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ARBITRALWOMEN
The International Network of Women in Dispute Resolution

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ArbitralWomen/TDM Special Issue on 'Dealing with Diversity in International Arbitration'
by L. Barrington and R. Rana

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.

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INTRODUCTION

Twenty-five years ago, no one was talking about "diversity" in international arbitration. If the word came up at all, it was likely to have been in reference to the diversity of the claims that came before arbitral tribunals. No one ever thought to wonder about the people involved in deciding those claims or representing parties in international arbitration. And to paraphrase a well-known international arbitration counsel/arbitrator: "When we choose an arbitrator, diversity is the last thing on our minds. We're not trying to make a statement; we simply want the best person for that particular case."

Modern arbitration, with its arbitration institutions such as the LCIA, ICC and Stockholm Chamber[1] began to develop in the early 20th century, created by businessmen who wanted an alternative to the risks, cost and perceived inadequacies of state courts attempting to deal with foreign parties, foreign law and foreign claims. Back then, arbitration cases involved parties and claims mainly centered in Europe and around the Mediterranean, with American claims increasing as U.S. money poured into Europe through the Martial Plan following the Second World War.

If a businessman invoked the arbitration clause of a contract, he naturally called upon one of those few counsel who specialized in arbitration, and they in turn chose one (or three) of their own to decide the case. The arbitration community was a tightly-knit, Anglo-European (plus the odd American) gentlemen's club, where everyone knew everyone else, either personally or by reputation, where arbitrators and counsel regularly lunched or golfed together, and where everyone was usually familiar with the style and proclivities of the other members.

Today in the first quarter of the 21st Century, international arbitration has evolved. For instance, the ICC court in 2014 received over new 700 arbitration cases, involving parties from 14

[1] LCIA founded in 1895, SCC in 1919, ICC Court in 1923

different jurisdictions[2]. To some degree this example can be replicated around the world as the caseload of each arbitral institution grows each year. As a result, the conversation has dramatically changed. The faces of the litigating parties are no longer exclusively white, Caucasian and male. Disputes arise between Asians and Africans, South Americans and Europeans, Americans and the Middle East. Women have entered the business world, and the field of law, in droves. Nevertheless, the faces of the counsel leading the legal teams, and of the arbitral tribunals deciding the disputes, remain – with the exception of a couple of high-profile exceptions – overwhelmingly white, Caucasian and male.

Over the past couple of decades, the changing and changed arbitration community has awakened to wonder whether this narrow mold represents the best resourcing for the resolution of disputes which bring into play dozens of different legal systems, cultures and expectations. Are these truly the "best persons for the case"?

And so the conversation has turned to a serious consideration of Diversity.

As the premier international organization promoting women in international dispute resolution, ArbitralWomen are delighted to take a lead role in the production of this very special publication of Transnational Dispute Management. We recognize that women must engage with all the stakeholders in order to succeed in our goals. We need to attract the attention and the collaboration of arbitration professionals of every type, of professionals drawn from the whole spectrum of geographical, ethnic and gender backgrounds. TDM casts its net wide, appealing to an international readership that crosses borders and attracts a vast and varied community of stakeholders, all of whom have a role to play in the evolution and improvement of international arbitration. ArbitralWomen are delighted to be a part of a movement that promotes equality and diversity.

In this special issue of the TDM journal, authors from around the globe place the arbitration community under a microscope, analyze critically what they find, ask whether we can do it better with diversity, how diversity will improve the process and how to bring diversity into the mainstream of the arbitration world.

[2] http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/

Kathleen Claussen sets out the rationales for increasing diversity in international arbitration: potential for improved outcomes and sustainability of the arbitrator pool, diversity as a public value, and increased legitimacy of the system in the eyes of stakeholders. She concludes that even though the arbitral institutions make only a small proportion of appointments, they are in the best position to increase diversity.

In an article re-published from the *Columbia Journal of Law*, **Susan Franck** and her co-authors examine the "invisible college" – the global elites in a white male game -- by studying about 500 participants at a recent ICCA Conference. They too contend that increased diversity will enhance legitimacy, public trust and procedural justice, and probably higher quality outcomes.

Arthad Kurlekar applies feminist critiques of contract to arbitration agreements, discussing the primarily male ethic present in the negotiation of dispute resolution clauses. He focusses on strict adherence to text, the undermining of party intention, the link to the abstraction and hierarchy of rights, and even to the unconscionable nature of some arbitration clauses.

Ula Cartwright-Finch looks at research on the impact of gender diversity at group level, and the effect of changing the male/female balance of a team on the way it functions and performs. Researchers have shown that teams with equal numbers of men and women, or with more women than men, performed a simulated management task better than all-male teams because of more cooperation and more variety in team members' approaches to communications.

Ingrid Müller questions the true neutrality of appointed arbitrators, and argues that younger arbitrators – necessary to replenish the pool of arbitrators as other retire - need better opportunities to learn and to gain the experience necessary for appointment. She agrees that institutions are in a good position to foster this change.

Elizabeth Oger-Gross explores ways in which the search for "gravitas" may influence the nomination of arbitrators, offering some rather amusing perceptions to illustrate her points. She points out that institutions have a better record on diversity than parties who appoint directly.

In Australian private law firms and at the Bar, women are still apt to be defined as outsiders, given a legal culture organized by and around men and defined by masculine traits. **Dalma Demeter** and her colleagues explore the different roles of the arbitrator, and how women's

communication styles and the presence or lack of "gravitas" affect the appointment process. They urge parties and their counsel to "think outside the box" to decrease sex discrimination in arbitral appointments and suggests that quantitative and qualitative research will demonstrate that exuding (masculine) power is not the only way to effect and enforce a determinative decision.

And, ironically, are women as guilty as men in perpetrating the status quo? According to some, when you talk to women at the very top, it becomes clear that part of their success is due to convincing men that they aren't like other women…denying their status as women becomes a reflex. So when they get up high enough on the ladder, far from making a difference for the women who come after them, they're still in the business of proving to the guys that they're really not one of the girls.

Several South American states have recently withdrawn from the ICSID Convention and critics from many sectors call for its removal from future trade treaties. The arbitration elite membership is skewed in favour of the "rich North". A study by **Robert Kovacs** and **Alex Fawkes** also found that of 499 ICSID arbitrators appointed only 25 were women. In other words, 95% of participants in investor-state tribunals are men. Kovacs and Fawkes point out the necessity for diversity in order to increase the legitimacy of arbitration and the public's confidence that it will produce a fair result in the framework of global governance.

Tony Cole and **Pietro Ortolani** discuss a study conducted for the European Parliament which, among other findings suggested that although ethnicity might not in itself be an obstacle to accessing the European arbitration industry, it does play a role in career progression patterns. They point out that in the 871 arbitrators who responded to the EU survey, only 30 described their ethnicity as "non-white".

Uché Ewelukwa Ofodile describes the crisis of legitimacy in Africa resulting from the lack of involvement of Africans in international arbitration. Weak arbitral institutions and limited attention to arbitration and ADR contribute to the uneven legal landscape of arbitration law and practice in Africa, producing judicial ambivalence or even hostility to arbitration, widespread ignorance in Africa about ADR and, until recently, the failure by governments to support the development of the arbitral infrastructure in Africa.

In early 2015, the United Nations congratulated Scotland for being one of only three countries in the developed world to have a gender-balanced cabinet, while some commentators wondered aloud how First Minister Nicola Sturgeon could be sure the women were appointed on the basis of merit. No one ever asked whether the men had been appointed on merit. **Gillian Carmichael Lemaire** aligns the situation of arbitration in Scotland with that of the Scottish judiciary and political scene, arguing that educational initiatives at even primary school levels are a way to help in redressing the gender imbalance in the legal profession, the state systems and in arbitration. After all, early learning sets the pattern later in life.

Nima Nasrollahi Shahri offers a dramatic description of the situation of women in Iran's Muslim state legal system. He reports that in 2012, of the top ten candidates in the entrance exam leading to law studies, six were girls. But since the revolution, it has been legally impossible for women to work as judges in the state court system. Nassrollahi argues that international arbitration has the potential to help reduce the disparity in Iran between women and men in positions of power.

Contrasting the growth in women's share to nearly one-third of state judicial roles over the past decades against our paltry 6% as investor-state arbitrators, **Lucy Greenwood** suggests that one way of confronting and eradicating this striking inequality is to use a "blind appointment" system. The administering institution would remove all names from the proposed list of arbitrators and standardize the CVs of suitable arbitrators for the dispute before it. It would then forward the anonymized list to counsel for the parties to make their selection. If it wished, a party could contact the institution to find out who the arbitrator was in order to review his or her publications, published awards, and so on. However, the preliminary "blind" process might go some way to rebalance the effect of implicit gender bias on the decision maker -- and certainly would sensitize that decision maker to the gender issue and its irrelevance to the decision.

In to better reflect the diverse nationalities of users, and reduce perceptions of arbitrator bias, **Courtney Dolinar-Hikawa** proposes a regional diversity requirement for the sole arbitrator or the presiding arbitrator of a tribunal: the decision-maker and the parties cannot be nationals of the same region.

Justice Barry Leon, until this year a Canadian counsel and arbitrator, is optimistic about the potential effect of a "magic bullet": CPR's new Diversity Commitment proposed to those engaging arbitration counsel and arbitrators to increase diversity: *"We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of mediators or arbitrators they propose. We will do the same in the lists we provide."*

Echoing Justice Leon's comments, **Baiju Vasani** discusses using the equivalent of "the Rooney Rule" in choosing arbitrators.

Wrapping up this special issue, **Mirèze Philippe** treats us to a very personal historical account of the progress made in increasing gender representation in the world of arbitration. In her 30 years with the ICC Mirèze has been on the scene, sometimes at the centre, sometimes as a keen-eyed historian, during many of the key events that have marked our progress to date. Tracing the progress made thus far, Mirèze pays tribute to those women and men who have taken initiatives to raise consciousness among women and within the dispute resolution community at large, whose initiatives been instrumental in effecting change, and who are committed to rebalancing the diversity equation.

We invite you to delve into this issue to read, reflect and enjoy. We hope what you find will inspire you to new levels of awareness and creativity in fostering diversity in the world of international commercial arbitration.

Collegially yours,

Louise Barrington, Founding co-President and Rashda Rana, President