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Commentary

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on diversity among the arbitrators seated on international arbitration tribunals. We would like to thank the following individuals for sharing their thoughts on this important issue.

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- Elizabeth Shimmin, Complex Commercial Litigation and International Arbitration Partner, Jenner & Block, London
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- Charles E. Harris, II, Partner, Mayer Brown, LLP, Chicago

Mealey's: How important is diversity among the arbitrators seated on international arbitration tribunals to perceptions of fairness in dispute resolution?

Willems: It is accepted by now that diversity is in and of itself important, and key to perceptions of fairness in both the processes and decisions of international arbitration tribunals. Tribunals should reflect the global nature of the arbitral system and of its participants. Diversity, quality, competence and impartiality of tribunal members are all key considerations.

My view is that diversity and arbitral excellence go hand in hand. Developments support this: For example, in 2019, the 972 individuals who were appointed to ICC tribunals came from 89 different countries, and 21% of arbitrators were women.

Progress is being made, but more work is needed. The speed of change should increase: Over the last few years, familiar faces do seem to continue to receive the lion's share of appointments. Increasing diversity in arbitration requires action on the 'supply' and 'demand' side of appointments. On the supply side, law firms are proactively promoting diversity, and take it seriously. The growth of diverse dispute lawyers will increase the pool of diverse arbitrators, as practitioners gain the necessary experience and standing. On the demand side, clients are ahead of the game: Diversity requirements are included in the selection criteria for their advisers, and law firms are rising to the challenge of meeting those.

The good news is that the field of excellent and diverse arbitrators is already much greater. Clients should feel confident in insisting that external counsel search out diverse decision-makers. It may also be time to consider whether arbitral seats themselves reflect the values of the international arbitration community, and those values may be taken into account when selecting the seat of the arbitration. Ultimately, fairness should not be a perception: It should be a hard and fast reality, baked into every arbitration cake.

Franzetti: Diversity among arbitrators seated on international arbitration tribunals is incredibly important to perceptions of fairness in dispute resolution. A homogenous tribunal with similar cultural and educational backgrounds has a very uniform appearance, which easily establishes a perception that members of the tribunal will examine the same sides of an issue and espouse the same opinions.

A diverse arbitral tribunal, however, is comprised of arbitrators with a wide range of backgrounds, experiences, perspectives and beliefs. Not only does such diversity provide a stronger appearance of fairness to the tribunal, but it also results in more accurate fact-finding and legal interpretations. That is because persons with, for example, different gender, sexual orientation or ethnic and cultural backgrounds might have different ways to perceive issues, resulting in a fairer overall result that accounts for all potential perspectives in a dispute.

As a consequence, arbitral institutions and practitioners from around the world are pressing for greater diversity in arbitral tribunals (and in the practice generally)—emphasizing the importance of diversity in international arbitration.

For instance, many renowned institutions have taken the Equal Representation in Arbitration Pledge in order to publicly announce their intention to promote gender diversity in arbitration.

In order to increase both the perception of fairness and actual fairness in international arbitration proceedings, parties and practitioners to international disputes must continue to press for increased diversity both in the arbitral tribunal itself and counsel before the tribunal.

Campbell: Diversity is essential. As someone who has represented clients in legal disputes on every continent (except Antarctica), I believe that diversity among arbitrators and judicial officers is critical to the continued success of international arbitration panels and other international legal disputes for several reasons.

First, it is right morally. To promote a fair and just society and legal system, we must be willing to include everyone. More importantly, we must not exclude

anyone, whether consciously or unconsciously. This means all forms of diversity, including race, ethnicity, gender, age, country of origin, economic status, and others. This requires recognizing groups that are underrepresented, understanding why that is the case, and taking reasonable steps to increase their representation. This might include increasing access to educational programs provided by the International Centre for Dispute Resolution (ICDR) or other similar groups.

Second, it improves results. In virtually every aspect of life and business, studies have demonstrated that groups of individuals from diverse backgrounds with their own unique perspectives—when put to a common purpose—regularly develop more creative and effective solutions than do homogenous groups of individuals from similar backgrounds. In the international arbitration context, a diverse group of panelists allows for broader and different perspectives on the allegations, defenses, documents, and witnesses, ultimately leading to more thoughtful results.

Finally, it enhances credibility. In international arbitration as in all litigation, there must be winners and losers. For the system to function successfully, it is the losers who are most important because they must ultimately (often bitterly) accept the results as those of a fair process. That is much easier to achieve when there are a diverse range of arbitrators from which to choose, so that no party feels as if the arbitrators are biased in favor of one side or the other.

Shimmin: Whether and to what extent diversity on tribunals panels is important to perceptions of fairness is likely to depend on the nature of the dispute and the type of diversity in question. Ethnic, cultural and geographical diversity may be of particular relevance in investor-state disputes, for example, where the understanding of a country or culture may be or may be perceived to be central to the dispute, especially from the point of view of the State party. The age or gender of a tribunal may be less important to parties' perceptions of fairness in that context. In such circumstances, awards made by a tribunal which do not appear to reflect the former aspects of diversity may be perceived by one or more of the parties to be less fair, undermining their legitimacy and potentially influencing the question of whether they are complied with voluntarily.

But fairness is surely a threshold requirement in dispute resolution — shouldn't parties, especially paying parties, demand more? Regardless of whether diversity is necessary for perceptions of fairness, it is a tool by which the process and quality of an award can be enhanced. If the role of a tribunal is to engage in robust debate of the issues before it and to memorialise the consideration of those issues in an award, all forms of diversity including that of background, thought and approach should all contribute positively to that process.

In any event, for many of us there is an intrinsic value in diversifying the pool of arbitrators. We need not correlate diversity and fairness absolutely in order to recognise that value and to see the merit in continuing to pursue increased diversity in the pool of arbitrators available to serve the needs of an international business community and beyond.

Roth: Diversity of arbitrators has never been more important to perceptions of the fairness of international arbitration. Lack of bias has always been core to the popularity of arbitration, one of its key benefits. This success rests on the understanding that arbitrators will not suffer from biases that a national court might — in favor of a country's citizens or business interests. But arbitration consumers are increasingly sophisticated with respect to other types of biases that can infect a proceeding, especially when the arbitration world is seen as overly homogeneous and less diverse than parties in arbitration and than national court systems. Arbitrators must be attentive to all aspects of diversity. Progress has been made — though too slowly. Women should and must be more present in the arbitration world — as President of the Union Internationale des Avocats, I supported The Pledge, a commitment to take steps to ensure that women are better represented on arbitration panels. Regardless of statistical results, I hope I am seeing an impact in my own arbitration experience: Of three arbitrations I've recently been involved with, at least one woman sat on the panel.

But diversity does not stop there. Clients demand meaningful, not token, representation of many communities — people of color, LGBT members, as well as socio-economic diversity. Just as with the bench, we hear from corporate and individual clients they want arbitrators who reflect the diversity of their

employees and their lawyers. As important are the benefits to the integrity of the international arbitration process. Diverse perspectives make for better decisions. Diverse panels are better able to take account of a broad range of considerations and to avoid the risks of implicit bias. Decisions issued by an arbitral panel lacking in different backgrounds may seem suspect. In short, it is time for the arbitration world, often ahead of national courts with respect to efficiency, confidentiality, expertise, and consistency, to catch up with respect to diversity.

Perepelynska: The issue of diversity within arbitral tribunal is important from various perspective. Firstly, it's a quality of the decision-making, as numerous studies show that a diverse group produces better decisions than a homogenous one. And this is true for many areas, not only for arbitration.

Secondly, there is a rising demand of more balanced representation of various minority groups (gender, generation, geographical, ethnical, etc.). This demand is a part of global trends and diversity movements, but it is also a result of development of arbitration. If initially only a relatively small pool of practitioners possessed knowledge and experience to act as arbitrators in international arbitral proceedings, and the number of cases was not so high, now the situation is drastically different. The number of arbitration cases is rising, so does an access to education and practice in arbitration. We already have a very diverse pool of parties and parties' counsel. And quite often they are not from the most known arbitration jurisdictions. As all arbitration users and counsel are human being, they want to see their cases resolved by an arbitral tribunal comprising an arbitrator similar to such users or counsel. Apart from an ancient subconscious filter "friend or foe", which might affect our attitude to some persons, such parties and their counsel might believe that an arbitrator from the same minority group might better understand their case, as he or she will more likely share their culture, religion, business and political realities etc. That is why, the parties might perceive a diverse tribunal as a fairer one. And such perception will, most likely, extend to an arbitral award rendered by such tribunal.

Haridi: Diversity in its every form is essential to the rendering of justice in dispute resolution. Every participant in the arbitral process, whether it is a tribunal

member, counsel or party representative, brings to the dispute resolution process — consciously or not — myriad elements of their own identity and cultural and legal traditions. This goes well beyond the civil and common law divide and permeates every aspect of the arbitration process. It is therefore paramount to ensure, in a world where participants on the receiving end of an arbitral award are increasingly diverse, that those rendering the award represent and reflect more diversity.

Parties who consider that they are underrepresented by reference to the available arbitrator pool are more likely to distrust the system and to perceive it as unfair and unjust towards them. They may reach the conclusion that, while heard, they were not understood because no one on the tribunal shared common values and/or reference points with them. Even worse, they may find that the system was rigged against them from inception because none of the arbitrators selected (in circumstances where they had little or no role in that process) resemble them.

Participants in international arbitration proceedings should continue to work towards ensuring that diversity among arbitrators seated on international arbitration tribunals is carefully considered and implemented.

Aglionby: The overall desire when selecting a tribunal is to appoint members who will exercise independent and impartial thought and judgment, manage an effective and timely process, and be reasonably predictable in the ways they operate the rules agreed in the contracts and laws which apply in that dispute.

Parties can think that people of some backgrounds and experiences will understand issues from useful perspectives, fit better what the parties expect, and reach more credible decisions. The availability of more diverse candidates is likely to appeal to a broader user base and create more trust in and demand for the arbitration process. The absence of candidates with relevant background or experiences lessens trust in the process, and is an obstacle to expansion of arbitration.

The policies of major companies and states actively encourage diversity and inclusion. Those are major clients to the arbitration community, and their requirements for increasing diversity are unequivocal.

Ignoring clients' clear goals and statements is not good for the arbitration business.

Party-nominated arbitrators are likely to be selected with the practical outcome of a particular dispute in mind. Because parties arbitrate about serious things which they care about, those parties are cautious in the selection of tribunal members. They look for people who satisfy the overall package of desirable attributes. While diversity is a part of that mix it is not the only important element. To ensure continued diversity, candidates for appointment should be credible in the other parts too. It is possible, but less likely, that parties may select tribunal members to promote and serve overall social and societal objectives, including diversity.

Vasani: International arbitration is a global phenomenon. Parties, both natural and juridical, hail from virtually every country in the world. And perhaps the greatest attribute of arbitration is the ability to choose one's own arbitrator. While that arbitrator is independent and impartial, and is not selected to advocate one party's position, he or she is still chosen because the party believes that arbitrator is best suited to understand the party's case. Often, that "understanding" of the case can be cultural in terms of the facts; other times, it can be legal in connection with a specific domestic law. Either way, the correlation is clear: arbitrators should be as varied in terms of legal background and national culture as the parties before them. Reducing experienced arbitrators into a narrow set in terms of gender, nationalities, ethnicities, and legal backgrounds, fails to reflect the diversity of the parties using the arbitral system. That in turn reduces the perception that the arbitrators "understood" a party's case, and hence, the fairness of the decision itself. Such a vicious circle can only have one outcome: a reduction in use of international arbitration, and hence, its own downfall. As a result, the call for diversity of arbitrators is not just a moral one, it's also about the very survival of the system itself.

Gerbay: Very important. Obviously, the primary concern of litigants in an arbitration is to win. But, win or lose, litigants also want to know they had a fair trial. That, in turn, depends largely on whether litigants perceive that the tribunal appointed to hear their dispute has *truly* understood them. And that, in turn, is more likely if the make-up of the arbitral

tribunal reflects the parties' own linguistic, cultural, ethnic, etc., backgrounds. A good illustration is the "Jay Z – AAA" controversy. In that well-publicized case of 2019, Jay Z had been named a Respondent in an arbitration by brand management companies with which he had contracted. Jay Z complained that the arbitration center administering the dispute provided him with a list of arbitrators which did not contain a single African-American individual. Sadly, that case is no isolated exception. Empirical research by Professor Susan Frank and others famously found that "the median international arbitrator was a fifty-three year old man who was a national of a developed state ..."¹. The problem of diversity is particularly salient in investor-State arbitration, where researchers found that only two of the 25 most influential arbitrators are women, and 22 are from either North America or Europe². This lack of diversity is problematic because it weakens the legitimacy (and therefore the appeal) of international arbitration as a dispute resolution mechanism.

1. Susan D. Franck, et al, *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 Colum. J. Transnat'l L. 429 (2015), at 466.

2. Malcolm Langford, Daniel Behn, and Runer Hilleren Lie, "The Revolving Door in International Investment Arbitration", (2017) 20 *Journal of International Economic Law* 301, at 313

Harris: Recent empirical studies on diversity and inclusion have shown what many have known for years: Diverse teams lead to better outcomes and performance. Said differently, teams produce better decisions when made up of people with different ways of thinking, which can be shaped by identification with

a particular group, whether it be nationality, ethnicity, race, gender, sexuality, or disability, to name a few.

Given that diversity and inclusion enrich decision-making, it makes perfect sense that diversity among arbitration tribunals is essential to the perception of fairness in dispute resolution. After all, the entities that use international arbitration to resolve disputes decide if the process is fair. Many of these organizations understand the benefits of diversity and inclusion, having incorporated the practices into how they conduct business. They would thus naturally expect that a fair process would be one where the tribunal includes a diverse panel of arbitrators to enhance the deliberative process.

Also, as a diverse practitioner and arbitrator, I believe that diversity and inclusion are inextricably tied to a perception of fairness. As advocates, we feel a certain sense of comfort when appearing before an arbitrator on a tribunal who shares the same characteristics. Even if it isn't true, the perception is, "I know I'm going to get a fair shake with this diverse arbitrator." As a neutral, I have noticed this same level of comfort in the eyes and body language of the parties and counsel appearing before me. I was recently the chairperson in a virtual arbitration where I shared the same race with several counsel and witnesses. I believe that my mere presence on the panel positively contributed to their view of the arbitration's fairness.

1. *E.g.*, McKinsey & Company Report, *Diversity wins: How inclusion matters* (May 19, 2020) <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters#> ■

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