Ethnic Imbalance in International Arbitration- Cause for Concern?

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Abstract

Arbitrators from all over the world collaborate to find solutions to legal conflicts in today's increasingly international and multiethnic corporate environment. Nonetheless, most arbitral tribunals continue to be controlled by white, male arbitrators from North America and Western Europe, limiting their breadth to solely include opinions from Western civilizations. Although women arbitrators have made strides to change this narrow view and have won support from many powerful institutions, they are still outnumbered by men in positions of authority. Taking a multifaceted approach to the pressing need for ethnically diverse international arbitration panels is the focus of this study. It also looks at the difficulties involved in the parties choosing arbitrators, and it emphasises the growing need for institutional support for arbitration to make sure that it is fair and inclusive of all communities.

Introduction

Western decision-makers are disproportionately "pale, stale, and male," producing a homogenous network with outsized influence in international arbitration.[1] Since the global

[1] Susan D. Franck, James Freda, Kellen Lavin, Tobias A. Lehmann & Anne van Aaken, *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration*, 53 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 429 (2015).

pool of arbitrators has shrunk to a very small number, there is a pressing need to increase the variety of cultures represented within it. Gary Benton's proposal of a new norm in international arbitration, wherein tribunals are labelled "defective panels" due to a lack of women and other practitioners from diverse backgrounds, has caused a commotion in the field.[2] Even if it is true that unbalanced panels tend to rule in favour of the complaining party, it is vital to keep in mind that this is not the norm for a well-functioning panel. This past May at London International Dispute Week, Vyapak Desai came up with the term "RAGE," which stands for "Race, Age, Gender, and Ethnicity," to explain factors that contribute to efficient dispute resolution.[3] Much has been said about the pervasive ethnic disparity in international arbitration, but it has persisted nonetheless.

This research demonstrates the value of having arbitrators who come from different cultural backgrounds for resolving disputes. More importantly, it recognises the challenge of appropriately appointing arbitrators as the primary impediment to development in this area. The report concludes by asking arbitral institutions to help increase racial diversity in international dispute resolution.

Overriding Ethnicity: The Problem with The Appointment of Arbitrators

The parties would profit from having an arbitrator appointed to hear their case who can interpret the evidence with foresight if, indeed, determining the facts is the most significant portion of resolving a dispute and selecting an arbitrator is the most important part of an arbitration proceeding. It is well accepted that the principle of party autonomy predominates in international arbitration. The parties can mutually agree on an impartial third party to serve as the arbitrator.

Arbitrators should be selected based on their "soft" and "technical" abilities, such as case-specific methodologies, case management skills, flexibility, and a willingness to accept certain procedures (such as joinder of third party, interim relief, document disclosure, witness examination, etc.). However, for reasons of confidentiality and safety, this data is no longer

[2] Gary L. Benton, *Let's Stop Talking About the Arbitrator Diversity Problem*, January 14, 2018, available at http://arbitrationblog.kluwerarbitration.com/2018/01/14/post/ (Last visited on June 17, 2021).

[3] http://arbitrationblog.kluwerarbitration.com/2020/03/01/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern/

available to the general public. Therefore, attorneys must rely on ad hoc research or ask the arbitrator themselves about their qualifications. This type of research is conducted so that counsel can assess the approach used by the relevant arbitrator in the present case, and it is usual practise for counsel to contact former clients in the hopes of hearing their thoughts on the arbitrator's performance. Even though they only provide a glimpse of the arbitrator's decision history, IQ, and temperament, researchers often rely on scholarly publications, journal papers, and seldom published arbitral rulings. However, the credibility of this essential data differs depending on the questioner, the respondent, and the adjudicator. This report may be out of date because the arbitrator's views were utilized to compile it. Additionally, the familiarity between the two parties may be the single most influential factor in determining the openness with which a person answers a question of this sort. This is because, in the presence of a person he knows well, the individual is more likely to feel comfortable exposing any unfavorable facts relating to the arbitrator. Therefore, considering the gravity of the topic at hand, employing such a low-tech method is bound to cause complications.

The diversity issue is exacerbated when attorneys are asked who has the "best chance of succeeding." A lawyer who is actively pursuing diversity promotion faces the ultimate diversity conundrum when faced with this situation. Lawyers will look for the "best" arbitrator to represent their clients. Even though there isn't universal agreement on what constitutes "best," a client would be well served if their attorney was a recognized authority on the issue who could sway the judge's judgement. When recommending arbitrators to their clients, lawyers tend to favour "old dudes." One anonymous responder to our global study expressed it thus way: "When asked by a client to choose an arbitrator, the last thing on anyone's mind is fostering diversity."

Because of this, it is essential, when selecting an arbitrator, to take into account the characteristics that parties place greatest significance on in order to increase racial diversity. Finding the "best person for the role" can be challenging for the reasons mentioned above, and this difficulty is compounded by the fact that the same process does not account for diversity. Therefore, we need a trustworthy method for selecting an appropriate arbitrator, preferably one that gives equal weight to criteria like gender and cultural diversity, which have historically been given less weight.

Do Arbitral Institutions Possess the Ability to Step Up Ethnic Diversity?

In recent years, industrialised nations have shifted from ad hoc procedures to more formalised institutional structures when appointing arbitrators. Arbitral institutions are largely responsible for resolving procedural difficulties, such as providing a fair and secret bound arbitral proceeding and supporting clients in forming the arbitral panel. This change gives arbitral institutions additional authority to open the way for more diverse parties to participate in international arbitration.

Arbitration organisations might take the initiative to promote a more transparent appointment process by making details about arbitrators' credentials, expertise, and decisions available to the general public. The parties will benefit greatly from this in their search for suitable persons to fill unfilled seats. Since arbitral institutions have the most knowledge on arbitrators and related topics, they should aim to share that information more effectively by creating helpful platforms and networks. This would be helpful in overcoming barriers such as the recurring appointment of "old boys," word-of-mouth queries, etc., that young, varied professionals face while trying to break into the international arbitration sector. In place of the broad assumptions and free-form inquiries used in traditional arbitration, this procedure can be utilised instead. Studies reveal that when decision-makers lack both qualitative and quantitative data, they rely on shady forms of subjective information. In order to make an informed decision when selecting an arbitrator, parties and their counsel need access to carefully curated information networks.

The vast majority of international arbitral institutions recognise RAGE's worth, but they have not yet set up a mechanism to lend support to the movement by publishing data on qualified arbitrators. The International Chamber of Commerce first mandated the practise of publishing information on appointed arbitrators in 2016.[4] Before now, it has only revealed information about the institution's judicial panel makeup. Comparable information is also made public by other organisations, such as the Hong Kong International Arbitration Centre and the Singapore International Arbitration Centre.[5] However, there are no databases maintained by these groups where interested parties could learn more about the background, credentials, and

[4] https://iccwbo.org/media-wall/news-speeches/icc-begins-publishing-arbitrator-information-in-drive-for-improved-transparency/
[5] https://www.hkiac.org/about-us/statistics

areas of competence of the arbitrator. To better ensure that a wide range of candidates are considered, arbitral institutions should commit to publicising information and replacing the current, informal appointment procedure with a more formalised system.

Not all appointments, meanwhile, are made by arbitral bodies. There's a chance that political parties can't solve the problem of racial tension by themselves. One member of a three-member/sole tribunal can be appointed in accordance with the 'RAGE' concept, although this is not essential as a result of party autonomy. Under a hybrid system, the parties may be able to choose an arbitrator from a panel of neutral experts. The identity of the arbitrator, including his or her age, colour, and gender, can be withheld in order to guarantee that the nomination is predicated primarily on grounds of qualification and other qualifying standards. The end goal of all of these different approaches is to make international arbitration more representative of society at large.

Conclusion

The Arbitrator Intelligence Questionnaire has developed as a useful technical tool in recent years for mitigating the consequences of diversity in international arbitration. However, implementation and widespread acceptance will rely heavily on arbitral institutions. Arbitral organisations would do well to communicate information about qualified arbitrators if they are serious about fostering transparency and confidence in the appointment of arbitrators. If this were to happen, arbitrators from underrepresented groups would finally have a chance to shine. In spite of the novel idea of exposing the "big boys" network as a defective panel, this scenario is extremely unlikely to ever play out in practise. At first, it may appear that progress toward racial parity in international arbitration is moving slowly. However, once it is reached, the sector as a whole and the quality of decisions made within it will reap

significant benefits. Therefore, if we are to address the issue of ethnic diversity in the arbitration process, it is crucial to place RAGE at the centre of international arbitration.