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by G. Carmichael Lemaire

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Achieving Gender Diversity for Future Generations in Appointments to International Commercial Arbitration Tribunals – A Focus on Scotland

Gillian Carmichael Lemaire

This paper has emerged from my interest in dispute resolution in schools and, in particular, a visit to my former school in Scotland earlier this year, when I was highly impressed to hear about a mock court project in which primary school pupils have won praise from seasoned legal professionals. The school put forward a team of ten year olds to the final of the competition, including two female "counsel". The project prompted me to consider how future generations of women will fare when they move up through the ranks in the world of international commercial arbitration,[1] especially in Scotland, a country justifiably keen to promote itself as a centre for international arbitration. What can we do now to ensure that diversity, including gender diversity, is taken into consideration in the appointment of international commercial arbitral tribunals? I consider the groundwork already laid in Scotland in relation to both gender diversity and international commercial arbitration, lessons that may be learned from this work, and how those lessons might filter through to the appointments process. Given the importance of international commercial arbitration as a final and binding method of resolving commercial disputes, I argue that not only is education of members of the international arbitration community indispensable, but so also is education of a wider population.

[1] It is beyond the scope of this paper to discuss the definition of international commercial arbitration. There are ample writings available on the subject. *See*, e.g., a thorough chapter in Fouchard Gaillard Goldman On International Commercial Arbitration, Kluwer Law International, chapter 1, *Definition of International Commercial Arbitration*, p. 9. From a Scottish perspective, the 2010 Arbitration Act contains no definition of international commercial arbitration. The explanatory notes to the Act, however, define arbitration as "a legal procedure where parties submit a dispute between them to a third party, who often has specialist expertise or knowledge, who will act as a private tribunal to produce a final and binding decision on the dispute." (Arbitration (Scotland) Act 2010, Explanatory Notes, http://www.legislation.gov.uk/asp/2010/1/notes). It has been said that " 'International' in this context refers to the situation where the parties to the arbitration are seated in different states; 'commercial' connotes that the arbitration arises out of a business relationship.": *see* the Rt Hon Lord Hamilton (retired from the offices of Lord President of the Court of Session and Lord Justice General of Scotland), *Arbitration in Scotland : Its Nature and Its Future*, Lecture to celebrate the inauguration of the Law School at Robert Gordon University, Aberdeen, on 11 March 2014).

Although my comments focus on gender diversity, many of them also apply to diversity in general.

This paper concentrates on appointments to international commercial arbitration tribunals and, other than drawing attention to certain remarks made about investment arbitration that could equally apply to commercial arbitration,[2] does not address the former.

Note that the Scottish legal system is distinct from that of the United Kingdom's two other legal systems, namely those of England and Wales, and Northern Ireland, a fact that is not always understood. Moreover, Scotland has had its own Parliament since 1999, which has power to make law in Scotland, except in certain reserved areas,[3] which in fact currently include equality legislation.

Part I addresses background matters, Part II looks at the existing terrain in Scotland for gender diversity and Part III concludes.

I. Background

A. Introduction

The Scottish legal system is a mixed system of civil and common law. The existence of arbitration in Scotland can be traced back to the thirteenth century.[4] Patchy legislation on different aspects of arbitration over hundreds of years meant that, until recently, Scots law on arbitration was archaic, unclear and far from user-friendly. Arbitration had therefore suffered a decline. In 2010 the Arbitration (Scotland) Act

[2] *See* Sergio Puig, *Social Capital in the Arbitration Market*, EJIL (2014), Vol. 25 No. 2, 387-424 : "… notwithstanding important differences, the appointment of investor-state arbitrators characterizes the basic dynamics of the field of international arbitration more generally."

[3] The Scottish Parliament was created by Act of the UK Parliament, the Scotland Act 1998. Under that Act and, as extended by the Scotland Act 2012, the Scottish Parliament received powers to make laws on devolved matters. Only the UK Parliament can make laws on reserved matters.

[4] *See*, e.g., Mark Godfrey, *Arbitration in the Ius Commune and Scots Law*, 2 Roman Legal Tradition 122 (2004).

2010 (the "2010 Arbitration Act") came into force,[5] bringing the country's law of arbitration into the twenty-first century.[6]

Arbitrators sitting in Scotland (and Scots arbitrators sitting elsewhere), including a number of high profile women, are usually selected from a pool of experienced solicitors,[7] solicitor-advocates,[8] Advocates,[9] former judges and, in appropriate cases, technical experts such as engineers, architects and chartered surveyors. Although it would seem that women have been able to act as arbitrators in Scotland since the early 1300s (*Regiam Majestatum*, the most important surviving treatise on Scots law, tells us that a woman could be an arbitrator, although "not until the very late 19th, even early 20th, century could she be a solicitor, chartered accountant or doctor!"[10]), statistics about the appointment of women to international arbitral tribunals seated in Scotland do not appear to be available, probably because the country does not yet have a significant number of international arbitrations (which in itself may be blamed, at least in part, on the former outdated legislation). Given the likely dearth of statistics in Scotland, we can be fairly sure that appointments of women there are not made with any greater frequency than in the rest of the international arbitration world. In 2012, Lucy Greenwood and C Mark Baker noted that a certain level of comfort had

[5] The Arbitration (Scotland) Act 2010 came into force and effect on 7 June 2010. For commentary on the 2010 Arbitration Act, *see*, e.g., Steven P. Walker, *The renaissance of Scottish arbitration*, Journal of the Law Society of Scotland, September 2010, http://www.journalonline.co.uk/Magazine/55-9/1008548.aspx: "Consumers of arbitration around the world need to know that Scotland has a new Act which is Model Law and New York Convention compliant."; Joanna Dingwall, *International Arbitration in Scotland: A Bold, New Future*, 2010 13 Int. A. L. R., Issue 4, p. 138 : "This innovative piece of legislation codifies Scots law on arbitration into one streamlined, user-friendly document and creates a unitary, modern, efficient system."; Rob Wilson and Valerie Allan, *Arbitration in Scotland*, CMS Guide to Arbitration: "The Scottish Arbitration Act radically overhauls the Scots law of arbitration and provides the first complete statutory framework for arbitration in Scotland. That framework seeks to adopt 'best practice ' from around the world."

[6] *See* Hew Dundas and David Bartos, *Scotland Leads The World In Arbitration*, http://www.davidbartos.co.uk/media/ActShAr.pdf and *Dundas and Bartos on the Arbitration (Scotland) Act 2010*, 2nd edition, 2014, W. Green.

[7] Solicitors in Scotland advise on a wide range of matters and represent clients in certain courts. They are members of and are regulated by the Law Society of Scotland, which promotes both their interests and the interests of the public in relation to the profession. They practise mainly in law firms, in-house in the public and private sectors, and in a significant number of organisations outside Scotland.

[8] Solicitor-advocates are solicitors who have undertaken specific advocacy training. Their rights of audience are the same as those of Advocates in the High Court of Justiciary (which hears criminal cases) and the Court of Session (which hears civil cases). They are members of and are regulated by the Law Society of Scotland. They practise mainly in law firms.

[9] Advocates at the Scottish Bar undergo special training and represent parties before any court in Scotland. They are usually instructed by a solicitor. They practise as independent members of the Faculty of Advocates, which is their regulatory body.

[10] *See* Hew Dundas, *The Arbitration (Scotland) Act 2010 : Converting Vision into Reality*, Sweet & Maxwell, (2010) 76 Arbitration 2-15.

set in regarding the low number of women in the international arbitration population: "… international arbitration practitioners have become comfortable with the notion that women are a significant minority, if not a 'tiny fraction' of the international arbitration population."[11] In their recent article, which updates the statistics they provided in 2012, they state that it is now "clear that the arbitration community is becoming less comfortable with this notion and more willing to address the issue." In 2012 they gave a "best estimate" that the percentage of women appointed to international commercial arbitration tribunals was around 6.5%. In their recent article, that percentage had increased to approximately 10%.[12]

It is instructive to note in relation to investment arbitration that: "The size of the core of the arbitration network is small. What stands out, however, is that around 93 per cent of all the appointments are of male arbitrators, suggesting an extreme gender imbalance. It gets even worse: only two women, Professors Stern and Kaufmann-Kohler combined, held three-quarters of all female appointments, pushing the male–female composition of arbitrators in the network to an embarrassing 95 per cent to 5 per cent proportion."[13]

B. Some of the problems and solutions

Various reasons, some of which I mention briefly below, may explain the small numbers of women appointed to international commercial arbitration tribunals. Scotland can learn from some of these experiences and, as I enlarge upon below in Section II, can also contribute greatly to future debate and action.

In early 2013 the Kluwer Arbitration Blog carried out a survey asking participants to rate three possible reasons for the under-representation of women in international arbitration: generational reasons (women at the top of the profession qualified when

[11] *See* Lucy Greenwood and C Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, (2012) 28(4) Arbitration Int 653, 666.
[12] *See* Lucy Greenwood and C Mark Baker, *Is the balance getting better ? An update on the issue of gender diversity in international arbitration*, http://arbitration.oxfordjournals.org/content/early/2015/05/02/arbint.aiv034.
[13] *See* Puig, p. 404-405, *op. cit. ; see* also *ibid*., p.3, in which Greenwood and Baker's research shows that women comprise roughly 5.61% of arbitrators in concluded ICSID cases.

fewer women practised in this area); the party appointment system,[14] which was said to "enforce the status quo" by favouring "an elite handful of repeat players"; and time demands, which can make it difficult to combine a career in international arbitration with having a family. Of the 256 respondents to the poll (of whom 74% were women), both women and men found the party appointment system to be the factor that most affected the under-representation of women in arbitration.[15] In an earlier survey carried out in 2012 by Queen Mary University of London and White & Case, 76% of respondents had nevertheless considered unilateral appointments to be the preferred method of choosing co-arbitrators in a three-member tribunal (private practitioners (83%) were keener on this system than in-house counsel (71%) and arbitrators (66%)).[16] There were 710 respondents to a questionnaire and 104 telephone interviews were conducted. 53% of respondents were from private practice, 26% were arbitrators, 10% were in-house counsel, and 11% were either academics, expert witnesses or from arbitral institutions. Statistics about the number of female respondents were not provided.[17]

Whether appointed by parties or institutions, certain characteristics of the system are evident: as has been discussed at length in the international arbitration community, the majority of arbitrators are white men from Western countries; in fact most arbitrators come from developed countries. Arbitrators who are appointed the most often are

[14] The party appointment system has been a subject of much discussion in recent years, following a debate launched by Professor Jan Paulsson in 2010. His proposition is that where parties have neither jointly nominated the entire tribunal nor provided that there will be unilateral appointments, the default rule should be that all arbitrators are appointed by a neutral appointing authority. He believes that unilateral appointments are "ill-conceived" and that there is no right to name one's arbitrator. Consequently, he recommends prohibiting or at least "rigorously policing" this practice, considering that confidence of both sides in the institutions charged with appointing "truly neutral and able arbitrators" is one of the real answers. *See* Jan Paulsson, *Moral Hazard in International Dispute Resolution*, ICSID Review, Volume 25 Issue 2 Fall 2010 and *Must We Live with Unilaterals ?*, American Bar Association Section of International Law, International Arbitration Committee, 2013, Volume 1, Issue 1, p. 5.
The case in favour of party appointments has been led by Charles N. Brower. He argues that neither the pre-existing list approach nor appointments by arbitral institutions are an adequate alternative to party appointments. The pre-existing list approach, according to him, infuses politics into the system and creates an artificial barrier to entry. It also provides a limited choice, whereas the pool of arbitrators is greatly expanded through the input of parties. He in addition doubts that any institution could achieve a level of user confidence matching that of appointments made by parties and counsel. *See* Charles N. Brower, *The (Abbreviated) Case for Party Appointments in International Arbitration*, American Bar Association Section of International Law, International Arbitration Committee, 2013, Volume 1, Issue 1, p. 10 and www.globalarbitrationreview.com/.../Charles_Brower_The_Death_of_the_ Two-Headed_Nightingale_Speech_2.pdf.
[15] Kluwer Arbitration Blog, 26 February 2013.
[16] 2012 International Arbitration Survey, Queen Mary University of London and White & Case, p.5.
[17] *Ibid.,* p. 44.

more likely to obtain further appointments. Parties tend to appoint people like themselves. They are highly likely to be risk-averse and will usually wish only to appoint well-known arbitrators with recognised experience.

Generational issues and time demands rated roughly equally in the Kluwer Arbitration poll as factors contributing to the under-representation of women.

Generational issues subsist. Many senior and highly experienced women who do not benefit from the numerous initiatives now available for beginners through to under-40s are being overlooked for appointments to international commercial arbitration tribunals. There would appear to be a perception that there is an insufficient pool of potential female arbitrators with the required experience. This in turn causes a lack of female role models.

Time demands could be one of the causes of "pipeline leak",[18] which may also contribute to the lack of women on international commercial arbitration tribunals: despite the level of female law graduates and young women lawyers, it is still the case that relatively few women make it to the most senior positions in the profession. "Sustainable participation" is another important question addressed by Annalise Nelson, who sees the leadership issue in international arbitration as having two branches, first, the presence of women in senior positions in arbitration, including arbitrator appointments, and second, "The other issue, which inevitably will affect leadership tomorrow if not today, is that of sustainable participation in arbitration: whether young women interested in arbitration are finding sufficient opportunities to practise and gain experience, whether they're staying in these opportunities, and whether firms and institutions are creating a flexible enough environment for women (and men) with families."[19]

Some other reasons why women remain under-represented on international commercial arbitration tribunals include the possibility that there is a "culture" of

[18] *Op. cit.*, Greenwood and Baker's 2015 article, p.6-8.
[19] *See* Annalise Nelson, *The representation of women in arbitration – one problem, two issues*, Kluwer Arbitration Blog, 2 November 2012.

international arbitration which is "monopolistic" and keeps new entrants out;[20] access to education may not be available to all women, especially in developing countries; stereotypes and implicit bias are still common; and there is also a concern that a lack of diversity might affect the quality of arbitral awards, leading to "a more narrowly informed body of doctrine."[21]

Although until recent years appointments to international arbitration tribunals have tended to be from the same or a similar group of individuals, the lifeblood of the arbitration community is now being renewed. The process is underway, but is taking place only by degrees and is far from advanced. As regards equality between men and women as a fundamental right, it has been estimated by the European Commission that at the present rate of change it would take another 70 years to achieve gender equality.[22] If this is the rate of change in the wider world, where does that leave us in the international arbitration arena, where clearly diversity is not keeping pace with developments in the "outside world"? What can we do to address the situation so that future arbitration users can rely on arbitration as a legitimate process, with access to a suitably broad choice of decision-makers for their cases?

Various actions and solutions have been proposed and indeed many put into practice, yet progress is unacceptably slow.

Many arbitral institutions are diversity-conscious and are appointing more women. Lucy Greenwood and C Mark Baker suggest that, when making appointments, institutions could provide lists of profiles rather than names and external counsel could do likewise when going through this exercise with in-house counsel;[23] they also say that better data management and transparency is a first step and that whilst "it is

[20] *See* Tom Ginsburg, *The Culture of Arbitration*, 36 Vanderbilt Journal of Transnational Law 1335 (2003).
[21] *Op. cit.,* Puig, p.401: "The over-or under-representation of a particular demographic of arbitrators is an issue of constant concern among most critics and many supporters of arbitration. Empirical research has demonstrated that the views of a decision-maker are unlikely to be completely independent of those of her colleagues or, more generally, of those of the professional community. The deliberative process before the arbitral tribunal is likely to be crucial and, therefore, the diversity of views may be fundamental for a fair process and outcome. If the community of arbitrators is dense and homogenous, and, as noted by Waibel and Wu, one in which developing countries or women are significantly under-represented, one would expect a more narrowly informed body of doctrine." *See* also *op. cit.,* Greenwood and Baker's 2015 article, p.8.
[22] European Commission Report on equality between women and men 2014.
[23] *Op. cit.*, Greenwood and Baker's 2015 article, p. 7.

apparent that there is an ongoing effort by the institutions to appoint more diverse candidates", the arbitration institutions are not solely responsible for addressing the issue and that efforts to address diversity are "largely a question of personal responsibility."[24]

Professor Jan Paulsson says one effective mechanism could be an institutional requirement that appointments be made from a pre-existing list of qualified arbitrators, "with in-built mechanisms of monitoring and renewal". He points out that certain institutions "have experimented with a variety of other practices, such as 'blind appointments' (i.e., seeking to ensure that nominees do not know who appointed them) or any number of list procedures which have in common the feature that the initial identification of the candidate comes from the institution rather than from one party."[25]

Transparency in the arbitrator appointment process has been severely criticised, as has the lack of statistics available. Arbitrator Intelligence, a non-profit start-up venture founded by Professor Catherine A. Rogers of Penn State Law and Queen Mary, University of London, aims to address this by promoting "transparency, fairness, and accountability in the selection of international arbitrators by increasing and equalizing access to critical information about arbitrators and their decision-making."[26]

Many law firms and businesses have addressed and continue to address the promotion of women to the most senior positions: I address this further below. Professional associations too provide support to women in the advancement of their careers in the dispute resolution field. For example, ArbitralWomen, the International Network of Women in Dispute Resolution, runs a mentoring programme which matches young members with older and more experienced women.

In my view, one important reason why the kinds of measures mentioned above have not resulted in increased numbers of women on international commercial arbitration tribunals is that the issue of diversity has been addressed mainly inside the

[24] *Ibid*., p. 2 and 11
[25] *Op. cit.*, Paulsson, *Moral Hazard in International Dispute Resolution*, p.11-12.
[26] http://www.arbitratorintelligence.org/

international arbitration community. Who better to speak to the issue perhaps, but there should be no "ownership" of the process and it is clear that the steps taken so far are not working or at least not quickly enough. There must be greater awareness of the arbitration process outside the arbitration community and the arbitration community itself must both be widened and must educate potential users of international commercial arbitration about who the arbitrators are in a more extensive way than has been done in the past. This to me seems paramount in a process where the decision-makers are rendering final and binding awards. As Professor Paulsson put it (in the context of commenting on the New York Convention): "… any single person in this room, without holding a judicial office, without having any legal training, simply by virtue of being appointed sole arbitrator, could render an award which has greater international effect than decisions of nine unanimous Justices of the US Supreme Court…".[27] The legitimacy of international arbitration[28] must surely be questioned if the process of appointing arbitrators (who are unregulated and may in some jurisdictions be immune from suit) is treated in a proprietorial and non-transparent manner by a very small and barely penetrable group of professionals, many of whom are themselves arbitrators.

Whilst sophisticated business users of international commercial arbitration are familiar with the process, who arbitrators might be and how they are appointed, I believe that gender diversity on international commercial arbitration tribunals is bound to be affected by the fact that only a very narrow section of society is familiar with arbitration. Even lawyers and business people not working in the area do not always have much knowledge of the process. The result is that diversity has trouble flowing through to the world of international commercial arbitration, even given the fact that it is currently under a very bright spotlight. This has to be undesirable given the increasing number of business transactions involving parties from different countries where it is highly likely that international commercial arbitration will be the chosen method of final and binding dispute resolution.

[27] *Op. cit*, Paulsson, *Moral Hazard in International Dispute Resolution,* p.2.
[28] This question was addressed by Joseph Mamounas, *ICCA 2014. Does 'Male, Pale, and Stale' Threaten the Legitimacy of International Arbitration ? Perhaps, but There's No Clear Path to Change,* Kluwer Arbitration Blog, 10 April 2014.

I believe that at least part of the answer lies in going back to square one: education. Not just high school and university education, but primary school education, like the project that inspired this paper. Education is required at a far earlier stage in relation to dispute resolution, international arbitration and diversity. There needs to be a much broader awareness of these issues by a wide range of members of society, including the business community and the legal profession, who have a responsibility to ensure that awareness of gender diversity is brought to the process of international commercial arbitration and, in particular, the appointment of arbitral tribunals.

Taking Scotland as an example, there are many educational initiatives underway involving the law generally and, as in the project which prompted this paper, dispute resolution in the courts. These initiatives provide an excellent experience which could be further enhanced by adding modules about decision-makers in international disputes and, notably, the taking into account of diversity in the appointment of international commercial arbitration tribunals. As is clear from my discussion with one of the teachers involved in the schools project that I describe below, and from watching the television coverage of the competition's final, even at age 10 pupils are capable of a high level of understanding. There is no reason why, at a very basic level, they could not be introduced to who our decision-makers are in various forms of dispute resolution and be made aware of diversity issues. They could be asked to reflect on how decision-makers are appointed, who they are, where they come from, what their qualifications and experience are, and the impact of their powers. It is in this way that a more diverse population will realise that jobs in the dispute resolution field may be open to them, thus ensuring that diversity becomes inherent in our disputes systems and appointment processes.

II. The existing terrain for gender diversity in Scotland

I address below initiatives that have already been taken or are underway in Scotland in relation to gender diversity. There are lessons to be drawn from some of these with regard to how diversity is considered when appointing international commercial arbitration tribunals.

A. The Scottish legislative background

As far as the issue of gender diversity is concerned, Scotland is governed by the Equality Act 2010, which consolidates earlier anti-discrimination legislation and sets out protection against direct and indirect discrimination, harassment and victimisation in work, education, services and public functions. The protected characteristics under the Act are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual orientation.

The Scottish and UK Governments are held to task by the 1980 Convention for the Elimination of all forms of Discrimination against Women ("CEDAW"), an international treaty ratified by the UK. Representatives of the UK Government, including Scottish Government representatives, appear before the CEDAW Committee to update the Committee on the steps that have been taken to develop equality. The Committee then issues observations, which set out actions the Government is required to take. In 2013, when the Committee considered the UK's seventh periodic report,[29] it called upon the UK to "Continue to take concrete targeted measures to improve the representation of women in Parliament and the judiciary, particularly black and ethnic minority women and women with disabilities".[30] The Committee also raised concerns about education and availability of data: "The Committee is further concerned at the persistence of traditional attitudes and stereotypes, including the choice of studies, which affect educational paths and careers followed by girls and women… The Committee is also concerned at the lack of data on the number of women heading academic institutions and at the low number of women in professorial positions."[31] The Committee recommended that the UK should, among other things, "Intensify career guidance activities to encourage girls to pursue non-traditional paths and improve the gender awareness of teaching personnel at all levels of the education system" and "Take appropriate measures to collect data on women in positions at all levels of academic institutions and improve the

[29] 1142nd and 1143rd meetings of CEDAW, on 17 July 2013 (*see* CEDAW/C/SR.1142 and 1143).
[30] Observation 43.
[31] Observation 44.

representation of women at the higher echelons."[32] The eighth periodic report of the UK to CEDAW is due in July 2017.

The UN-accredited Equality and Human Rights Commission in Scotland also works to eliminate discrimination, reduce inequality, and protect and promote human rights. In relation to equality and diversity specifically, the Commission is also under a duty, among other things, to promote understanding of the importance of equality and diversity, encourage good practice, promote equality of opportunity, promote understanding of rights under the Equality Act 2010, and enforce the Equality Act 2010. The Commission works with the Scottish Human Rights Commission, with whom it shares its human rights remit in Scotland. Examples of the Equality and Human Rights Commission's work in 2014/15 include publishing guidance on the legal framework for steps that can lawfully be taken to increase the number of women on the boards of organisations. Further work of the Commission in 2015 includes tackling under-representation at senior levels, by improving recruitment practice in FTSE 350 companies to promote diversity on FTSE boards.[33]

Why address the legislative and supervisory framework in the context of international commercial arbitration? I consider that there is a far greater chance of diversity receiving the attention it deserves in the appointment of international commercial arbitrators if there is across-the-board awareness of legislation which applies to the wider community. Knowledge of the characteristics protected by legislation, including gender, and the types of situations the legislation is intended to address should prompt consideration of diversity in the arbitration population until it becomes an automatic reflex when appointing a tribunal. Greater awareness of legislation on diversity at a wider level and through generations should serve to create these reflexes, which I would suggest we have a responsibility to develop.

[32] Observation 45.
[33] http://www.equalityhumanrights.com/commission-helps-companies-increase-representation-women-boards.

B. Scottish Government initiatives

On 14 March 2015, Scottish First Minister Nicola Sturgeon, herself qualified as a solicitor, addressed the Scottish Parliament at a celebration of International Women's Day. In her speech she set out what the Scottish Government is doing to promote economic opportunities for women. These measures include developing a Scottish Business Pledge and encouraging a voluntary target for gender balance on boards of 50:50 by 2020. A Public Boards and Corporate Diversity Programme has been set up to supervise the latter work and is working to increase the percentage of women and other under-represented groups in leadership roles in Scotland.[34]

When Ms Sturgeon addressed the under-representation of women in senior positions she pointed out that "When I appointed a gender-balanced cabinet, it caused a bit of a stir. The United Nations congratulated Scotland for being one of only three countries in the developed world to have a gender-balanced cabinet. But there were also some less complimentary comments. I received quite a few e-mails asking how I could be sure that the women in the Cabinet had been appointed on merit. Of course, nobody at all wrote in to ask whether all of the men in the cabinet had been appointed on merit. … I'm a strong believer in meritocracy. But the figures demonstrate that we do not live in a meritocracy at the moment."

The First Minister also noted that women are underrepresented in careers like engineering, stating that more than 50% of further education students in Scotland are female, but only a seventh of engineering and technology students, and less than a fifth of computer science students are women, some of which can be explained by subject choices at school. In an attempt to address this issue the Scottish Government launched a "Careerwise" initiative two and a half years ago, which encourages girls to study science, technology, engineering and maths.[35]

[34] Much of the work carried out is summarized in a paper published by the Scottish Government on 14 March 2015, *Maximising Economic Opportunities for Women in Scotland*. In most of the areas which could assist women's economic position, powers to legislate are reserved to Westminster: e.g., powers over employment law and equality legislation. The Scottish Government is however implementing various initiatives to support women in the economy through its devolved powers. *See* http://www.gov.scot/Resource/0047/00473060.pdf.

[35] Careerwise Annual Report 2014, http://www.equatescotland.org.uk/sites/files/careerwise_annual_review_2014.pdf.

The Scottish Government has also created an "action framework for women in enterprise", which is unique in the European Union. Its purpose is to provide better mentoring and networking opportunities, as well access to finance for women who might want to set up their own business.[36]

One of the principal desired objectives of leading the way on diversity at government level is improved economic performance. More business means more disputes, and more disputes mean more arbitration. Women have a significant contribution to make, both in increasing business and in taking their place as arbitrators on international tribunals. Government initiatives such as the above mentioned Careerwise project could play an important role in increasing the pool of suitably qualified international arbitrators : individuals who sit as arbitrators are not always lawyers and the appointment of arbitrators who are engineers or have other specialised technical qualifications is frequent in sectors such as construction and engineering.

C. The Judiciary

Judicial appointments in Scotland are made by the Queen on the recommendation of the Scottish First Minister, who in turn receives recommendations from the Judicial Appointments Board for Scotland, a ten-member board comprising judicial, legal and lay members. Before making a recommendation to the Queen, the First Minister must consult the Lord President, who is the senior judge in Scotland and the head of the judiciary. The functions of the Judicial Appointments Board are set out in the Judiciary and Courts (Scotland) Act 2008 and its responsibilities include making selections solely on merit and having "regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to a judicial office." The Judicial Appointments Board has a Diversity Steering Group which monitors the diversity profile of all appointment rounds, follows up on applicants' progress, publishes statistics, discusses the diversity agenda with the Law Society of Scotland (which is organising a series of seminars at various venues in Scotland in June 2015 to explain the process of applying for judicial office) and the

[36] http://wescotland.co.uk/influence/framework/

Faculty of Advocates, and holds events to inform the legal profession about its work. The Board places an emphasis on the importance of its website as a source of information and has also developed a social media policy and carried out a trial in the use of Twitter and LinkedIn.

The latest Annual Report of the Board, for 2013/14, reported that further to an invitation for applications for appointment to the office of Senator of the College of Justice,[37] eight applications were received, of which three were from women. Two appointments were made in December 2013, both female. The installation of the Rt Hon Lady Wolffe as a judge in the Scottish Supreme Courts in March 2014 brought to nine the number of female judges in the Court of Session and the High Court. At the installation ceremony, the Rt Hon Lord Gill, the Lord President of the Court of Session (until his retirement in May 2015) said that "In March 1996, there were no women members of this Bench. Five years ago, there were three. With your appointment today, there are now nine, more than a quarter of the Bench. In the Inner House, there are now four women judges out of 11. So, we are making progress."[38] In addition, the Rt Hon Lady Smith became the first President of the Scottish Tribunals in 2014.[39]

Out of 141 applications considered for recommendation for appointment to vacancies during 2014/15 for the office of Sheriff,[40] 46 applications were from women. Out of 131 Sheriffs, only 28, i.e., 21%, are women. 81% of applicants for the office of Sheriff completed a diversity monitoring questionnaire.

For the office of Sheriff Principal[41] 2014, 15 applications were received, only one of which was from a woman. Two out of the six Sheriffs Principal are currently women.

[37] Those appointed as Senators of the College of Justice are the senior judicial office holders in Scotland. They hear cases in the Court of Session, which is the supreme civil court and the High Court of Justiciary, which is the supreme criminal court.
[38] http://www.advocates.org.uk/news/news_20140311_wolffe.html.
[39] The Tribunals (Scotland) Act 2014 created the Scottish Tribunals, which comprises a first-tier Tribunal for first instance decisions and an Upper Tribunal (mainly for dealing with appeals) under the leadership of the Lord President of the Court of Session.
[40] Sheriffs sit in the Sheriff Court and hear the majority of civil and criminal court cases in Scotland. They must have been qualified as an Advocate or solicitor for at least ten years.
[41] Sheriffs principal head Scotland's six sheriffdoms. With the Inner House of the Court of Session, they hear appeals against sheriffs' decisions in civil cases. They also hear certain criminal cases and fatal accident inquiries. They must have been qualified as an Advocate or solicitor for at least ten years.

At a conference in early 2014, the Rt Hon Lord Carloway, the Lord Justice Clerk,[42] said that the “trickle up effect of a more diverse legal profession and compulsory training are key to creating a diverse judiciary in Scotland.” and that "Success cannot be measured by a mere tally of the relative numbers of men and women or of ethnic minority and other groups. What should be looked at is not diversity in a judge's credentials, but diversity in judges' decisions." He painted the bigger picture as being not whether the bench was diverse, but whether it was “legitimate” in the eyes of the public, and emphasised that whilst the judicial appointments process must remain first and foremost a meritocracy, there required to be a guard against prejudice, discrimination or other barriers to judicial appointment.

Rabbi Baroness Julia Neuberger DBE, also said at the conference that "Merit and diversity are simply not in competition. What needs discussing is definitions of merit, and whose definition of merit holds sway, and also measures of diversity and whose definition of diversity holds sway."[43]

On a European level, in 2014 women still only accounted for 21% of judges in the Court of Justice of the European Union.[44]

Although judicial appointments of women are at the slightly higher level of approximately 25% in England and Wales, Britain only has one female UK Supreme Court[45] judge out of twelve, the Rt Hon The Baroness Hale of Richmond, who has pointed out that “There has only ever been one female Head of Division and in the Supreme Court there is still only me. It speaks volumes that we have to celebrate such a low proportion of senior women judges.” and “It looks even worse when you realise that there have been thirteen appointments since I was appointed ten and a half years ago, and all of them are men.”[46] She noted that “one of the biggest changes I

[42] The Lord Justice Clerk is the second most senior judge in Scotland.
[43] Lord Carloway addressed delegates at a conference on *Merit and Diversity - Compatible Aspirations in Judicial Appointments?*, Law Society of Scotland news release, 11 March 2014, http://www.lawscot.org.uk/news/2014/03/judicial-appointments-must-be-made-on-merit-to-ensure-public-trust,-says-lord-carloway/.

[44] *Op. cit.*, European Commission Report, p.19.
[45] The UK Supreme Court is the final court of appeal for all UK civil cases and criminal cases from England, Wales and Northern Ireland.
[46] Baroness Hale gave the Fiona Woolf Lecture for the Women Lawyers' Division of the Law Society on 27 June 2014 ; https://www.supremecourt.uk/docs/speech-140627.pdf.

have seen over the past two decades is that more and more influential people – not just the press – have come to recognise that we do have a problem." And "it is not enough to get the appointment process right. We have to get the definition and assessment of merit right too and that is much harder." She went on to pinpoint the education system as tending to "perpetuate disadvantage", where students from state schools are less likely to attend the top universities and, when recruited for jobs, find themselves at a disadvantage compared with students from the top universities. Work patterns may also make it hard for women to combine legal practice with a family life. Baroness Hale highlighted the areas that she would address as being "widening recruitment to the legal profession; broadening the pool from which candidates at all levels are recruited … abandoning traditional stereotypes about who gets what sort of job; … actively encouraging and supporting able but unusual candidates to apply; and creating a proper judicial career structure which enables judges with the potential to move onwards and upwards to be identified, mentored, given the right opportunities to show and develop their qualities and to be transferred or promoted." She went on to say that "We judges could set a good example by offering ourselves as mentors to those wondering about a judicial appointment. This would all amount to affirmative action but not to positive discrimination."[47]

The 2010 Report of the Advisory Panel on Judicial Diversity, which addressed progress in judicial diversity in England and Wales, made 53 recommendations, some of which may be found to be also relevant to international commercial arbitration, such as the following: progress needs to be measured;[48] "judges and members of the legal profession should engage with schools and colleges to ensure that students from under-represented groups understand that a judicial career is open to them.",[49] a plan for developing a diverse pool should be made;[50] and a campaign of mythbusting should take place.[51]

It is plain that notwithstanding recommendations for action, there is a view at the top level of society that we cannot wait too long for a diverse judiciary. In March 2012,

[47] *Ibid.*
[48] The Report of the Advisory Panel on Judicial Diversity 2010, Recommendations 5-8.
[49] *Ibid.*, Recommendation 9.
[50] *Ibid.*, Recommendation 12.
[51] Ibid., Recommendation 49.

The House of Lords constitution committee published a report proposing that non-mandatory targets to appoint more judges from among women and members of the ethnic minorities should be considered if the judiciary does not make itself more diverse within the next five years.[52]

Although the arguments for diverse appointments are in a number of respects different depending on whether we are looking at the judiciary or international commercial arbitrators (for the former, there is an argument that the judiciary should be a representation/reflection of the wider community and not merely an elite part of it), I consider that the international arbitration community has much to learn from how diversity has been integrated into judicial appointments systems thus far.

D. The Arbitration institutions and appointing authorities

The 2010 Arbitration Act provides that either party may refer to an arbitral appointments referee if the arbitral tribunal cannot be appointed in accordance with (i) the arbitration agreement; or (ii) the agreement of the parties; or (iii) in accordance with Rule 6 of the Scottish Arbitration Rules (which are part of the 2010 Arbitration Act): where there is to be a sole arbitrator, the parties must jointly appoint an eligible individual; where the tribunal is to have two or more members, each party must appoint an eligible individual; and where more arbitrators are to be appointed, the party-appointed arbitrators must appoint eligible individuals as the remaining arbitrators. The Arbitral Appointments Referee (Scotland) Order 2010 authorises eight persons to act as arbitral appointments referees, including the Chartered Institute of Arbitrators, the Dean of the Faculty of Advocates, the Institution of Civil Engineers and the Law Society of Scotland.

More recently, in 2011, Scotland established its own arbitration centre, the Scottish Arbitration Centre. The Scottish Arbitration Centre may, upon request, appoint an arbitrator through its Arbitral Appointments Committee, which is an independent committee that acts separately from the Centre's Board. The Scottish Arbitration Centre has issued Directions and Guidance in relation to arbitral appointments by the

[52] http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/272.pdf, para. 105.

Arbitral Appointments Committee.[53] Seven of the 13 Committee members are women.[54]

Even more recently, in 2013, the Scottish Arbitration Centre and the University of Dundee's Centre for Energy, Petroleum and Mineral Law and Policy entered into a joint venture to form the International Centre for Energy Arbitration ("ICEA").[55] In conjunction with the Scottish Arbitration Centre, ICEA can supply arbitrators for all types of energy dispute.

International arbitral institutions are themselves becoming more diverse[56] and have a crucial role to play in the progress of diversity in international commercial arbitration; it would certainly appear that they are making efforts to appoint more diverse candidates.[57]

E. The legal profession: solicitors, Advocates and solicitor- advocates

Solicitors and solicitor-advocates in Scotland number approximately 11,000. More women are joining the profession and make up 49% of its members, with a shift for under-45s: in this group 61% are women.[58] Even though the legal profession is becoming more representative of society, there is still work required "to ensure women face a level playing field, with many of the top jobs still dominated by men."[59]

The Law Society of Scotland, the regulatory body for solicitors and solicitor-advocates, is now headed by an all-female team: Lorna Jack, Chief Executive,

[53] http://www.scottisharbitrationcentre.org/index.php/about/arbitral-appointments-committee
[54] http://www.scottisharbitrationcentre.org/index.php/about/arbitral-appointments-committee/arbitral-appointments-committee
[55] The ICEA will promote Scotland as a seat of arbitration for energy disputes.
[56] *See* ArbitralWomen's Newsletter N° 13 published in March 2015. This edition featured four women leaders in dispute resolution institutions in Africa: Megha Joshi, Executive Secretary/CEO of the Lagos Court of Arbitration (Nigeria), Bernadette Uwicyeza, Secretary General of the Kigali International Arbitration Centre (Rwanda), Bintou Djibo Boli, Secrétaire Permanent Centre d'Arbitrage et de Médiation (Burkina Faso) and Coumba Diatigui Diarra, Director of the Conciliation & Arbitration Centre of Mali (Mali). http://www.arbitralwomen.com/files/founder/55031608553221.pdf.
[57] *Op. cit.*, Greenwood and Baker's 2015 article, p.11.
[58] Law Society of Scotland news release, 13 November 2014, http://www.lawscot.org.uk/news/2014/11/number-of-scottish-solicitors-reaches-all-time-high/
[59] Herald Scotland, 14 November 2014.

Christine McLintock, President, and Eilidh Wiseman, Vice-President. On taking up her role as President on 29 May 2015, Christine McLintock said: "… It's important that we have a diverse legal profession and that we can continue to attract talented individuals who, if they have the ability and ambition to become a solicitor, should not have to encounter unnecessary barriers …". [60]

The Law Society of Scotland's three-year equality strategy, published on 7 January 2015, is intended to improve equality in the profession and support solicitors as they move up in their careers. The strategy concentrates on areas where little change has been noted, including equal pay (there is still a pay gender pay gap of up to 42% in the profession), progression and work patterns, including the impact of maternity leave on making partner. At the end of the three years the Law Society will assess whether the voluntary approach is successful, or whether rule changes need to be made.

The Convenor of the Law Society of Scotland's Equality and Diversity Committee said that "Having strong equality standards brings real business benefits and helps employers attract and retain talented people. It's widely recognised that an inclusive workplace can help increase commitment and levels of motivation among staff, boost productivity and innovation and, as a result, benefit clients and the business overall."[61]

Further to the publication of the equality strategy, the Law Society of Scotland published new equality standards for the legal profession in February 2015. The standards are voluntary and include having a named "equality lead" at law firms and within in-house legal teams; publishing an equality strategy with measurable objectives; and equality and diversity training and reporting.[62]

[60] Law Society of Scotland news release, 29 May 2015, http://www.lawscot.org.uk/news/2015/05/christine-mclintock-takes-up-reins-as-law-society-president/.
[61] Law Society of Scotland news release, 7 January 2015, http://www.lawscot.org.uk/news/2015/01/new-equality-strategy-aims-to-help-solicitors-meet-career-goals/.
[62] Law Society of Scotland news release, 16 February 2015, http://www.lawscot.org.uk/news/2015/02/new-equality-standards-and-equal-pay-guidance-for-solicitors/.

In May 2015 the Law Society of Scotland published research on Perceptions and Impacts of Working Patterns Within the Legal Profession in Scotland. It was found that "there does appear to be an issue around assumptions made about women. Some partners acknowledged that they would make assumptions about a female employee that they would not make about a male, and that these assumptions would affect promotional opportunities. Evidence of females being denied promotions or alternative jobs because of an expectation that they may get pregnant in the future was uncovered. There was also concern and/or reluctance expressed by some for firms/organisations to allow teams or the number of partners to become too heavily reliant on females due to the expectation that they will take maternity leave. Some even suggested that positive discrimination may well take place to redress the balance of teams in favour of males." and "many respondents also highlighted that despite greater numbers of women entering the profession they are still found in only relatively small numbers in the top positions. One felt that recent market conditions had perhaps allowed for discrimination to be masked."[63]

ArbitralWomen interviewed 12 recently promoted women in the legal profession, several from law firms, for its above mentioned 13th newsletter, published on International Women's Day in March 2015. Each interviewee provided her comments on the advancement of women in the field of dispute resolution. It emerged from the interviews that many law firms are giving special priority to and providing specific support for diversity of all forms, including career progress for women; in some firms a high percentage of associate promotions are women; in many firms, especially the London offices of those firms, the number of women partners is steadily increasing; clients are playing a key role as regards the advancement of women in law firms by demanding diverse teams; and women are generally playing an increasing leadership role in the field, including in dispute resolution centres. However, appointments of women as arbitrators do not seem to be following these trends.[64]

As far as Advocates are concerned, approximately 25% of practising Advocates in Scotland are women (the total practising membership of the Bar is about 460, of

[63] Research on Perceptions and Impacts of Working Patterns Within the Legal Profession in Scotland published by the Law Society of Scotland in May 2015, http://www.lawscot.org.uk/about-us/equality-and-diversity/the-society/published-research/.
[64] *Op. cit.,* ArbitralWomen Newsletter N° 13.

whom around one-quarter are QCs; of those about only 6% are women).[65] For the occasion of International Women's Day on 8 March 2015 the Dean of Faculty, James Wolffe, QC, noted several high profile legal appointments of women: "… Lady Smith became the first President of the Scottish Tribunals, Sheriff Principal Mhairi Stephen, QC, was named as the first President of the Sheriff Appeal Court, and the Faculty of Advocates elected Dr Kirsty Hood to one of its ancient offices, as Clerk of Faculty."[66]

It is to be hoped that the above mentioned initiatives and will result in more women reaching senior positions and joining the pool of talent available for appointment to international commercial arbitration tribunals.

F. The Business Community

A new voluntary code for companies to commit to modern business practices, the Scottish Business Pledge, was launched in Scotland on 26 May 2015. This is a partnership between the Scottish Government and business to commit to fair and progressive policies that boost productivity, recognize fairness and increase diversity.[67] The Scottish Business Pledge has nine components including "making progress on diversity and gender balance." It states that there is compelling evidence that having greater diversity of thinking and talent in the management team, and in the business overall, leads to better business performance. It refers to a study of 2,400 businesses from 2005 to 2011 in which the Harvard Law School Forum on Corporate Governance and Financial Regulation noted that: "large-capital companies with women directors outperformed peers with no women directors by 26%; and small to mid-capital companies with women on the board outperformed their peers with all male boards by 17%." Companies with a more modern, progressive, open-minded and meritocratic approach do better. They outperform their rivals by making the best use of all the talents at their disposal.[68]

[65] For England and Wales the appointment of 93 new QCs was announced in January 2015. 42 women applied and 25 were appointed (compared with 18 appointments the previous year, which represents an increase in female appointments of 39%). Although the number of women awarded silk is growing steadily, the Queen's Counsel Selection Panel has nevertheless commented that the number of female applicants "remains stubbornly low."
[66] http://www.advocates.org.uk/news/news_20150306_woman.html.
[67] Press release dated 26 May 2015.
[68] www.scottishbusinesspledge.scot

The business community is a critical component in the development of the consciousness of diversity and many businesses have successful diversity policies. However, whether or not those policies actually result in diversity should be monitored to ensure that businesses are not merely ticking boxes but are actually practising what they preach. Moreover, despite the deep involvement of many businesses in the arbitration process, many others remain ignorant of how it works, due in part to its lack of transparency. Although great strides have been made, the international arbitration community should be made more accessible and user-friendly for business. Many of the institutions have achieved a great deal in this regard (e.g., conferences which focus on users of arbitration, more in-house lawyers speaking on international arbitration panels, and the ICC's "Effective Management of Arbitration - A Guide for In-House Counsel and Other Party Representatives" published in February 2015) and their practices are becoming more transparent than was previously the case.

Although sophisticated users of arbitration have been demanding more diversity for some time, they may be reluctant to take the risk of appointing newcomers who do not fit what they see to be the traditional profile of an arbitrator. Other less frequent users may rely on their outside counsel to propose names for nomination. General Counsel familiar with the process are well-placed to educate their business people. Businesses should not hesitate to question their outside counsel's recommendations and should insist on receiving lists of candidates which take diversity into account. Although businesses are likely to wish to avoid risk by using a newcomer, this is at some point inevitable and safeguards can be put in place, e.g., having new arbitrators sit on a three-person tribunal where the two other members are highly experienced. How big a risk is a lawyer corresponding to the required profile with perhaps decades of international arbitration experience as counsel?

The Rt Hon Lord Hamilton put it simply: "… for those with ambitions in business … a familiarity with arbitration is of the first importance."[69] In order that diversity may be taken into consideration in appointments to courts and tribunals, knowledge of the process within the business community is essential.

[69] *Op. cit.*, lecture given by the Rt Hon Lord Hamilton.

G. Schools and universities

I believe that at least some elements of education in the field of international disputes should start early, at a very basic level. The project that caught my attention and impressed me is the School Mock Case project "Switched On – getting involved and helping to motivate young minds".[70] My former school is involved in this project and was kind enough to meet me to tell me more about it. As well as the law, various other skills including maths, English (written and spoken), drama, resarch skills, art and science are used to create a mock court case in which the whole class can participate. A case outline is provided and roles assigned to pupils: solicitors, witnesses, court artists, journalists, researchers and even gown makers. Teachers and legally-qualified tutors coach pupils to prepare the equivalent of a statement of claim[71] and a defence, adjust the pleadings, prepare witnesses, submit exhibits[72] and play a role in the court hearing. There are projects for both junior and senior pupils. For the last academic year, 47 schools registered with almost 2,000 students. The website for the project includes links to television coverage. The junior project is based on a contract case and the senior project, which is more academic, centres on a personal injury case.

Other initiatives in schools have been organised by bodies including the Law Society of Scotland. The Street Law scheme [73] develops classroom and community programmes that educate school pupils about law, democracy, and human rights. The programme is taught by law students from the Scottish universities. The Law Society is collaborating internationally on the programme content and training with Harvard Education School, Georgetown Law School and the Law Society of Ireland. Other initiatives organised by the Law Society at schools level include giving pupils the opportunity to meet law students, trainees and solicitors.[74] The Law Society also supports the Schools Law Web project, which uses current news events to introduce pupils to the legal system and help them understand that laws bring responsibilities as

[70] http://www.mockcourt.org.uk/. The founder is Gerald Murphy.
[71] "Initial Writ" in the Scottish court system.
[72] "Productions" in the Scottish court system.
[73] http://www.lawscot.org.uk/media/458748/street-law-sponsorship-proposal-march-2015-new-version.pdf.
[74] http://www.lawscot.org.uk/education-and-careers/schools/legal-studies-and-careers-events/.

well as rights.[75] Yet another initiative is the schools outreach project Your Future in Law,[76] jointly developed by staff in the Government Legal Service for Scotland (GLSS) and the Crown Office and Procurator Fiscal Service.[77] The main purpose of the project is to widen access to the legal profession for pupils from state schools who have been found to be under-represented in the legal profession in Scotland. One pupil commented: "This course has made me realise I want a career in public law." Pupils should be left in no doubt that careers previously considered to be for a particular group in society may, in fact, be open to other groups, including themselves.

These projects are proof that even at quite a young age, children are receptive and can understand subjects that we might think are beyond them. Such initiatives open up the world of dispute resolution to schools. They make children (and their teachers, parents and tutors) think about who is actually making a decision on a dispute. This, it seems to me, is an area that merits further exploration in order to inform the wider community about international commercial arbitration and who decides such disputes.

Careers advisers in schools also have an important role to play. Taking the law as a career, the different options for legal roles should be explained, including not just court but also arbitration roles.

It could be thought that with so many initiatives gender diversity will never be an issue for the very young generations. However, it would be foolhardy to assume so. These initiatives are wide, encompassing the law in general and dispute resolution, but not, to my knowledge, international arbitration. It would not take much to alert young pupils to the existence of international arbitration. Lessons learned at this age have to filter right through to those making the appointments.

As regards universities, women coming up through university are diversity-conversant and, on law courses, will receive at least some basic teaching on international arbitration. The study of international commercial arbitration has

[75] http://www.lawscot.org.uk/education-and-careers/schools/; www.schoolslawweb.co.uk.
[76] The Journal of the Law Society of Scotland, December 2014, p. 43, http://www.journalonline.co.uk/Magazine/59-12/1016781.aspx.
[77] The Crown Office and Procurator Fiscal Service is Scotland's prosecution service.

become popular, usually as a post-graduate course, with law schools in Europe, North America and Asia running arbitration modules as part of their regular courses and specialised LLM programmes. In Scotland, for example, the University of Strathclyde in Glasgow offers an LLM/MSc in Mediation and Conflict Resolution, which includes a module on arbitration. Strathclyde University also offers an LLM in Advocacy, aimed at arbitration lawyers, among others. The Programme Leader and Visiting Professor is former Strathclyde student the Rt Honorable Dame Elish Angiolini QC, former Lord Advocate[78] and Solicitor General[79] for Scotland (she holds the distinction of being the first woman to be appointed to both of those offices). Other Scottish universities too have post-graduate courses on arbitration. Opportunities for young people to participate in such courses will raise their awareness of the area as they go through universities and into jobs, whether as lawyers or in the wider business community. Many business courses have disputes modules and this is to be encouraged. Again, as part of that education, pointed questions need to be asked about who our decision-makers are and how they are appointed. Funding of these courses will be important to ensure that students from diverse backgrounds have an opportunity to participate.

Universities also contribute to ingathering data on and spreading knowledge of international arbitration. For example, the University of Aberdeen, in conjunction with the Law Society of Scotland and a Scottish law firm (Burness Paull), and supported by the Chartered Institute of Arbitrators and the Scottish Arbitration Centre, has launched the Scottish Arbitration Survey to collect data and report upon arbitration use, attitudes and trends (the results are due in June 2015).

During their time at university many students become involved in moot competitions, of which there are now several worldwide. These competitions are an excellent opportunity to hone skills whether as arbitrator or counsel and to network. ArbitralWomen had already dedicated an edition of its Newsletter to moot

[78] The Lord Advocate is the ministerial head of the Crown Office and Procurator Fiscal Service.
[79] The Solicitor General is the Lord Advocate's deputy and is also a Minister of the Scottish Government.

competitions in May 2011.[80] A further ArbitralWomen newsletter was published on the subject in May 2015.[81] It addressed the increase in the number of all-women and majority women teams and the number of women arbitrators at the Vienna Vis Moot. All-women teams from Afghanistan and Saudi Arabia competed this year. ArbitralWomen members reported that they arbitrated two all-women teams (Panama v The College of Law London, Australia v New South Wales) with an all-women tribunal.

When the time comes to enter the professional arena, university careers services have a fundamental role to play. University job fairs also play their part.

H. The media, the internet and social networks

The role of the media has always been key to the public perception of diversity and international commercial arbitration. The internet and social networks are prominent in relation to the spread of the message on diversity and as a source of information on international commercial arbitration and will become even more so. Taking a simple example, I explained to my ten year old daughter what an arbitrator was, to which came her reaction: "Oh, you mean like Roy in The Simpsons[82]?" Judge Roy Snyder's skin colour has changed from yellow to brown during the series and his colleague Judge Constance Harm is transgender. It may seem flippant to refer to such an example, but this is precisely the type of information that children will absorb. Despite for many years having been aware of the fact that his mother works in international arbitration, my 16 year old son fared no better when I questioned him on his knowledge of the dispute resolution process. For him too, disputes are resolved in courts. One thing is however certain: like practically all young people of his age, he is an adept user of the internet and social networks and will be receptive to the information, accurate or not, to which he is exposed. The young generations are making their voices heard in a way that has not previously been possible, through social media and their own websites and blogs. The internet and social networks are

[80] ArbitralWomen Newsletter N°3, May 2011.
http://www.arbitralwomen.org/files/founder/51051921221685.pdf
[81] ArbitralWomen Newsletter N°14, May 2015.
http://www.arbitralwomen.org/files/founder/16052025283375.pdf
[82] The American animated sitcom.

of course extensively used by the international arbitration community. Many of the Scottish websites which I consulted for the purpose of this paper make a valuable contribution to the debate on diversity. In the wider international arbitration community, for example, ArbitralWomen's website is an opportunity for women in dispute resolution to showcase their profiles. ArbitralWomen also has a LinkedIn page and has recently become active on Twitter. It would be a fine challenge to extend the use of social media by the arbitration community by having the message on diversity and basic information about international arbitration reach the younger generations via age-appropriate on-line facilities.

III. Conclusion

As a final and binding method of dispute resolution, international arbitration is used to determine thousands of disputes. As such, it must be legitimate in the eyes of its users; I believe that full and fair consideration of diversity in the appointment of tribunals is necessary for the process to maintain its legitimacy. It is to be hoped that diversity will take care of itself once an understanding of arbitration and knowledge of diversity have permeated the minds of the very young generations, although complacency about the generational issue is to my mind a mistake. Regrettably, many prospective arbitrators practising today in other senior positions are a lost generation when it comes to arbitral appointments.

I am not arguing for diversity, including gender balance, at all cost, but a *modus operandi* in which users have a far more diverse choice of arbitral candidates, potential arbitrators have a full and fair opportunity to be considered on merit, and the process of arbitral appointments is monitored and statistics made available.

Consideration of diversity needs to become a reflex when international commercial arbitration tribunals are being appointed. The only way that this can happen is for diversity from a wider level to seep into the international arbitration community, and for knowledge of arbitration to make its way out of that community into society at large: treating the issue from the inside of the arbitration community is not resulting in change at an acceptable pace. The pool of possible arbitrators needs to be replenished with a far more diverse range of candidates.

Change must start with the young generations. The foundations for change are already in place in many countries, including Scotland, but the appointments are not yet there.

Concrete steps, some of which have already been worked on extensively by the arbitration community, could include:

- Continuing to make governments in developing countries aware of the importance of diversity in international arbitration and assisting them in creating legislative frameworks, both for diversity and for arbitration.
- Learning lessons from the judiciary, such as the rigorous monitoring of diversity in appointments, encouraging diverse candidates to come forward, developing a specific plan for a diverse pool, and mythbusting about the appointments process.
- Working with the arbitral institutions to improve the collection and use of statistics on diversity, ensuring that they are informed of the candidates available for appointments, and helping them expand their lists.
- Encouraging members of the international arbitration community to continue to educate their peers, which could involve educating non-contentious lawyers in their firms and helping businesses train their legal and operational people.
- Impressing on users that at some point they will have to take a "risk" by appointing arbitrators they do not know. Outside counsel should work much harder at ensuring they are able to put forward a range of suitable candidates.
- Encouraging schools and universities to include dispute resolution modules which examine who our decision-makers are and how they are appointed.
- Using the media and social networks to the benefit of the international arbitration process and diversity by considering how the issues can be shaped to make them palatable for young minds.

Only education of society at large will operate towards solving these issues and avoiding the very problems and concerns that occur today. The responsibility to do so lies fairly and squarely with the arbitration community. It has been said that "… the

international arbitration community would be well served to continue its dialog to find the most effective ways to promote diversity. Failure to do so would truly put at risk the legitimacy that so many have worked so hard to create."[83] The time has come to move beyond that discussion and to continue with renewed vigour the hard work already undertaken to demystify international arbitration and to promote diversity on tribunals. Although the present terrain in Scotland, compared with almost 30 years ago when I left my traineeship there and went to practise in France, is now much more favourable to international arbitration and diversity, extensive work remains to be done on a number of fronts and as a shared effort by various members of society. When the Dean of the Faculty of Advocates marked International Women's Day 2015, he quoted Gloria Steinem's words: "The story of women's struggle for equality belongs to no single feminist nor to any one organisation, but to the collective efforts of all who care about human rights."[84]

[83] *Op. cit.*, Mamounas.
[84] *Op. cit.*, address by James Wolffe, QC for International Women's Day 2015.