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Sifting Through the Arbitrators for the Woman, the Minority, the Newcomer

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SIFTING THROUGH THE ARBITRATORS FOR THE WOMAN, THE MINORITY, THE NEWCOMER¹

*Douglas Pilawa**

This Note examines the process of choosing an arbitrator in international arbitration. Much of the debate and criticism of this process addresses the lack of diversity in arbitral tribunals around the world. Diversity in this context means not only traditional diversity (i.e. gender, race, ethnicity), but also the basic idea of adding “fresh faces” to arbitral tribunals.

Yet the ethical obligation to provide a client with the best chance to prevail encourages counsel to choose a familiar, well-known name with an established “track record” over a little-known “dark horse.” This tension illustrates a fundamental point of friction in international arbitration: choosing experienced arbitrators or “fresh faces,” and which group ensures continued success of international arbitration as a dispute-resolution system. This Note argues that much of the debate and the calls to action are unconvincing for two reasons. First, the unsupported arguments used to justify proactive efforts to diversify arbitral tribunals frustrate skeptics from seeing the actual benefits that diversity could bring. Second, the yearly surveys that state the same findings—that arbitral tribunals are not diverse enough—are crucially misdirected. Instead, the groups behind those surveys would be better served to show how diversity of arbitral tribunals could solve other problematic areas in international arbitration—like lengthy proceedings and rising costs. Once clients and counsel alike begin to take notice of diversity’s collateral effect, the subsequent natural shift to a more diverse arbitrator pool will occur and prove sustainable for the health of the whole system.

1. CHARLES BUKOWSKI, SIFTING THROUGH THE MADNESS FOR THE WORD, THE LINE, THE WAY: NEW POEMS (John Martin ed., 2004).

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INTRODUCTION

Throughout the rise of international arbitration's place in the legal world, insiders and outsiders have observed that the same names continue to dominate arbitral tribunals across the globe.² These high-profile arbitrators sit in judgment of arbitrations with staggering

2. Lisa Bench Nieuwveld, *Choosing the Weathered Veteran or the Young Buck*, WOLTERS KLUWER (Jan. 8, 2011), <http://arbitrationblog.kluwerarbitration.com/2011/01/08/choosing-the-weathered-veteran-or-the-young-buck/> [https://perma.cc/F4G5-YFZC].

amounts of money at stake.³ In investor-state arbitration, the ramifications of an arbitral proceeding can go beyond money; sometimes an entire country's political system is implicated.⁴ In a system that promotes party autonomy and unfettered freedom, how is it, then, that the same people dominate these tribunals? Arbitrators are not elected like a U.S. Federal Judge—they do not serve lifetime tenures.⁵ This phenomenon has exacerbated the claim that international arbitration is an insular club of a few privileged elite.⁶ Some have even referred to this group of international arbitrators as a mafia—a corrupt inner circle of lawyers and arbitrators who trade appointments for financial gain and professional prestige.⁷

Admittedly, seeing the same private individuals ruling on million and billion dollar claims behind closed doors objectively raises an eyebrow. Who are these arbitrators and why do they always decide these cases? This innocuous inquiry reveals an intense debate over the lack of diversity in international arbitral tribunals.⁸ While some approach the subject with reservation, others claim that the continued existence of international arbitration depends upon increased diversity.⁹ In general, efforts to regulate the arbitration selection process¹⁰ receive praise and criticism.¹¹ Parties who welcome

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3. See Stephen P. Anway, *Advocacy in International Arbitration*, in THE GUIDE TO ADVOCACY 117 (Stephen Jagusch QC et al. eds., 2016) (discussing the high stakes involved in international arbitration).
 4. See Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, in COLUMBIA FDI PERSPECTIVES: PERSPECTIVES ON TOPICAL FOREIGN DIRECT INVESTMENT ISSUES BY THE VALE COLUMBIA CENTER ON SUSTAINABLE INTERNATIONAL INVESTMENT No. 33 (Karl P. Sauvant et al. eds., 2010) (discussing how decisions in investor-state arbitrations can affect the state and its people).
 5. Compare U.S. CONST. art. III, § 1, with Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 959 (2005).
 6. Charles Nairac, *Due Process Considerations in the Constitution of Arbitral Tribunals*, in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 119, 140. (Andrea Menaker ed., 2017).
 7. Sam Luttrell, *Chapter 1: Bias in International Commercial Arbitration*, in INTERNATIONAL ARBITRATION: THE NEED FOR A "REAL DANGER" TEST 1, 5 (Kluwer Law International ed., 2009).
 8. See generally Ricardo Dalmaso Marques "To Diversify or Not to Diversify"? Report on the Session Who Are the Arbitrators?, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES, 579 (Albert Jan van den Berg ed., 2015) (providing a short, but thorough look into the diversity questions typically addressed in any critique of the subject matter).
 9. *Id.*
 10. For example, the IBA Guidelines on Conflicts of Interest in International Arbitration were introduced in 2004 to address disclosure

this change perceive the efforts as an attempt to rectify certain wrongs in the system.¹² Others, however, view these sorts of efforts as infringing upon the sacrosanct freedom that international arbitration promises¹³—the same freedom that has largely contributed to its success as the premier dispute resolution mechanism for cross-country disputes.¹⁴

obligations for arbitrators. In its own words, “[t]he 2004 Guidelines reflected the view that the standards [of disclosure] existing at the time lacked sufficient clarity and uniformity in their application. “The Guidelines, therefore, set forth some ‘General Standards and Explanatory Notes on the Standards’. Moreover, in order to promote greater consistency and to avoid unnecessary challenges and arbitrator withdrawals and removals, the Guidelines list specific situations indicating whether [certain conflicts of interest] warrant disclosure or disqualification of an arbitrator.” Int’l Bar Assoc. [IBA], *Guidelines on Conflicts of Interest in International Arbitration*, at 2 (October 23, 2014) https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx [<https://perma.cc/2EB9-6E7N>].

11. See Margaret Moses, *The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges*, WOLTERS KLUWER (Nov. 23, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/> [<https://perma.cc/JL3T-V5PC>] (noting that “the Guidelines, even though non-binding, have become quite influential in the face of increasing challenges to international arbitrators and awards on the basis of arbitrator conflicts. The Guidelines are frequently viewed by courts and arbitral institutions as providing relevant criteria for assessing the impartiality and independence of a challenged arbitrator.”); *but see* Will Sheng Wilson Koh, *Think Quality Not Quantity* 34 J.INT’L ARB. 711 (2017) (taking issue with the quantitative approach that the IBA Guidelines uses with respect to certain aspects of the arbitrator selection process, most notably, repeat appointments).
12. See generally Samaa A.F. Haridi, *Towards Greater Gender and Ethnic Diversity in International Arbitration*, 2 BCDR INT’L ARB. REV. 305, 314 (2015) (detailing studies of implicit biases and positing that such implicit biases against women and minorities exist in international arbitration).
13. Koh, *supra* note 11, at 738 (“Depending upon one’s opinion of the system of unilateral party-appointed arbitrators, the quantitative approach [to challenging arbitrator on the basis of repeat appointments] can be seen either as an intrusion on the parties’ fundamental right to select arbitrators or a small step towards safeguarding the legitimacy of arbitration.”).
14. See generally Mia Louise Livingstone, *Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?* 25 J. INT’L ARB. 529 (2008) (addressing party-autonomy in international arbitration and actually investigating whether this facet of international arbitration is still true).

However desirable and morally good those efforts to diversify tribunals may be, they arguably collide with an attorney's ethical obligation to provide their client the best chance to prevail. No one seems to disagree with the premise that, given the choice between an arbitrator with a favorable jurisprudence to one's side and a totally unknown newcomer, a competent lawyer will choose the former. But every year, more and more voices call for change.¹⁵ As explored in the next section of this Note, the literature on this subject comes in many forms and at a quick pace: presentations are given on the topic, articles are written, and "grassroots" efforts are made to diversify the practice on a near-monthly basis.

By examining why individuals believe diverse tribunals positively affect international arbitration, we can determine whether the continuance of this dispute resolution mechanism is in jeopardy. In asking that question, we can also hypothesize whether the call for diversity must be answered, and more importantly, how it should be answered. The analysis leads to one of the great tensions in the diversity debate. On one side is party autonomy and client interests—international arbitration was founded on the principle that the parties control the process. On the other side is the value that diversity can bring to international arbitration and the struggle to convince practitioners that party autonomy does not have to be subverted in the quest for diverse tribunals. Thus, how to answer the diversity question is the most important aspect of toeing this line between party autonomy and the benefits of diversity.

Part I of this Note explores the current research trends and critiques of arbitral tribunals, and looks at the most recent survey on diversity in international arbitration. Parts II and III examine the importance of the party-appointed arbitrator as evidenced by the history of arbitration and the importance of the arbitrator selection process in today's arbitral proceedings. Part IV focuses on some of the primary reasons for which international arbitral tribunals have become homogenous. Part V asks to what extent does a lack of diversity harm international arbitration, and analyzes three possible ways homogeneity affects the quality of the arbitral system. Part VI addresses the largest obstacle remaining in the diversity debate: changing behavior. Part VII concludes by illustrating how organic solutions—like taking into consideration financial incentives—could lead to more diverse tribunals in international arbitration.

15. See generally Jonathan Mackojc, *10 Hot Topics for International Arbitration in 2017* (Feb. 18, 2017), [http://arbitrationblog.kluwerarbitration.com/2017/02/18/booked/\[https://perma.cc/ARW2-WRC6\]](http://arbitrationblog.kluwerarbitration.com/2017/02/18/booked/[https://perma.cc/ARW2-WRC6]) (highlighting the arbitrator selection process as a "hot topic" for 2017).

I. ARBITRAL TRIBUNALS ARE A PERENNIALY RICH TOPIC OF DEBATE AND CRITIQUE.

Arbitrators, the selection process of arbitrators, and diversity of arbitral tribunals are perennially rich topics in the international arbitration community. In February 2017, the Kluwer Arbitration Blog published its “10 Hot Topics for International Arbitration in 2017.”¹⁶ Arbitrator Selection Process was number two on the list;¹⁷ Diversity in International Arbitration was number nine.¹⁸ Indeed, 2017 saw a flurry of law publications on the subject, including surveys detailing the gender disparities in international arbitration.¹⁹ In March, Won Kidane published his analysis of cultural diversity in international arbitration in his article *Does Cultural Diversity Improve or Hinder The Quality of Arbitral Justice?*²⁰ In the same month, Pennsylvania State University, in tandem with the International Arbitration Association, hosted the “Contemporary Issues & Emerging Trends in International Arbitration” conference.²¹ One of the main panel discussions involved women in arbitration and the diversity issues related to gender in international arbitration.²²

Later, in Fall 2017, *The International Dispute Resolution News*, a publication of the American Bar Association, published an article titled *Diversity in International Arbitration: Daring To Open New Doors*.²³ Even up until the very last days of the year, scholars were writing about diversity. Catherine Rogers, a notable international

16. *Id.*

17. *Id.*

18. *Id.*

19. See Dr. Markus Altenkirch & Dr. Jan Frohloff, *Gender Diversity in International Arbitration – Statistics* (July 3, 2017), <https://globalarbitrationnews.com/gender-diversity-in-international-arbitration-some-statistics/> [<https://perma.cc/EK4M-EDY9>].

20. Won Kidane, *Does Cultural Diversity Improve or Hinder The Quality of Arbitral Justice?* (Mar. 31, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/03/31/does-cultural-diversity-improve-or-hinder-the-quality-of-arbitral-justice/> [<https://perma.cc/NMG2-ZSJF>].

21. João Marçal Martins, *Penn Law to Host Forum on Key International Arbitration Trends Including Post-Brexit and Trump Era Arbitration, Enforcement and Annulment after Yukos and Diversity Issues* (Mar. 15, 2017), https://globalarbitrationnews.com/20170315_event_penn_law/ [<https://perma.cc/6PPW-6V2M>].

22. *Id.*

23. Shari Manasseh Ohri, Esq., *Diversity in International Arbitration: Daring to Open New Doors*, *THE INTERNATIONAL DISPUTE RESOLUTION NEWS* 7 (Fall 2017).

arbitration scholar, ended 2017 with her article *The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence*, published on December 27th.²⁴

The topic even made it into the 25th Annual Willem C. Vis International Commercial Arbitration Moot problem—an international arbitration competition with thousands of law school participants.²⁵ One part of the mock legal problem dealt with the challenging of an arbitrator (Mr. Prasad) over his repeat appointments (a topic associated with lack of diversity) by the same law firm as well as his ties to a third-party funder in the proceeding.²⁶ In March 2018, for the oral arguments portion of the competition, thousands of law students from around the world met in Vienna and Hong Kong and argued about these very real, pressing issues, albeit in a completely fictitious environment.²⁷

But even before 2017, the topic of arbitrator selection—and the lack of diversity in international arbitration—was on the radar of many scholars and practitioners. In 2015, a group of women practitioners in international arbitration launched the website “Equal Representation in Arbitration” (“ERA”).²⁸ The website’s focus is “the Pledge:” an agreement to work towards nominating more women as arbitrators.²⁹ In its own words, ERA represents that, “The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity.”³⁰ Currently, 3,414 people have signed the Pledge.³¹

24. Catherine Rogers, *The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence*, WOLTERS KLUWER (Dec. 27, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators/> [<https://perma.cc/V9HF-PZZN>].

25. The official 25th Vis Moot Problem is available for download at <https://vismoot.pace.edu/media/site/previous-moots/25th-vis-moot/25thVisMootFinalPO2.pdf> [<https://perma.cc/DXX4-EXLA>]. On the document itself, an arbitrator in the fictitious problem is officially challenged on page 38 (Notice of Challenge of Mr. Prasad).

26. *See id.*

27. 25th Annual Willem C. Vis International Commercial Arbitration Moot <https://vismoot.pace.edu/media/site/previous-moots/25th-vis-moot/programme.pdf> [<https://perma.cc/GYA4-EAZQ>].

28. EQUAL REPRESENTATION IN ARBITRATION, <http://www.arbitrationpledge.com/> [<https://perma.cc/ZMJ9-7AUE>].

29. *Id.*

30. *Commentary on the Pledge*, EQUAL REPRESENTATION IN ARBITRATION, <http://www.arbitrationpledge.com/about-the-pledge> [<https://perma.cc/Q2BB-CJJT>].

31. See EQUAL REPRESENTATION IN ARBITRATION, *supra* note 28. (As of January 2019, the Pledge had 3,414 signatories. According to the

Apart from the Pledge itself, the website currently serves as a resource for numerous gender-diversity initiatives.³²

Similarly, in 2012, Catherine Rogers published her industry-changing proposal: Arbitrator Intelligence, Inc.—an initiative to change the way that lawyers seek information about prospective arbitrators.³³ Again, in its own terms, “Arbitrator Intelligence aims to promote transparency, accountability, and diversity in arbitrator appointments.”³⁴

No doubt, lack of diversity in international arbitration is a hot topic. The Kluwer International Arbitration Blog³⁵ could have put it on a “hot topic” list for every year for the past decade. While the subject matter undeniably dominates the headlines in international arbitration, breaking down those articles to concrete numbers shows that practitioners themselves recognize the importance of diverse tribunals—or at a minimum, believe that arbitral tribunals are not diverse.

Pledge’s website, “This number includes both individual signatories signing in their own name and organisation signatories to the ERA Pledge. While most signatories are listed on this website, some individual signatories choose to remain anonymous.”).

32. *Events*, EQUAL REPRESENTATION IN ARBITRATION, <http://www.arbitrationpledge.com/events> [<https://perma.cc/6UKJ-UZMD>].
33. See Catherine Rogers, *The International Arbitrator Information Project: An Idea Whose Time Has Come*, WOLTERS KLUWER (Aug. 9, 2012), <http://arbitrationblog.kluwerarbitration.com/2012/08/09/the-international-arbitrator-information-project-an-idea-whose-time-has-come/> [<https://perma.cc/8XKG-58FS>]. (This blog post served as the catalyst to Catherine Rogers’ project—well before she even had a name for what would become *Arbitrator Intelligence*. In her call to action, she describes the project as follows: “Perhaps the time has come for an International Arbitrator Information Project, a resource to provide reliable one-stop-shopping for information about arbitrators. The Project would collect and provide instant electronic access to all available and relevant awards, publications, judicial opinions, and commentaries about individual arbitrators. It would also include a mechanism for providing feedback about arbitrators. The challenge will be to solicit reliable and useful feedback, and avoid feedback that resembles the gripes that disgruntled customers cram into grocery store comment boxes. Constructive and reliable information about arbitrators will be sought primarily through questions addressing the specific issues that are currently pursued through ad hoc inquiries. Judicious editorial policies and procedures will provide safeguards against unprofessional postings and disclosure of confidential information.”).
34. The full mission statement of Arbitration Intelligence is available at ARBITRATOR INTELLIGENCE, <http://www.arbitratorintelligence.org/> [<https://perma.cc/62VS-5C92>].
35. *Kluwer Arbitration Blog*, WOLTERS KLUWER, <http://arbitrationblog.kluwerarbitration.com/> [<https://perma.cc/TMQ5-PXPX>].

Surveys of practitioners make up a considerable chunk of the empirical evidence that speaks to diversity in international arbitration. Nearly every year, a new survey comes out that corroborates the overwhelmingly used catch phrase to describe international arbitral tribunals: male, pale, and stale.³⁶ But this description is not as crass as one might think. The truth is that men from North America or Western Europe do dominate most arbitral tribunals, and most are generally older.³⁷ Practitioners agree.

In 2017, the law firm Berwin Leighton Paisner (“BLP”) conducted a survey (“BLP Survey”) on diversity in international arbitration and polled 122 respondents from all over the globe.³⁸ 84% of the respondents thought there were too many men in arbitral tribunals.³⁹ Furthermore, 80% of respondents thought that tribunals contained too many white arbitrators.⁴⁰ The survey, though, was not comprised solely of thoughts or observations—it showed raw data. BLP pointed out that from January to November of 2016 at the ICC,⁴¹ only 20% of arbitrators appointed were women.⁴² And, even though raw numbers on minority appointments are difficult to obtain, one statistician found that 45% of arbitral tribunals in ICSID proceedings⁴³ from 1972 to May 2015 were composed of *all* Anglo-European Arbitrators.⁴⁴

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36. Joseph Mamounas, *ICCA 2014. Does “Male, Pale, and Stale” Threaten the Legitimacy of International Arbitration? Perhaps, but There’s No Clear Path to Change*, WOLTERS KLUWER (Apr. 10, 2014), <http://arbitrationblog.kluwerarbitration.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/> [<https://perma.cc/82HU-P924>].
37. *Id.*
38. BERWIN LEIGHTON PAISNER, *DIVERSITY ON ARBITRAL TRIBUNALS: ARE WE GETTING THERE?* 7 (2017).
39. *Id.* at 10.
40. *Id.*
41. INT’L CHAMBER OF COM., <https://iccwbo.org/> [<https://perma.cc/HF7J-N6GY>]. The ICC is the International Chamber of Commerce and has its headquarters in Paris, France. The ICC is arguably the most recognized arbitral institution in the world.
42. BERWIN LEIGHTON PAISNER, *supra* note 38, at 4.
43. INT’L CTR. FOR SETTLEMENT OF INV. DISP., <https://icsid.worldbank.org/en/pages/default.aspx> [<https://perma.cc/S672-W5KV>]. ICSID, or the International Centre for Settlement of Investment Disputes, was established 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. It is “a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank’s objective of promoting international investment. ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and

One might begin to wonder why the arbitrator receives such attention. Yes, the arbitrator is ultimately the adjudicator of a dispute—and the fact that a party can choose its arbitrator is distinct from other forms of dispute resolution.⁴⁵ But those two reasons alone cannot justify the sheer number of people writing on the subject, or the resources used to conduct surveys every single year that ultimately come to the same conclusion. Better explanations for the importance of arbitrator dialogue exist in the history of the arbitrator as well as the modern day selection process of one's arbitrator.

II. THE PARTY-APPOINTED ARBITRATOR IS THE CORNERSTONE OF INTERNATIONAL ARBITRATION FROM TIME IMMEMORIAL

The ability to appoint one's arbitrator exemplifies and defines international arbitration.⁴⁶ The party-appointed arbitrator's roots quite literally reach back to antiquity.⁴⁷ This should come as no surprise: international arbitration itself dates back millennia, with some scholars citing to cases that allegedly occurred in the 2000s B.C.⁴⁸ Specifically regarding the role of the arbitrator, orators in both the Classical and Hellenistic periods of Ancient Greece reference the position of party-appointed arbitrator in speeches.⁴⁹ Party-appointed arbitrators served important roles during the Renaissance, the American Civil War, and during the Hague Conventions of 1899 and 1907.⁵⁰ In 1907, attendees at the Hague Conference described the

States helps to promote international investment by providing confidence in the dispute resolution process. It is also available for state-state disputes under investment treaties and free trade agreements, and as an administrative registry." *About ICSID*, INT'L CTR. FOR SETTLEMENT OF INV. DISP., <https://icsid.worldbank.org/en/Pages/about/default.aspx> [<https://perma.cc/BLQ6-KQTC>].

44. BERWIN LEIGHTON PAISNER, *supra* note 38, at 4.
45. Gary Born, *Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration*, in, INTERNATIONAL COMMERCIAL ARBITRATION 1636, 1639 (Kluwer Law International 2d ed. 2014).
46. *Id.*
47. Sundaresh Menon, *Adjudicator, Advocate, or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator*, 34 J. INT'L ARB. 348, 351-4 (2017).
48. *See* Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION 6, 8 (2014) (citing Lafont, *L'arbitrage en Mésopotamie*, 2000 Rev. arb. 557, 568-78, noting, for example, the case of *Ur v. Lagash* in which the King of Uruk ordered a city to return territory seized by force from another).
49. *Id.*
50. *Id.*

opportunity for a party to select its own adjudicator as “a right which is the very essence of arbitral justice.”⁵¹ The Treaty of Washington—implemented to settle disputes between Great Britain and the United States—formed the basic structure of what is now international arbitration, and it, too, depended upon the party-appointed arbitrator.⁵²

Given the arbitrator’s role in history, some have even stated that the party-appointed arbitrator is the cornerstone to the very existence of arbitration as a dispute resolution mechanism.⁵³ Indeed, party appointments “were used as a tool to overcome the distrust between disputants from diverse cultures. Without the comfort of being able to appoint an arbitrator of one’s choosing, it was said that the parties could not be brought to the table.”⁵⁴ History, therefore, accounts for one of the reasons why arbitrator selection dominates criticism and intrigue.

Today, the party-appointed arbitrator maintains this important position, and selection of the arbitrator is considered to be the single most important step in the arbitration process.⁵⁵ Not only is it of fundamental importance that parties and counsel know *how* to select the best arbitrator, but also, “a proper selection process is essential for the protection and safeguard of the rights of the parties to the arbitration.”⁵⁶ Identifying the criteria that counsel and parties seek in potential arbitrators as well as understanding *why* these criteria matter reinforces the seriousness of the decision, and provides a background to why a lack of diversity in international arbitration might be problematic.

III. THE RESOURCES, TIME, AND EFFORT EXPENDED IN THE ARBITRATOR-SELECTION PROCESS UNDERSCORES THE IMPORTANCE OF THE ARBITRATOR’S ROLE IN INTERNATIONAL ARBITRATION

Arbitrator selection has already been compared to the Hasbro™ family game “Guess Who.”⁵⁷ The game involves a board that has the

51. Nairac, *supra* note 6, at 127.

52. Menon, *supra* note 47, at 353.

53. *Id.* at 354.

54. *Id.*

55. Douglas Earl McLaren, *Party-Appointed vs List-Appointed Arbitrators: A Comparison*, 20 J. INT’L ARB. 233, 233 (2003).

56. Carlos Alberto Matheus López, *Practical Criteria for Selecting International Arbitrators*, 31 J. INT’L ARB. 795, 796 (2014).

57. Paul Baker, *Why Picking an Arbitrator is Like Playing Guess Who™?* WOLTERS KLUWER (Sept. 1, 2017),

faces of 24 individuals on it.⁵⁸ A player chooses a character with distinguishing physical features (i.e. glasses, a certain hair color, facial hair).⁵⁹ Then, the other players try to guess which character was selected by asking questions like “Does this person have hair?” Or, “Does this person wear glasses?”⁶⁰ With each answer, a character is eliminated, and the pool of remaining individuals dwindles.⁶¹

In its most basic form, this process *is* like arbitrator selection. Lawyers from both parties begin to “construct” their arbitrator by looking for individuals with certain characteristics—objective and subjective factors—that all converge to one point, and at that point is the arbitrator who meets all of the qualities sought by a party. For example, an international arbitration proceeding might involve a French contractual dispute. Thus, a lawyer with a list of names of prospective arbitrators would ask of each candidate, “Does this individual speak French?” Each case has its own intricacies, and the character traits sought—as evidenced below—vary from case-to-case. Like “Guess Who,” each trait sought eliminates a potential arbitrator up until only one man or woman remains. But given the importance of the party-appointed arbitrator, and the dueling sides in an adjudicative process, arbitrator Guess Who becomes more a chess match, with each side trying to gain a leg up by choosing the *perfect* arbitrator.⁶²

The basic outline of the arbitrator selection process is as follows: (1) review the candidate’s professional background; (2) conduct a “word of mouth” interview of colleagues and practitioners to ascertain personal details about the arbitrator; (3) review previous awards that the arbitrator has issued, if possible; (4) analyze any and all articles, treaties, or other publications that could possibly shed light on an arbitrator’s disposition regarding a certain issue, especially if that issue is in one’s proceeding; (5) identify any conflicts of interest that

<http://arbitrationblog.kluwerarbitration.com/2017/09/01/picking-arbitrator-like-playing-guess/> [<https://perma.cc/K7Z8-ZFTL>].

58. *Guess Who Game Rules: How Do You Play Guess Who?*, HOW DO YOU PLAY IT, <http://howdoyouplayit.com/guess-game-rules-play-guess-who/> [<https://perma.cc/8BQG-BR3S>].

59. *Id.*

60. *Id.*

61. *Id.*

62. What makes a perfect arbitrator depends on the proceeding. But one of the most highly sought qualities is an arbitrator with a favorable jurisprudence to one’s side. A perfect arbitrator, in this case, would be the arbitrator who will most likely rule in one’s favor. This characteristic is a major part of the selection process. *See* López, *supra* note 56, at 796 (“There is a tendency amongst the parties to seek the greatest predictability in the constitution of the arbitral tribunal”).

could possibly lead to disqualification of the arbitrator; (6) conduct a pre-appointment interview—this is a hot-button issue in the international arbitration community in of itself;⁶³ (7) finally, officially appoint the arbitrator.⁶⁴ These steps further break down into two subcategories: objective qualities and subjective qualities.⁶⁵ Striking the perfect balance between these two categories is the goal of the arbitrator selection process.

A. *The Typical Objective Qualities sought in the Arbitrator-Selection Process*

In general, the objective qualities of the arbitrator selection process are a combination of the minimal procedural structure of the arbitration—like the number of arbitrators—coupled with the pieces of information that professionals routinely share on their CVs or their websites: expertise, language abilities, compensation, etc.⁶⁶ For example, the number of arbitrators and language of the arbitration proceeding are two fundamental objective qualities.⁶⁷ Both of these factors usually stem from the dispute-resolution clause, or the procedural rules chosen by the parties.⁶⁸ Linguistic skills matter, of course, for the proceeding itself.⁶⁹ But imagine the scenario of a dispute that involves a contract written in a particular language—a language that might even be different than the language of the proceeding itself. Undoubtedly, a party will look for an arbitrator who can read and understand the contract that sits at the heart of the dispute.

Expertise of the arbitrator matters, too.⁷⁰ Does the dispute involve technical matters that require an arbitrator with a specific skill set? An industry expert, who is also an arbitrator, “fosters efficiency, since less time needs to be spent educating [the arbitral tribunal] about technical matters. Arbitrators with such expertise can

63. See Kabir Singh and Elan Krishna, *Interviewing Prospective Arbitrators*, WOLTERS KLUWER (Sept. 29, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/09/29/interviewing-prospective-arbitrators/> [<https://perma.cc/KRT5-5V8H>] (detailing the right and wrong way to conduct a pre-appointment interview).

64. López, *supra* note 56, at 802.

65. *Id.* at 796-801.

66. See *id.* at 796-800 (enumerating the various objective factors used when considering an arbitrator).

67. *Id.* at 796-7.

68. *Id.*

69. *Id.* at 797.

70. *Id.* at 798.

‘cut through’ the issues.”⁷¹ This desire for a technical expert must be balanced with the need to have arbitrators that, above all else, understand the technicalities of the *arbitration proceeding* itself. Since the integrity of the arbitration proceeding has a potential effect on the validity of the award in the face of judicial scrutiny, counsel might be inclined to sacrifice this technical expertise for the safer bet of an arbitrator who simply follows the rules.⁷²

The availability of an arbitrator and the standing and influence of an arbitrator are two important, interrelated factors.⁷³ Elite and prestigious arbitrators are a natural choice for counsel for numerous reasons. The elite arbitrator can exercise influence inside the arbitral tribunal.⁷⁴ Furthermore, the decorated arbitrator is less likely to be accused of favoritism in the party-appointed system because his or her rise to the top of the profession stems from being “just and competent” and not partisan or influenced by the party who appointed the arbitrator.⁷⁵ But the difficulty with choosing a top-name arbitrator is twofold. First, top arbitrators typically have higher fees for their services.⁷⁶ Second, these industry giants are typically booked—they are in arbitral proceedings all over the world, and their schedules and availability become problematic.⁷⁷ Some arbitrators are full-time arbitrators, while others are practicing attorneys, law professors, or government officials.⁷⁸ Accordingly, trying to sync the schedule of the proceeding with the fixed schedule of a professor, or with the schedule of an in-demand arbitrator can delay proceedings considerably. Imagine the scheduling nightmare if a panel of three high-demand arbitrators is constituted. Thus, speed of the proceedings becomes a tactical consideration when choosing an arbitrator.⁷⁹

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71. Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator*, 60 DISPUTE RESOLUTION J. 24, 27 (2005).
72. López, *supra* note 56, at 798 (explaining that “whether a technician or a lawyer is chosen, they must have knowledge of arbitration law, because they might incur various errors in procedendo that could result in the annulment of the arbitral award. In this sense, the arbitrators will need to have experience conducting arbitration proceedings effectively and expeditiously”).
73. *Id.* at 798-9.
74. *Id.* at 799.
75. *Id.* at 798.
76. *Id.* at 799.
77. *Id.* at 798.
78. *Id.*
79. Yu Jin Tay, *Reflections on the Selection of Arbitrators in International Arbitration*, in INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE? 112, 128 (Albert Jan van den Berg ed., 2013).

These characteristics obviously do not make up all of the objective qualities in the selection process. But they form the very basic form of the arbitral tribunal and lay the foundation for who will serve as the arbitrators. Once this base level is established, then the focus turns to the subjective qualities and finding the right arbitrator match for one's case.

B. The Subjective Qualities of the Arbitrator-Selection Process and How these Characteristics Affect the Proceeding

Subjective qualities often involve what are known as the “soft skills” of an arbitrator⁸⁰ and address an arbitrator's individual work habits, styles, and propensities. In layman's terms, it is a personality test. Choosing the right personality is pivotal to one's case. It is important to remember that the arbitrator may end up on an arbitral tribunal with two other members. Strong personalities—and egos—matter.⁸¹ This potential of competing personalities on the arbitral tribunal lead counsel to ask an often-overlooked question: does the arbitrator “play well” with others?⁸² Those with the temperament of a “diplomat” tend to be more attractive choices.⁸³

Subjective qualities manifest themselves with respect to the way in which an arbitrator even approaches a case. For example, a major subjective quality is the dichotomy of big-picture people versus sticklers—the conceptual, open-minded, equity-oriented person at one extreme, and the rule-oriented, no-nonsense, by-the-numbers strict constructionist at the other.⁸⁴ An offshoot of these characteristics is the importance of an arbitrator with strong management skills.⁸⁵ Arbitration's freedom from the procedural constraints of litigation is one of its greatest assets.⁸⁶ But if this freedom is not managed properly, it can lead to delays and increased costs in the arbitral process.⁸⁷ Indeed, parties might actively seek an

80. Ema Vidak-Gojkovic et al., *Chapter II: The Arbitrator and the Arbitration Procedure, Puppies or Kittens? How to Better Match Arbitrators to Party Expectations*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 61, 64 (Christian Klausegger et al. eds., 2016).

81. Tay, *supra* note 79, at 126.

82. Vidak-Gojkovic, *supra* note 80, at 66.

83. Tay, *supra* note 79, at 126.

84. Moxley, *supra* note 71, at 26.

85. Jessika Stadwick, *Four Factors to Consider When Selecting an Arbitrator* ALTAMIMI & CO. (June 2013), <http://www.tamimi.com/law-update-articles/four-factors-to-consider-when-selecting-an-arbitrator/> [<https://perma.cc/9YF8-G7MD>].

86. *Id.*

87. *Id.*

arbitrator known for “creative case management” because the case demands that type of proceeding.⁸⁸

These subjective qualities are important insofar as one has concerns regarding the procedural management of the case—and most practitioners do have this concern.⁸⁹ As important as these procedural-personality proxies are, far more important are the potential landmines that hide from counsel in the field of arbitrators. Is the arbitrator that lawyer who was a bully when serving in the judiciary and now makes counsel “jump through unnecessary hoops of their creation?”⁹⁰ Some call this personality type “the superjudge.”⁹¹ Or, is the prospective arbitrator the type of person who cannot maintain order and lets the arbitral process get out of hand?⁹² This type is called “the wimp.”⁹³ The personality types and potential ramifications on the arbitral process are endless.⁹⁴

These few questions addressed make up, understandably, just a fraction of the game that counsel plays when picking the right arbitrator. While some of the information sought is readily available—like basic CV information—accurate information speaking to the subjective qualities “can be the single most difficult challenge when identifying candidates for nomination.”⁹⁵ The subjective qualities are everything that the objective qualities are not—they are the unknown bits of information that shed light on an arbitrator’s *personal* personality and *legal* personality.

The logical implication of each objective and subjective factor is a narrowing of the prospective candidates. Each box checked that meets a necessary or desirable quality in a prospective arbitrator eliminates a name from the candidate list. And, if one considers how many boxes need to be checked, these “required and desirable qualities result in

88. Tay, *supra* note 79, at 128.

89. See Vidak-Gojkovic, *supra* note 80, at 65 (elaborating on a 2010 survey in which respondents emphasized these soft skills as important and having an impact on the efficiency and cost of a case).

90. López, *supra* note 56, at 801.

91. *Id.*

92. *Id.*

93. *Id.*

94. See *id.* (listing other personality types like the egomaniac, the superlawyer, the White Knight, and the unemployed opportunist and giving a breakdown of how they affect the arbitral tribunal).

95. Vidak-Gojkovic, *supra* note 80, at 64.

the selection of a small group of highly talented international arbitrators.”⁹⁶

A dilemma exists—or at least a contradiction on this point. Since the ideal arbitrator always depends on the particular case,⁹⁷ and each case theoretically has its own ins and outs—its own boxes that need to be checked—diverse tribunals should be the norm rather than the exception. To have the same people adjudicating the same claims would imply that cases are so similar, every time, that counsel chose the same arbitrators because their specific qualities mandate that arbitrator choice. We know this to be false, though. The easiest way to show it is false is the fact that the same arbitrators have sat on investment treaty tribunals as well as commercial arbitration tribunals.⁹⁸

People refer to this group of select individuals as the “pool” of arbitrators.⁹⁹ The constant critique is that the pool of arbitrators is too small, and increasing the pool of arbitrators is a necessary first step to diversifying arbitral tribunals.¹⁰⁰ But the diversity issue is not that simple. Throwing names into this pool will not solve the problem without also considering the other major systemic factors in international arbitration that stifle tribunal diversity.

96. Chiara Giorgetti, *The Arbitral Tribunal: Selection and Replacement of Arbitrators*, in LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER’S GUIDE 143, 156 (2014).

97. Moxley, *supra* note 71, at 25.

98. International arbitration is primarily broken down into two distinct categories: international commercial arbitration and investment-treaty arbitration. The former is usually a contract dispute between two international companies who have agreed to submit their disputes to arbitration. The latter refers to arbitration proceedings between a claimant investor of one state and a respondent government of another state, in whose jurisdiction the investor claims to have made an investment that is the subject of a dispute. This system allows for individuals to bring arbitration proceedings against countries in their sovereign capacities. While both of these forms of arbitration share similarities, their differences are tremendous. For an in-depth look at investor-state arbitration and its history, see Andrew Newcombe Lluís Paradell, *Chapter 1 - Historical Development of Investment Treaty Law*, in LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 1 (Andrew Newcombe & Lluís Paradell eds., Jan. 2009).

99. Jacomijn J. van Haerolte-Van Hof, *Diversity in Diversity*, in 18 LEGITIMACY: MYTHS, REALITIES, CHALLENGES 638, 638-39 (Albert Jan van den Berg ed., 2015).

100. *Id.*

IV. THE OTHER CONTRIBUTING FACTORS TO NON-DIVERSE
TRIBUNALS THAT FURTHER COMPLICATE DIVERSITY
EFFORTS.

Several reasons exist for the overall lack of diversity in international arbitration beyond the small pool of arbitrator thinking. Many acknowledge the notion of the “old boys club,”¹⁰¹ and furthermore, “the tendency of outside counsel to appoint arbitrators who are similar to them”¹⁰² as leading reasons for a lack of diversity. Implicit bias, some argue, has led to the cycle of women and ethnic candidates’ exclusion from arbitral tribunals.¹⁰³

The old boys club and an individual’s biases, though, concern themselves more with the individual and not the system as a whole. To indict the entire institution of arbitration based upon the biases and potential discriminatory behavior of a select few is simply unfair and prejudicial to all practitioners.¹⁰⁴ Whether pure discrimination plays a role in the diversity struggle remains unknown, mainly because people do not openly flaunt their discrimination. Instead, certain aspects of the international arbitration system itself thwart tribunal diversity. For example, an overall lack of transparency in the actual arbitrator selection process is a *systemic* flaw in the institution that prevents new faces from joining arbitral tribunals.

A. *Lack of Transparency: The Problem and Proposed Solutions to help Diversify Tribunals.*

Despite living in an age when technology permits us to access information on almost any subject, the fact remains that the primary method by which parties research and choose an arbitrator is by word of mouth¹⁰⁵—an old-fashioned phone call to a friend or colleague. Why is this the case? Part of the issue, which just happens to be one of

101. Thomas J. Stipanowich, *A Recent Survey of Experienced U.S. Arbitrators Highlights Areas For Further International Study and Discussion*, WOLTERS KLUWER (Feb. 6, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/02/06/a-recent-survey-of-experienced-u-s-arbitrators-highlights-areas-for-further-international-study-and-discussion> [https://perma.cc/2CC3-EJT5].

102. Haridi, *supra* note 12, at 314.

103. *Id.*

104. *See* Koh, *supra* note 13, at 713 (arguing that allowing the potential biases and actions of a few should not implicate the entire arbitration process).

105. Mauro Rubino-Sammartano, *A Second (Quasi-Perfect?) Storm Also in Arbitration?* 34 J. INT’L ARB. 925, 927 (2017).

arbitration's biggest perks, is the privacy of it all.¹⁰⁶ Arbitral awards are not typically public information, and when they are made public, the arbitrators' names are removed.¹⁰⁷ Thus, while parties can typically find general biographical information about arbitrators with ease, they struggle to find the information they truly desire—those soft, subjective qualities sought in the selection process—like the prospective arbitrator's efficiency, work ethic, and handling of discovery.¹⁰⁸ Therefore, the only way that counsel can access this coveted information is by contacting the party or parties who have routinely or recently worked with the prospective arbitrator—the word-of-mouth system.

But this word-of-mouth system ultimately “creates an information bottleneck.”¹⁰⁹ The result? “The limited number of individuals who can provide such information stifles the ability of newer and more diverse arbitrators to develop international reputations that . . . are key to getting appointments.”¹¹⁰ Another major issue with the word-of-mouth method of gaining information about potential arbitrators is the subjective nature of it. Person-to-person research “largely confines assessment of potential arbitrators to subjective evaluation by a limited number of individuals.”¹¹¹ Subjective evaluation becomes more “telephonic lottery” and less of a systematic evaluation system.¹¹² And discrimination materializes more often in a subjective evaluation as opposed to a systematic one.¹¹³ The result here? Male, pale, and stale.

What compounds the situation even more is the relationship between the person *giving* the information about a prospective arbitrator and the person *asking* for the information. The extent to which one feels comfortable to divulge information in response to an ad hoc, personal inquiry about an arbitrator depends, in large part, on the relationship between the information seeker and the information divulger.¹¹⁴ Colleagues or close friends will speak more candidly about

106. Gary Born, *Chapter 1: Overview of International Commercial Arbitration*, in INTERNATIONAL COMMERCIAL ARBITRATION 89 (Kluwer Law International 2d ed., 2014).

107. Catherine Rogers, *Chapter II: The Arbitrator and the Arbitration Procedure, Transparency in the Arbitrator Selection*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 79 (Christian Klausegger et al. eds. 2016).

108. *Id.*

109. Rogers, *supra* note 24.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Rogers, *supra* note 107, at 79-80.

a prospective arbitrator than two parties who do not share the same familiarity.¹¹⁵ Therefore, two people asking the same person about the same arbitrator could receive different accounts of the prospective arbitrator—not necessarily conflicting information, but information that differs with respect to the “complete view” of the arbitrator.¹¹⁶ This lack of a complete view frightens the attorney seeking a strong, reliable arbitrator.¹¹⁷ Faced with an incomplete view of a prospective arbitrator, counsel has almost no choice but to revert to a well-established name in the industry to avoid any risk of one of those landmine arbitrators that affects the entirety of the proceeding.¹¹⁸

While this current lack of transparency has a direct effect on the composition of an arbitral tribunal, and continues the lack of diversity in arbitral tribunals, it also fundamentally hinders a new lawyer involved in international arbitration, or a lawyer who will participate in one international arbitration proceeding in her entire career—the so called “one-shot player.”¹¹⁹ The lawyer is either a repeat player or a one-shotter.¹²⁰ It is the “repeat players” who “shape the development of law rather than the ‘one-shotters.’”¹²¹ Indeed, “the ‘one-shotter’ is the player that does not have the advantage of ‘(1) advance intelligence...(2) expertise and ready access to specialists...(3) opportunities to develop facilitative informal relations with institutional incumbents...[or] (4) interest in his ‘bargaining reputation’....”¹²² This dichotomy epitomizes the result of the lack of transparency in the arbitrator selection process. If the selection of the arbitrator is the most important decision made by counsel in international arbitration, then “it would seem reasonable to assume that there is likely no greater ‘repeat player’ advantage—or ‘one-shotter’ disadvantage—than at the time of arbitrator appointment.”¹²³

115. *Id.*

116. *Id.*

117. See generally Daniel Schimmel et al., *Transparency in Arbitration*, THOMPSON REUTERS 2 (2018) (discussing how transparency removes some of the concern regarding arbitration and the lack of information about arbitrators), available at https://foleyhoag.com/-/media/files/foley%20hoag/publications/articles/2018/transparency%20in%20arbitration_practical%20law_mar2018.ashx.

118. *Id.*

119. Chiann Bao, *Chapter 2: One Shot Players and Arbitrator Selection: A Fair Shot or a Shot in the Dark?* in *THE POWER AND DUTIES OF AN ARBITRATOR* 10. (Patricia Shaughnessy & Sherlin Tung eds., 2017).

120. *Id.*

121. (quoting Marc Galanter’s article *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. AND SOC. R. 1 (1974)).

122. *Id.*

123. *Id.* at 12.

The implications of this perceived (and possibly real) advantage is the following logical thought process: Repeat players have an information advantage over one-shotters with respect to the arbitrator selection process—mainly the advantage of having the coveted information about an arbitrator. If we assume that these repeat players constitute a relatively small number of firms,¹²⁴ then these firms are likely to receive a disproportionate number of appointments in relation to the entire international arbitration field.¹²⁵ The belief is that this disproportionate number of appointments makes these repeat players “gatekeepers” to the arbitral process.¹²⁶ And most importantly, this division between repeat players and one-shotters may also reduce the volume and diversity of the arbitrator pool.¹²⁷

These observations of the system, though, are not from an outsider’s perspective. In 2015, the Queen Mary-White & Case Survey polled international arbitration practitioners about improvements that respondents would like to see in the international arbitration practice.¹²⁸ The overwhelming response was a call for institutions to “provide more information about arbitrator performance and increase transparency about institutional decision making in relation to arbitrator appointments and challenges.”¹²⁹ Interestingly, arbitral institutions realized that providing this information led to increased use of that same institution.¹³⁰ Therefore, a major incentive to attract counsel and parties to use that institution was precisely to open this vault of information that counsel typically sought by the word-of-

124. No assumption is really needed because resources like the Global Arbitration Review’s “Top 30” corroborate that a small amount of law firms receive the most amount of cases. The Global Arbitration Review is a subscription-based website whose paywall prevents easy access to some of their resources. See, Richard Wooley, *GAR 30 Revealed*, GLOBAL ARBITRATION REVIEW, Feb. 26, 2015. But for those who cannot access the website, a basic look at the GAR’s methodology can be found at *Best International Arbitration Law Firms and Practice Groups Worldwide: 2018 Rankings*, ACERIS LAW (Oct. 17, 2018) <https://www.acerislaw.com/best-international-arbitration-law-firms/> [<https://perma.cc/K37R-49YX>]. Finally, a copy of the 2017 PDF containing the GAR 30 rankings can be found at https://res.cloudinary.com/lbresearch/image/upload/v1490004001/GAR302017_ukcmcn.jpg [<https://perma.cc/98E2-SHZU>].

125. Bao, *supra* note 119, at 13.

126. *Id.*

127. *Id.*

128. Rogers *supra* note 107, at 76.

129. *Id.*

130. *Id.* at 78-9.

mouth-system.¹³¹ As a business decision, it is an unequivocal win: an arbitral tribunal's reputation improves by this commitment to transparency and, in so doing, attracts more business—i.e. parties and counsel choose that institution and pay that institution for its services. Calling for transparency in the arbitrator selection process was once “akin to threatening to raze the gates of Rome and sack its inhabitants.”¹³² Now, transparency of some sort is the norm for some arbitral institutions.¹³³

B. The Best Chance to Succeed Conundrum Requires Counsel to Put the Client's Interests Above Diversity Initiatives.

Another major factor that contributes to the lack of diversity in tribunals is “the best chance to succeed” conundrum.¹³⁴ The international arbitration community is highly sensitive to perceptions of its own legitimacy.¹³⁵ The observations detailed up until this point constitute more of the negative beliefs of how the same names continue to dominate arbitral tribunals, and why there exists a lack of diversity in international arbitration. Accordingly, “indictments” like those addressed in this Note “should be taken seriously and be refuted

131. *Id.* at 79.

132. *Id.* at 75.

133. Some of the leading institutions have made serious commitments to transparency. The ICC now mandates a prospective arbitrator to disclose the number of arbitrations in which he or she is currently acting as well as that arbitrator's availability going forward. See generally, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE, Sept. 2016 (mandating prospective arbitrators to disclose the number of arbitrations in which he or she is currently acting as well as that arbitrator's availability going forward). The Commercial Arbitration Centre of Lisbon – Portugal has implemented “Criteria for the appointment of arbitrators by the Centre approved by the Board of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry.” The essence of these guidelines is to regulate, increase party input, and make the overall arbitrator selection process more transparent. In a different manner, the Hong Kong International Arbitration Court (HKIAC) now uses feedback forms to evaluate the institution's performance as well as the arbitral tribunal's management of a case. For more information regarding these efforts as well as others not listed, see Rogers *supra* note 107, at 78.

134. See Nieuwveld, *supra* note 2 (referring to this conundrum as choosing between the “weathered veteran” or the “young buck”); see also, Rogers, *supra* note 25 (describing the conundrum as the “diversity paradox” wherein counsel wants to provide the best chance to succeed while also trying to help diversify tribunals).

135. Catherine Rogers, *The Arrival of the “Have-Nots” in International Arbitration* 8 NEV. L. J. 341, 377 (2007).

where possible.”¹³⁶ To leave these accusations unaddressed might “cast a pall over the legitimacy of international arbitration and allow baseless suspicions to fester.”¹³⁷ Therefore, while some see invidious discrimination and systemic shortcomings as a reason for a lack of diversity in international arbitration, another group of individuals explain the lack of diversity as a mere consequence of counsel’s ethical obligation to give a client the best chance to succeed.¹³⁸

Just as a client wants to choose “the best” law firm or attorney, so, too, does the client (through counsel’s recommendation) wish to have the “best” arbitrator. Obviously “best” has different meanings. It can mean the arbitrator most likely to rule in one’s favor, or simply an arbitrator with substantial experience.¹³⁹ That “big-name” arbitrator is easy to choose then, because counsel “can feel confident that [the arbitrator] could likely quote every important book written on the subject matter which may greatly influence the outcome of [the] arbitral proceedings.”¹⁴⁰ This “best arbitrator available” view is best illustrated by the response of an anonymous commentator to a survey on international arbitration who stated, “When asked by a client to select an arbitrator, the desirability of promoting diversity is the last feature on anyone’s mind. ‘We are not being asked to make a statement’ he said, ‘we are asked to pick the best person for the job.’”¹⁴¹

The BLP Survey¹⁴² from Section III of this Note also touched upon this “best arbitrator” theme. Corroborating the anonymous commentator’s views, 93% of respondents felt that a prospective arbitrator’s expertise was either “very important” or “important” whereas only 54% felt that it was desirable to have a “diverse”

136. Koh, *supra* note 13, at 713.

137. *Id.*

138. *See generally id.* (justifying the tendency for repeat appointments to ensure a better result for clients).

139. *See, e.g.*, Daniel Girsberger & Nathalie Voser, *Chapter 3: The Arbitral Tribunal*, in INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES 158 (3d ed., 2016) (discussing how experience of the arbitrator is tantamount in some instances); *see also, e.g.*, William W. Park, *Part III Chapter 9: Arbitrator Integrity*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 203 (Michael Waibel et al. eds., 2010) (“Party participation in the constitution of a tribunal means that each side will want to be sure that its nominee (and the presiding arbitrator if possible) will be free of doctrinal predispositions that would adversely affect its case”).

140. Nieuwveld, *supra* note 2.

141. Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals* 28 J. OF THE LONDON COURT OF INT’L ARB. 653, 661 n.42 (2012).

142. BERWIN LEIGHTON PAISNER, *supra* note 38.

tribunal.¹⁴³ Curiously, when asked how important gender and ethnicity were when choosing an arbitrator, 52% of respondents noted “not important at all” for the former, and 30% noted “not important at all” for the latter.¹⁴⁴ Nothing nefarious exists in this mindset.¹⁴⁵ Indeed, “[a]ppointing parties cannot reasonably be expected to appoint arbitrators they are unfamiliar with or do not trust.”¹⁴⁶ A lawyer’s ethical obligation to provide her client with the best chance possible to prevail, therefore, practically *requires* the lawyer to search for that repeat player—that arbitrator who has such an extensive body of work (writings, awards, interviews, etc.) that counsel can, with some certainty, guess how that arbitrator will rule.¹⁴⁷ With high stakes, and the possibility of an arbitral award making the whole proceeding a zero sum game, any temptation to choose that “dark horse” candidate in the name of promoting diversity disappears.

For the lawyer wishing to make a change in the system, this situation presents the ultimate diversity paradox.¹⁴⁸ How can we further diversity initiatives while still honoring the ethical obligation to give clients the best chance to succeed? As Catherine Rogers notes, “The key to resolving this paradox is to close the gap between the altruism that animates abstract concerns about diversity, and the strategic pragmatism that dominates arbitrator selection in individual cases.”¹⁴⁹ But all of the surveys, the writings, and the calls for diversity rest on *some* assumption that the lack of diversity in international arbitration negatively impacts the practice.¹⁵⁰ Since some proponents go so far as to say that the continued existence of

143. *Id.* at 9.

144. *Id.* at 8.

145. Haridi, *supra* note 13, at 315 (“ . . . counsel’s duty is to appoint an arbitrator in the best interest of the client, not necessarily in the best interests of diversity. Appointing an unqualified arbitrator simply because he or she is diverse would be ethically deficient. However, similarly appointing an unqualified arbitrator simply because he is a white male of a certain age would also be ethically deficient”).

146. Koh, *supra* note 13, at 735.

147. *See* Rogers, *supra* note 107, at 82 (explaining how arbitral awards can be used to investigate arbitrator’s decision-making practices).

148. Rogers, *supra* note 24.

149. *Id.*

150. Patricia Živković, Diversity in International Arbitration: Where Do We Stand? An Overview of a Berwin Leighton Paisner Survey, WOLTERS KLUWER (Feb. 9, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/02/09/diversity-in-international-arbitration-where-do-we-stand-an-overview-of-a-berwin-leighton-paisner-survey/> [<https://perma.cc/SF32-72NM>].

international arbitration depends upon diversifying tribunals,¹⁵¹ ascertaining the extent of the problem—if one even exists—is pivotal to address such claims. Even generally speaking, it is impossible to address the diversity problem without first understanding why it is an issue.

V. ALL OF THE CRITICISM ABOUT DIVERSITY ASSUMES THAT THERE IS POISON IN THE WELL. BUT IS THERE?

A lack of diversity in arbitral tribunals is just one of the many concerns that involve arbitrators. The arbitral tribunal is a lightning rod for attention and controversy. One of the most egregious abuses of the system occurred in 2009 after the Republic of Croatia and the Republic of Slovenia concluded a treaty to settle land and maritime disputes by arbitration.¹⁵² In the ensuing arbitration, Slovenia and Croatia each appointed their own arbitrator.¹⁵³ Three more distinguished members joined the two party-appointed arbitrators, resulting in a five-member tribunal.¹⁵⁴ About five months before the expected award, a Croatian daily newspaper published transcripts and audio recordings of conversations between the Slovenian arbitrator and the Slovenian agent.¹⁵⁵ The revelations demonstrated arguably the worst abuse of the party-appointed arbitrator process: the agent and arbitrator colluded over how best to sway the Tribunal to rule in favor of Slovenia.¹⁵⁶

Luckily, behavior like this is not common in international arbitration.¹⁵⁷ Indeed, bribery or manipulation of a judicial figure is not limited *only* to international arbitrators.¹⁵⁸ Ridding these institutions of corruption and bribery—or some other serious flaw—should be the goal of the international community. The push for diversity in international arbitration assumes that non-diverse

151. van Haersolte-Van Hof, *supra* note 99, at 648.

152. Menon, *supra* note 47, at 348-50 (explaining in much more detail the disaster that followed the revelations).

153. *Id.* at 349.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 350.

158. See Jennifer Steinhauer, *Senate, for Just the 8th Time, Votes to Oust a Federal Judge*, N.Y. TIMES (Dec. 8, 2010), <https://www.nytimes.com/2010/12/09/us/politics/09judge.html> [<https://perma.cc/U8SP-DTAA>] (detailing the impeachment of Judge G. Thomas Porteous Jr., a federal judge, for accepting bribes and making statements under penalty of perjury).

tribunals are problematic in this fashion.¹⁵⁹ Nothing of the same gravity of the Slovenia-Croatia debacle is directly attributable to the lack of diversity in international arbitration, though.¹⁶⁰ But several other issues do require us to ask if a lack of diversity is a fundamental flaw that jeopardizes the future of international arbitration as a global dispute resolution mechanism. This section looks at three main issues that directly stem from having the same people adjudicate the same claims across the world: repeat appointments and the appearance of bias; moral justifications for diversity; and cultural differences and the relation to fact-finding.

*A. Repeat Appointments and the Appearance of Bias is a Potential Problem that can be connected to a Lack of Diversity.*¹⁶¹

Repeat appointments are a source of tension in international arbitration, and the diversity issue attached to repeat appointments exacerbates the criticisms.¹⁶² The party-appointed arbitrator and the current system are ripe for controversy and corruption.¹⁶³ Seeing the same names appointed by the same law firms can lead a reasonable person to imagine a quid pro quo system is in place.¹⁶⁴ This system appears to create an inevitable tension. Arbitrators earn substantial fees for their professional services.¹⁶⁵ Accordingly, “there is . . . a

159. See, e.g., Darius J. Khambata, *Tensions Between Party Autonomy and Diversity*, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES 620 (Albert Jan van den Berg ed., 2015) (representing the common reasons given for diversity, none of which rise to a level of severity as expressed in the Slovenia v. Croatia debacle).

160. *Id.*

161. For this section, the diversity issue is not traditional diversity (minority and gender representation), but instead it is the consequence of the small pool of arbitrator concept—seeing the same people adjudicate proceedings across the world.

162. See e.g., Natalia Giraldo-Carrillo, *The ‘Repeat Arbitrators’ Issue: A Subjective Concept*, 19 INT. LAW: REV. COLOMB. DERECHO INT. 75-106 (2011) (discussing the issues related to repeated appointments of arbitrators in conjunction with diversity of panels).

163. See Seth H. Lieberman, *Something’s Rotten in the State of Party-Appointed Arbitration: Healing ADR’s Black Eye that is “Non-Neutral Neutrals,”* 9 CARDOZO J. CONFLICT RESOL. 215 (2004) (describing the controversial nature of party-appointed arbitrators and their potential corruptive nature).

164. Smit, *supra* note 4 (“Once selected, an arbitrator’s personal incentive is to secure reemployment by providing his or her party with a favorable outcome”).

165. See generally Gary Born, *Chapter 13: Rights and Duties of International Arbitrators*, in INTERNATIONAL COMMERCIAL ARBITRATION (2d ed., 2014) (explaining in detail the arbitrator’s fees and how those fees are calculated across various rules and laws).

financial incentive to promote one's attractiveness as a prospective appointee which could, in the eyes of the appointing party, turn on the likely outcome of the cases for which they are appointed."¹⁶⁶ Undoubtedly, this system contradicts the notion that adjudicators should have no interest—especially a pecuniary one—in the outcome of a case.¹⁶⁷ Therefore, one of the thoughts about the party-appointed arbitrator is that the appointment of the arbitrator translates into an automatic vote for the party who appointed him or her.¹⁶⁸ Hence, some parties feel that if their arbitrator joins in an award in favor of the other side, that arbitrator is a traitor to the cause.¹⁶⁹

Imagine, then, seeing the same law firm appoint the same arbitrator, and prevail more often than not when that arbitrator is on the tribunal. Is this coincidence or bias? Were the awards unanimous? Did the arbitrator grant provisional measures that helped her appointing party?¹⁷⁰ It is not difficult to understand that the optics of repeat appointments invite these questions of bias or prejudice. They “put a cloud on due process” and create issues of legitimacy in the eyes of insiders and outsiders.¹⁷¹ If tribunals are dominated by older, white males from Western cultures, and these same men are appointed as arbitrators by the same client or law firm year in and year out, international arbitration looks like it lives up to its reputation as an “old boys network.”¹⁷²

Given the international arbitration community's sensitivities to the outside world's perception of its inner-workings,¹⁷³ repeat appointments became an issue that needed immediate attention. Accordingly, in 2004, the International Bar Association published the IBA Guidelines on Conflicts of Interest in International Arbitration,¹⁷⁴

166. Menon, *supra* note 47, at 356.

167. *Id.*

168. Herman Duarte, *Unilateral Appointments in International Commercial Arbitration. Is it time to Change the Way Arbitral Tribunals are Constituted?*, LAW IN SOCIETY, 101 (2013).

169. McLaren, *supra* note 55, at 235.

170. These are the types of questions that are asked when an arbitrator is challenged on the basis of repeat appointments. See *Tidewater Inc., v. The Bolivarian Rep. of Venezuela*, Int'l Centre for Settlement of Inv. Disp., No. ARB/10/5 (2010) (submitting questions similar to the aforementioned).

171. Nairac, *supra* note 6, at 141.

172. *Id.* at 140.

173. Rogers, *supra* note 134.

174. See IBA Guidelines, *supra* note 10.

which deals directly with repeat appointments and other conflicts of interest in international arbitration.¹⁷⁵

The Guidelines are split into four lists—the non-waivable red list, the waivable red list, the orange list, and the green list.¹⁷⁶ Each list contains mini fact-patterns of examples of conflicts of interest whose severity—or need for disclosure—varies depending upon which colored list contains the conflict of interest.¹⁷⁷ Article 3.1.3. on the Orange List contains one of the more controversial attempts to curb repeat appointments: “The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.”¹⁷⁸ Here, the IBA Guidelines are taking issue with the same company or country appointing the same arbitrator year in and year out. Article 3.3.8 is written in the same style, targeting repeat appointments with respect to the lawyer and law firms in general.¹⁷⁹ Thus, the law firm that taps the same arbitrator every year for a new proceeding will have difficulties complying with this guideline. At some point, counsel will

175. *Id.*

176. *See id.* at 17-25 (“The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c). The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a). Finally, [t]he Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view.” Thus, the arbitrator has no duty to disclose situations falling within the Green List. As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of ‘the eyes’ of the parties.)

177. *Id.*

178. *Id.* at 22.

179. *See id.* at 24 (“The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm”).

run out of “the usual suspects” and resort to a fresh face—a new arbitrator never before appointed by that law firm.¹⁸⁰

Much of the other Guidelines that target repeat appointments work in this same fashion.¹⁸¹ But two main criticisms arise with the Guidelines in their application to repeat appointments: the fact that the Guidelines are simply guidelines, and the quantitative approach the Guidelines take. By the drafters’ own admissions, the Guidelines “are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties.”¹⁸² They are mere guidelines that “reflect the understanding of the IBA Arbitration Committee as to the best current international practice.”¹⁸³ Despite this possible roadblock, the Guidelines have almost universal acceptance in international arbitration.¹⁸⁴ Between 2004 and 2009, the ICC found that out of 187 arbitrator challenges, 106 of those reference an article of the IBA Guidelines.¹⁸⁵

Yet, the successes of the IBA Guidelines lead some to question its quantitative approach.¹⁸⁶ Arguing for a qualitative approach to repeat appointments, one scholar succinctly sums up why the plug-and-disqualify approach of Article 3.1.3 fails: “Repeat appointments could be a *result* of an arbitrator’s independence and impartiality” and not a sign of impropriety.¹⁸⁷ Similarly, the number of appointments simply says nothing about the a true conflict of interest:

“By presuming dependence based on absolute numbers removed from context, the quantitative approach displaces the proper approach of assessing the significance (if any) of the repeat appointments against the wider factual backdrop. Any practical advantages of such a quantitative approach in terms of

180. An active international arbitration law firm might easily be involved in 10+ proceedings in a span of three years. Arbitrator selection becomes a game of numbers and timing for appointing the right arbitrator. Counsel might find themselves in a position where all of their preferred arbitrators have been appointed by that same law firm numerous times in the previous three years. This situation would run afoul of Guideline 3.3.8, and require the law firm to pick an arbitrator never before appointed by that law firm.

181. See IBA Guidelines, *supra* note 10, at 20 (“The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.”).

182. IBA Guidelines, *supra* note 10, at 3.

183. *Id.* at 2.

184. Moses, *supra* note 11.

185. *Id.*

186. For a discussion, see generally Koh, note 13, at 729-39.

187. *Id.* at 718-19.

certainty are illusory because most would agree that uncertain justice is still better than certain injustice.”¹⁸⁸

This response to the Guidelines illustrates the sensitivity surrounding any attempts to regulate the arbitrator selection process. Furthermore, “the [IBA Guidelines] approach can be seen either as an intrusion on the parties’ fundamental right to select arbitrators or a small step towards safeguarding the legitimacy of arbitration.”¹⁸⁹

Whatever side of this spectrum one believes, the fact remains that the IBA Guidelines represent a real attempt to combat one aspect of the diversity issue in international arbitration—the phenomenon of seeing the same arbitrators in a majority of the proceedings. The IBA Guidelines help ensure, as realistically as possible, that the arbitral proceeding is not damaged or influenced by repeat appointments or similar conflicts of interest that lead critics of international arbitration to imagine quid-pro-quo agreements between an arbitrator and her appointing party.¹⁹⁰ They serve as a check on the system, and actively combat possible negative effects of non-diverse tribunals. Therefore, critics’ concerns that a lack of new arbitrators has a negative effect on arbitration have been addressed, and continue to be a work in progress. If there were a so-called “poison in the well” because of repeat appointments, the arbitral community has met this concern with initiatives like the IBA Guidelines. But a larger calling for traditional diversity continues to dominate the practice area. While diversity in the repeat appointments context is a concern, the lack of minorities or equal gender representation, to some, also has a substantial effect on the quality of arbitral proceedings.

B. The Moral Argument for Diversity Lacks Tangibility and Feels Too Much Like a Direct Infringement on Party-Autonomy.

In June 2015, the Director General of the London Court of International Arbitration, Jacomijn J. van Haersolte-Van Hof, published her article *Diversity in Diversity*.¹⁹¹ With respect to why diversity is potentially relevant, van Haersolte-Van Hof notes, “[D]iversity and inclusion are commendable because they ensure a better product, in this case a better arbitration process resulting in better arbitration awards.”¹⁹² Quoting an ABA Report, she concludes

188. *Id.* at 734.

189. *Id.* at 738.

190. See Jeffrey Waincymer, *Part II: The Process of an Arbitration, Chapter 5: Selection, Challenge and Change of Arbitrators*, in *PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION* 298-299 (Jan. 2012) (detailing in part the IBA Guidelines’ approach to major financial conflicts of interest with respect to arbitrator appointments).

191. van Haerolte-Van Hof, *supra* note 99.

192. *Id.* at 641.

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.”¹⁹³

This idea that diversity yields better results appears in numerous publications about the subject.¹⁹⁴ Most scholars and writers that maintain this view referenced in a *Harvard Business Review*¹⁹⁵ study, which concluded that diverse teams are smarter.¹⁹⁶ Other studies about the effects of diversity in general yield similar results: diverse teams have increased creativity and productivity, and produce wholly better products.¹⁹⁷ So important is diversity, that proponents even state that “diversity on the tribunal is crucial to sustain arbitration as a modern, flexible, and desirable method of dispute resolution.”¹⁹⁸

From this author’s perspective, the intangibility of these justifications for diversity initiatives prevents proponents from convincing skeptics or even neutral persons that a lack of diversity is detrimental to international arbitration. Part of the problem is the amorphous concept that diversity automatically yields a better product. Notwithstanding the intangibility of the term “better product,” proponents that advocate this way gloss over the reality that, in the throes of any adversarial system, parties simply do not care about a “good product”—they just want to win.¹⁹⁹ No matter how well written a judicial opinion or arbitral award, the losing party will probably not find solace in a “good product.”²⁰⁰

Perhaps what these critics mean is that a diverse tribunal will be more likely than not to decide cases correctly. But even this contention rests on weak reasoning. Unless one’s case is so black and white that only a fool would mess up the result, most issues that make it all the way to hearings on the merits can go for the claimant or the respondent. To make matters worse for this line of reasoning—

193. *Id.* at 642.

194. *See, e.g.*, David Rock & Heidi Grant, *Why Diverse Teams are Smarter*, HARV. BUS. REV. (Nov. 4, 2016) <https://hbr.org/2016/11/why-diverse-teams-are-smarter> [<https://perma.cc/9GQG-KKHF>] (discussing the importance of diversity for a better workplace).

195. *Id.*

196. Rogers, *supra* note 24; Haridi, *supra* note 12.

197. Haridi, *supra* note 12, at 310.

198. *Id.* at 307.

199. Rogers, *supra* note 24.

200. As the tennis great Andre Agassi once reflected, “Now that I’ve won a slam, I know something very few people on earth are permitted to know. A win doesn’t feel as good as a loss feels bad, and the good feeling doesn’t last long as the bad. Not even close.” ANDRE AGASSI, OPEN 167 (1st eds., 2009).

that diversity yields better results—international arbitration does not conform to any real system of *stare decisis*.²⁰¹ Accordingly, it is difficult to argue that diverse tribunals are more likely than not to apply the law correctly to a dispute since, quite frankly, *stare decisis* in international arbitration is not nearly as important as it is in other legal worlds.²⁰²

Or, perhaps these critics are imagining the following scenario: an arbitral tribunal, comprised of three older men from Western cultures, hears a case about a construction dispute between contractors and subcontractors in Africa, regarding competing contracts governed by an African nation's laws, in a language that no arbitrator on the panel speaks. The argument in this instance would be that the arbitrators are less likely to understand the law because it is foreign to them. But critics are wise not to make this argument. Why? Because this line of criticism is essentially calling into question the intelligence or analytical reasoning of arbitrators in their abilities to interpret a foreign law. Interpreting a foreign law is commonplace in international arbitration²⁰³—even court systems around the world do this.²⁰⁴ So, to argue that non-diverse tribunals misapply law in general risks insulting one's professional capacities.

Therefore, to take the conclusions of studies that draw a direct line between diversity and some positive result, and to apply that thinking to arbitral tribunals requires some finding that the system right now is failing because of this lack of diversity. And critics that rely on this thinking simply do not point to tangible, concrete

201. See generally Dolores Bentolila, *Chapter 4: Arbitrators' Constraints in Arbitral Decision-Making* in ARBITRATORS AS LAWMAKERS (Bentolila ed., 2017) (explaining the contours of precedent in international arbitration and describing how, though no precedent exists, this by no means suggests that arbitrators do not look to previous decisions); *But see*, August Reinisch, *Chapter VI: Investment Arbitration - The Role of Precedent in ICSID Arbitration*, in AUSTRIAN ARBITRATION YEARBOOK 2008 (Christian Klausegger et al. eds., 2008) (describing the importance of precedent in investor-state arbitration despite the fact that no precedent exists in international arbitration).

202. See generally, Bentolila, *supra* note 201 and Reinisch, *supra* note 201 (discussing the constraints on arbitrators when issuing decisions).

203. See Dolores Bentolila, *Chapter 3: Arbitrators' Freedom in Arbitral Decision-Making*, in ARBITRATORS AS LAWMAKERS 83 (Kluwer Law International ed., 2017) (detailing all of the law interpreting that arbitrators routinely perform in both the commercial and investor state contexts).

204. See, e.g., FED. R. CIV. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.").

evidence of tribunals failing in their duties *because of* a lack of diversity.²⁰⁵

While this Note takes issue with the “diversity yields better results” conclusion, it does not disagree with these scholars’ assessment that diverse tribunals can help legitimize international arbitration. Just as citizens want to see a cross section of society reflected in the judiciary, so, too, some argue, should arbitral tribunals reflect a cross section of the business world—modern, creative, and diverse.²⁰⁶ The argument is one of public perception, too: a country’s judicial system should reflect those who come before it—thus, a diverse society should be judged by a diverse bench.²⁰⁷ Yet this argument overlooks the fact that a state’s judicial system serves a much broader population than international arbitration.²⁰⁸ International arbitration serves a very select community—primarily international businesses, in the context of international commercial arbitration.²⁰⁹ So, if those who judge us should resemble us, how does a tribunal properly resemble a corporation? In fact, parties that come before international tribunals are parties that have forgone their right to resort to a state’s judicial system.²¹⁰ Do these parties have the same expectations of an arbitral tribunal that they would have of a state’s judiciary? The tension, of course, is that international arbitration, at its core, was an attempt to get *away* from a state’s judicial system.²¹¹ Therefore, trying to close the gap between the two legal systems—the judiciary and international arbitration—feels somewhat wrong.

Ultimately, once again, diversity becomes an issue with respect to optics. According to at least one United States senator, international arbitrators are not neutral judges; they are “highly-paid corporate

205. See, e.g., Marques, *supra* note 8; Haridi, *supra* note 12; Ohri, *supra* note 23; Mamounas, *supra* note 36; van Haerolte-Van Hof, *supra* note 99 (Each of these analyses of diversity international arbitration demonstrate the common reasons given for the need to diversify tribunals. But not one of these authors state that tribunals somehow fail *because of* a lack of diversity).

206. Haridi, *supra* note 12, at 308.

207. *Id.* at 307-8.

208. See *What is International Arbitration?*, INT’L ARB. INFO., <https://www.international-arbitration-attorney.com/what-is-international-arbitration/> [https://perma.cc/3LYN-Z6GU] (“International arbitration can be used to resolve any dispute that is considered to be ‘arbitrable,’ a term whose scope varies from State-to-State, but which includes the majority of commercial disputes.”).

209. *Id.*

210. *Id.*

211. Born, *supra* note 106, at 30 (explaining how, even in the 8th century up until today, arbitration was used to avoid the established judicial systems and its drawbacks).

lawyers [who] go back and forth between representing corporations one day and sitting in judgment the next....”²¹² Anything to help eradicate this belief is welcomed; anything to further this belief weakens international arbitration. A diverse tribunal can certainly strengthen the perception of legitimacy of international arbitration.²¹³ Just as addressing repeat appointments arguably works to help legitimize international arbitration’s standing in the legal world, so, too, does seeing tribunals that reflect the modern business world—or at least what we hope the modern business world to be: diverse.

C. Cultural Differences Related to Fact Finding Is One of the Strongest Arguments for Diverse Tribunals.

Perhaps the most compelling call for diversity is the way that culture interacts with the interpretation of facts. In essence, the argument is that because “[t]he same set of facts could be attributed different meanings because of the fact finders’ cultural backgrounds” a more culturally diverse arbitral tribunal will correctly apply the facts to the law.²¹⁴ The reason why facts are of such importance, beyond serving the narrative of the case, is because “[f]acts always grow out of cultural interactions.”²¹⁵ For example, “African arbitrators would probably not be dumbfounded by a witness who points to an orange identification card and calls it yellow because in many African cultures, yellow represents a range of colors, including orange.”²¹⁶

Pausing and reflecting on this approach to the diversity issue in international arbitration fills the gaps that are left open by those who preach the “better product” theory. It is a conceded fact that the majority of international arbitrators are white men from Western cultures.²¹⁷ These arbitrators handle disputes from literally all over the world. We therefore are asking arbitrators to decide on large disputes based upon facts that possibly end up lost in cultural

212. Haridi, *supra* note 13, at 308 (quoting Elizabeth Warren’s op-ed, Elizabeth Warren, Op-ed, *The Trans-Pacific Partnership Clause everyone should oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.2e7ab13cf6f7 [https://perma.cc/8E5H-J8MT]). It is not clear if Senator Warren has any experience with international arbitration, or if these remarks were more geared towards a political statement with respect to the Trans-Pacific Partnership.

213. *Id.* at 307.

214. Kidane, *supra* note 21.

215. *Id.*

216. *Id.*

217. BERWIN LEIGHTON PAISNER, *supra* note 39, at 4.

translation. It is clear, then, that “[t]he determination of fact is probably the most culturally sensitive step [in the arbitral process], but the ability to correctly determine facts is perhaps the most ignored of all criteria for arbitrator selection.”²¹⁸ Therefore, it is not the *arbitrator’s* culture that matters. It is more the arbitrator’s ability to understand the cultural significance of certain facts. No survey thus far appears to probe this area.

This critique instantly feels more tangible than any statement that diversity yields better results. Interpreting foreign laws requires a certain set of skills and education whereas interpreting facts correctly requires something much more nuanced—something that, assumedly, cannot be learned as easily as principles of law.²¹⁹ If the facts are the most important part of a dispute, and arbitrator selection is the most important process of the arbitral proceeding, then making sure that the arbitrator is one who can properly comprehend and interpret the facts arguably creates the highest probability of a “correct result,” or a “better product.” Of course, this conclusion rests on multiple assumptions. For starters, it assumes that there is a correct result and an incorrect result in every proceeding. It also assumes that choosing the arbitrator who can best interpret facts will also correctly determine a dispute. Overall, though, this distinction is the missing link in the critiques of the arbitral tribunals that merely state that diversity ensures a better product.

What the conclusion should be, instead, is that a diverse tribunal is more likely to interpret facts differently, and therefore possibly interpret the application of law to those facts in a manner different than a non-diverse tribunal. This conclusion might not be earth-shattering—it might not even seem that important—however, it is incredibly important to make the connection from diversity to ramifications *in order to convince people why diverse tribunals should be the norm and not the exception*. After all, the diversity issue in international arbitration has a massive hurdle—convincing people to implement change.

VI. CHANGING INDIVIDUAL BEHAVIOR REMAINS THE LARGEST OBSTACLE TO DIVERSITY INITIATIVES.

Arguments for or against diversity aside, the largest obstacle remaining is implementation. Indeed, the decision on who to appoint as arbitrator is the party’s.²²⁰ Thus, arbitral tribunal diversity

218. Kidane, *supra* note 20.

219. See Michael Leathes, *Chapter 4: Culture, in* NEGOTIATION: THINGS CORPORATE COUNSEL NEED TO KNOW BUT WERE NOT TAUGHT 53 (2017) (showing the ins and outs of learning and understanding culture in the context of negotiations).

220. Haridi, *supra* note 12, at 308.

depends in part on the will of a party. Only in part, though, because arbitral institutions appoint arbitrators, too.²²¹ Depending upon the situation, the applicable rules, and any disputes between the parties, the arbitral institution or an appointing authority might actively participate in the constitution of an arbitral tribunal.²²² These institutions are in a far better position to exercise their powers to diversify tribunals. This has become a major trend in the move to diversify arbitral tribunals.²²³ While some institutions use a “closed-list” system that allows a party only to choose an arbitrator from that list,²²⁴ others have contemplated moving away from this closed-list system, which therefore expands the pool of potential arbitrators.²²⁵ Whatever the method chosen, the trend right now is to demand of arbitral institutions to be the change—to lead the way in arbitral tribunal diversity.²²⁶

The more challenging behavior to change is that of the individual—the client or counsel. On one side of the debate, proponents argue that “when selecting an arbitrator, [client’s] should insist on an inclusive list of potential candidates that includes at least one woman and one younger person. Moreover, law firms should have

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221. Int’l Chamber Comm., ICC Arbitration Rules, at Art. 12(5) (2012) <http://internationalarbitrationlaw.com/about-arbitration/international-arbitration-rules/2012-icc-arbitration-rules/icc-arbitration-rules/> [<http://perma.cc/FEJ2-2K5T>]; Int’l Chamber Comm., ICC Arbitration Rules, at Art. 8(4) (1998) https://www.trans-lex.org/750200/_/icc-arbitration-rules-1998/#head_13 [<http://perma.cc/96VZ-HTUK>]; Stockholms Handelskammars Skiljedomsinstitut [Arbitration Institute of the Stockholm Chamber of Commerce], 2010 Skiljedomsregler [2010 Arbitration Rules] (Swed.).
222. Gary Born, *Chapter 12: Selection, Challenge and Replacement of Arbitrators*, in INTERNATIONAL COMMERCIAL ARBITRATION 1654 (2d ed. 2014).
223. *See generally* Andrew de Lotbinière McDougall, *Arbitral Institutions Are Doing Their Bit; What About The Other Players?*, WOLTERS KLUWER (Apr. 20, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/04/20/arbitral-institutions-are-doing-their-bit-what-about-the-other-players/> [<http://perma.cc/7KDC-8PZS>] (detailing arbitral institutions’ diversity efforts).
224. Khambata, *supra* note 159, at 620.
225. *See generally* Ank A. Santens, *The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?*, WOLTERS KLUWER (June 28, 2011), <http://arbitrationblog.kluwerarbitration.com/2011/06/28/the-move-away-from-closed-list-arbitrator-appointments-happy-ending-or-a-trend-to-be-reversed/> [perma.cc/U5TW-5LPN] (outlining steps that CIETAC has taken and whether other tribunals might follow a similar approach).
226. *See generally* Haridi, *supra* note 13 (putting the onus on arbitral institutions to do their part in the diversity push).

the resources available to produce and recommend such lists.”²²⁷ Some worry about this approach.²²⁸ Diversity is not an end in itself, they argue.²²⁹ Instead, “the focus should be on promoting within the international-arbitration community and as international arbitrators the best talent, regardless of the diversity markers to which that talent may correspond.”²³⁰ This notion of international arbitration adopts a more market-based, economic theory:

“[I]nternational arbitration, as a creature of contract, is driven by the user community, and users’ interest is in selecting arbitrators that will best represent their positions and rights, which includes offering predictability and consistency. So, if the “male, pale, and stale” presently serves that interest best, the user community will draw international arbitrators from that profile pool.”²³¹

Ultimately, those who take this approach do so, in part, out of a concern over the ramifications of implementing an “affirmative action” type approach to diversifying arbitral tribunals.²³² International arbitration’s popularity will decline if those who use it feel their freedom of choice being subordinated to diversity initiatives.²³³ Finding an organic way to maintain party autonomy while implementing diversity initiatives is the ultimate tension of “good diversity” and “bad diversity.” Good diversity is when “party autonomy can be married with diversity without substantial, if any, conflict at all.”²³⁴ Bad diversity, however, is when the imposition of diversity occurs to meet some quota or statistical goal.²³⁵

Figuring out organic solutions to the diversity problem is the crux of it all. As discussed earlier, one of the biggest organic initiatives is the transparency movement regarding the arbitrator selection process. Another recognized approach is the “pipeline” theory.²³⁶ Women and

227. Mamounas, *supra* note 36.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Khambata, *supra* note 159, at 622 (“Diversity itself cannot be carried too far. It is not akin to affirmative action and there is no question of applying ‘quotas’. The challenge is to strike a balance between diversity in appointment imposed by an institution without stretching party autonomy to breaking point.”).

233. Mamounas, *supra* note 36.

234. Khambata, *supra* note 159, at 635.

235. *Id.*

236. Haridi, *supra* note 12, at 311.

minorities in the “talent pool” of law school slowly exit their careers in the big law firms that dominate the international arbitration world.²³⁷ Thus, this “pipeline” loses its diverse qualities, leaving a small, select few to serve as arbitrators.²³⁸ So, fixing this “pipeline leak” is one possible organic solution.

But many proponents still place the onus on the client or counsel to push for diverse candidates and actively change the system by their own power.²³⁹ But even the forward-thinking, gung-ho lawyer/proponent who wishes to appoint a diverse arbitrator comes face-to-face with the ethical conundrum: “Appointing an unqualified arbitrator simply because he or she is diverse would be ethically deficient.”²⁴⁰ How then, in the most organic way possible, can the lawyer convey to her client the need to look to those lesser known arbitrators—the new faces; the young buck; the arbitrators in the emerging talented pool who, by virtue of increased representation of women and minorities in the legal profession over the last several decades, represent the diversity that so many practitioners want to see? One possible solution is a conversation about money.

VII. THE FINANCIAL INCENTIVE TO CHOOSE THE NEWCOMER IS AN ORGANIC APPROACH THAT CAN BE USED TO ADDRESS DIVERSITY CONCERNS.

In 2015, the law firm White & Case, along with Queen Mary University of London, published their third survey on international arbitration.²⁴¹ The theme was “improvements and innovation” in international arbitration.²⁴² One section dealt with both the time and cost of proceedings.²⁴³ The consensus? “Cost and lack of speed were both ranked by respondents as amongst the worst characteristics of international arbitration.”²⁴⁴ One of the questions in the survey proposed 15 innovations for the arbitral process, and asked respondents to rank each innovation on a one to five scale: low scores

237. *Id.* at 312.

238. *Id.*

239. *Id.* at 316.

240. *Id.* at 315.

241. *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, WHITE & CASE (Oct. 6, 2015), <https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations> [<https://perma.cc/YX3X-HKCZ>].

242. *Id.*

243. *Id.* at 24.

244. *Id.*

were for innovations considered “not effective” and high scores were considered “effective” innovations.²⁴⁵ The five highest scoring innovations, starting with the highest scoring, were the following:

1. A requirement that tribunals commit to and notify parties of a schedule for deliberations and delivery of final award.
2. Stronger pre-appointment scrutiny of prospective arbitrators’ availability.
3. Sanctions for dilatory conduct by parties or their counsel.
4. A requirement for early procedural conference.
5. A pre-hearing preparatory meeting of the arbitral tribunal.²⁴⁶

Every one of these points with the exception of number three involves working around arbitrators’ schedules. In fact, all of these schedule-oriented changes make up subparts of the second point: the arbitrator’s availability. Recall that one of the objective factors to take into consideration when selecting an arbitrator is that arbitrator’s availability. Again, tensions appear. Practitioners want the big-names—the recognized arbitrators who dominate the industry.²⁴⁷ But four of the five biggest criticisms of practitioners revolve around scheduling concerns that can be directly traced back to the arbitrator’s prominence in the field, which is subsequently related back to the arbitrator’s availability.²⁴⁸

While counsel and practitioners alike might feel the headaches of prolonged proceedings, delayed submission timelines, and frustrating attempts simply to schedule pre-hearing meetings, the true burden falls on the client. Not only will longer proceedings most likely lead to larger bills, but also the mere fact of choosing a well-known arbitrator means a higher arbitrator fee.²⁴⁹ It appears, then, that an arbitrator’s professional status is a *point faible*, felt both by counsel and client alike. But this weak spot is the perfect opportunity to combat, in the right circumstances, the diversity issue.

Arbitrator selection is a tactical maneuver. Meeting with a client, and pushing for a diverse tribunal because “diversity yields better results” is a difficult pitch. Yes, counsel can elaborate on the interplay of diversity and fact-finding. But even then, that approach is filled with hedging language (i.e. a diverse tribunal *might* view facts in a

245. *Id.* at 25.

246. *Id.*

247. Bentolila, *supra* note 201, at 151.

248. White & Case, *supra* note 241, at 25.

249. Nieuwveld, *supra* note 2.

certain manner that *could* affect the application of law to those facts, which *might* result in a different conclusion than another tribunal). Diversity for diversity's sake is even a harder pitch to make because the overriding factor has little to do with case strategy. This "bad" diversity can come off as virtue signaling—subordinating one's tactical choices for good optics.

But exploiting the availability issue of a potential arbitrator is the perfect opportunity to implement change. By showing a client that choosing a big-name might have its advantages, it will also lead to a higher arbitrator's fee, and most likely result in scheduling concerns that lengthen the dispute proceedings, and increase overall costs. Again, some clients might not mind. But not every single proceeding is a "bet-the-company" dispute.

Accordingly, when it comes to arbitrator selection, there exists a financial incentive to choose a newcomer. First, that arbitrator most likely has more time to devote to the proceeding, since theoretically that arbitrator is not currently involved in numerous proceedings.²⁵⁰ Having an arbitrator solely devoted to one's case, in theory, means a quicker turnaround time for action. Second, that arbitrator will most likely charge smaller fees.²⁵¹ Instead of approaching a client with a list of diverse candidates, explaining that these candidates were chosen because diversity yields better results, counsel can have a conversation with the client about budgetary concerns. Imagine that—a budget constraint might actually help. If counsel can compile a list of suitable newcomers, and show the client that choosing from this list will save money and time, all while maintaining the integrity of the proceeding, it is hard to imagine turning down that offer.

This potential fix is a bit like the transparency movement. It does not remove a party's choice—it simply opens the arbitrator pool to candidates that might not have been previously considered. It does not require counsel or a client to give up their unfettered freedom with respect to arbitrator selection. But it does give counsel a great opportunity to provide a list of up-and-coming arbitrators—who hopefully represent our diverse world—and give those fresh faces the chance at establishing their careers. Besides, it only takes one or two appointments for an arbitrator to break into the international arbitration world. Once there, the onus is then on those newcomers to continue to expand the arbitrator pool, and to open doors that, for them, were seemingly forever closed.

250. *Id.*

251. *Id.*

CONCLUSION

A lack of diversity in international arbitration is not an insurmountable problem. It also cannot be fixed immediately. The tension between party autonomy and implementation of diversity goals leads to valid concerns about the *way* in which diversity is sought and ultimately achieved. The benefit of finding organic solutions to diversity concerns is that, typically, these efforts also combat other problematic areas in international arbitration. Transparency efforts help counsel access tons of previously inaccessible information; transparency also helps address diversity concerns. Similarly, a conversation about money could help lead to a new face on the arbitral tribunal while driving down the costs and time of a proceeding. Provided that proponents continue to point to real, positive effects of a diverse tribunal, in a way that does not feel as if change is being forced upon others, skeptics will let down their guards and open their ears. That is what counts most anyway—getting people to listen.