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Gravitas: Persuasion and Legitimacy
by E. Oger-Gross

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Gravitas: persuasion and legitimacy

Elizabeth Oger-Gross[1]

(or why calling on parties and their counsel to appoint more diverse arbitrators may be wishful thinking)

1. It is no secret for anyone regularly involved in international arbitration that older, white men, usually from Western Europe or North America, are nominated as arbitrators much more often than others.[2] Diversity is clearly lacking.[3] Women are usually considered to account for significantly fewer than 10% of arbitrators in international arbitrations,[4] and very few women appear to account for a very significant percentage of that already small number.[5] Most arbitrators are from Europe or North America, and most are "senior in age and experience."[6] Outside of the US context, race does not seem to have been much

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1 Elizabeth Oger-Gross is Counsel in White & Case LLP's International Arbitration group. The author would like to thank Pauline Barthélémy for her assistance with this article.

2 In an often repeated quotation, Sarah François-Poncet has described the majority of arbitrators as "pale, male, and stale." See Michael Goldhaber, Madame La Presidente, 1 Transnational Dispute Management (July 2004).

3 Diversity includes "cultural, racial, geographic, language and gender differences." Sasha A. Carbone and Jeffrey T. Zaino, "Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrators and ADR Community Should Be Doing to Achieve This Goal," NYSBA Journal (January 2012), p. 1.

4 See Lucy Greenwood, "Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals," International Law News, Vol. 42, No. 2 (Spring 2013), p. 1 ("only around 6 percent of appointments to international arbitration tribunals are female arbitrators"); Sophie Nappert and Sarita Patil Woolhouse, "Diversity Amongst Arbitrators and the Usefulness of Lists – An OGEMID Discussion", Transnational Dispute Management (2010), p. 3 (reporting that 4% of the top 250 arbitrators are women); Joseph Mamounas, "ICCA 2014. Does 'Male, Pale, and Stale' Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change," kluwerarbitrationblog.com (reporting that approximately 10% of international commercial arbitrators are women); Gus Van Harten, "The (lack of) women arbitrators in investment treaty arbitration," Columbia FDI Perspectives, No. 59 (February 6, 2012), p. 1 (analyzing 249 known investment treaty cases until May 2010 and noting that 4% of those serving as arbitrators were women).

5 See Van Harten, *supra*, note 4, p. 1. He notes that, in investment arbitration, two women, Gabrielle Kaufmann-Kohler and Brigitte Stern, accounted for 75% of nominations of women, while the two most frequently appointed men accounted for 5% of the total. See also Lisa Bench Nieuwveld, "Women in Arbitration: Lots of Talk, Any Changes?" 2011 Kluwer Arbitration Blog, available at: http://kluwerarbitrationblog.com/blog/2011/11/22/women-in-arbitration-lots-of-talk-any-changes/ ("What referrals do go to females, go to the very same core small group of females").

6 See Mamounas, *supra*, note 4. The author reported from the ICCA 2014 conference that the ICC had "reported that approximately 50% of its appointments came from the United States, the United Kingdom, Switzerland, France, or Germany alone". For investment arbitration, it has been reported that 68% of all appointments in cases registered and administered by ICSID are from Western Europe and North America. Chiara Giorgetti, "Is the Truth in the Eyes of the Beholder? The Perils and Benefits of Empirical Research in International Investment Arbitration," 12 Santa Clara Journal of International Law, 263-275, 270 (2014). See also Rashda Rana "Is there a gender gap in arbitration?" April 24, 2015, available at http://blogs.lexisnexis.co.uk/dr/wp-content/uploads/sites/2/2015/04/women.jpg, who notes that the "appointment of European and American arbitrators usually account for a large chunk of the pie, within that the thinnest, barely visible slivers represent female arbitrators."

considered,[7] but it seems clear that the great majority of nominations in international arbitration go to Caucasians.

2. Various theories have been put forward to explain the phenomenon. With regard to the low numbers of nominations of women (which seem to have attracted more attention than those of other underrepresented groups), a perceived lack of women candidates – often partly explained by "pipeline leak,"[8] the phenomenon by which large numbers of women start out working in international arbitration, but very few make it to the partner or senior partner level – and bias are often indicated as possible culprits.[9]

3. With regard to bias, it has been explained that:

> "Many studies ... show categorically that unconsciously, we tend to like people who look like us, think like us and come from backgrounds similar to ours. This means that white men choose white men for board

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7 See Benjamin G. Davis, "The Color Line in International Commercial Arbitration: An American Perspective," 14 The American Review of International Arbitration (2003), 461-543, 471 ("Race has not, at least overtly, been discussed in the literature relating to cultural diversity"); Benjamin G. Davis, "Diversity in International Arbitration," Dispute Resolution Magazine, Winter 2014, p. 15. He states, with regard to Americans working in international arbitration: "As of today, a significant number of American women (most likely white) are involved in international arbitration. Many women serve as counsel, but fewer serve as arbitrators. A few American minorities work as counsel, even fewer are working as arbitrators, and an infinitesimal number of American lawyers with disabilities or American LGBTQ lawyers are involved in the field." See also David H. Burt and Laura A. Kaster, "Why Bringing Diversity to ADR Is a Necessity", ACC Docket, October 2013, p. 42 (noting, in the US context, that the "participation of racial minorities is not statistically available but is known to be far lower [than the participation of women]").

8 Lucy Greenwood and C. Mark Baker, "Getting a Better Balance on International Arbitration Tribunals," 28 The Journal of the London Court of International Arbitration 4 (2012), p. 653, 657-658, 667. They state: "[I]t can be posited that the main culprit for the scarcity of female arbitrators is the effect of pipeline leak. In the international arbitration field, once a female associate makes it through the pipeline to partnership, she is likely to find that almost nine out of ten of her partner colleagues are male, a stark comparison to when she started work, when only around four out of ten of her trainee colleagues would have been men." They note, however, that "the figures for female arbitrators appointed to international arbitration tribunals compare poorly to female representation in the judiciary and in companies, both of which suffer similarly from 'pipeline leak.'" They therefore conclude: "The best estimates of 6% of women appointed as arbitrators on international arbitration tribunals is just over half the 11% figure for female partners on international arbitration teams. Accordingly, it seems that international arbitration is suffering from more than the usual 'pipeline leak.'"

9 Noemi Gal-Or, "The Underrepresentation of Women and Women's Perspectives in International Dispute Resolution Processes," Transnational Dispute Management, 2008, p. 10. She states: "There are various explanations for this obstacle [the bias in *appointments* of women for cases at all, including high-stakes cases], e.g. the male image of "gravitas," immunity against pressure to appoint women due to the confidentiality and lack of transparency of [international dispute resolution] mechanisms, perceived shortage of suitable women candidates, outright sexism, etc." Others take the unlikely position that this phenomenon results from choices made by women themselves. See, e.g., "L'arbitre est une femme: Entretien avec Priscille Pedone," La Lettre de la Chambre arbitrale internationale de Paris, No. 7 (March 2014) (page 7 out of 13) (explaining that the reason that women [in France] are a majority of judges but a minority of arbitrators is due to different choices made at the beginning of their careers).

> rooms, as counsel, as arbitrators, as judges. The bias clearly is not always unconscious – sometimes it is deliberate negative bias."[10]

4. The perceived "gravitas" of older men has also been identified as being one factor causing the dearth of women arbitrators. Michael Goldhaber appears to have acknowledged this first, stating:

> "By consensus, the main reason for the dearth of women in high-stakes cases is a bias in appointments. The clients who make appointments – for instance, the general counsel of energy or engineering multinationals – prefer experienced lawyers who project an image of gravitas, or at least an image of gravitas with which they are familiar. This creates an echo-chamber effect. Arbitration is dominated by a few aging men, many of whom pioneered the field."[11]

5. Accordingly, some of this phenomenon is that older, white men pioneered the field, and therefore people are used to seeing and prefer to have these same experienced, older white men arbitrate international disputes.[12] But the phenomenon seems more important – and perhaps more complicated – than a simple desire to go with what one knows. In any case, this seems to be something different from simple bias, though the two notions may be related.

6. I explore in this article the ways in which the search for "gravitas" may influence the nomination of arbitrators in international arbitration. Through an unscientific use of Google, I look first at what gravitas seems to imply and who appears to have it. I then look more closely – but equally unscientifically – at how and why this notion may influence arbitrator nominations, concluding that its influence may be tenacious. Finally, I set out a few thoughts about whether this is a problem and whether there might be a solution.

I. POPULAR NOTIONS OF GRAVITAS

7. Individuals involved in international arbitration are members of society before becoming actors in international arbitration, and they presumably are subject to and influenced by

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10 See Rana, *supra*, note 6. See also Davis, "Diversity in International Arbitration," *supra*, note 7, p. 16. He explains: "These implicit social cognitions are derived from stereotypes in the sense of traits we associate with a category and attitudes (overall evaluative feelings that are positive or negative). Through the process of the schemas with these implicit social cognitions, implicit forms of bias have been seen to emerge. In this research, implicit social cognitions abound around the world, and they tend to support existing social hierarchies."

11 See Goldhaber, *supra*, note 2, p. 1.

12 International arbitration has often been likened to a "club", with its members both nominating and being nominated repeatedly. In this context, they favor their own. See, e.g., Catherine A. Rogers, "The Vocation of the International Arbitrator," 20 American University International Law Review 5 (2005), 957-1020, 967.

the same stereotypes as are others. To see what the popular understanding of gravitas is, I thus turned to Google.

8. On-line Merriam-Webster told me that gravitas is: "a very serious quality or manner," as well as "high seriousness (as in a person's bearing or in the treatment of a subject)." Examples given were: "The new leader has an air of gravitas that commands respect" and "a comic actress who lacks the gravitas for dramatic roles."[13]

9. I also looked on the Urban Dictionary, which told me, more colorfully, that "gravitas" means "strength of character, self-esteem, confidence" and added that a synonym was "balls." The Urban Dictionary also informed me that gravitas was a "hidden, invisible but extremely palpable, perceptible Dark Jedi Power possessed mostly by members of the mainstream media". "Gravitas is difficult to define, but you know it when you're seeing it." Those with gravitas have "neatly cut dark hair, above-average height, and a rugged masculine jaw". Finally:

> "Some news anchorwomen possess gravitas … but they are often assumed lesbian or shrill and do not last long, despite their credentials and professionalism. American news anchorwomen are often offered perkiness as its substitute, and eagerly take it."[14]

10. When I googled "gravitas personified," I was told on Twitter that "John Nolan is basically gravitas personified."[15] I learned that he is a British actor.[16] His picture is below:

13 Available at: http://www.merriam-webster.com/dictionary/gravitas

14 Available at: http://www.urbandictionary.com/define.php?term=gravitas

15 Available at: https://twitter.com/poiwritersroom/status/524756059018125313

16 Available at: http://www.google.com/imgres?imgurl=http://www.john-nolan.com/JN%2520-%2520Images/Gallery/John%2520Nolan%2520English%2520Actor%2520-%2520Gallery%2520Image%25209.JPG&imgrefurl=http://www.john-nolan.com/John%2520Nolan%2520English%2520Actor%2520-%2520GalleryII.htm&h=380&w=300&tbnid=sQbqPNwjZpbgjM:&zoom=1&tbnh=186&tbnw=146&usg=__AIAQol4vRSyUAPexTwGH6091zzo=&docid=nvFMF7MvLf1NNM&itg=1

II. HOW MIGHT NOTIONS OF GRAVITAS INFLUENCE ARBITRATOR APPOINTMENTS?

11. With this in mind, notions of gravitas may influence arbitrator appointments in two separate but intertwined ways.

12. First, parties and their lawyers, when nominating arbitrators, consider it important that their party-nominated arbitrator hold sway with the other members of the arbitral tribunal. It is thus important that he be considered to have gravitas, so that his opinions are taken seriously and he can influence the ultimate award. This is thus about persuasion.

13. Second, parties and their lawyers are concerned that the arbitral award, which the tribunal will render, itself be taken seriously – that it have gravitas. Of course, the most important way for that to occur is for the award to be well-reasoned in law and squarely based on the facts at issue. But it also may be perceived that the gravitas of the arbitrators will be transmitted to the award. This is thus about legitimacy.

A. PERSUASION-RELATED GRAVITAS

14. Whenever an arbitration is to be decided by three arbitrators, the dynamics of the tribunal are such that each individual arbitrator's ability to influence the others becomes important. These dynamics are considered carefully by counsel nominating an arbitrator.

15. To the extent counsel are convinced that older white men are best placed to influence other older white men, counsel will nominate older white men. In his article, Michael Goldhaber refers to a "male general counsel who made an even more astonishing confession," when he told Professor Thomas Walde that he "consciously favors 'old boys' in making appointments," since, "because the other arbitrators on a panel are likely to be old boys, he maximizes his chances of influencing them by appointing his own."[17] This is an example of someone consciously attempting (and admitting) to influence the tribunal's decision by nominating older white men (or "old boys"). Although Michael Goldhaber calls this "astonishing," it seems likely that this is quite often a part of the calculation of those appointing arbitrators in international arbitration.

16. This tendency has also been identified by Patricia Shaughnessy, who has stated:

> "When appointing arbitrators on behalf of clients, lawyers often select arbitrators who they think can influence the others on the tribunal and unfortunately often prefer male candidates."[18]

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17 See Goldhaber, *supra*, note 2, p. 2.

18 Sarah Dookhun, Women of Arbitration, transcribing Patricia Shaughnessy's thoughts on Women in Arbitration, GAR 2007, Vol. 2, No. 4. She continues: "However, increasingly women are being appointed and are demonstrating their competence and ability."

17. Regardless of the identity of the other arbitrators, those with gravitas are thought to be able to influence others on the tribunal, while those without gravitas are thought to have less possibility of doing so – or at least they will have to work harder to achieve the same effect.

18. Although identified by Michael Goldhaber as "bias," appointing arbitrators in this way does not in fact seem to be true bias. Rather, those nominating are consciously (or unconsciously) taking into account *others'* real or perceived biases. If counsel are honestly convinced that having an arbitrator in the image of the other arbitrators is important for their party-nominated arbitrator to have influence over them, counsel might not correctly be doing their job by appointing individuals less likely to be able to successfully influence the other arbitrators. The same is true, regardless of the identity of the other arbitrators, if counsel believe (1) that those with gravitas will have a better chance of influencing others and that (2) older white men naturally have more gravitas than others.

19. If counsel continue to believe that this calculation – i.e., that older white men will be more effective in influencing the other arbitrators, on average, than will other groups – is correct, then counsel may continue appointing in the same manner as they do today in at least the medium term. That is because parties want to win, and their outside counsel are paid to help them do that.[19] As Emmanuel Gaillard stated during the 2014 Freshfields lecture, "the parties' primary concern" is "to win fast, to pay as little as possible and to recover the entirety of their costs."[20]

20. Parties expect their outside counsel to do anything that will assist in that task (within the limits of ethics). Indeed, it is well known that one of the important services that specialist international arbitration practitioners and groups perform is expert advice on the appointment of arbitrators. One aspect of that task is understanding the individuals involved and the dynamics of the tribunal and making appointments accordingly.

21. In other words, counsel are not thinking systemically about the influence the appointment of particular arbitrators may have on this or that group because "in-house counsel only has an interest the arbitration he or she is facing."[21] In-house and outside counsel are looking to win the arbitration for their client.

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19 But see Nana Japaridze, "Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration," 36 Hofstra Law Review 4, 1415-1446, 1415 (2008) (referring to a 2002 survey by Richard W. Naimark and Stephanie E. Keer, finding that fairness and justice in the process were more important than winning for the parties to arbitration).

20 As reported in the Global Arbitration Review (GAR), Alison Ross, "Creatures of ritual?", December 2, 2014.

21 See Greenwood and Baker, *supra*, note 8, p. 663.

22. In this context, the "rights" of women, minorities, and young people to be nominated are not the dominant concern of counsel nominating arbitrators.[22] This does not necessarily imply any bias on the part of counsel, but it also does not help increase diversity in arbitrator nominations. To the contrary, this element appears to be a strong factor in maintaining the status quo. Appeals to the greater good of having higher numbers of other individuals serving as arbitrators across the system may, therefore, not be very effective in changing the current situation.

23. Of course, this calculation – that older white men will likely be better at influencing other older white men, as well as others through their natural gravitas – may be wrong. Depending, of course, on the identity of the other arbitrators, it may be that individuals other than the usual suspects are more likely to be persuasive. And it should also not be overlooked that clever, knowledgeable individuals in all demographic categories may be extremely persuasive. Indeed, we may even be underestimating the very individuals to whom we are trying to appeal by miscalculating their ability to interact with and listen to individuals who do not outwardly resemble them or individuals who do not project a traditional image of gravitas.

B. LEGITIMACY-RELATED GRAVITAS

24. Professor Oscar Chase of New York University has explained in his book entitled *Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context* that rituals are important to legitimate "dispute-ways."[23] In the court system, symbols play an important role in conferring perceived value on the decision:

> "Legal practice includes a variety of techniques for suppressing the subjecthood of the judge. These include not just the obvious suppression of personal appearance in the ritualized uniformity of the court room, but also the rhetorical techniques of judicial expression."[24]

25. Professor Chase further explains that the judge's black robe, in the US courtroom, "implies that the wearer is both learned and divinely charged and that the occasion is somehow extraordinary."[25] He also points, among other things, to the raised "altar like" bench, the special behavior required in the presence of the judge, and the "culturally required depersonalization" of the judge herself.[26] These ceremonious aspects of the

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22 See Gal-Or, *supra*, note 9, p. 7 ("Women share with men the *right* to equal opportunity to advance and grow in their profession, to freely choose and gain position along the hierarchy of [international dispute resolution] which means, among other things, access to lucrative remuneration and high prestige.").

23 Oscar Chase, Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context, New York University Press (2005), p. 14, 114-124.

24 Paul W. Kahn, The Cultural Study of Law: Reconstructing Legal Scholarship, University of Chicago Press (1999), p. 79.

25 See Chase, *supra*, note 23, p. 119.

26 See Chase, *supra*, note 23, p. 119-122.

judicial process have "the effect of sacralizing and legitimating the social transformation that takes place in the courtroom."[27]

26. Arbitration benefits from none of those things[28] and instead derives its authority and decision-making power from the parties' consent. Indeed, as identified by Emmanuel Gaillard in his article on the "Sociology of International Arbitration," the key ritual in the "social life" of "international arbitration players" is the arbitral hearing, but that hearing deliberately lacks the sorts of ceremonious symbols that a courtroom may have, in favor of symbols that demonstrate the "business-like nature of the process and its lesser adversarial nature".[29] In this context, the "lawyers will remain seated while pleading and will not wear a wig, robe or court dress, as the atmosphere is supposed to be more congenial than that of a State court."[30]

27. It is possible that, as a way of compensating for ceremony, the perceived gravitas of the arbitrators, whose aura of seriousness and scholarship defines the award they render, becomes even more important.

28. The gravitas of the arbitrators may thus be one aspect of their "symbolic capital," as described by Yves Dezelay and Bryant Garth in their book *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*.[31] The authors identified "social class, education, career, and expertise" as the relevant factors to determine symbolic capital.[32] They cited to Pierre Bourdieu's definition of symbolic capital as "recognized power" and his explanation that "the weight of different agents depends on their symbolic capital, i.e. on the *recognition*, institutionalized or not, that they receive from a group."[33] The authors concluded that "the concept of symbolic capital can be used to explore the field of international commercial

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27 See Chase, *supra*, note 23, p. 122. Even where this sort of ceremony is not in evidence in national courtrooms, the fact that the courtroom is placed under the aegis of the State may assist in conferring at least some of the same benefits.

28 That is not to say that there are not codes, meant to convey certain values. Emmanuel Gaillard notes that the party-appointed arbitrators typically sit on the side of the chairperson further away from the nominating party, to symbolize their independence. See Ross, *supra*, note 20.

29 Emmanuel Gaillard, "Sociology of International Arbitration," Transnational Dispute Management, December 2014, p. 15. The other two major rituals he identifies are "recognition tournaments," such as the GAR Awards, and "periodic mass gatherings," such as the ICCA and IBA conferences on international arbitration. Id., p. 15-18.

30 Id., p. 15.

31 Yves Dezelay and Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order, University of Chicago Press (1996), p. 18.

32 Id., p. 18.

33 Id., p. 18.

arbitration" and asked "what are the characteristics of the people who are *recognized* as having authority to handle these high-stakes, complicated disputes."[34]

29. These authors thus identify external factors – such as education, career, and expertise – as contributing to symbolic capital, and those are doubtless the most important characteristics for establishing it. But it very well could be that implicit biases (the individuals who appear to have gravitas) and force of habit (seeing older white men as arbitrators) mean that individuals who have these internal characteristics have a leg-up in terms of this symbolic capital. Indeed, the reference to "social class" as one factor leading to symbolic capital would seem to allow just as easily for factors such as gender, race, or age; just as social class is unrelated to competence, so are these other characteristics.

30. As seriousness and scholarship are unconsciously or consciously associated with older white men, there is an inherent conservatism in nominations.

31. As a result, it may be wishful thinking to argue – attractive as it may be – that the credibility of arbitration is harmed by the identity of the arbitrators as older white men. This argument has been phrased in various ways:

> "[I]f the top echelons of the arbitration field do not reflect the realities of all corners of the world (and not just Western Europe and North America), the credibility and viability of arbitration as a method of international dispute resolution is stunted."[35]
>
> "Diversity among arbitrators will provide more credibility to the process in the eyes of the grievants."[36]

32. Or, as regards women, it has been stated that:

> "At least from the point of view of the parties' perception, the outcome of an [international dispute resolution] process fairly inclusive of women adjudicators or neutrals promises to produce a socially and culturally

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[34] Id., p. 29. Indeed, writing in the mid-1990s, Yves Dezelay and Bryant Garth described a tension between the "grand old men" of international arbitration and a new generation of "technocrats" who had recently come to international arbitrational, were younger, and had "specialization and technical competence." Id., p. 34-36. The authors interestingly describe how only the grand old men appear to have the authority to invoke the *lex mercatoria*, while the younger generation must "restrain themselves and carefully explicate the legal reasoning that prevents their decision from being condemned as arbitrary." Id., p. 39. More recently, Thomas Schultz and Robert Kovacs identified a third generation of international arbitrators, whom they called the "managers" and described as those notable for "their organizational skills, their propensity for quickly and accurately identifying the salient issues (which may not only be legal), and their abilities to deal with the underlying emotions." Thomas Schulz and Robert Kovacs, "The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezelay and Garth," 28 Arbitration International 2 (2012), 161-171, 162.

[35] See Nappert and Woolhouse, *supra*, note 4, p. 2.

[36] Gwynne A. Wilcox, quoted by Carbone and Zaino, *supra*, note 3, p. 1.

> fairer result for it will be representative of the composition of human society."[37]
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> "Some scholars have argued that, regardless of whether or not men and women actually 'think differently,' many international adjudicative panels' constituencies nonetheless believe there are such differences, and that thus the perceived legitimacy of these panels can be increased through greater gender diversity. It thus stands to reason that many users of international arbitration services may perceive arbitrators and their awards as more 'legitimate' if there were more female arbitrators appointed to their cases. Much greater attention must be brought to the important differences that gender and other aspects of diversity make in decision making and in adjudication."[38]

33. But, if all the participants – including women, non-Westerners, and the young – consider, consciously or unconsciously, that older white men have the most gravitas and will render a more respected award, then arbitration loses nothing in credibility in its current state. To the contrary.

34. In this regard, comparisons between international arbitration, on the one hand, and corporations selling products that promote diversity as improving "business judgment," on the other, may fail to take into account that, if international arbitration is selling something, it is a legitimate end to a dispute. This seems fundamentally different from a business, selling goods, that wants to have diversity so as to understand what will sell best to a particular market. Where one is selling legitimacy, what matters is the respect of the users for those handing down the decision. If everyone agrees that those individuals deserve respect, then it may matter very little whether the decision-makers resemble the users.

35. In the current state of affairs, an award rendered without women, racial or ethnic minorities, and various other groups is not considered illegitimate. As a result, the parties and their counsel simply may not care if the award is representative of the composition of human society.

36. Indeed, it may be that the users even want – consciously or unconsciously – people who do not resemble them to resolve their dispute (at least to the extent that they are not themselves old white men). In the U.S., for example, judges wear robes and sit on

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[37] See Gal-Or, *supra*, note 9, p. 7. She also states, at page 8: "That it would be instrumental to consider women's experiences is important also for the satisfaction of parties' *interests*, particularly where the parties' interests may affect interests of others who have no voice in the [international dispute resolution] process (e.g. investment's impact on women's concerns in developing countries)." But the parties' interests are not necessarily the same as those with "no voice" in the process (i.e., non-parties).

[38] Thomas J. Stipanowich, "Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals," Legal Studies Research Paper Series, Paper Number 2014/29, p. 58.

elevated platforms to mark the difference between them and everyone else.[39] In international arbitration, there is no such ceremony, but users may – likely unconsciously – find it important that the arbitrators "look the part" of the wise purveyor of justice by being male and having gray hair, wrinkles, and white skin.

III. CONCLUSION: IS THIS A PROBLEM FOR INTERNATIONAL ARBITRATION?

37. There is no doubt that this is a problem if one is a woman, non-white or younger person who wants to be nominated as arbitrator. Whether this is a problem for arbitration itself – as means of resolving disputes and perhaps a means of administrating justice – is, however, a different question.

38. "Resolving a dispute" implies coming to a solution that ends a private situation causing strife. If arbitration is viewed only as a private way to end a dispute, a process controlled by the parties, then one logically should not question the parties' choice of arbitrators. If the parties want to nominate only white men over 60, then that is their prerogative. If the parties were convinced that having their dispute resolved by seeing whether a poisoned chick died was the best option,[40] that would also be their prerogative, as long as they were happy with the outcome of the dispute-resolution process.[41]

39. Or, as one commentator has put it, describing one "camp" in the debate:

> "This school of thought is linked closely to the notion that international arbitration, as a creature of contract, is driven by the user community, and users' interest is in selecting arbitrators that will best represent their positions and rights, which includes offering predictability and consistency. So, if the 'male, pale, and stale' presently serves that interest best, the user community will draw international arbitrators from that profile pool."[42]

40. If, on the other hand, we are concerned about the administration of justice in international arbitration, then we also need to ask whether, objectively, the nomination of men is

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39 Juries, while placed lower than the judge, are nonetheless put in a raised box to symbolize that the importance of their mission. Chase, *supra*, note 23, p. 121.

40 This way of disputing is described by Professor Chase in connection with the Azande tribe. Id., p. 1.

41 Thomas Schulz and Robert Kovacs have said that "today more than in the past, parties seem to see disputes going to arbitration as just another business problem, to be dealt with – 'managed' – just as another business problem, and neither as a problem of justice for grand old people, nor as a problem of eminent legal intricacy for super-technicians." Schulz and Kovacs, *supra*, note 34.

42 Mamounas, *supra*, note 4.

hurting our hunt for the right answer.[43] Various attempts have been made to argue that it is important for the pursuit of justice[44] that arbitral tribunals be diverse:

- It has been argued that international arbitration is missing out on different perspectives by limiting itself to white old men.[45] According to this point of view, a diversity of viewpoints will lead to a better outcome.[46]

- It has been argued that the question is not getting to a different answer but rather that it is important that decision-makers "reflect the make-up of those affected by their decisions."[47] That particular comment was made in relation to investment arbitration, with the implication that the award may affect groups or individuals other than the parties. There is no reason, however, that it might not also be transposed to commercial arbitration, and indeed more general arguments have also been made to the effect that diversity in this arena is an "issue of fairness, public justice and public acceptance that the decision-makers or facilitators of private dispute resolution processes are representative of the individuals, institutions and communities that come before them."[48]

41. Nonetheless, it appears to be a stretch, at least, to argue that older white men will not reach the right answer in a given dispute.

42. It is not within the scope of this article to address how this situation might change, but it is worth highlighting an important point made by several others. That point is that institutions can have a large role to play, since they often make recommendations and in some minority but significant percentage of cases make nominations.[49] Apparently, already, tribunals appointed through institutions tend to be more diverse in terms of gender and age than those selected by the parties.[50]

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43 There is, in any case, at least a very good case to be made that awards should be right. See Jennifer Kirby, "What is an award anyway?" Journal of International Arbitration 4 (2014), 475-484.

44 See, e.g., Rogers, *supra*, note 12, p. 962. Setting out why international arbitration has a justice function, she further notes that "the modern international arbitrator is not simply an instrumentality of the parties' collective will expressed through the arbitration agreement, but instead an integral part of a larger system that depends, in part, on them performing their role as responsible custodians of that system." Id., p. 963.

45 See Burt and Kaster, *supra*, note 7, p. 42. They argue that it is "a known fact that cognitive diversity in groups improves decision-making" and that "race and gender are proxies for differences in viewpoint, experience and approach."

46 See Mamounas, *supra*, note 4 ("Diversity spawns perspective, which, overall, may make arbitration more just and fair").

47 Van Harten, *supra*, note 4, p. 1.

48 See Burt and Kaster, *supra*, note 7, p. 42. Overall, it seems to me to be problematic to try to compare the groups or individuals affected by a decision with the personal characteristics of the arbitrators.

49 See, e.g., Nappert and Woolhouse, *supra*, note 4, p. 3.

50 Greenwood and Baker, *supra*, note 6, p. 665.

43. It would indeed seem legitimate for institutions to take into account questions of diversity – at least gender and ethnic,[51] in addition to national, as is already done – in making these recommendations and nominations.[52] Presumably, institutions may have less difficulty getting out from under the yoke of the influence of gravitas than counsel may be.

44. In any case, just having different names out there could be helpful. It has been observed that "there is a natural tendency to consider the 'elite' names that instantly spring to mind", as well as that appointing counsel seek safety in nominating arbitrators who have been nominated by many others, many times, as this brings "validation."[53]

45. It may also be that just thinking about these issues will, over the long run, assist in diluting them. As Paul Kahn said in *The Cultural Study of Law*, "[t]o recognize power is already to stand free of it."[54]

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51 I do not include age in this list, although it could be argued that it should be. It seems difficult to deny that, with age and experience, often – though not always – come an increase in perspective and, perhaps, wisdom. Also, from a fairness perspective, all of us will, with some luck and care, become old, whereas most people will not change sex or gender, and changing race or ethnicity appears impossible, at least for the moment.

52 Still, it has been estimated that parties nominate arbitrators 75% of the time (at the ICC), so institutions' nominations will not be a panacea in any case. Mirèze Philippe, "Evolution of women's involvement in dispute resolution in the last thirty years; the institutional experience & ArbitralWomen experience", conference presentation printed in the Arbitral Women Newsletter, No. 8 (April 2013), p. 8. See also Nappert and Woolhouse, *supra*, note 4, p. 3. The authors note that Lorraine Brennan of the CPR Institute replied that "in 80% of cases, institutions are not asked to make a recommendation." See also Melanie Willems, "Future Challenges", presentation printed in Arbitral Women Newsletter, No 8 (April 2013), p. 11-13.

53 Greenwood and Baker, *supra*, note 8, p. 659.

54 Kahn, *supra*, note 24, p. 139.