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[INSPIRED ARBITRATOR CHOICES: ADDRESSING INTERNATIONAL ARBITRATION'S DIVERSITY DEFICIT] By Sarah Z. Vasani • [DISPUTE CENTRE: HOW TO SIFT THE WHEAT FROM THE CHAFF?] By Arran Dowling-Hussey • [RECONSIDERATION UNDER THE ICSID CONVENTION: REDRAWING THE LABYRINTH] By Nicolás Alarcón Loayza • [RELATIONSHIP BETWEEN ARBITRATION AND BANKRUPTCY PROCEEDINGS IN RECENT CASE LAW OF THE ITALIAN SUPREME COURT] By Roberto Oliva • [WE DECIDED TO JOIN THE NEW YORK CONVENTION... WHAT'S NEXT?] By Alexandra Gonçalves • [REFORM TO ARBITRATION LAW IN RUSSIA: WHAT IS NEW?] By Hanna Shalbanava • [THE USE OF ARBITRATION IN THE RESOLUTION OF DOMESTIC AND INTERNATIONAL TAX DISPUTES] By Mayara Nunes Medeiros de Souza and Sâmila Nunes Vianna • [THE SUCCESSFUL EXPERIENCE OF THE PRO BONO ADVOCACY GROUP DURING THE RIO 2016 OLYMPIC GAMES] By Daniel Becker and Caio Gabra • [PORTO AND LISBON CROSS EXAMINATION SEMINARS] By Laurence Burger



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the entire system is called into question. What should be a wide and nuanced system of dispute resolution instead gets filtered through a narrow and singular lens.

Importantly, this legitimacy crisis is not confined to the ISDS context. It is bleeding into the international commercial arbitration sphere as well, which likewise is dominated by “*pale, stale, and male*” decision makers. Data from a recent study conducted by Professor Susan Franck of 413 participants at the 2014 International Council for Commercial Arbitration (“ICCA”) biennial Congress suggests that the proportion of women arbitrators, and arbitrators from developing countries, has been relatively small.⁵ Franck’s findings support what those practicing in the area already know: “*international arbitration is a relatively homogeneous group.*”⁶ Following the biennial Congress, V. V. Veeder urged the international arbitration community “*to act now to regulate itself or risk ‘reputational disaster’.*”⁷ Concern that the diversity deficit threatens the legitimacy and sustainability of international investment and commercial arbitration has support throughout the community. For example, Franck’s research found that 57.5 percent of those surveyed either somewhat agreed or strongly agreed that “*international arbitration experiences challenges related to gender, nationality, or age.*”⁸

The international arbitration system is global, and its decision makers must reflect the make-up of its users in order to maintain its legitimacy and its status as the preferred forum for resolving international investment and commercial disputes. To save the system from itself, its stakeholders – institutions, counsel, and clients alike – must take concrete steps to broaden the pool of arbitrators to include (without limitation) women, diverse ethnicities, diverse nationalities, and a range of ages.

This article explores the extent of the diversity deficit plaguing the international arbitration system. After setting forth the relevant statistics relating to gender diversity, three observations are made. First, women are unquestionably underrepresented on arbitration tribunals in both the investment and the commercial arbitration context. Second, there is reason to believe that in light of the attention given to the issue of diversity by the arbitration community in recent years, some progress is being made, albeit gradual. Third, available data demonstrates that arbitral institutions are best placed (as compared to parties and their counsel) to reduce the diversity deficit most significantly and most quickly by appointing diverse candidates, either as sole arbitrator or chair, in a significant proportion of their appointment. After analyzing the statistics, this article briefly explores why the diversity deficit is problematic for the sustainability and legitimacy of the international arbitration system. Finally, the article concludes that the stakeholders of the system must make more inspired arbitrator choices to save the system from itself. To do so, the stakeholders of the international arbitration system would benefit from an approach similar to the Rooney Rule developed by the National Football League (“NFL”), a policy that requires NFL teams to interview and seriously consider (although not necessarily hire) minority candidates for head coaching and senior football operation positions. By making more inspired arbitrator choices, the system’s stakeholders can diversify and increase the number of decisions makers available to address the ever-increasing number of international arbitrations. With

caseloads spread more widely amongst a greater pool of younger and more diverse talent, users likely will also benefit from a more efficient and cost effective system.

The Extent of the Diversity Deficit in International Arbitration – The Case of Gender

Empirical studies have laid bare the extent of the diversity deficit in international arbitration. Such studies have confirmed the “repeat-player phenomenon,” which is rampant within the field, as well as a dearth of women, ethnically-diverse, nationality-diverse and younger arbitrators.⁹ While all of these diversity traits are important, this article focuses primarily on gender, both because gender has been tracked more frequently and has received the greatest amount of attention in recent years. Because of the larger pool of gender statistics, it is possible to draw more conclusions from them. This is not to say that ethnic diversity, nationality and age diversity are any less important than gender. To the contrary, the international arbitration community should be focusing its efforts to increase all forms of diversity in order to broaden the pool of arbitrators, an objective which is critical for both the legitimacy and sustainability of the system. Importantly, the proposed solution in this article – namely, the adoption of the Rooney Rule in relation to arbitrator selection – can apply with equal force to ethnicity, nationality and age.

In 2006, Professor Susan Franck of American University carried out a detailed study of the composition of investment treaty tribunals based upon the 102 publically-available awards at that time.¹⁰ Professor Franck’s research revealed that women arbitrators comprised only a “*tiny fraction*” of the arbitrators in the awards analysed. Indeed, of the 145 arbitrators reviewed by Franck, only 5 were women, accounting for merely three percent of the investment arbitrator pool at that time.¹¹ Lucy Greenwood and Mark Baker updated Franck’s research in 2012, by examining the constitution of ICSID tribunals relating to 254 “concluded cases” published on the ICSID website as at 1 March 2012, which spanned between 1972 and 2012.¹² Of the 746 arbitrators appointed in those published cases, only 42 were women, accounting for merely 5.63 percent of total appointments.¹³ While acknowledging that the percentage of women serving on ICSID tribunals had increased since Franck’s 2006 survey, Greenwood and Baker observed that the overall level of female arbitrators in ICSID cases remained exceedingly low.¹⁴ Such statistics caused Greenwood to conclude that “*arbitration tribunals do not reflect the diversity of individuals in any real-world business demographic, and they look increasingly anachronistic in the modern world.*”¹⁵

Comprehensive statistics in relation to international commercial arbitration are more difficult to ascertain in light of the confidential nature of such proceedings. Nevertheless, there is good reason to believe that women are unrepresented in international commercial arbitration appointments, just as they are in the investment arbitration context. In 2009, Michael Goldhaber noted that only around four percent of the 250 arbitrators involved in the cases he reviewed for the 2009 American Lawyer Scorecard of major arbitrations were female.¹⁶ The 2015 American Lawyer Arbitration Scorecard did not demonstrate any improvement in gender diversity. The proportion of women serving on tribunals

with matters in dispute of at least US\$ 1 billion remained stagnant at four percent.¹⁷ The Scorecard elaborated that only two women were frequently appointed in high stakes disputes, while a “thin layer” of 10 women received one or two appointments. In 2012, and based in part on statistics provided the previous year by the London Court of International Arbitration (“LCIA”) and the Stockholm Chamber of Commerce (“SCC”), Greenwood and Baker found “*that the best estimate of the percentage of women appointed to international commercial arbitration tribunals is around 6%.*”¹⁸

In 2012, the LCIA Registrar’s Report made reference to the growing concern about the diversity of arbitrators when it stated that “[t]here continues to be growing public interest in the number of female and first-time appointees.”¹⁹ In that same year, the LCIA Registrar’s Report published gender statistics relating to its appointments for the very first time; the percentage of women arbitrators appointed in LCIA arbitrations amounted to 9.6 percent (33 of 344 individual appointments).²⁰ In 2013, the percentage of women arbitrators rose slightly to 11.5 percent (43 of 372 individual appointments).²¹ Of the 420 appointments made in 2014, 49 (11.7 percent) were female arbitrators,²² and in 2015, this percentage increased to 15.8 percent (71 of 449 arbitrators).²³

Perhaps in light of the “*growing public interest in the number of female and first time appointees*”, the LCIA Registrar’s Report, commencing in 2014, included discrete sections on both “*Gender Diversity of Candidates*” and “*First Time Appointees*.”²⁴ The former category divides the LCIA gender statistics into three subcategories: female arbitrators selected by the LCIA Court, the parties, and the parties’ nominees.²⁵ From the data available, it becomes clear that, at least in the case of LCIA arbitrations, the LCIA Court as an institution is making the greatest headway to diversify its arbitrator pool, by appointing female arbitrators at significantly higher rates than either the parties or their nominees. Of the total number of nominees appointed by the LCIA Court between 2013 and 2015, 19.8 percent were women in both 2013 and 2014, and 28.2 percent were women in 2015. This is in contrast with the number of female arbitrators nominated by parties (6.9 percent in 2013, 4.4 percent in 2014, and 6.6 percent in 2015), and party nominees (0 in 2013, 14.5 percent in 2014, and 4 percent in 2015).²⁶ These statistics lay bare the important role that arbitral institutions have to play in diversifying the pool of international arbitrators. As discussed below, they are better positioned than parties and their counsel to ensure that diverse arbitrators are appointed and given the opportunity to gain experience and flourish.

In 2015, a number of other arbitral institutions began to publish statistics relating to the appointment of female arbitrators for the very first time. The International Chamber of Commerce (“ICC”) reported that female arbitrators represented just over 10 percent of all appointments and confirmations in 2015.²⁷ The Singapore International Arbitration Centre (“SIAC”) reported in its Annual Report that “[f]emale arbitrators appointed by SIAC in 2015 constituted nearly a quarter of all arbitrator appointments.”²⁸ This figure comprises only appointments made by SIAC; it does not reflect appointments made by either parties or their nominees.²⁹ As in the case of the LCIA, SIAC appoints female arbitrators with greater frequency than both parties and their nominees and accordingly, the percentage noted in the 2015 Annual Report would be lower

if those nominations were also taken into account. Finally, the SCC also began publishing female arbitrator statistics in 2015. In that year, female arbitrators comprised 39 of 279 total SCC appointments, equating to the appointment of female arbitrators in nearly 14 percent of all cases. In cases where parties themselves appointed an arbitrator, a woman was appointed in 6.5 percent of cases (11 of 168 appointments). For appointments made by co-arbitrators, a female arbitrator was appointed in 10 percent of cases (1 of 10 appointments). For appointments made by the SCC institution, a woman was appointed in 27 percent of cases (27 of 101). Accordingly, the SCC was responsible for appointing 70 percent all women appointed in SCC arbitrations in 2015.³⁰

Decreasing the Diversity Deficit in International Arbitration – Learning from the Statistics

At least three conclusions can be derived from the above statistics. First, in light of the fact that “*women have entered the business world and the field of law in droves*”³¹ the above statistics confirm what those practicing international arbitration already know – women are unquestionably underrepresented on arbitration tribunals in both the investment and the commercial arbitration context.

Second, there is reason to believe that in light of the attention given to the issue of diversity by the arbitration community in recent years, some progress is being made, albeit gradual. The headway made to reduce the diversity deficit in recent years likely is attributable in part to the increasing awareness of diversity and implicit bias within the arbitration community, as well as the affirmative steps taken by a significant number of those within the international arbitration community to foster change on this front.

For example, and perhaps most notably, the Equal Representation in Arbitration Pledge (the “**Pledge**”),³² which has been described by its supporters as a turning point for gender equality in international arbitration, was launched in 2016.³³ The Pledge is the result of a collaborative effort between global representatives of corporate entities, States, arbitral institutions, arbitration practitioners (both counsel and arbitrators) and academics. It calls on the international dispute resolution community to commit to increase the number of female arbitrators on an equal opportunity basis.³⁴ Since its launch, the Pledge has garnered tremendous support. As at 24 October 2016, 1414 signatories have signed the Pledge, including arbitral institutions (such as the LCIA, ICC, SCC, SIAC, the International Centre of Dispute Resolution, and the International Centre for Energy Arbitration), corporations (such as BP PLC, ConocoPhillips, General Electric and Shell International Ltd.), and various international law firms and barrister chambers.³⁵ While it is unclear how quickly the Pledge will spur the change necessary to decrease the diversity deficit, it is certainly an important step in the right direction.

The third conclusion that can be drawn from the foregoing data is that arbitral institutions are best placed (as compared to parties and their counsel) to reduce the diversity deficit most significantly and most quickly by appointing diverse candidates, either as sole arbitrator or chair, in a significant proportion of their appointment. Across the institutions where data is available (i.e. the LCIA, SCC, and SIAC), it was the institution that significantly



out-performed both the parties and their nominees in appointing female arbitrators. These figures are to be expected in relation to party appointment. As counsel, the aim is to select the “right” or “best” party-appointed arbitrator for the case, and for this reason arbitrators with established track records and experience are almost always preferred. Fear of an unfavorable outcome, the unknown, and how a “fresh” face that is not part of the “inner circle” of the arbitration elite may serve as insurmountable hurdle for counsel to appoint more diverse candidates. Fortunately, institutions are not shackled by the same concerns that parties and their counsel have. They have more latitude to appoint a more diverse candidate when appropriate, either to serve as a chair or a sole arbitrator. Those same institutions also have the most to lose if the system as a whole fails and equally the most to gain if it succeeds. It is therefore for them to train, appoint, hand hold and nurture the next generation of diverse arbitrators.

Reasons Why the Diversity Deficit in International Arbitration Must Be Addressed

Numerous commentators have written on why diversity matters in the context of international arbitration.³⁶ Rather than explore those reasons exhaustively, this article briefly sets out three key reasons why a diverse arbitral pool is important. The first reason relates to differences in decision making. Currently there is a broad array of talent in international arbitration which “*extends across borders and encompasses both genders.*”³⁷ Utilizing this broad experience and varied approach to decision making can provide a significant benefit. Arbitrators from a North American, Northern European and Antipodean extraction would tend to look at the world through a relatively homogeneous prism. There are outliers; there are individuals with experiences with other cultures, and an appreciation of the context gleaned through family history or life experience.³⁸ But by and large, it is one world view. There is no doubt that those from Africa, Asia, and Latin America are more likely than not to view the world differently. It may not be a significant difference, but it will be significant enough to appreciate nuances, and can inform an “*intuitive response to a dispute.*”³⁹

From deals made on a handshake, to a lack of paperwork, to the importance of commitments made on nothing more than a family’s reputation, the judges of international arbitration cases must reflect the system’s users. To function as a global system, arbitrators from around the globe are required.

The same can be said of different genders, as studies have shown that women often approach problem solving differently to men. Empirical data suggests that “*panels with at least one female judge tend to have a higher quality of reasoning in some respects than an all male panel.*”⁴⁰ It is thought that women possess a number of other “*gender specific traits that are highly compatible with arbitration.*”⁴¹ Accordingly, excluding women from the process could be detrimental.

The second reason why diversity matters is legitimacy. The legitimacy of international tribunals is particularly important, especially given that it is widely thought that “*appearance and trust matter*”⁴² in the field of arbitration. If you consider that international arbitration will “*only be perceived as legitimate if it appears to embody the rule of law and democratic principles,*”⁴³ the need to address the diversity deficit becomes pivotal. The fact that “[t]he international investment arbitration industry is dominated by a small and tight-knit Northern hemisphere-based community of law firms and elite arbitrators”⁴⁴ could suggest that international arbitration is “*inherently biased;*”⁴⁵ this then opens up the system to criticism, which in turn brings the identity of arbitrators under the spotlight. This criticism has already commenced. As the Corporate European Observatory recently criticized: “*[t]he concentration of cases in so few hands suggests that this small group of frequently appointed arbitrators has a significant career interest in the system. This is problematic because it poses the danger of making arbitrators even more receptive to investor interests, the latter being the only ones who can initiate investment disputes.*”⁴⁶ Given that the international commercial arbitration system suffers from the same diversity deficit, its legitimacy too is being called into question.⁴⁷

The third reason why diversity matters is that it is essential for the sustainability of the system. The main frustrations voiced by the users of international arbitration are costs and delay.⁴⁸ One

important reason for this is that due to the narrow pool of arbitrators currently selected, the “repeat players” are increasingly busy.⁴⁹ With no deadlines for rendering awards, it is in the self-interest of those arbitrators to continue to accept more cases. That is unsustainable, especially given the age of the majority of these arbitrators.⁵⁰ A direct benefit of diversifying the arbitrator pool therefore is the influx of fresh blood into the system. This will give users more choice and allow the workload to be spread over a greater number of people, which should in turn result in faster decisions at a lower cost.

Some in the international arbitration establishment dispute that measures should be implemented to address the diversity deficit described above. Those individuals argue that the concept of party autonomy is untouchable,⁵¹ the value of experience should not be interfered with, and manufactured change is not required because time will allow the system to correct itself as any market for services.⁵² While it is true that parties are free to choose their arbitrators, there is no reason for the community not to challenge the methodology behind their selection, in the interest of creating a more diverse, efficient, legitimate, and sustainable system of resolving disputes. Equally, we cannot deny that the experience of an arbitrator is of critical importance. But if this is the sole consideration taken into account when choosing an arbitrator, how can young women or those from diverse backgrounds gain the experience required for selection when they are not given the chance to acquire the relevant experience in the first place? We cannot divine whether the system will or will not change by itself. However, there is “*an increasing recognition that the pace of change is unacceptable*”⁵³, which supports the view that if we leave the system to correct itself over time we are simply not doing enough to address the issue. Arbitration needs to be innovative, and its decision makers need to reflect the systems’ diverse and global users; accordingly, reducing the diversity deficit is an issue that requires action now.

Making Inspired Arbitrator Choices

In theory, the principle of party autonomy could easily enable parties to appoint diverse candidates. In reality, however, parties are driven by “*fear of an unfavorable outcome*”⁵⁴ they will not “risk” their case by selecting a more diverse but less experienced candidate. The party will be apprehensive that its appointee will be sidelined by a more experienced appointee by the other party, or by a more experienced chair. Too much is at stake to rely on the parties alone to diversify the arbitral pool. Indeed, the statistics above demonstrate that parties are not significant drivers of change in this respect. Accordingly, unfettered party autonomy is not an avenue through which diversity will flourish.

To address this, the stakeholders of the system — arbitration

users, counsel, arbitrators, and institutions alike — should adopt an approach similar to the NFL’s Rooney Rule when appointing arbitrators⁵⁵. The rule, introduced by Dan Rooney, the chairman of the Pittsburgh Steelers, spearheaded a requirement that NFL teams with head coach and general manager vacancies interview (but not necessarily hire) at least one minority candidate. The interview has to be serious, and thoughtful consideration must be given to the minority candidate.⁵⁶ Within four years of implementing the Rooney Rule, the percentage of minorities in leadership positions rose from 6 to 22 percent.⁵⁷

Similarly, the stakeholders of international arbitration — its users, their counsel, arbitrators, and institutions — should give serious consideration to more diverse candidates at every opportunity. The key is to break the habit of resorting to the “usual suspects” or “go to arbitrators” that parties, their counsel, and co-arbitrators have a tendency to appoint, and instead, to seriously consider whether there is a diverse candidate who would be appropriate for the appointment. Simply by thinking outside the box as to who is best to serve in a particular arbitration, the arbitration community can make more inspired arbitrator choices that will inure to the benefit of the system as a whole. This could create a successful pathway for more diverse candidates.

Conclusion

International arbitration unquestionably suffers from a diversity deficit which threatens its legitimacy and sustainability. The predicament is that “*no-one really owns the problem*”⁵⁸. But what if the users of the system decided to view the diversity deficit as an “*opportunity to be seized*”⁵⁹ What if those within the community refrained from immediately resorting to their respective lists of “go to” appointees (which they previously advocated before or sat with)? What if instead of calling upon the usual suspects, the stakeholders of the system thought outside the box to ensure that diverse candidates are considered and appointed whenever suitable opportunities arise? What if our arbitrator choices were more inspired?

The suggestions made above are manageable solutions which do not impinge on the principle of party autonomy and should be straightforward changes to make. To succeed, international arbitration needs to remain global and as such arbitrator selection needs to align with this idea and be much more inspired - before it becomes too late.

Sarah Vasani

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 - 19 LCIA 2012 Registrar’s Report, at p.4.
 - 20 *Idem*.
 - 21 LCIA 2013 Registrar’s Report, at p.4.
 - 22 LCIA 2014 Registrar’s Report, at p.4.
 - 23 LCIA 2015 Registrar’s Report.
 - 24 LCIA 2014 Registrar’s Report, at pp. 4-5. In relation to first time appointees, the LCIA reported that in 2014, 56 of 420 individual appointments represented first time appointees, amounting to 13.33 percent. In 2015, 65 of 449 individual appointment represented first time appointees, amounting to 14.5 percent.
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 - 26 LCIA 2014 Registrar’s Report; LCIA 2015 Registrar’s Report.
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 - 34 The Arbitration Pledge 2016, available at <http://www.arbitrationpledge.com/>. The Pledge provides in relevant part: “As a group of counsel, arbitrators, representatives of corporates, states, arbitral institutions, academics and others involved in the practice of international arbitration, we are committed to improving the profile and representation of women in arbitration. In particular, we consider that women should be appointed as arbitrators on an equal opportunity basis. To achieve this, we will take the steps reasonably available to us – and we will encourage other participants in the arbitral process to do likewise – to ensure that, wherever possible: . . . lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates; states, arbitral institutions and national committees include a fair representation of female candidates on rosters and lists of potential arbitrator appointees, where maintained by them; where they have the power to do so, counsel, arbitrators, representatives of corporates, states and arbitral institutions appoint a fair representation of female arbitrators; gender statistics for appointments (split by party and other appointment) are collated and made publicly available; and senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.”
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Sarah Z. Vasani is an experienced international arbitration counsel specialising in both international commercial arbitration and foreign investment disputes. She is commended for providing “excellent client service” and has been described by her clients as an “energetic, tenacious and incredibly capable counsellor and advocate.” Sarah was recently recognised by Who’s Who Legal and Global Arbitration Review as a “Future Leader in International Arbitration”.

Sarah represents clients before key arbitral institutions including the International Centre for the Settlement of Investment Disputes (ICSID), London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC), International Centre for Dispute Resolution (ICDR), World Intellectual Property Organization (WIPO), Singapore International Arbitration Court (SIAC), Hong Kong International Arbitration Court (HKIAC), Stockholm Chamber of Commerce (SCC), and in arbitrations conducted under the UNCITRAL Rules. In addition to advocating for her

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Sarah has particular experience in energy, oil and gas, mining, and other large scale project disputes in Africa, the Middle East, Central Asia, the Indian Subcontinent, and Latin America. She has represented client such as Chevron, ConocoPhillips, El Paso Corporation, Sempra Energy, Murphy Oil Corporation, Exterran, Reliance Industries, and Madagascar Oil.

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