars and practitioners.

This begs the question: why do international tribunals only privilege the opinions of certain writers whose production may have straddled the line between the systemic dimension and the more doctrinal, black-letter analysis of specific legal questions?

Further, the centrality retained by certain individuals in doctrinal scholarships also

¹⁴ <https://academic.oup.com/book/8000/chapter/153369312>

¹⁵ <https://iusgentium.ufsc.br/downloads/grupo20142/texto-doutrina-2014.2.pdf>

¹⁶ <https://academic.oup.com/ejil/article/28/2/357/3933331>

¹⁷ <https://www.duo.uio.no/handle/10852/59830?show=full>

¹⁸ https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3577798_code610657.pdf?abstractid=3577798

gives rise to the vexing question of whether their scholarship truly reflects the intellectual legacies of international arbitration that usually sits at the intersection of public international law, public law, and human rights fields.

Even though it is worthwhile to assess what factors have contributed to a monopoly of doctrinal sources and their thematic influence in international arbitration—as well as the fact that the ideologies of certain scholars are immune from further scrutiny—I'd like to point to a few caveats that could be triggered by the lack of multiplicity in doctrinal scholarships.

A. *De facto Hierarchy:*

A point of criticism that is particularly relevant here is that the prolific and occasionally indiscriminate citation of certain authors by arbitral tribunals to rationalize a source of law may lead to a *de facto* hierarchy. This is particularly troublesome in international arbitration which does not have a hierarchical setting¹⁹ when it comes to legal authorities. The practice of privileging certain opinions over others may not sit well with the concept of a collective pronouncement of what law is. It also reduces the act of citation to a mere formality where the writings of certain scholars will be treated as an authoritative statement in the guise of propositions of *De Lege Lata*.²⁰ In addition, the overreliance on the authority of certain writers as evidence of international law may diminish the role that separate or sometimes dissonant opinions may play in the development of the law.

B. *Undermining Social and Moral Values:*

Legal proposition has roots in economic, political, and social factors, and thus an inter-disciplinary approach becomes essential in fields such as investment arbitration that uniquely embodies changing values,²¹ social mores, and economic factors. Critically, international arbitration as a so-called transnational system of justice carries the obligation to regulate political morality.²² Therefore, in cases that involve difficult questions of political morality, arbitrators ought to consider all moral and legal conceptions as potential answers. This means that when deciding on critical issues they should engage with doctrinal sources that correspond with historical, comparative, and philosophical research. In other words, tribunals need to endorse more up-to-date literature to enrich their deliberations, and in turn, increase public confidence in the outcome of the awards. The argument for diversity in doctrinal resources essentially advocates the importance of being responsive to an evolving research front and accounting for alternative moral views. If arbitral tribunals remain

¹⁹ <https://academic.oup.com/book/5602/chapter/148590425>

²⁰ <https://www.jstor.org/stable/20452757>

²¹ <https://voelkerrechtsblog.org/de/from-the-margins-to-the-center-can-social-movements-save-international-investment-law/>

²² <https://www.iisd.org/itn/en/2019/04/23/politically-motivated-conduct-in-investment-treaty-arbitration-jonathan-bonnitcha-zoe-williams/>

agnostic toward a new generation of doctrinal resources, there is a chance of undermining the social and moral character of the law.

C. Diminishing the Vigor of Legal Reasoning:

Relying on a monolithic viewpoint may not appeal to those who believe in the importance and distinctiveness of legal reasoning. There is a strand of argument that arbitrators, as decision-makers, should construct a form of reasoning that is framed by a variety of narratives, reflecting a broad range of views.²³ Considering disparate scholarly work can only enhance the intellectual vigor of a decision and formulate powerful exergies that are sociologically convincing. This suggests that endorsing the recent scholarships that confronts the difficult questions, complex issues, and uncomfortable challenges presented by contemporary societies may help arbitrators fashion new compromises to resolve political-moral dilemmas regarding issues with a controversial backdrop. Taking into account dissonant views, which may be regarded as the crème-de-la-crème of doctrinal philosophy, helps tribunals to comprehend and grapple with the full range of potential resolutions, and thus arrive at better and more rigorous reasoning.

I'd be very happy to hear any further thoughts in this regard.

Naimah Masumy



Emeritus Professor Ben Davis:

I have only two quibbles with the excellent summation done on the symposium on diversity that I add here for the focus of this arena which are persons under 40.

Pain. Across the excellent presentations and comments I salute the courage of all those who took on the challenge of articulating misgivings and concerns. To me, they are revealing contradictions between values espoused and values experienced. These efforts are laudable attempts at interpreting arbitral reality and dissonance.

I was dismayed about the non-discussion of the point Sophie Nappert I believe made about the glaring unequal compensation for women and the possible tracking of women into less well compensated kinds of arbitration.

That suggest a dismal hierarchical hegemony which in different ways we're addressed by the protagonists of the symposium.

I do believe that revealing these concerns is showing a willingness to reveal certain pain of some actors in the system. And I welcome that as a way to help the system grow.

²³ <https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-1999-2-page-93.htm>

I am reminded of the great quote of the great writer Zora Neale Hurston, “**If you are silent about your pain, they'll kill you and say you enjoyed it.**”

So do not be silent.

Also, in the ambition to climb in the profession you may attempt to please higher ups with demonstrations of fealty wearing a mask that you one day think you will take off. Over time you will find the mask becomes you and you cannot take it off. So watch it if you betray yourself.

Finally, I would change one word in the summation if I might from « fairness » to « justice ». Yes, a ridiculed word in many quarters yet surely in an arena dispensing with great power decisions affecting the rights of those involved, we also seek for its legitimacy that it renders a form of justice that stands up in the public courts. And that does call for the arena to be representative and not just another hegemonic hierarchy.

Ben Davis



Dr. Piotr Wiliński, closing words:

Dear all,

It is time to end our virtual symposium on diversity in international arbitration. Thanks for all exciting interventions (so far). Of course, if you have additional points to make, you should feel free to raise them on- or offline.

Until then, please join me in thanking our wonderful speakers, Victoria Kigen, Umika Sharma, Jennifer Ivers, Carolyn Lamm, Katherine Simpson, Johnny Tan, Ben Davis, Joshua Karton.

Many thanks and have a great weekend ahead,

also on behalf of Eva and Young-OGEMID,

Dr. Piotr Wiliński

Transnational Dispute Management is a peer-review online journal publishing about various aspects of international arbitration with a special focus on investment arbitration.

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Young professionals and students with an interest in transnational disputes, international investment law developments and related issues, are hereby invited to join the Young-OGEMID discussion group. Membership is free.

Simply visit www.transnational-dispute-management.com/young-ogemid/ and fill in the registration form. Other summaries of our Young-OGEMID virtual seminars focussing on career development can also be found there.