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Diversity in international arbitration: A no-woman's land?

Caroline dos Santos

Bibliography

American Bar Association Presidential Initiative on Diversity, Diversity in the Legal Profession: The Next Steps – Report and Recommendations Race and Ethnicity Gender Sexual Orientation Disabilities, 2010.

Bowcott Owen, Proportion of Female Judges in UK among Lowest in Europe, in: The Guardian (London, October 6, 2016) <https://www.theguardian.com/law/2016/oct/06/proportion-of-women-judges-in-uk-among-lowest-in-europe> accessed February 23, 2017.

Berwin Leighton Paisner (BLP), Diversity on Arbitral Tribunals Background Note, (BLP, October 28, 2016) https://www.blplaw.com/media/download/Diversity_on_arbitral_tribunals_-_background_note.pdf, accessed 17 March 2017.

Budden Amber et al., Double-Blind Review Favours Increased Representation of Female Authors, (2008) 23 Trends in Ecology & Evolution 4.

CEPEJ, European judicial systems Efficiency and quality of justice (CEPEJ Studies No. 23, 2016) http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/REV1/2016_1%20-%20CEPEJ%20Study%2023%20-%20Overview%20-%20EN.pdf, accessed 22 February 2017.

Chambers Student, 2014 Gender in the Law Survey, in: Chambers Student http://www.chambersstudent.co.uk/where-to-start/newsletter/2014-gender-in-the-law-survey/, accessed February 22, 2017.

Credit Suisse, Gender diversity and corporate performance, (Credit Suisse, April 2012) <https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=88EC32A9-83E8-EB92-9D5A40FF69E66808> accessed March 6, 2017.

Franck Susan et al., The Diversity Challenge: Exploring the "Invisible College" of International Arbitration, (2015) 53 Columbia Journal of Transnational Law 429.

Goldhaber Michael, Madame La Présidente – A Woman Who Sits as President of a Major Arbitral Tribunal Is a Rare Creature. Why?, (2004) 3 Transnational Dispute Management <https://www.transnational-dispute-management.com/article.asp?key=158> accessed March 17, 2017.

Goldin Claudia/Rouse Cecilia, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, (2000) 90 The American Economic Review 715.

Gray Lois/Netufeld Maurice/Gross James, Jean McKelvey Cornell University Memorial Statement February 9, 1908 – January 5, 1998 (ILR School Cornell University) https://www.ilr.cornell.edu/about-ilr/founding-faculty/jean-mckelvey, accessed 18 March 2017.

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Greenwood Lucy, Could “Blind” Appointments Open Our Eyes to the Lack of Diversity in International Arbitration?, (2015) 12 Transnational Dispute Management https://www.transnational-dispute-management.com/article.asp?key=2248 accessed 17 March 2017.

Greenwood Lucy/Baker Mark, Getting a Better Balance on International Arbitration Tribunals, (2012) 28 The Journal of the London Court of International Arbitration 653.

Hale Brenda, The Appointment and Removal of Judges: Independence and Diversity, in: International Association of Women Judges 8th Biennial Conference 3-7 May 2006 Sydney, Australia 2.

ICC, ‘ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency’ (ICC, 5 January 2016) <http://www.iccwbo.org/News/Articles/2016/ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/> accessed 17 February 2017.

– ICC Arbitration Posts Strong Growth in 2015, (ICC, 11 May 2016) <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-posts-strong-growth-in-2015/> accessed 16 March 2017.

– ICC Reveals Record Number of New Arbitration Cases Filed in 2016 (ICC, 18 January 2017) <https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/> accessed 1 March 2017.

Janis Irving, Groupthink, in: Harold Leavitt/Louis Pondy/David Boje (eds), Readings in Managerial Psychology (The University of Chicago Press 1980) 84.

– Groupthink: Psychological Studies of Policy Decisions and Fiascoes (2nd edn, Houghton Mifflin 1982).

Kahneman Daniel, Thinking, Fast and Slow (Penguin 2012) 24.

LCIA, Registrar's Report 2013, http://www.lcia.org/LCIA/reports.aspx, accessed 17 March 2017.

211

Mamounas Joseph, ICCA 2014. Does “Male, Pale, and Stale” Threaten the Legitimacy of International Arbitration? Perhaps, but There’s No Clear Path to Change, (Kluwer Arbitration Blog, 10 April 2014) http://kluwerarbitrationblog.com/2014/04/10/icca-2014-does-male-pale-and-stale-threaten-the-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/, accessed 15 February 2017.

Moxley Charles, Selecting the Ideal Arbitrator, (2005) 60 Dispute Resolution Journal 1.

Nathan K.V.S.K, ‘Well, Why Did You Not Get the Right Arbitrator?’ in Mealey's International Report (2000) 15 MEALEY’S International Arbitration Report 24.

Philips Peter, It Remains A White Male Game (NLJ), (CPR International Institute for Conflict Prevention & Resolution, 27 November 2006) http://www.cpradr.org/news-publications/articles/2006-11-27-it-remains-a-white-male-game-nlj, accessed 18 March 2017.

Puig Sergio, Social Capital in the Arbitration Market, (2014) 25 The European Journal of International Law 387.

PwC, Corporate choices in International Arbitration Industry perspectives, 2013 International Arbitration survey, http://www.arbitration.qmul.ac.uk/docs/123282.pdf, accessed 2 March 2017.

Roberts Simon/Palmer Michael, Dispute Processes: ADR and the Primary Forms of Decision-Making (Cambridge University Press 2005).

Rothman Deborah, ‘Gender Diversity in Arbitrator Selection’ (2012) 18 Dispute Resolution Magazine 22.

Scottish Arbitration Centre, Quarterly Newsletter, 2015 (Scottish Arbitration Centre, July 2015) <http://us2.campaign-archive1.com/?u=6f57b2ebaad804398b0bf50db&id=425cb9b5e8> accessed 17 February 2017.

Seraglini Christophe, Who Are the Arbitrators? Myths, Reality and Challenges, in: Albert Jan van den Berg, Permanent Court of Arbitration and International Council for Commercial Arbitration (eds), Legitimacy: Myths, Realities, Challenges (Kluwer Law International 2015) 591.

SIAC, Annual Report 2015 <http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2015.pdf> accessed 16 March 2017.

Smalls Mark, It’s time to focus on diversity in ADR, (2011) 19 The Recorder (30 May 2011) 1.

212

Tacha Deanell, Diversity in the Judiciary: A Conversation with Deanell Tacha, (2011) 59 Kansas Law Review 1037.

TackaNEJ, Men Say No, Thanks, http://tackanej.se/men-say-no-thanks/, accessed 17 March 2017.

Tetley William, How to Become an International Arbitrator Without Even Trying, http://www.mcgill.ca/maritimelaw/tetley/arbitrator/, accessed on 23 February 2017.

The Law Society, Entry Trends (The Law Society) http://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/entry-trends/, accessed 22 February 2017.

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Turner Caley, “Old, White, and Male”: Increasing Gender Diversity in Arbitration Panels, (CPR International Institute for Conflict Prevention & Resolution, 3 March 2015) <https://www.cpradr.org/news-publications/articles/2015-03-03--old-white-and-male-increasing-genderdiversity-in-arbitration-panels> accessed 18 March 2017.

Van Haersolte-van Hof Jacomijn, Diversity in Diversity, in: Albert Jan van den Berg, Permanent Court of Arbitration and International Council for Commercial Arbitration (eds), Legitimacy: Myths, Realities, Challenges (Kluwer Law International 2015) 650.

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Introduction

Jean McKelvey used to tell an anecdote about her first arbitration case: “(I) walked into the room and there was nothing but men there; one looked up and said, ‘Oh, you’re the secretary’ and I said ‘No, I’m the arbitrator’”.[1] When interviewed about her outstanding career in international arbitration, she amusingly used to explain that being born with a gender-neutral first name had been a major advantage in evolving in this profession.[2]

Arbitration is a consensual alternative dispute resolution method involving a neutral third party, chosen by the disputants, that has the authority to impose a final and binding decision within a flexible procedural context. In substance, arbitration is a “private form of adjudication”.[3] Over the last decades, the popularity of international arbitration has become uncontroversial, not only because it is confidential,[4] but also because parties can usually elect their decision-makers. By doing so, they might choose specialists with in-depth knowledge of the subject area.[5] As a corollary to the popularity of arbitration, the need for decision-makers has followed its trend.[6]

That being said, the frequently appointed and confirmed arbitrators all seem to come from a single pool and share specific features. As stated by a past Chair of the American Bar Association, John Bickerman, “In terms of the big cases, we see the same names all the time, (…) high-profile white men that have been doing this for the past ten or fifteen years”.[7] In addition to this, the “usual suspect” is likely to be a lawyer at the partner level, or a retired judge.[8] These features (and the main issues they raise) have been well described by Dr. K.V.S.K. Nathan:

“An observer from planet Mars may well observe that the international arbitral establishment on earth is white, male and English-speaking

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(…). The majority in a multi-member international arbitral tribunal is always white. The red alien from Mars will be puzzled in his own way because the majority of the published disputes before international arbitral tribunals involve parties from the developing countries and nearly three-quarters of the people on Earth live in those countries and are not white and more than half the total population are women”.[9]

Over the last decades, women have been as numerous as their male counterparts in law schools, as well as at the associate level in law firms.[10] Yet, this success is not reflected at all levels, as they are far less likely to become partners in law firms or access leader positions in a general manner.[11] This is often referred to as the women’s “glass ceiling”; an invisible barrier preventing them from reaching upper-level positions.[12] International arbitration is no exception, as women are far less likely to be selected as arbitrators, let alone be arbitrators in “big cases”.

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1 Gray/Netufeld/Gross, February 9, 1908 – January 5, 1998.

2 Ibid.

3 Roberts/Palmer, 264.

4 Ibid. 124.

5 Moxley, 2.

6 Turner, March 3, 2015.

7 Philips, 27 November 2006.

8 Seraglini, 591.

9 K.V.S.K Nathan, Mealey's International Report (2000) 15 MEALEY’S International Arbitration Report 24.

10 Rothman, 23.

11 Ibid. 22.

12 Turner, March 3, 2015, n 6.

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Although there are few publicly available data regarding the appointment process, arbitral institutions release general and high-level statistics on a regular basis in this regard.[13] In 2013, only 43 out of 372 London Court of International Arbitration (LCIA) appointments were women (11.5%).[14] The International Chamber of Commerce (ICC) has recorded that in 2015, women arbitrators represented only around 10% of all appointments and confirmations.[15] In the same year, the Singapore International Arbitration Centre (SIAC) registered less than a quarter of female arbitrator appointments.[16] These statistics depict a clear imbalance between genders in international arbitration, leaving a very small proportion of female appointees. This imbalance is reinforced by the fact that even when female arbitrators are appointed, two "formidable women" capture most of the female appointments.[17] Indeed, while

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"the arbitrator network remains male-dominated"[18] only Professors Gabrielle Kaufmann-Kohler and Brigitte Stern are frequently appointed.[19]

The purpose of this work will be to bring to light the negative repercussions of a dearth of women in international arbitration. This paper will propose various remedies that could be implemented to bring about a change.

Chapter one of this essay will analyse the contributing factors leading to a lack of women among arbitrators. Chapter two will examine the risks related to such a lack, answering the question why a fundamental change would be welcomed. Finally, chapter three will provide solutions that could remedy this issue, through the perspective of the various actors playing a role in international arbitration.

Chapter I: Factors leading to the gender gap in international arbitration

I. The "pipeline-leak" and the "old boy network"

The key factor regarding the lack of successful female arbitrators is often called the "pipeline leak". The "pipeline" is to be understood as the solid resume one can build in order to become a successful arbitrator, through legal education, experiences and associations.[20] In this context, the common arbitrator appointed for major international cases is selected from a limited pool of professions and is likely to be a lawyer, most likely at the partner level, or a former judge.[21]

The core of the problem is that women are fewer than their male counterparts in both of these professions. As Secretary of State for Justice, Liz Truss recalled, "Currently, only one in seven of QCs and one in three of partners in law firms are women. Fewer than one in ten judges come from ethnic minorities. (…) we can do better than this".[22] Indeed,

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the European Commission for the Efficiency of Justice (CEPEJ) confirms that, in the United Kingdom, male judges are in the majority in all instances.[23] Moreover, the proportion of women practitioners reaching the partner level in law firms is extremely low. For the years 2015 and 2016, statistics demonstrated that 67.3% out of the 17,335 students in law at an undergraduate level were women.[24] In 2015, 61% of the solicitors admitted to the roll were women.[25] Yet, the percentage of women becoming partners in the Magic Circle firms is only 18.8%, representing a drastic drop.[26] As summarized by Mark Smalls, vice-president and chief

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13 Greenwood/Baker, 655.

14 LCIA, Registrar's Report 2013, 4.

15 ICC, May 11, 2016.

16 SIAC, Annual Report 2015, 4.

17 Puig, 410.

18 Ibid. 419.

19 Ibid. 419.

20 Turner, March 3, 2015, n 6.

21 Seraglini, n 8, 591.

22 Bowcott, October 6, 2016.

23 CEPEJ, Studies No. 23, 2016, 21.

24 The Law Society, Entry Trends.

25 Ibid.

26 Chambers Student, 2014 Gender in the Law Survey.

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marketing officer of JAMS, “The same forces that keep many women from reaching the partner level at law firms or attaining the general counsel title at corporations naturally reduce the pool of candidates that transition to a career as a mediator or arbitrator”.[27]

The “pipeline-leak” effect exacerbates the challenges women already face in being accepted into the “old boy network”. In *How to Become an International Arbitrator Without Even Trying*, William Tetley amusingly illustrates the strength of this “men’s private club” and the role it played in his career. He relates how he came to arbitrate a major international case, despite having no experience in the field and having never heard of the ICC Rules. His appointment followed an informal call from an old acquaintance he had studied with, arbitrator Patrick Neil, who asked him to be the Chairman of that case. Both his co-arbitrators were unaware he had no experience in the area and nevertheless praised his work, eventually confirming that the “old boy network” still plays an important role in people becoming successful arbitrators.[28]

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II. The “famous clique”

Tackling the diversity issue in international arbitration is an ambitious task notably due to the lack of available data.[29] Confidentiality is a cornerstone of arbitration, and it is often regarded as its main advantage.[30] As a result, there is a lack of transparency regarding the appointment process and it is arduous to obtain information as to who actually sat at the table in international commercial arbitration (as opposed to international investment arbitration, where statistics are available online).[31]

The “quality” of arbitrators can therefore only be measured by their visibility on the international stage. The more an arbitrator is present and attracts attention, the more he or she is to be considered to be an undisputed star in the area. In this regard, international exposure acts as a guarantee of professionalism and experience. This results in a limited pool of “elite arbitrators” who are likely to be more frequently requested and who can be referred to as a “famous clique”.[32]

In addition to this, legal advisers tend to exclusively recommend celebrities to their clients. This way, should the claim be rejected, the unpleasant result will not be attributed to poor advice regarding the recommendation.[33] This prevents newcomers with excellent resumes from reaching the arbitral stage and a more diverse panel of arbitrators. Indeed, women are not well represented in the “famous clique” and therefore not visible on the international stage. It is then a vicious circle where fewer women are appointed, and therefore not recommended by law firms, which reinforces the lack of visibility of women, leading women to be appointed less frequently.

Risk aversion is only part of human nature and therefore it is understandable that one may try to ensure one’s recommendations will not backfire on oneself in the case of a disappointing outcome. Nonetheless, visibility on the international stage does not necessarily entail experience (or knowledge) in a specific legal area, nor availability and professionalism for specific cases. In other words, a famous and frequently

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appointed arbitrator may have profound knowledge and experience in construction law yet not be a specialist in oil and gas, for which they might have been appointed. Although it is unquestionable that the more they are appointed, the more procedural experience they acquire, elite arbitrators might not be, substantively, the best experts for the particular issue presented to them.

Furthermore, “superstar” arbitrators handle numerous cases at the same time. Every case represents an important amount of work, not always manageable by themselves. Those arbitrators are well equipped to carry out their task and are surrounded by solid teams to whom they delegate work. Choosing one individual only for the sake of their fame does not entail they will be experts in the area, nor that they will be the ones dealing with the case from A to Z.

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27 Smalls, May 30, 2011, 2.

28 Tetley.

29 Greenwood/Baker, n 13, 656.

30 Roberts/Palmer, n 3, 264.

31 Greenwood/Baker, n 13, 656.

32 Ibid. 659.

33 Ibid. 659.

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III. Cognitive bias

In addition to the “pipeline-leak”, women must face unconscious bias. In his book *Thinking, Fast and Slow* published in 2011, Nobel laureate Daniel Kahneman presents the dichotomy between the two systems of the mind. System 1 is the automatic, effortless system that operates quickly and allows us to perceive the world around us (e.g. System 1 enables us to detect that one object is more distant than the other, or to easily answer the question of 2 + 2 = ?). System 2 is the system used to perform mental activities and conscious reasoning (e.g. fill out a tax form; answer the question of 32 x 54 = ? or answer the question “Which arbitrator should I appoint?”). System 2 is a “lazy system” and mainly relies on System 1. Laziness of the analytical system may result in biased decisions, as System 2 relies on the suggestions, intuitions and feelings transmitted by System 1. System 2 tends to adopt and act on those suggestions, intuitions and feelings, with little or no modification.[34] In other words, a human will constantly use “mental shortcuts” that can result in illogical and erroneous decisions or irrational choices. By doing so, System 2 is likely to be influenced by cognitive bias, particularly gender stereotyping or ingroup bias, induced by System 1. For instance, stereotype bias might lead one to assume that people from a certain group (e.g. of a certain gender, or a certain nationality) will automatically have certain competences (e.g. assume that males tend to be

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leaders more than women). The in-group bias, also commonly called “similar-to-me bias”, might lead parties to promote a person more similar to them over a different one. An interesting study carried out in the 1970s at Harvard University, underlined the way cognitive biases jeopardize diversity.[35] Since the 1950s, mainly male musicians have conducted symphony orchestras in the United States. Seeking to reduce ingroup bias and stereotypes in the selection process, various orchestras in the United States carried out “blind interviews” to select their candidates. The sole implementation of a “blinding” device (e.g. screen) led to a 25% increase in female musicians”.[36] Such an experiment was proven to be successful in various areas. Regarding academic publication, it has been posited that the proportion of papers written by first-authored women grows significantly when a “blind review” of their work is established. The journal *Behavioural Ecology* introduced such a system and experienced a significant increase in women’s publications.[37] On a lighter note Joanne Rowling, who submitted her first-authored book, the famous *Harry Potter* for review had a similar experience. She accepted her publisher’s suggestion to be known as J.K. Rowling, because “Traditionally boys don’t like to read books written by girls (whereas) girls read book written by anybody”.[38]

Tackling unconscious biases might be the most difficult task to undertake in order to improve diversity, especially because it might arise from good intentions (e.g. not wanting to put a woman in a position where she will be surrounded by male co-arbitrators, male parties, and male experts, in a traditionally male-associated area). Cognitive biases are natural and must therefore be deliberately overturned. It is then essential to acknowledge and address biases in every area, including arbitration. As in the above examples, a system of blind reviews of the resumes of arbitrators is recommendable. In her work *Could “Blind” Appointments Open Our Eyes to the Lack of Diversity in International Arbitration?,* Lucy Greenwood has already suggested the idea.[39] Only in this way would the selection of arbitrators be based on their resume rather than, unconsciously, on bias. That being said, although such an initiative is appealing, the real question would be whether it is realistically capable of hiding the arbitrator’s identity. Indeed, famous arbitrators could be easily identifiable, even based on a blind resume, due to their vast amount of publications, associations and experiences. In spite of its good intentions, such a measure might have limited results in practice compared to the studies cited above.

IV. The lack of mentors, and women’s self-barriers

The lack of successful women arbitrators leads to a lack of women trying to enter the field. Indeed, as there are few women visible in the arena, young women embracing arbitration as a career option are inclined to change trajectory.[40]

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34 Kahneman, 24.

35 Goldin/Rouse, 716.

36 Ibid. 716.

37 Budden et al., 4.

38 See interview with Joanne Rowling, https://www.youtube.com/watch?v=jcKZxv-hNoU.

39 Greenwood, 2015.

40 Turner, March 3, 2015, n 6.

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Moreover, it has been posited that women tend to have self-barriers regarding their own skills and abilities as well as to be less self-confident than men in a general way.[41]

Thus, the snake bites its own tail when young women renounce entering the profession because of a combination of low self-confidence and the lack of female mentors. It is a vicious circle in which women feel they are at a dead end because they doubt that they have the capacity to succeed and so they quit before starting because no other women seem to make it to the top.

This vicious circle could be reversed only by the emergence of women mentors. As soon as a few women enter the market and set an example, it will break this negative cycle. Young women will be prompted to believe more in their competence, consequently increasing their self-confidence.

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Chapter II: Diversity, why should it matter?

I. The legitimacy of the system

International arbitration and litigation are two parallel systems sharing a common core of features.[42] Each of them are perceived as real alternatives for disputants. Collaborative research conducted in 2013 by Queen Mary University of London and PricewaterhouseCoopers (PwC), points out that across all represented sectors, respondents submit as many disputes to arbitration (47%) as they do to litigation (47%).[43] According to this, parties are as much inclined to file a case as suitable for arbitration as they are to submit it to litigation. When asked about the reasons leading to such an inclination, the "fairness" of the method is mainly invoked.[44] One subject reported that arbitration "gives a sense of fairness that litigation in foreign courts sometimes cannot provide".[45]

It is uncontroversial that "a diverse judiciary is an indispensable requirement of any democracy".[46] A judicial system that reflects its users leads to a greater acceptance and a more deliberate compliance with the law and with decisions taken.[47] Deanell Tacha, former federal judge in the United States, highlighted the importance of diversity among judges: "When the judiciary is composed of people who all look the same way, speak the same way, and identify the same way, then there are many, many people in our country who don't feel like the life experiences –and the resultant mindset – of the judge are the same as their own".[48]

Even though she is referring to the judiciary, this statement might be transposed to a panel of arbitrators. Therefore, in order to ensure "fairness" of process, arbitrators should reflect the specificities of the disputants, failing which, a large proportion of parties are not represented,

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and thus, the entire legitimacy of international arbitration is jeopardized.[49] Considering the actual lack of diversity in the field, parties should be particularly concerned regarding who sits in their arbitral tribunal.

This need for representation is exacerbated today, as statistics demonstrate that diversity among disputants is increasing. For 2016, the ICC registered a record number of cases filed, involving more than 3,000 parties, including a 15% increase of parties coming from Latin American countries, and record figures for cases filed by parties coming from Korea, Nigeria or Turkey.[50] This illustrates a growing need for diversity among arbitrators.

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41 Rothman, n 10, 25.

42 Roberts/Palmer, n 3, 264.

43 PwC, 2013 International Arbitration survey, 7.

44 Ibid. 7.

45 Ibid. 7.

46 Hale, May 3-7, 2006.

47 Tacha, 1038.

48 Ibid. 1038.

49 Franck et al., 496.

50 ICC, January 18, 2017.

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II. Skills, perspective and point of views

"If everyone is thinking alike, then nobody is thinking," said Benjamin Franklin. The idea behind this famous quote is that a broader panel of thinkers instils perspective, different points of view, new arguments and ways of thinking. It also brings different skills and experiences to the decision table, which is reflected in the outcome. In the current context, homogeneity among the panel of arbitrators hinders greater fairness and the quality of the result.[51] It prevents innovative solutions from emerging as almost all decision-makers are cut from the same cloth. Uniformity of the way of thinking is likely to lead to uniformity of the outcome.[52] Therefore, this "routine" of thinking also contributes to establishing the predictability of the solution.[53] In the hope of promoting diversity among legal professions, the American Bar Association conducted a survey in 2010 of more than 200 participants. The result was an impressive report: *Diversity in the Legal Profession: the Next Steps*, considered as "a roadmap for advancing diversity in the legal professions".[54] This report underlines the importance of more diversity: "The

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overarching message is that a diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes".[55]

Diversity should not be pursued just for the sake of having a utopian system where all human beings are treated equally. Having a fair judicial system entails that every citizen is able to find their interests reflected by the bench and therefore accepts and enforces its decisions. Failing this, the entire system collapses and the trust of the population in its institutions falls apart.

Moreover, the lack of diversity may lead to overlooking important facts or to a failure to plainly understand one party's point of view. Concrete action should be taken in order to prevent this from happening. In Switzerland, for instance, such a matter has already been considered. Therefore, the *Code de Procédure Pénale Suisse* states that it is mandatory for the judge in charge of certain cases to be the same gender as the victim (e.g. for sexual harassment and criminal cases related to sexual integrity).[56] This ensures that, from the victim's perspective, no crucial issue is ignored. It also guarantees that the victim's particular point of view is represented and well understood.

Whereas states can easily promote diversity through hiring policies, it is tortuous to impose measures promoting gender diversity in a consensual method where parties select their judges. Such a system risks omitting and disdaining certain perspectives that could change the face of the outcome. As we experience an increase of the general awareness of the diversity issue, concrete initiatives must be taken. Failing this, international arbitration might lose credibility in comparison to litigation, which is better equipped to face it.

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III. Group thinking theory

Irving Janis, pioneer in his field, published in 1972 his work about groupthink: *Victims of Groupthink: A Psychological Study of Foreign Policy Decisions and Fiascoes.*[57] In his study, he defines and examines the influence of "groupthink" that often results from political fiascoes, such as the Bay of Pigs invasion. Irving Janis describes this phenomenon as "a quick and easy way to refer to the mode of thinking that persons engage in when concurrence-seeking becomes so dominant in a cohesive ingroup that it tends to override realistic appraisal of alternative courses of action".[58] In other words, risks of group thinking are exacerbated when a very cohesive and too homogeneous group of people are to take decisions together and tend not to see alternative solutions. He continues by explaining:

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51 Franck et al.,n 49, 496.

52 Mamounas, Kluwer Arbitration Blog, April 10, 2014.

53 Ibid.

54 American Bar Association Presidential Initiative on Diversity, 2010, 3.

55 American Bar Association Presidential Initiative on Diversity, 2010, 5.

56 Section 335 § 5, Swiss Penal Procedure Code.

57 Janis, 1982.

58 Janis, 1980, 84.

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> “The symptoms of groupthink arise when the members of decision-making groups become motivated to avoid being too harsh in their judgments of their leaders' or their colleagues' ideas (…). At meetings, all members are amiable and seek complete concurrence, which is likely to be recognized erroneously as *consensus*, on every important issue”.[59]

Based on this author’s work, group thinking can result in extreme decisions, as demonstrated by the members of the “Tuesday Cabinet”, President Johnson’s ingroup, which pursued an unpopular and costly war against Communism during the 1960s.[60] Irving’s work points out that the more similar the members of a group are, the more this phenomenon is accentuated.[61] Conversely, a less cohesive group allows members to feel free to express critical and uncensored opinions.[62]

That being said, a great deal of research points out that including women at the decision table reduces the risk of group thinking.[63] Risks linked to groupthink affect many areas. In August 2012, the research

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institute of the Swiss bank Credit Suisse published a report on gender diversity and its impact on corporate performance. In this research, the performance of almost 2,400 companies, with and without women board members, had been tested since 2005. Overall, the results indicate that corporations with female board members performed better and that on average, it would have been better to have invested in corporations with women on their boards rather than in those without them.[64]

International arbitration is not untouched by this phenomenon, especially because of the homogeneity of arbitrator panels, which remain “pale, male and stale”.[65] Unsurprisingly, “better-gendered” panels of arbitrators could lead to better performance. A female arbitrator still being a “rare creature”[66] and a less cohesive member of the group, her presence could bring critical opinions and therefore, better-balanced awards.

Nobody would dispute that diversity could only benefit tribunals in charge of making a final and well-founded decision, by enriching them with young specialists in the area, and different point of views. However, this might be of limited effect as young arbitrators entering the arena – at last – might be influenced in their decisions by more experienced arbitrators, as could mentees blindly following their mentor.

Chapter III: Diversity: what solutions?

To quote Henry Ford: “If everyone is moving forward, then success takes care of itself.” With respect to diversity, it could be said that only general awareness and common action may result in a positive outcome. To achieve greater diversity, all the actors playing a role in the field must act together.[67]

When thinking of protagonists in the area, one’s first ideas may well be only arbitrators. Nevertheless, arbitral institutions, law firms, lawyers

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and even bar associations also have key roles to play. All of them individually need to undertake concrete actions that may benefit the entire community.

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59 Ibid. 84.

60 Ibid. 85.

61 Ibid. 85.

62 Ibid. 85.

63 Turner, March 3, 2015, n 6.

64 Credit Suisse, April 2012.

65 Goldhaber, 2004.

66 Ibid.

67 Rothman, n 10, 25.

68 BLP, October 28, 2016, 6.

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I. Arbitral institutions

Institutions are probably in the best position to act on diversity for two main reasons. Firstly, they hold the relevant data regarding the identity of the frequently appointed arbitrators.[68] Only institutions are able to accurately gauge the extent of the diversity issue[69] in order to act on it. They would also be in a better position to assess the results of any measures undertaken.

Although a general trend is gradually emerging, achieving greater transparency in the appointment process should be a priority. First of all, it is already a positive sign that institutions regularly release statistics about their panels and appointments in general.[70] Nonetheless, this information is not exhaustive and it would be useful to obtain accurate figures. In January 2016, the ICC took a further step and started publishing the names and nationalities of the arbitrators sitting in ICC cases, as well as whether the choice of the arbitrator(s) was made by the parties or by the institution.[71]

Secondly, institutions are able to take major decisions regarding the selection of arbitrators.[72] By choosing who is to actually sit on the tribunal, they can enhance diversity.[73] As Director General of the LCIA Jackie van Haersolte-van Hof states, "Institutions can (and should) take the lead in diversity in instances where the institution itself is selecting the whole tribunal for appointment, as there is an opportunity to mix and match arbitrators".[74] In other words, when parties cannot agree on the selection of their decision-maker(s), arbitral institutions should provide a choice for them. In 2013, only 11.5% of individuals' appoint-

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ments were of women. Of this proportion, approximately 75% were selected by the LCIA Court (as opposed to being chosen by the disputants).[75] Even though parties usually indicate a preference for picking their own arbitrators rather than letting the institution select them, sufficient room for manœuvre remains for the institutions to make a difference.[76]

In addition to this, arbitral institutions could adopt a more inclusive panel of speakers. Substantial benefits could result from such an initiative, without being costly to establish. International institutions are well placed to spotlight newcomers in public conferences. Those events are showcases for young talents, and international institutions could enhance diversity by inviting more female lecturers.[77] Such initiatives could help to break the glass ceiling that is an obstacle in women' careers and offer plain visibility on the international stage. Speakers with in-depth knowledge in particular areas could be identified and then more easily appointed. Last but not least, arbitral institutions would benefit from their initiatives in terms of reputation and be seen as "diversity avant-gardists".

II. Law firms, lawyers and bar associations

Law firms and lawyers do not only advise their clients regarding the substance of the case, but also provide recommendations for arbitrators' selection. This raises the question to determine the way they suggest the appointee to their client.

When receiving a list of potential arbitrators, prudent law firms will take steps to check out the individuals before recommending them. First, the list containing information about the candidates might circulate among the firm in order to obtain feedback regarding each arbitrator.[78] Some law firms keep records and information about potential decision-maker(s) to select the best of them for the present case. However,

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69 Ibid. 6.

70 LCIA, n 14, 4.

71 ICC, January 5, 2016.

72 Greenwood/Baker, n 13, 664.

73 van Haersolte-van Hof, 650.

74 Scottish Arbitration Centre, Quarterly Newsletter, July 2015.

75 LCIA, n 14, 4.

76 Ibid. 4.

77 Rothman, n 10, 26.

78 Ibid. 24.

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when still in doubt, lawyers tend to turn to their peers and their network to seek advice from other lawyers.[79]

When recommending their candidates, lawyers usually do not take the risk of proposing unknown arbitrators, even though they might have excellent profiles. By choosing among visible and well-known arbitrators, law firms insure themselves against the risk of a negative outcome. That being said, by acting this way, law firms prevent new profiles from entering the market and bringing “fresh blood” to the field, even for smaller cases. This “zero risk tactic” indirectly prevents women from entering the field and breaking the glass ceiling that blocks their path. Therefore law firms and their lawyers should recommend their candidate based on their real qualities as opposed to the number of times they have appeared on the international stage. Since law firms and lawyers are aware of the diversity issues, their suggestions should take an inclusive approach.[80]

Law firms and lawyers have an essential role to play and can act as a hub in order to promote diversity. Various law firms have been trying to promote diversity within their own structure with the help of new technologies. In this regard, law firms are often leading the diversity bandwagon. In order to promote diversity, the well-known law firm Clifford Chance introduced a “CV blind” policy regarding the universities candidates went to. This approach aimed to neutralize cognitive bias that led the firms to mostly recruit their trainees among those who graduated from Oxford and Cambridge universities. However well-meaning their intentions are, it seems that law firms do not “take their own medicine” in every activity they undertake. Those same lawyers should apply their principles to all areas they work with, including international arbitration, and have the courage of their own convictions. In this respect, the lack of lawyers’ willingness might be counter-balanced by a strong incentive of bar associations to promote diversity. For instance, in the previously mentioned report, the American Bar Association issues specific recommendations for specific sectors (e.g. law

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schools, law firms, corporate departments, judiciary, and even bar associations) to attain more diversity.[81] The same initiative could be applied for the selection of arbitrators.

III. Arbitrators

It is unquestionable that the current limited pool of arbitrators has valuable experience and knowledge. It is undeniable, however, that this group is ageing. Passing on their know-how is essential to guarantee that the efficiency of the method does not decline over time.[82] The “famous clique” has a responsibility for a more varied new generation to whom they will pass the torch.

Their commitment to diversity can also take place in their daily work. For instance, in Scandinavia it is not unusual to see business conferences exclusively held by male lecturers. Male speakers from Sweden and Norway have taken concrete action and have launched the “Tackanej” or “Takknei” action, known as the “Thank you, but no thank you” initiative. When invited to give a speech in a conference, male speakers only agree to lecture on condition that female speakers are invited too. Otherwise, they decline the offer. The idea is to promote diversity by concrete action at the individual level. The action immediately attracted more than 200 signatures, including media personalities, scholars and successful entrepreneurs.[83]

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Conclusion

Overall, although statistics on gender clearly depict that “pale, male and stale”[84] arbitrators are still considerably more frequently appointed, the trend seems to be moving in the right direction. This is progressing with various initiatives being undertaken at many levels. For instance, the “Arbitration Pledge” is another popular initiative undertaken by a large group of counsels, arbitrators, arbitral institutions, representatives of corporations, states, and scholars. Their main goal is to improve the profile and representation of women in international arbitration. Through “the Pledge”, they try to ensure that conference organizers adopt a more inclusive panel of speakers. They also try to incentivize states, arbitral institutions,

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79 Moxley, n 5, 3.

80 Greenwood/Baker, n 13, 666.

81 American Bar Association Presidential Initiative on Diversity, 2010, n 54.

82 Franck et al., n 49, 495.

83 TackaNEJ.

84 Goldhaber, n 65.

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and national committees to include more women in lists of potential selectable arbitrators. They ask for more transparency and encourage their members to support, mentor and sponsor women in the field. In February 2017, approximately 1,700 members had already taken "the Pledge", including the LCIA, the ICC, the SIAC, but also illustrious arbitrators and academics.[85] Such initiatives signify great progress as they bring the diversity issues into the public sphere, thus making them visible. Common awareness is essential to trigger positive results. Nonetheless, more efforts and more initiatives must be undertaken to achieve a significant result. Specifically, as stated above, only by uniting forces should we be able to achieve an efficient result. What is particularly striking is that all the solutions presented in this essay are readily conceivable. Hopefully, by working hand in hand and pooling forces, no woman arbitrator should in the foreseeable future be put in the situation of the outstanding arbitrator Gabrielle Kaufmann-Kohler, who amusingly relates: "Lawyers are sometimes embarrassed, and don't know what to call me (…). Do they say, 'Madame la Présidente' or 'Madame le Président'?"[86]

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85 http://www.arbitrationpledge.com/.

86 Goldhaber, n 65.

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