

Diversity in arbitration

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Diversity



Who are the international arbitrators?



Diversity

Arbitration today

- *Male, pale and stale* (or: qualified, experienced and reliable?)
- Disproportionate number of older, white men from Western world
- Absence of diversity is visible
 - how does this arise?
 - remedies?
- Access to arbitration is difficult: informal selection process, hardly specific rules
 - Very similar to judges' elections and appointment (but slightly worse)
- Very few female, black, Eastern European (and others) lawyers in arbitration > lack of diversity has many facets
- Lack of diversity undermines legitimacy (authority) of international arbitration (NB. it is *international* arbitration)

Diversity

Why is diversity important?

Importance of diversity

- Diversity is inherently good: **representativeness as a democratic value**
- Diversity is important because of the different perspectives (experience, knowledge, culture) **a diverse group of lawyers will bring better, more inclusive judgments**
- Diverse teams are generally **more capable at solving complex issues**

Lack of diversity makes international arbitration as a method less attractive > the public is watching!

More diversity amongst arbitrators will lead to more 'buy in':

- Acceptance of arbitration as dispute settlement
- Acceptance of awards

Reasons for lack of diversity

- **Party autonomy**
- Lack of appointments of *non-mainstream* arbitrators (> party autonomy)
- Opaque selection procedures (> party autonomy, ‘old boys’ network)
- Unconscious bias of selectors > looking for similarity (‘our kind of people’)
- ‘Lack of fit’ > the ideal (traditional?) arbitrator looks different (no bright jackets, no high heels)
- ‘Pipeline leaks’ > losing capable women along the way

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How does a lack of diversity arise?

- Parties choose own arbitrator > both arbitrators decide on further arbitrators
 - Parties value the autonomy to choose arbitrator, *our case now*
 - Repetition of appointments, *it is a small world*
- Lawyers (counsel) are inherently conservative
 - Need to win this case: no loose canons on the arbitral tribunal
 - We want reliability and proven expertise
 - Bias in favour of an arbitrator used previously > but where does one build experience? (chicken-and-egg problem)
- Arbitration is an ‘old boys club’ > need to know the important people
 - Selection mechanisms work against access for women and other outsiders
 - Women move in other circles
 - ‘You cannot aspire to be what you can’t see’ (need for role models)
 - Attitudes work against access for women: “Yes, women are welcome, but so few are really interested” (*the Smurfette*) (‘lack of fit’ problem)

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International norms (Article(s) 8)

UN Charter (1945)

The United Nations shall place **no restrictions on the eligibility of men and women to participate in any capacity** and under **conditions of equality** in its principal and subsidiary organs.

CEDAW (1979) (+ General Recommendation 40(2024))

States Parties shall take all appropriate measures to ensure to women, **on equal terms with men and without discrimination**, the opportunity to represent their Governments at the international level and to **participate in the work of international organizations**.

Sustainable Development Goals (2015) > SDG 5.5

Ensure women's full and effective participation and equal opportunities for leadership at all levels of **decision-making in political, economic and public life**.

Diversity

Starting point: the person matters *selection is problematic*

Arbitration: party autonomy in selection of arbitrators

- Long-list > short list > final proposal by Counsel to Client
- Process is fraught with hurdles for newcomers
- It is possible to require the selectors to present a diverse list for the selection process > the client is in charge, not the law firm(!)

Parties only have *one* chance

- *Our case now*: there is no appeal > we need a predictable, dependable arbitrator (but no guarantees)
- Parties make choice with a short-term perspective: *our case now* (no responsibility for the overall picture, or long-term development)
- Profile: expertise (a specific field), experience (previous cases) and *gravitas* (ability to convince other arbitrators in panel)

How to improve diversity?

Required:

- Space for female talent
- Space for young(-er) talent (average age is 70+)
- Space for non-western talent

This is not just happening:

- Several international initiatives: role of ICSID, The Pledge, Gqual
 - Difference between commercial arbitration/ investment arbitration and interstate arbitration?
 - Benefits of professional organisations, but absent in interstate arbitration
- Role of arbitral institutions in assisting parties towards more inclusiveness
- Role of the Appointing Authority, and knowledge of the field > information on female arbitrators to be more available
 - Rules or instructions by parent body (SPLoS, PCA Council) to Appointing Authority: guidelines on the role of AA could be formulated
- Role of senior women > mentoring

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Improving the selection process

- Need for parties to (be able to) explain selection process > perceived quality has impact on acceptance of results
- The outside world is watching: confidentiality not accepted any more
 - States: explain choices made to parliament
 - Commercial/investment arbitration: shareholders, and NGOs want explanations of choices
- Steps towards transparency: reporting about the *how* and *who* of the selection
 - General: including diversity criteria in model BIT agreements
 - Formulation of requirements by the client for the search by the law firm (such as gender or other criteria)
 - Pre-selection by law firm > role of independent experts to formulate shortlist for the client > client makes the final choice but has included outsiders to put the process at arms length

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Benefits of improved diversity

- ✓ Diverse teams (= arbitral tribunal) function better
 - No group thinking
 - Wider range of knowledge and experiences, styles
 - Greater potential to find alternative solutions
 - Better understanding of other perspectives > more inclusive
- ✓ Representativeness enhances sense of fairness and public confidence (the public is watching)
- ✓ Importance of renewal and development in arbitration necessary as caseload grows (> entry of new arbitrators is necessary)
- ✓ More career opportunities 😊

Diversity

