

Diversity in arbitration

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Diversity

**Who are the
international
arbitrators?**



Diversity



Diversity

Why is diversity important?

Importance of diversity - related to legitimacy

- Diversity is inherently good: **representativeness is 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 awards

Diversity

Arbitration today

- *Male, pale and stale* (or: qualified, experienced and reliable?)
- Disproportionate number of older, white men from Western world
- 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)
- Access to arbitration is difficult: informal selection process, hardly specific rules
 - Very similar to judges' elections and appointment (but slightly worse)
- Absence of diversity is visible
 - how does it arise?
 - remedies?

Diversity

Possible reasons for lack of diversity?

- Lack of party appointments of non-mainstream arbitrators (> party autonomy)
- Unconscious bias of selectors
- ‘Pipeline leaks’ (we lose capable women along the way)
- Opaque selection procedures (> party autonomy, ‘old boys’ network’)
- The ideal arbitrator looks different (aka ‘male, pale and stale’) – no bright jacket, no high heels

How does lack of diversity arise?

- Parties choose own arbitrator > both arbitrators decide on further arbitrators
 - Parties value the autonomy to choose arbitrator
 - Repetition of appointments, *it is a small world*
- Lawyers (counsel) are inherently conservative,
 - Bias in favour of an arbitrator used previously > but where does one build experience?
 - Need to win the case: no loose canons on the arbitral tribunal
 - We want reliability and proven expertise
- 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
 - Attitudes work against access for women: “Yes, women are welcome, but so few are really interested” (*the Smurfette*)

Diversity

Starting point: the person matters

the selection is problematic

Arbitration: party autonomy in selection of arbitrators

- Process is fraught with hurdles for newcomers
- *It is possible to require the selectors to present a diverse list for the selection process*
- Long-list > short list > final proposal by Counsel to Client
- Party autonomy

Parties only have *one* chance

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

Diversity

Article(s) 8

Mostly relevant to interstate arbitration

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)

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**.

Diversity

How to improve diversity?

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

This is not just happening

- ❖ Several international initiatives: role of ICSID, The Pledge, Gqual
 - Difference between commercial arbitration and 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

Diversity

What is the benefit of improved diversity?

- Diverse teams (= arbitral tribunal) function better
 - Better understanding of non-Western perspectives > more inclusive
 - No group thinking
 - Wider range of knowledge and experiences
 - Greater potential to find alternative solutions
- 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

