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Diversity and Lack Thereof Amongst International Arbitrators - Between Discrimination, Political Correctness and Representativeness

by I.A. Müller

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TDM special issue "Dealing with Diversity in International Arbitration"

Ingrid A. Müller

Diversity and lack thereof amongst international arbitrators – between discrimination, political correctness and representativeness

Abstract

Diversity, usually referred to as a *must have balance*,[1,2] should be universally achieved in international arbitration. Since it can affect the perceived legitimacy of a dispute resolution system and the quality of decisions,[3] it is very easy to understand why there are meetings and conferences regularly organized to discuss diversity and the need for it, and why "task forces" promoting diversity in ADR have been formed.[4]

Interestingly enough, some practitioners consider arbitrators' diversity to be "the last thing on anyone's mind" when selecting them.[5] However, due to the great heterogeneity of parties in international arbitration, inadvertently, every time parties appoint an arbitrator to their likening,[6] diversity is not only sought, but also promoted.

In contrast, every time an institution endorses again and again,[7] and chooses from, the same list that contains arbitrators with a very similar profile - the practice consensus being that such lists

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[1] See, Lucy Greenwood & C. Mark Baker, **"***Getting a Better Balance on International Arbitration Tribunals"*, The Journal of the London Court of International Arbitration, Volume 28, Number 4, 2012.

[2] See Jill Evans, "*Redressing the Balance*" The Resolver, 2012, available online at http://www.aculextransnational.com/pdf/The_Resolver_May_2012_article_Redressing_the_Balance.pdf

[3] http://piaba.org/system/files/pdfs/PIABA%20Press%20Release%20(October%207,%202014).pdf

[4] See F. Peter Phillips, "*Diversity in ADR More Difficult to Accomplish than First Thought"*, Dispute Resolution Magazine, 2009.

[5] See Lucy Greenwood,"*Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals"*, International Law News, Vol. 42 No. 2, 2013, available online at http://www.americanbar.org/publications/international_law_news/2013/spring/unblocking_pipeline_achieving_greater_gender_diversity_international_arbitration_tribunals.html

[6] See John Uff CBE QC **"***UK: Party-Appointed Arbitrators: What Is Their Proper Role?", 2013*, Available http://www.mondaq.com/x/267544/Arbitration+Dispute+Resolution/PartyAppointed+Arbitrators+What+Is+Their+Proper+Role

[7] *See F. Peter Phillips, "Diversity in ADR More Difficult to Accomplish than First Thought", Dispute Resolution Magazine, 2009. "Again and again, corporate counsel lament that they are being given the same short lists of the same arbitrators and the same mediators (presumably older white men) from whom to choose"*

are comprised in majority by older, white men[8] - it is obvious that there is an underlying lack of diversity.

This is why it is important to understand that, in international arbitration, diversity (of arbitrators) can be viewed from several perspectives: considering the politically correct approach, the representativeness perspective and in light of discrimination - the latter being considered as the main reason for lack of diversity.

As such, the present article will present arbitrators' diversity as a concept formed at the intersection of the three perspective mentioned.

Also, this article will briefly address statistical data available for arbitrators' diversity, taking into consideration different divides, like gender, ethnicity/race/nationality, age, and backgrounds.

The objective of the paper is to analyze the impact of arbitrators' diversity and lack thereof, on the credibility of arbitration as ADR method (in unrepresented groups) and to suggest new approaches to increase diversity.

In achieving this goal, different arguments – both for and against – shall be made, mainly via a fictive debate, as part of an elenctic like method of progressing to a conclusion through inquiring and reasoning.

But what is *diversity*?

We should start by saying that even if there are numerous articles and papers on the subject and despite the fact that practitioners and academics alike meet regularly discussing *diversity and the need for it* with specific reference to international arbitrators, only rarely *diversity* has been clearly defined in the context of international arbitration. Therefore, before proceeding to the detailed presentation of the topic at hand, the concept of *diversity* - and for that matter, *lack thereof* – when it comes to international arbitrators, should be accurately defined.

As a general concept, diversity refers to the recognition, acceptance and inclusion of the differences between individuals and groups of individuals.

Sometimes, the term *diversity* is used interchangeably with *equality* although the two notions are distinct from one another. However, most of the times the two are used in tandem since the two concepts do relate. Because equality refers to the fact that equal opportunities should be given to everyone, despite the inherent diversity generated by aspects such as those pertaining to differences between individuals concerning gender, ethnicity, background and age.

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[8] See Caley E. Turner, *"Old, White, and Male": Increasing Gender Diversity in Arbitration Panels, 2014, available online at* http://www.cpradr.org/Portals/0/Old_White_and_Male_Increasing_Gender_Diversity.pdf

Nevertheless, it should be noted that although in the present paper only diversity will be discussed, at times, when referring to diversity, the reference is to be construed as implying also the equality that should accompany diversity.

It is important to say that in international arbitration, diversity - apart from having many subsets, such as: gender, age, ethnicity and background - should be discussed from several perspectives:

The first perspective, refers to the ultimate, politically correct approach, i.e. whether or not the international arbitration community recognizes enough practitioners from different geographical and ethnic backgrounds as well as of different genders.[9] It also addresses the ”gray hair factor”,[10] i.e. the fact that age (and not just experience) plays an important part in the choice of arbitrators.

The second perspective, looks at diversity from a more pragmatic approach. It considers the representativeness of the arbitrators, when taken into account in relation to the multitude of cultural, legal, social and economic frameworks of potential parties.

Both perspectives mentioned above, allude to a third one, of extreme consequences, yet rather difficult to substantiate. It refers to the *lack of diversity* of arbitrators as being, more or less, the outcome of discrimination in the appointment of arbitrators.

This perspective has lately drawn considerable attention from both practitioners and academics in the field of international arbitration.[11]

For the purpose of the present paper however, *diversity* will be discussed from a general perspective. Regardless of the fact that the present discussion may be approached from any perspective, diversity is to be construed as encompassing all perspectives mentioned above, as a concept formed at the intersection of the three.

Therefore, in order to understand *diversity*, one must refer to the notions of *impartiality, independence and neutrality*, which, although apparently unrelated to diversity and distinct from one another, interrelate in such a manner, that the concept of diversity - as it is understood in international arbitration - becomes obvious. And for that matter, the need for diversity, too.

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[9] Julianne Huges-Jennet and Rashida Abdulai, “*Hogan Lovells International Arbitration Salon: Perspectives on Diversity in International Arbitration*”, posted on April 16th 2015, available on http://www.hlarbitrationlaw.com/

[10] Susan D. Franck, James Freda, Kellen Lavin, Tobias A. Lehmann, Anne Van Aaken, *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration”*, Columbia Journal of Transnational Law, 2015, page 452, paragraph 4- *mean age of ICCA arbitrators is 54*.

[11] Umar A. **Oseni**, Hunud Abia **Kadouf**, “The Discrimination Conundrum in the Appointment of Arbitrators in International Arbitration” Kluwer Law International, 2012, *Journal of International Arbitration*, volume 29, Issue 5, pp. 519–544

Impartiality, as one of the fundamental prerequisites of arbitration, relates to the actual or apparent bias of an arbitrator[12] and it must be emphasized that it is different than *neutrality*. Although the two may seem identical at first and as a consequence, often confused, they are in fact, distinguished from one another.[13]

While *impartiality* is an abstract concept, relating to the state of mind of an arbitrator[14] and as such, its subjective attitude when approaching the dispute,[15] *neutrality* is similar to *independence* in this respect, as it refers to the relationship of the arbitrators with the appointing party, thus being capable of objective verification,[16] and does not imply any prejudice towards the other party.[17]

However, unlike *independence, neutrality* is not mandatory for arbitrators.[18] Usually, it is considered that any party appointed arbitrator is "non-neutral".[19] Nevertheless, they are generally still bound by the *impartiality* and *independence* obligation.[20]

Also it should be noted that, although initiated by one party, the appointment of each arbitrator is implicitly confirmed by the other party and as such, it is not an unilateral act, but a confirmation of the common intention of the parties. [21]

So, how does this relate to diversity?

From the representativeness perspective, diversity is understood as a purposeful alignment of each of the diverse parties' background to that of their respective appointed arbitrator. It is

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[12] See Allan Redfern, "*Law and Practice of International Commercial Arbitration*", Sweet & Maxwell, 2004, page 201, paragraph 4-55.

[13] Ibidem, paragraph 4-56.

[14] See supra, note 12.

[15] The Baker & McKenzie, '*The Baker & McKenzie International Arbitration Yearbook 2008*", Wolters Kluwer Russia, 2009, page 181, paragraph 3.

[16] See Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage, "*Fouchard, Gaillard, Goldman on International Commercial Arbitration*", Kluwer Law International, 1999, page 564, paragraph 1028.

[17] Arthur W. Rovine, Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007, BRILL, 2008, page 88, paragraph 1.

[18] It should be noted that some legislations require an obligation of independence and impartiality only from neutral arbitrators. See for example the AAA Commercial Arbitration Rules, 2004, applicable to US domestic arbitration.

[19] Jay E. Grenig, Rocco M. Scanza, "*Case Preparation and Presentation: A Guide for Arbitration Advocates and Arbitrators"*, Juris Publishing, Inc., 2013, page 77, paragraph 1.

[20] See supra note 18.

[21] Apud Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage, "*Fouchard, Gaillard, Goldman on International Commercial Arbitration*", Kluwer Law International, 1999, page 575, paragraph 1047. - quoting The French Cour de cassation 2e civ., Apr. 13, 1972, JCP 1972, II, 17189.

through diversity, i.e the very non-neutrality of the arbitrators, that a neutral, decision is created, as a product of non-neutral – while still impartial - extremes.[22]

As far as the other two perspectives go, it is here where they seem to align with each other, because, in order for an arbitral tribunal to be genuinely impartial - as in to understand things from all perspectives without any partisan standpoint - no discrimination should exist, which in turn could be attained with a politically correct approach, that promotes diversity.

Obviously, all three perspectives could and sometimes do overlap.

So when diversity, from a representativeness perspective, overlaps with the politically correctness perspective, and taking in consideration that both could also encompass lack of diversity as a form of discrimination, a general, all-inclusive understanding of diversity, is created.

And why is diversity so important?

It should be noted that when referring to the international arbitration process in general, diversity, apart from having a number of positive effects[23] on the process of international arbitration, could also be construed as having negative effects.

Take, *exempli gratia*, the problems and misunderstandings caused by cultural diversity.[24] It is here where the similarities and dissimilarities between the legal, social, economic and cultural framework of actors in international arbitration, may hinder understanding of the other's standpoint. [25] That is, considering that arbitrators could have different backgrounds and as a consequence, either understand differently, or not at all, certain aspects that the party relies upon in order to present its case.[26] However, this is where the party appointed arbitrator comes in, the actual *raison d'être* of this institution.[27] The role of the party appointed arbitrator is to

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[22] Rosabel E. Goodman-Everard, Cultural Diversity in International Arbitration – a Challenge for Decision-Makers and Decision-Making, Oxford University press Journal, Arbitration International, Volume 7, Issue 2, page 155-164, 1991.

[23] See Joseph Mamounas, Bilzin Sumberg Baena Price & Axelrod LLP,, *"Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change"* April 10, 2014 - Wolters Kluwer Law & Business.

[24] Rosabel E. Goodman-Everard, Cultural Diversity in International Arbitration – a Challenge for Decision-Makers and Decision-Making, paragraph 1, available online at http://arbitration.oxfordjournals.org/content/7/2/155

[25] Idem, paragraph 5.

[26] This also goes to the diversity of arbitrators but in this part of the paper we shall simply pointy out to the way it interrelated to impartiality (and neutrality).

[27] See Yuval Shany, *Squaring the Circle? Independent and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 Loy. L.A. Int'l & Comp. L. Rev. 473 (2008), page 474, paragraph 3, Available at: http://digitalcommons.lmu.edu/ilr/vol30/iss3/8

make sure that the appointing parties' standpoint is properly understood and considered by the arbitral tribunal.[28]

This is exactly why some have said that this affects arbitrators' *impartiality*,[29]which is not excluded and it is obvious that there is a higher risk for lack of impartiality from a party appointed arbitrator, than from a jointly appointed one, or from a neutral authority' appointed arbitrator. Nevertheless, assuming ideal conduct of the arbitrators, it is the party appointed arbitrators that ensures impartiality of the Arbitral Tribunal, through diversity, and it is the neutral arbitrator's role to equally consider all standpoints.

Normally, in order for any individual arbitrator to be impartial, it has to be voided of any implicit bias – which, granted, is usually arising out of a different background. Paradoxically, in order for a multi-party Arbitral Tribunal to be impartial, this could be better achieved through diversity, i.e. different constituents (apart from a neutral arbitrator), similar in background to the party that appointed them, ensuring representativeness and through it, an impartial decision.

And here, the effects of diversity get a positive connotation, because each party is able to appoint an arbitrator [30] who understands their traditions and approach [31] and who, in turn, is able to explain their perspective to the other arbitrators, achieving objectivity of the arbitral tribunal.

Furthermore, diversity improves decision-making, by bringing in different perspectives.[32] Admittedly, predictability (and consistency) of the outcome is one of the most important aspect that parties look for in (institutionalized) arbitration as an alternative dispute resolution method and it is an important factor in appointing arbitrators. Nevertheless, even if this could explain why disputes end up being resolved by similar panels,[33] diversity counters the risk that an

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[28] Idem page 482, paragraph 1.

[29] Jan Paulsson, *"Moral Hazard in International Dispute Resolution"*, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law, 2010, available online at http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf

[30] When talking about an Arbitral tribunal composed of 3 arbitrators, however, the same applies for any number of arbitrators, because usually, parties do have a say in choosing the Arbitral Tribunal.

[31] See John Uff CBE QC **"***UK: Party-Appointed Arbitrators: What Is Their Proper Role?"* Available at http://www.mondaq.com/x/267544/Arbitration+Dispute+Resolution/PartyAppointed+Arbitrators+What+Is+Their+Proper+Role

[32] See Scott E. Page, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies, (Princeton *University Press, 2007).*

[33] Nathan Hale, Diversity Key To Int'l Arbitration's Push For Legitimacy, available online at http://www.law360.com/articles/525580/diversity-key-to-int-l-arbitration-s-push-for-legitimacy

arbitral tribunal will act the same as its predecessors.[34] If disputes would be resolved only through analogies, without effectively addressing the particularizes of a case, this would undermine the credibility of the arbitration process.

As a consequence, it becomes evident that diversity is essential to a fair and effective arbitration process[35] and without it, the perceived legitimacy of a dispute resolution system and the quality of the decisions are affected. [36]

What about the numbers? How do they pertain to the analysis of the current state of diversity in international arbitrators?

We couldn't address the aspect of statistics without first mentioning that there is a notorious lack of transparency [37] in the data available for international arbitration.

While, due to the underlying confidentiality of an arbitration, this is understandable where the actual elements of a dispute are concerned, when it comes to the arbitrators themselves, this creates an aura of distrust and insecurity that is damaging not only to arbitrators, but, in some cases to the arbitration process itself. [38]

Because of this lack of publicly available data on arbitrators – except for some limited data communicated by arbitral institutions – they are considered as being a part of the "invisible College"[39] of international arbitration.

One would think that arbitrators' demographic makeup should reflect, to the extent possible, the demographic makeup of the parties.[40] However, this is not always the case.

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[34] See Joseph Mamounas, Bilzin Sumberg Baena Price & Axelrod LLP, ICCA 2014. Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change, available online at http://www.terralex.org/publication/p016f429f78/icca-2014-does-%E2%80%9Cmale-pale-and-stale%E2%80%9D-threaten-the-legitimacy-of-international-arbitration-perhaps-but-there%E2%80%99s-no-clear-path-to-change, posted 2014.

[35] See Caley E. Turner, *"Old, White, and Male": Increasing Gender Diversity in Arbitration Panels, 2014.*

[36] See Susan D. Franck, James Freda, Kellen Lavin, Tobias A. Lehmann, Anne Van Aaken, *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration"*, Columbia Journal of Transnational Law, 2015, page 429, paragraph 1.

[37] Idem, page 430.

[38] See Piaba Press Release on the Piaba report on FINRA Arbitrators,: Study: Industry run FINRA arbitrator pool lacks diversity, and fails to detect, communicate potential bia, October 2014, available online at http://piaba.org/system/files/pdfs/PIABA%20Press%20Release%20(October%207,%202014).pdf

[39] See Oscar Schachter The Invisible college of International Lawyers, referred to the elite of professional influencing international law as an "Invisible college". Arbitrators are a part of it. Apud. Susan D. Franck, James Freda, Kellen Lavin, Tobias A. Lehmann, Anne Van Aaken, *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration"*, Columbia Journal of Transnational Law, 2015, page 432 paragraph 1, see also note 1.

Since modern international arbitration was initiated by a "small group" [41] of American and British Old Men, back in 1794,[42] the historical portrait of an international arbitrator becomes very clear. But then again, this was the socio-politico and legal reality at the time. So from an evolutionary point of view, it seems that there's some inertia in adjusting the mentality of actors in arbitration, to the current state of the international, socio-politico and legal reality, and in complying with the universally accepted principles of diversity and equality by promoting them in international arbitration.

In order to understand the progress - or lack thereof - made when it comes to diversity in international arbitration, recently, more and more studies[43] endeavored to analyze the little data available for international arbitration from the perspective of diversity of arbitrators. Such research is done considering different subsets of diversity.

Most important subsets frequently reviewed, are: gender, age, ethnicity and the background of the arbitrators. Those are the subsets discussed in the present paper.

Gender diversity

Gender diversity, especially where arbitrators are concerned, is one of the most discussed aspects of diversity in international arbitration.

But before discussing about the current state, we should start with a few words on the beginnings of international arbitration and present some historical facts, that will help us understand the current status of gender diversity in international arbitration. There were no women present in arbitration at the moment international arbitration was initiated.[44] As mentioned above, this was the reality at the time.

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[40] See Deborah Rothman, *Gender Diversity in Arbitrator Selection*, Dispute Resolution Magazine, 2012, available online at http://c.ymcdn.com/sites/www.wlala.org/resource/resmgr/imported/rothman.pdf

[41] See Catherine A. Rogers, *The Vocation of the International Arbitrator*, American University International Law Review, Volume 20, 2005, page 963, paragraph 3.

[42] See the International Court of Justice presentation- *The modern history of international arbitration is, however, generally recognized as dating from the so-called Jay Treaty of 1794 between the United States of America and Great Britain*, available online at http://www.icj-cij.org/court/index.php?p1=1&p2=1

[43] See exempli gratia Susan D. Franck, James Freda, Kellen Lavin, Tobias A. Lehmann, Anne Van Aaken, *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration"*, Columbia Journal of Transnational Law, 2015

[44] Yves Dezalay & Bryant G. Garth, *Dealing in virtue: International Commercial Arbitration and The Construction of a Transnational Legal Order* 18-21 (1996). *Apud* Catherine A. Rogers, *The Vocation of the International Arbitrator*, American University International Law Review, Volume 20, 2005, page 958, note 2.

Women were not even present in the legal profession – it took more than one hundred and twenty years before the first women was allowed to attend and graduate a law school [45] and it was only the beginning of a very sinuous road until women were completely accepted as equals.[46] At least in theory, at a declarative, *de jure* level, because *de facto*, women are still striving for acceptance.[47]

When it comes to international arbitration, it was only about twenty years ago that the lack of gender diversity and the underrepresentation of women arbitrators in international arbitration, was first addressed.[48] It was from that moment on, that people were starting to wonder what can be done to include women, more and more, in international arbitration.[49]

Yet, even today, there is an unjustifiable gender gap for women in arbitration.[50]

Not only that arbitrators themselves think that their gender affects their appointment, as demonstrated by a 2002 survey in which 85% of those interviewed stated this,[51] but statistics published by arbitral institutions confirm that there is a gap, as the number of women appointed, whether by the parties or by the institutions, is very low.

Exempli gratia, the Stockholm Chamber of Commerce reported that 6.5% of all arbitrators appointed in its arbitrations were women and the LCIA reported that in 2011, only 6.5% of all arbitrators appointed in its arbitrations were women.[52] Where it came to ICSID cases, only 5,63% of arbitrators appointed for the overall interval between 1972-2012, were women.[53]

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[45] See Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn From Their Experience About Law and Social Change?*, 2009,

Cornell Law Faculty Publications, Paper 12, page 2, paragraph 2, available online at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1011&context=facpub

[46] Idem.

[47] See Deborah Rothman, *Gender Diversity in Arbitrator Selection*, Dispute Resolution Magazine, 2012, available online at http://c.ymcdn.com/sites/www.wlala.org/resource/resmgr/imported/rothman.pdf

[48] See Louise *Barrington, Arbitral Women: A Study of Women in International Commercial Arbitration,* The commercial Way to Justice, 229, 229-41, Geoffrey M. Beresford Hartwell, 1997, page 230.

[49] Idem. Page 231.

[50] See the April 2015 interview of the President of Arbitral Women - Ms. Rashada Rana – interview by Evelyn Reid, available online at http://blogs.lexisnexis.co.uk/dr/25184/

[51] Apud Caley E. Turner, *"Old, White, and Male": Increasing Gender Diversity in Arbitration Panels, 2014*, see note 12

[52] See the Fulbrigt & Jaworski L.L.P, 2012 International Arbitration Report on Gender Diversity

[53] See ICSID annual reports available online at https://**icsid**.worldbank.org

That is even if women have usually equal or even better credentials.[54]

So the question is, why this difference in the number of men versus that of women appointed as arbitrators?

The consensus is that there is a multitude of factors.

Starting with the fact that since women don't get appointed as often – it's difficult for them to get known and because this is of great importance when parties appoint,[55] it creates a vicious circle. Continuing with the fact that there seems to be an implicit bias against women[56] and ending with the fact that - as some have stated[57] - the women behave differently and by being less confident and under-estimating themselves, they get noticed (and as a consequence appointed) less than men.

Detailed approaches will be discussed in the last part of the paper, however, as far as gender diversity is concerned, it is suggested that women should reverse the trend by persevering in being themselves and not by mimicking men's behavior.[58]

Ethnicity/race/nationality

Although different, ethnicity/race and nationality are considered together due the fact that most of the time, nationality relates to ethnicity – and sometimes race.

There is an even greater lack of statistics available for this divide, as even the institutions that release some data on arbitrators like their gender, do not disclose the racial or ethnic identity.[59] As a consequence, this group will be presented in general terms.

Nevertheless, there are similarities between women and other groups that are underrepresented.[60]

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[54] See F. Peter Phillips, It Remains a White Male Game, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION (Nov. 27, 2006), available at http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/90/categoryId/86/It-RemainsA-White-Male-Game-NLJ.aspx

[55] See Deborah Rothman, *Gender Diversity in Arbitrator Selection*, Dispute Resolution Magazine, 2012, page 24.

[56] Idem page 25.

[57] See William Tetley, How to Become an International Arbitrator without Even Trying, June 14, 2011

[58] See the April 2015 interview of the President of Arbitral Women - Ms. Rashada Rana – interview by Evelyn Reid, available online at http://blogs.lexisnexis.co.uk/dr/25184/

[59] See Benjamin P. Edwards, *Finra's diversity dilemma*, available at http://www.investmentnews.com/article/20141116/REG/311169992/finras-diversity-dilemma

[60] See David A. Hofmann and Lamont E. Stallworth, *Leveling the Play Field, for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 2008 available at http://www.bostonlawcollaborative.com/blc/45-BLC/version/default/part/AttachmentData/data/HoffmanStallworth.pdf?branch=main&language=default

Also similarly, both conscious and unconscious forms of racial and ethnic bias in our society have resulted in the underutilization of minorities as arbitrators in ADR.

It is thought that ethnic and racial discrimination is not done openly due to anti-discrimination laws. [61]

As far as the nationality goes, it is a slightly different situation, because it is openly considered when appointing and it relates specifically to an arbitrator's impartiality, independence and especially with neutrality.[62] That much so, that some relate arbitrators' nationality with their neutrality,[63]and it is the practice of arbitral institution to appoint national neutral arbitrators and to have restrictive rules on nationality of arbitrators. Regardless, most arbitrators that get appointed are either European or American,[64] especially from the United States, the United Kingdom, Switzerland, France, or Germany, as this is where, for instance, the ICC reported that 50% of its appointees came from in recent years.[65] So, it is easy to see why it is said that the full potential ADR will not be realized until the use of ADR reaches a broader community than it does today.[66]

Which could be accomplished by increasing the diversity of the arbitration community.

Age diversity

In most cases, international arbitrators are very experienced and above middle age.[67] Although the experience prerequisite is very easy to understand, the age issue is not so simple. Obviously, experience does come with age, however, the median age for international arbitrators is quite high - fifty three- while the minimum is twenty-nine and the maximum eighty-five.[68]

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[61] Idem.

[62] See Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator, Fordham International Law Journal Volume 31, Issue 3 2007 Article, page 604.*

[63] Idem, page 607.

[64] See the April 2015 interview of the President of Arbitral Women - Ms. Rashada Rana –by Evelyn Reid

[65] See Joseph Mamounas, Bilzin Sumberg Baena Price & Axelrod LLP,, "*Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change"* April 10, 2014 - Wolters Kluwer Law & Business.

[66] See David A. Hofmann and Lamont E. Stallworth, *Leveling the Play Field, for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 2008

[67] See Joseph Mamounas, Bilzin Sumberg Baena Price & Axelrod LLP,, "*Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change"* April 10, 2014 - Wolters Kluwer Law & Business.

[68] See Susan D. Franck, James Freda, Kellen Lavin, Tobias A. Lehmann, Anne Van Aaken, *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration"*, Columbia Journal of Transnational Law, 2015, page 466, paragraph 3.

Considering the years needed for a minimum experience after some undergraduate and possibly graduate degree, twenty-nine is an acceptable minimum age for being appointed arbitrator. But when it comes to the maximum of eighty-five, we can't help noticing that this is at least twenty years past a mandatory retirement age promoted by organizations like the United Nations (of sixty two) [69] or the European Union institutions (of sixty five).[70]

Of course, we are not talking about a public sector and besides, this rule in itself could be considered as hindering diversity and discriminatory. Nevertheless, in the case of an EU age limit, for instance, the main reason for mandatory retirement at sixty five, is based on the perceived importance of age-diversity in the workforce.[71] This has been upheld as non-discriminatory by the European Court of Justice, that ruled that older workers can be mandatorily retired, given that this is "*objectively and reasonably justified by a legitimate aim."* [72] The aim in this case is to create opportunities for different age groups.

Again, there's a big difference between the public sector and the usually private arbitrations, ruled by the will *of the parties* (which usually also applies to appointment). And we are not - in any way - contesting the ability and wisdom of the older arbitrators. On the contrary. However, we disagree with the suggestion that resuming to "known quantities" (in age, gender, or otherwise)[73] will always, necessarily, produce the best results. At the same time, we are noticing that the arbitration community is not making any efforts towards increasing age diversity in arbitration, given that most arbitrators appointed are older.

Normally, we do not accept the mentoring suggestions that are already put forward for consideration, as a mean to increase diversity in arbitration,[74] because we consider that implementing mentoring programs to promote (only) the inclusion of women and minorities in arbitration is simply offensive, as the very suggestion implies that women and minorities are, automatically, in need of mentoring, due to the simple fact of being of the female sex or of a certain race or ethnicity.

Nevertheless, when it comes to the age divide, it is considered acceptable, given that is obvious that experience and knowledge do come (normally) with age. So we are suggesting, as part of

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[69] See UN website http://www.un.org/wcm/webdav/site/visitors/shared/documents/pdfs/FS_Employment.pdf

[70] See http://ec.europa.eu/romania/eu_you/working_institutions/arhiva_ro.htm

[71] Jabeen Bhatti, *Europe's Forced Retirees Not Going to Go Gently*, 2011, available at http://www.wsj.com/articles/SB10001424053111903791504576584313139219254

[72] See Judgment of the Court (Third Chamber) of 5 March 2009. Case C-388/07, Reference for a preliminary ruling. Directive 2000/78 - Equal treatment in employment and occupation - Age discrimination - Dismissal by reason of retirement - Justification.

[73] Sophie Napper, Sarita Patil Woolhouse, Diversity Amongst Arbitrators and the Usefulness of Lists An OGEMID Discussion, 2009, available at http://www.arbitralwomen.org/files/publication/36062120571327.pdf

[74] See Sasha A. Carbone, Jeffrey T. Zaino, *In Increasing Diversity Among Arbitrators A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal*, NYSBA Journal, January 2012

mentoring programs, for the arbitration community to accept such stages to be handled similarly to internships: as in not only for the mentors to share their knowledge, but to allow mentees to openly immerse in the practice of arbitration along with their mentors, to gain experience.

Some will say that this is already happening and it is completely up to potential mentors - and this is, admittedly, true - however, if it were accepted as a regular practice in arbitration (as an arbitration specific internship) it would be easier for young practitioners to become experienced enough to get nominated on their own.

The way to implement it, could be if "soft laws" would recommend that older, more experienced arbitrators, be instated and officially recognized as "arbitration community elders"[75] who share their wisdom and knowledge with the younger generations.

This way, perhaps a smoother transition would take place, with older, experienced arbitrators being more willing to hand over the practice to younger generation, which, in turn, would be better prepared to take over.

At the same time, parties might be more inclined to nominate younger arbitrators, as the distinction between a potential arbitrator's age and its experience and knowledge, would be clearer and younger practitioners would be "legitimized" by their association with an older one.

Arbitrators' background

This is usually a very important factor in the nomination of an international arbitrator. When we talk about the background of an arbitrator, we could refer to a number of aspects, such as its cultural background – nationality, ethnicity, race, native language, or its educational background – such as a legal education or otherwise, or even its professional background - e.g. past employers.

So, an arbitrator's background relates to the representativeness perspective of diversity and could influence the arbitrators' impartiality, independence and neutrality.

As this aspect was addressed in detail in the first part of the article, in this section we will only refer to the statistical data. Which shows us very clearly, that most arbitrators have a legal background, with the majority being attorneys or former judges.[76] Out of those with a legal

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[75] Elders are almost universally and cross-culturally viewed as being synonymous with wisdom and knowledge and, as a consequence, they are usually also considered the teachers of younger generations. See http://wps.prenhall.com/wps/media/objects/3918/4012970/NursingTools/ch23_CultViewElders_407.pdf

[76] 2 See Charles J. Moxley Jr., Selecting the Ideal Arbitrator, DISPUTE RESOLUTION JOURNAL (August/October 2005) available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003897

background,[77] the most (46%) have common law training, slightly less (30%) civil law training, and even less are specialized in both legal systems (24%). [78]

It is obvious that an arbitrator's background is an important factor that should be considered when it comes to diversity in international arbitration.

Since most arbitrators have a legal background and considering the fact that some knowledge of legal aspects is necessary for a correct arbitration process and for rendering an enforceable award, it is our opinion, that the specifics of arbitration as an ADR method - with effects similar to litigation – show that arbitration can be viewed as another legal profession, ripe for being regulated as such.[79]

So, do arbitration panels reflect the diversity of parties? [80]

Are potential parties at risk not to identify with potential arbitrators due to a lack of representativeness? Well, that depends.

Since the parties are normally free to chose their arbitrators, most of the time, to some extent, the arbitrators chosen will be a reflection of the needs of the parties – even if not necessary a reflection of every angle of diversity applicable to the parties.

However, given the limited pool of arbitrators, overall lacking in diversity, most of the time, the parties that fell in minority,[81] will not be able to find a close enough reflection in the arbitrators at hand. If so, minority divides are probably not entirely free to chose arbitrators to their likening, since they will rarely find someone similar enough.

And this is not a good thing since arbitrators should mirror those affected by their decision[82]and this will, indeed, affect the credibility of arbitration and lower those parties' expectation for a satisfactory result.

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[77] This statistics considers only ICCA arbitrators

[78] Susan D. Franck, James Freda, Kellen Lavin, Tobias A. Lehmann, Anne Van Aaken, *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration"*, Columbia Journal of Transnational Law, 2015, page 455.

[79] See the Conclusion of this article for a detail presentation of the suggestion for arbitration as a regulated legal profession.

[80] See The Great Arbitration Debate Presentation, April 30, 2014, Association of Corporate Counsel, ACC America, available online at http://www.acc.com/chapters/stlouis/upload/STL-The-Great-Arbitration-Debate-April-2014.pdf

[81] Refers to all minorities and includes women in arbitration

[82] See Jill Evans, "*Redressing the Balance*" The Resolver, 2012, available online at http://www.aculextransnational.com/pdf/The_Resolver_May_2012_article_Redressing_the_Balance.pdf

Therefore, since one of the fundamental characteristics of arbitration is somewhat denied to minority divides due to the lack of diversity of arbitrators to choose from, this might compel potential parties to choose a different ADR method, or even litigation instead.

And what to do about it?

How to better promote diversity? The most important observation is that this should be addressed in such a manner that other aspects are not neglected. Because promoting diversity misguidedly, only for the benefit of politically correctness and without assessing also other important factors, would, in fact, be detrimental. So, the goal should be to promote a "healthy" diversity that doesn't overshadow other important selection criteria.

Let's discuss, *exempli gratia*, about the way experience pertains to age diversity of international arbitrators. And about how finding ways to asses experience and knowledge of potential arbitrators without relating it directly (and only) with their age, might, paradoxically, promote age diversity.

If parties could find a way to asses, objectively, the knowledge of potential arbitrators (considering this relates to an overall better grasp of aspects necessary to ensure finality and enforcement of an arbitral award) this could circumvent a direct assessment of their age.

Therefore, instating an objective test, might bring improvements to arbitration and the process of choosing an arbitrator, by guaranteeing that a potential arbitrator has the necessary knowledge. This would curtail, for instance, the need for a subjective evaluation of arbitrators' knowledge and experience through a direct analogy with their age. Which would constitute an advancement in promoting diversity in the field of international arbitration.

Of course, even if such a method could and would be implemented, strict measures should be taken to prevent it from becoming a bigger impediment for diversity itself. This might happen, for example, if an accession test would not be standardized and different knowledge would be assessed for different persons - notwithstanding inherent differences for industry specific examinations.

So what about arbitration as a regulated profession?

At the moment, even if there are some requirements that arbitrators need to fulfill before practicing – either from the parties' perspective, or from a certain arbitral institution's perspective – there are no universally accepted prerequisites, not even when it comes to a minimum understanding of the legal aspects. And there's no question that the lack of understanding of basic legal aspects, is detrimental to arbitration.

Let's take, for instance, two important (legal) notions that are often confused in international arbitration. *Jurisdiction* and *admissibility*. Without going into specific details, it should be said that even if the distinction between them is very clear, the two being as "different as night and

day",[83] they are often confused, misapplied, unusually interpreted or incorrectly made use of in international arbitration.[84]

And, given that, usually, decisions on jurisdiction are reviewable - albeit on limited grounds in setting aside procedures or in resisting enforcement - and those on admissibility are not, confusing *jurisdiction* with *admissibility*, has the potential to affect the finality and enforceability of an award.

For someone with a legal background, the distinction might be easily noticed, however, for someone without a legal background, would probably prove more difficult to make the distinction.

This leads us to the conclusion that those arbitrators without a legal background should, at least have some prior (minimum) training in order to understand basic legal aspects pertaining to the arbitration process.

Accordingly, what if arbitrators would be only those individuals ***trained*** *and* ***licensed*** *for this profession?* Lawyers are. So are mediators. So are judges. Yet, somehow, despite the importance of arbitration in resolving disputes - with rules and legal effects similar to litigation - arbitrators are not unitarily organized in a profession. There are no standard prerequisites for becoming an arbitrator and there are no objective criteria for potential arbitrators to demonstrate their knowledge (experience aside).

If arbitration would be regulated as a profession and an accession test instated, objective accession methods would be created to guarantee the knowledge of arbitrators, as well as ensuring diversity.

Granted, such a suggestion might generate sound contra-arguments.

Some could say that it would be difficult to instate a universally applicable accession method, due to the various professional backgrounds of arbitrators. But equally diverse are the backgrounds of mediators. Yet, this is a regulated profession with strict accession methods under most legislations. So, it seems reasonable to do this for arbitrators, too.

Others may argue that this would be an intrusion in the arbitration process. Because one of the main characteristics of arbitration is the parties' freedom to chose their arbitrators and only in exceptional situations the choice is made by third parties (like appointing authorities),

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[83] See Jan Paulsson, "Jurisdiction and Admisibility", Reflections on International Law, Commerce and Dispute Resolution: Liber Amocorum in honor of Robert Briner (Paris, International Chamber of Commerce, 2005), page 603, para 3- "They are indeed as different as night and day"

[84] See Ingrid A. Müller, "*Analysis on Jurisdiction and admissibility in international arbitration. Is there a confusion between the two notions or are there different views?" University of Bucharest, 2015, page 7, paragraph 2.*

restrictions on the pool of arbitrators available to chose from, could mean an unjustifiable intrusion in the process of arbitration. Regardless, given that the parties would still be free to chose any *licensed* arbitrator they want, this could hardly be construed as a restriction of the parties' rights.

It is our opinion that the existence of strict accession rules to a hypothetical profession of "arbitrator" would not, in any way, hinder the parties freedom to choose, nor make the appointment too difficult. On the contrary, it would offer guarantees for the parties that the arbitrators they do chose, are trained and knowledgeable enough to act as arbitrators. It would change the subjective criteria of evaluating an arbitrator's knowledge by interviewing her or him, to an objective criteria of an universal accession test to the profession.

And the fact remains, that potentially regulating this as a profession, would offer equal opportunities to everyone wanting to become an arbitrator. Because everyone would have to train – similarly - and pass an exam - the same exam - in order to qualify as an arbitrator.

This could be, *exempli gratia,* training and examination specific to a certain arbitral institution, or even set up at an international level, as regulations for a transnational profession - although, granted, the latter is a rather elusive desiderate to be achieved. Furthermore, despite some industry specific arbitration particularities, all arbitrations face similar procedural issues: how to decide applicable law, how to comply with due process, how to avoid potential challenges of the awards, how to render an enforceable award, etc.

As a consequence, trainings and examinations could address those issues that are similar in all arbitrations, but there would also be national, industry or institution specificities which will have to be addressed, too.

Those with a legal background, which comprise the vast majority of arbitrators,[85] might say that they are already trained to address such issues. However, although there are similarities between litigation and arbitration, there are some specificities that one couldn't be aware of without arbitration specific training. *And if the educational background includes arbitration?* Then, an accession exam should pose no problem.

And those with no legal background could say that the training and examination requirements might be "too legal". Still, so is the arbitration process. So if one wants to become an arbitrator, despite having no legal background, one should be familiarized with the legal aspects (and other aspects too) of arbitration. And prove their knowledge of arbitration specific aspects and procedures by passing an examination.

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[85] See Joseph Mamounas, Bilzin Sumberg Baena Price & Axelrod LLP,, "*Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change"* April 10, 2014 - Wolters Kluwer Law & Business,

What about those that are already experienced in arbitration - diverse backgrounds aside? Well, this should probably be addressed before implementing potential regulatory norms of such a profession – that of arbitrator. Obviously, those already experienced in arbitration before the actual implementation of potential regulations to the effect mentioned, should probably be exempted from passing an accession exam.

Potentially regulating arbitration as a profession, might also raise questions as to ad-hoc arbitrators. *Should they abide to the same rules*? We believe so - since ad-hoc and institutionalized arbitration arbitral awards are similarly enforced and recognized, even ad-hoc arbitrators should be chosen only from those trained and licensed as arbitrators.

As a consequence, the need for an independent regulatory body would become evident. Obviously, since the organization of a transnational body would probably face insurmountable difficulties, similar bodies would have to be set up at a national level and the professional accreditation offered by such bodies to arbitrators, should be recognized internationally - through reciprocity.

And going back to appointment criteria, let's take for example the criterion of experience. Since experience is usually the most important factor in choosing arbitrators (because it pertains to their knowledge) accession tests could prove more reliable in assessing an arbitrator's knowledge, than the parties' subjective assessment of their experience. Therefore, this might allow parties to make a more objective and accurate evaluation of the potential arbitrators.

So, it might be that instating such objective accession method, would promote diversity and address the discrimination issue, given that everyone - despite any differences in gender, age, or otherwise – would be free to accede the profession. Provided of course, that the testing method and the results are transparent and the test itself is relevant, objective, error-free and universally applied (whether at a national, international or an arbitral institution level).

Regardless, a legitimate credential as a member of the profession, in itself, will not say enough of the arbitrator to guarantee its appointment and it should be completed with other factors important for representativeness of the parties, or for the outcome, like the knowledge of applicable law.[86]

However, it will definitely say that the arbitrator has the theoretical knowledge necessary to conduct an error-free arbitration process – and where necessary even industry specific arbitration training. This, in turn, would potentially ensure less grounds for challenge and

[86] This is the second most influential factor in choosing an arbitrator- See PricewaterhouseCoopers, Queen Mary University of London, School of International Arbitration -2013 International Arbitration Survey.

better chances of enforcement of the award (which seems to be the most important aspect, since the ”ultimate purpose of an arbitral tribunal is to render an enforceable award”).[87]

Obviously, this would address the issue only as far as an evaluation is concerned and would only regulate the free, unconstrained, objective accession to the profession as an arbitrator.

It wouldn’t however, address genuine aspects of deliberate discrimination based on certain criteria like gender differences, but it would give interested individuals - regardless of gender, age, ethnicity, background, or any other criteria - an equal opportunity to become an arbitrator.

Therefore, this suggested approach would address diversity from the politically correctness perspective, counteract discrimination and ensure representativeness of any potential party.

Overall, an all-encompassing approach perhaps needs a closer look from the arbitration community.

[87] Lew, Julian, D.M – “The Law Applicable to the Form and Substance of the Arbitration Clause” ICCA Congress Series, 1998 Paris Volume 9 (Kluwer Law International 1999), page 119.