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Navigating the practicalities of achieving diversity in arbitration*

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Abstract: Available literature highlights that though most countries had their own form of private dispute settlement, similar to an unorganized form of arbitration, the development of modern international commercial arbitration, as it exists today, dates back to several concrete steps taken in the twentieth century by Western countries. Decades later, this Western influence continues to be highly pervasive, and is one of the important contributing factors for practitioners from such regions enjoying the greatest number of appointments as arbitrators. This has led to serious debates revolving around diversity and inclusivity in arbitral tribunals. Through this research paper, the authors attempt to examine the various factors that affect these ideas of 'inclusivity' as well as 'diversity', and how these ideas are consistent or inconsistent with the fundamental principles underlying arbitration. The paper discusses various initiatives that have been undertaken to increase all forms of diversity – of nationality, race, gender, culture, and so on- and then evaluates the effectiveness of the same. It also analyzes the idea of 'familiarity' in appointment of arbitrators, including the idea of an arbitrator's previous experience, and if at all it would be fair to ask parties to give up on their autonomy while pushing for diversity in the tribunal. The research is premised on the hypothesis that there exists an inherent tension between these ideas. Given that most legislations recognize the autonomy of contracting parties are extremely essential, any initiative seeking to increase diversity might turn out to be a complex one. The authors also discuss, as a case study, the structure of the Indian judicial system, which in the absence of any definite setup has struggled to create and sustain diversity, particularly from the gender vantage. The paper concludes by discussing plausible solutions, structures and stakeholders, which if identified, as well as regulated efficiently, can play a significant role in pushing for such changes.

Keywords: Arbitration. Bias. Diversity. Tribunal appointments.

Summary: Introduction – Part I: the quest for diversity: a question for legitimacy? – Part II: outline of existing hurdles – Part III: towards a novel solution – Conclusion – References

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Introduction

For the past few years now, the proposition of watching an alien invasion or superhero movie from Hollywood has begun to feel less exciting. This is primarily because of two reasons – Firstly, because most of these invasions take place in either the USA, Europe or some white-majority dominated country. Secondly, because of the borderline laughable attempts by the filmmakers to have diverse representation in the movie. For instance, with India, it is almost always Bollywood dances, Indian spices and food. However, regardless of such stereotyping, the idea that filmmakers of the West are now pushing for diversity, highlights that in a rapidly globalizing world, diversity is increasingly being recognized as not only important, but even necessary, in most formal (or in some cases, even informal) contexts for greater acceptance.

It would seem that governments and think tanks, companies and businesses, even educational and financial institutions are pushing for optimal inclusion at every level, often measuring their performance along 'diversity dimensions,' and attempting to assess and bolster the impact of their diversification initiatives.

Considering that in today's era, a huge number of parties (individuals, corporations, even states) from different geographical locations, contracting in different languages and subject to different sets of laws, are electing to submit their disputes to international arbitration, it hardly comes as a surprise that there has been a uniform push for "*greater diversity, especially in relation to the appointment of arbitrators*"[1] in international arbitration. As captured by a phrase that was catapulted into popular use by its usage at the 2014 ICCA Miami Conference, as of today, the vast majority of international arbitrators are "*male, pale, and stale*",[2] a fact that is well-reflected in the data measuring these appointments. Apart from the visible dominance of senior, male arbitrators, the ICC reported that approximately half of its appointed arbitrators came from five countries (USA, UK, Switzerland, France, and Germany) alone.[3]

This fact is disappointing, though not surprising; even though promisingly, and in step with most other sectors, the arbitration community has identified its 'diversity' problem, and demonstrated at least a willingness to engage with

[1] '2021 International Arbitration Survey: Adapting arbitration to a changing world?', White & Case LLP (2021). Available at – https://www.whitecase.com/publications/insight/2021-international-arbitration-survey/diversity-arbitral-tribunals.

[2] Winkler, Matteo and Schinazi, Mikael, 'No Longer "Pale, Male, and Stale"? Approaching Diversity and Inclusiveness in International Arbitration' (January 31, 2021). Forthcoming in Liber Amicorum Guillermo Aguillar Alvarez, Available at SSRN: https://ssrn.com/abstract=3776738 or http://dx.doi.org/10.2139/ssrn.3776738.

[3] ICC Dispute Resolution Statistics, Arbitration notes (2021). Available at: https://hsfnotes.com/arbitration/tag/icc-dispute-resolution-statistics/.

it through both discussion and action, party autonomy continues to supersede broader inclusivity considerations, preserving the hegemonic status quo. This paper attempts to assess the existing problems and efforts related to the 'diversity push' in international arbitration (partly through a case study of the structure of the Indian judicial system) to discuss possible solutions, structures and stakeholders which, if identified and regulated efficiently, can play a significant role in such a push.

Part I of this paper points to the historical development of arbitration as a system of *private* law, highlighting the problem concomitant with trying to bring greater diversity to arbitral tribunals: where parties are entitled to select their tribunal, 'diversity' and 'inclusivity' as external concepts have to be reconciled with this choice of the parties that is so intrinsic to arbitration. It then addresses why concepts like 'diversity' and 'inclusivity' are important, not only generally, or with respect to the principles of natural justice and legal fairness, but also specifically to international arbitration. It also discusses the impact that these factors have on efficiency and decision-making. Part II outlines the existing hurdles with respect to diversity in international arbitration, furnishing a critical description of the problems that contribute to this lack of diversity. A study of the Indian judicial system is undertaken to shed light on the struggle to generate diversity, particularly from the vantage of gender inclusion, in the absence of any definite setup. Part III discusses how this normative proposition of greater diversity in constituting arbitral tribunals should be implemented, not only by reviewing the existing initiatives related to this idea but also recommending improved and novel solutions, both institutional and individual. It also addresses the need to properly recognize and control any such reform in order to establish a legal framework.

Part I: the quest for diversity: a question for legitimacy?

Arbitration is generally regarded as a private, voluntary dispute-resolution mechanism. Parties to an arbitration agree to confer the power to resolve their dispute on a tribunal, simultaneously depriving courts of that jurisdiction. Because the arbitration procedure is contractual in nature, the parties possess a great deal of autonomy, a critical component of arbitration.[4]

However, arbitration is far from a purely private matter. Over time, it has evolved from a mere creature of the parties' contract to a sophisticated, global dispute-resolution system with numerous aspects of public law. International

[4] 'What is Arbitration?' World Intellectual Property Organization. Available at https://www.wipo.int/amc/en/arbitration/what-is-arb.html.

arbitration rests on an impressive edifice of national and international legislation as well as the rules and procedures of global arbitral institutions.

With this evolution of arbitration, the principle of party autonomy has become less absolute. Party autonomy can be superseded, for example, when the parties are treated unequally or the contract violates public policy. It is obvious that there are "… *many intrusions on party autonomy*"[5] that, over time, "*have been accepted as a natural element of arbitration life*".[6]

The broader concept of diversity, as an idea, refers to the practice or quality of drawing, including and involving people from a variety of backgrounds in any set-up. Diversity in arbitral tribunals, it may be defined with reference to gender, age, regional, ethnic, cultural, or any other factors.

Many have questioned if there are any value additions that diversity might bring to arbitration. This question is in many instances also used as a counter argument to argue whether diversity in international arbitration is important at all. The answer is simultaneously simple and complex. At the outset, it must be noted that diversity, by itself, is merely a fact. Half of the world's population is female. Ninety percent are below the age of sixty-five. Three-fourths reside in so-called 'developing countries'.[7] Diversity in international arbitration is important to ensure that arbitration reflects the reality of the world population. Unless a concerted effort is made to update international arbitral tribunals not to be so overwhelmingly white, male, and American/European, it is likely that arbitration will be left behind in an antiquated era while the rest of the world (and the legal services industry) marches on.

Apart from empirical and ethical considerations, there are other reasons why diversity is desirable, both generally and in international arbitration. To begin with, it is now widely recognized that individuals with varied backgrounds and experiences (naturally) carry their novel perspectives with them. They possess a wider variety of talents that a team can put to use to achieve its goal. A range of diverse viewpoints can even assess a plan and gauge its efficiency before the plan is actually implemented in the real world. On a macro-level, companies with a diverse workforce can compete more effectively in the global market.[8]

This factor has enormous implications for arbitration, which was and remains essentially a decision-making process. The diversification of any group of

[5] Darius J. Khambata, 'Tensions Between Party Autonomy and Diversity', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, (2015) 18 (Kluwer Law International; ICCA & Kluwer Law International) pp. 612-637.

[6] *Ibid.*

[7] Max Roser, Hannah Ritchie and Esteban Ortiz-Ospina (2013) – "World Population Growth". Published online at OurWorldInData.org. Retrieved from: 'https://ourworldindata.org/world-population-growth'.

[8] '12 Benefits of Diversity in the Workplace', (SplashBI). Available at – https://splashbi.com/pdf/benefits-advantages-diversity-in-workplace-pdf.pdf.

decisionmakers concurrently enhances its cognitive capabilities. It allows such a group to draw from a pool of heterogeneous knowledge, experiences, and understandings to reach a comprehensively reasoned decision. This is well-corroborated by data: an analysis of a number of business decisions demonstrated that 'inclusive' decision-making clearly boosted performance. Teams that were formed keeping in mind diversity of gender, age, and geographical location had a clear competitive edge.[9] Moreover, they were able to reach these improved decisions in "*half the time, with half the meetings.*" In empirical terms, when a team was gender-diverse, it performed 6% better than average. When the team was also age-diverse, this percentage climbed to 45. A team that was diverse with respect to gender, age, and geography performed above average a staggering 60% of the time.[10] Clearly, as far as collective decision-making itself is concerned, diverse groups of persons are able to reach the same or even improved decisions and outcomes faster, more efficiently, and more often than average. The same result was replicated in a study of arbitral tribunals' decisions. Diversity had a demonstrable impact on an arbitral tribunal's teamwork, efficiency, and decision-making, as well as expediting and improving the quality of different phases of the hearing.[11] Further, without diversity the idea of 'international' arbitration would paradoxically not be representative of the global community it seeks to serve. Arbitrator's idea of reasoning would be dependent on experiences which consequently give them the ability to understand the circumstances in a dispute.[12] Further, this cannot only help bring fresh perspectives about the diverse issues but also impact the justifications and acceptability of the awards. It can also help push for pluralism in the decision-making process and break the predictable ways in which parties would look into a dispute. However, such pluralism, which has now been looked at as being fundamental to a fair process and outcome, must not be confused with 'unfettered powers' where the arbitrators can go against the generally decided norms while awarding decisions.[13]

9 Hacking Diversity with Inclusive Decision Making', (Cloverpop,2021), https://www.cloverpop.com/hubfs/Whitepapers/Cloverpop_Hacking_Diversity_Inclusive_Decision_Making_White_Paper.pdf.

10 *Ibid.*

11 Dr. Cristina Iona Floreschu, 'Report on the Diversity Roundtable at Vienna Arbitration Days 2018', (2018) 8(1) International Law Review, pp. 42-59 at 44. See also Franck S., Freda J. Lavin K. Lehmann T. & van Aaken A., "The Diversity Challenge Exploring the 'Invisible College' of International Arbitration", Columbia Journal of Transnational Law, 2015 at p. 496.

12 Naimeh Masumy, 'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role Ensuring Diversity?', Fordham International Law Journal, available at- https://www.fordhamilj.org/iljonline/2020/11/23/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern-and-should-arbitral-institutions-play-a-greater-role-ensuring-diversity#_ftnref8.

13 C. Rogers, 'The Vocation of the International Arbitrator', (2005) 20(5) American University International Law, available at – https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1150&context=auilr.

Part II: outline of existing hurdles

Arbitration is not what it was a few decades ago. With the economy opening up in many countries and the consequent change in economic dimensions, the geographical origins of the disputants are also changing which further exacerbate the urgent need for diverse representation. For example, in 2020, the ICC court of Arbitration had 41.9% of its parties coming from Asia Pacific and Latin American countries.[14] Similarly, for SIAC, in 2020 India and China alone constituted 86.9% of the total cases in Arbitration.[15] However, a glance at the number of arbitrator appointments from these regions will inevitably reflect a growing need for diversity.

Since 2012, when efforts were first made to systematically gather data to highlight the lack of female arbitration practitioners and associated biases in arbitrator appointments, the literature around gender diversity has consistently expanded, gradually becoming an important part of the debates, discussions and discourse of the arbitration community.[16]

2.1 The diversity deficit beyond gender

While these increased discussions have ushered in positive changes in the gender aspects, a parallel issue that has plagued and severely damaged the reputation of arbitration as a truly 'global' dispute-settlement mechanism is the lack of representation from the perspective of race, age and geography. In the 2021 QMUL White & Case International Arbitration Survey, many interviewees stressed upon the serious need for such diversity in investor state arbitration in an effort to enhance the perception of its Arbitration's legitimacy. The report also highlighted that a significant number of interviewees felt that the tribunals composed entirely of arbitrators who have no understanding or relationships with a specific country or culture central to the dispute in question may not be able to appreciate the cultural differences and could subconsciously favour parties from areas or cultures with which they are familiar with.[17]

The path to increase diversity in these aspects is admittedly even more complex, owing to the fact that the lack of such representation has rarely been addressed, let alone properly researched. However, such a lack of diversity can be

[14] ICC Dispute Resolution 2020 Statistics, available at – https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf.

[15] SIAC Annual Report, available at – https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf.

[16] Lucy Greenwood and C. Mark Baker, 'Is the balance getting better? An update on the issue of gender diversity in international arbitration, Arbitration International' (2015) Arbitration International.

[17] 2021 International Arbitration Survey, Adapting Arbitration to a Changing World, The School of International Arbitration (SIA), Queen Mary University of London White & Case, https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

narrowed down to two external factors – the lack of voices highlighting such ethnic and geographical concern (unlike with say, gender, where many women and men alike have started to voice their opinions), and the lack of success in the decolonization of international law and consequently, international arbitration, in many parts of the world. As a result of this, there persists even today an overrepresentation[18] of Americans, Europeans and other Westerners in most realms of public life.

Often identified as a problem of invisible 'glass-ceiling' difficult for diverse candidates to break, this lack of gender diversity in international arbitration is in many ways also mirrored in appointments to judiciary, the elevation of lawyers to designated senior counsels, and higher positions in law firms more generally. The glass-ceiling problem inevitably also contributes to the pipeline leak,[19] as many such underrepresented groups leave the profession because they are unable to overcome numerous invisible barriers. For arbitration, such concerns are inevitably more acute.[20] This is because, as pointed out, tribunal members from diverse backgrounds can add value in understanding certain aspects of an arbitration specific to that particular region, which, for example, an old, white, male arbitrator could not have foreseen.[21]

2.2 Bottle necks in diversity – common for all systems?

There are two broad schools of thought that identify the problem of diversity: supply side issues, according to which the pool of diverse arbitrators is not sufficiently large, and demand-side issues, which puts the onus of increasing diversity on the process of arbitrator appointment and nomination.[22]

The question then remains: which factors have acted as hurdles for an increase in diversity? A general comparison shows that hurdles to diversity of all types are mostly common. Here the controversial, and often debated as a primary hurdle to diversity in arbitration, like repeated appointment of arbitrators

[18] Douglas Pilawa, 'Sifting Through the Arbitrators for the Woman, the Minority, the Newcomer', (2019) 51(14) W. Res. J. Int'l Law, https://scholarlycommons.law.case.edu/jil/vol51/iss1/14.

[19] 'Diversity on arbitral tribunals: What's the prognosis?', White & Case LLP (2021). Available at: https://www.whitecase.com/publications/insight/2021-international-arbitration-survey/diversity-arbitral-tribunals.

[20] Naimeh Masumy, 'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role Ensuring Diversity?', Fordham International Law Journal, available at- https://www.fordhamilj.org/iljonline/2020/11/23/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern-and-should-arbitral-institutions-play-a-greater-role-ensuring-diversity#_ftnref8.

[21] Payel C. and Vyapak D., 'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?'(Wolters Kluwer, 2020), http://Arbitrationblog.Kluwerarbitration.Com/2020/03/01/Is-Increasing-Gender-And-Ethnic-Diversity-In-Arbitral-Tribunals-A-Valid-Concern/.

[22] Gemma Anderson, Richard Jerman And Sampaguita Tarrant, Morrison & Foerster, 'Diversity In International Arbitration', Thomson Reuters Practical Law, https://Uk.Practicallaw.Thomsonreuters.Com/W-0195028?Transitiontype=Default&Contextdata=(Sc.Default)&Firstpage=True#Co_Anchor_A663452

can be placed,[23] together with other serious bottlenecks like 'Pipeline leak', wherein the pool of people available for appointment to an arbitral tribunal keeps on decreasing.[24] Moreover, most arbitrators appointed are either retired judges or senior counsels, and in most legal systems, minorities are historically and systematically underrepresented in such positions.[25]

At other times, however, the difference lies in the specific nature of the issue – for instance, many might argue that geographical diversity is affected by the country or geography of the dispute as most parties would want to appoint arbitrators who know the region and its history well, whereas such factors do not act as a hurdle for gender diversity. However, the bottom line for such problems is that the solution ultimately lies in recognition and expansion of the circle of arbitrators to provide opportunities to candidates from diverse backgrounds.

In addition to these aforementioned factors, the lack of information about arbitrators and an established reputation also serves as significant deterrent in selection. As *Yves Dezalay* and *Bryant G. Garth* have argued, there exists a feedback loop within arbitral institutions, of which chairs, clients, potential arbitrators and counsels are a part.[26] Such a feedback loop while answering to any queries regarding the quality of potential arbitrators are often conservative and riddled with inherent biases.[27] Such practices could not only raise questions on the merit of the arbitrators selected, but can also at the micro level adversely affect the validity of the proceedings. The only way to counter such a problem is by curing the information asymmetry i.e., making arbitrator information (like their skill level, experience, area of specialization, track record, and so on) accessible to the all interested parties, thereby making such a feedback loop redundant.[28] Many organizations have already begun this process: for example, Arbitrator Intelligence, a not-for-profit organization aims to promote openness, accountability, and diversity in arbitrator selection. This is done by making information about the arbitrators' prior decision-making more widely accessible via the release of AI Reports. Arbitrator

[23] Darius J. Khambata, 'Tensions Between Party Autonomy and Diversity', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, (2015) 18 (Kluwer Law International; ICCA & Kluwer Law International) pp. 612-637.

[24] Gemma Anderson, Richard Jerman And Sampaguita Tarrant, Morrison & Foerster, 'Diversity In International Arbitration', Thomson Reuters Practical Law, https://Uk.Practicallaw.Thomsonreuters.Com/W-019.5028?Transitiontype=Default&Contextdata=(Sc.Default)&Firstpage=True#Co_Anchor_A663452

[25] Fakhruddin Ali Valika, Improving the Participation of Minorities in International Arbitration, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2019/11/10/improving-the-participation-of-minorities-in-international-arbitration/.

[26] Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and The Construction of A Transnational Legal Order, (The University of Chicago Press 1998).

[27] Lucy Greenwood, 'Tipping The Balance – Diversity and Inclusion in International Arbitration', 2017 33 (1) Arbitration International.

[28] C. Rogers, 'The Vocation of the International Arbitrator', (2005) 20(5) American University International Law, available at – https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1150&context=auilr.

Intelligence has garnered support from arbitration practitioners, who agree that more knowledge about arbitrators can enhance international arbitration for everyone. Young and diverse arbitrators, in particular, might benefit immensely from eliminating the information bottleneck that hinders them from creating reputations that boost their chances of future appointments. The use of AI technology on the available databases can improve data analytics to suggest the most suitable candidate for a particular case based on the requirements and preferences of the parties. But whether such technology can completely filter out human biases is a continuing debate with scholars diversely divided.[29] Additionally, use of such technology may be affected by two potential hurdles – Data and Filter. The question of which data must be considered to feed is and such data must be ranked is significant. For instance, any young arbitrator who might register in the platform could display his/her previous work experience in a firm, published opinions or papers as information. However, such data might be much different for an experienced arbitrator, who might have an edge on account of the experience. This could also be true for two similarly aged person with same qualifications and publications but with different number of previous appointments due to different geographical opportunities. The question that then arises, is on the capability of the AI algorithm to differentiate such data while making diverse appointments. The second issue of filter is intricately related to data. For any algorithm, even if all the significant data have been included, the power of using a filter will lie with the consumer – which in most if not all cases is the party. There is every chance that the parties will in such cases suffer from consumer biases. To build on this argument, imagine this, if Mr. X wants to buy a smartphone and found 2 models on the same price range with the exact same features but one of them is from a company that is launching its first product (which is the phone), while the other is from a company that has established itself in this business from the last 10 years. Inevitably, in most cases, the consumers would buy the latter phone, owing to the trust that the brand has built. To think of it, the idea of choosing an arbitrator is not much different. It is not necessary for the parties to select a filter of diversity which instructing the algorithm to choose potential matches.

In the recent years, several institutions have created and supported initiatives to increase gender, ethnic and racial representation. But this has not necessarily translated into a tangible positive impact. Taking gender diversity as an example, Lucy Greenwood and Mark Baker highlight the statistics of American Arbitration Association's International Centre for Dispute Resolution (ICDR). The ICDR had

[29] Matthew Hutson, 'Even artificial intelligence can acquire biases against race and gender' (Science, 13 April 2017), available at www.sciencemag.org/news/2017/04/even-artificial-intelligence-can-acquire-biases-against-race-and-gender.

taken steps to increase the number of women arbitrators in the roster, but had later observed out that mere inclusion of women in arbitrator rosters have not led to a corresponding increase in the number of female arbitrator appointments.[30] Therefore, while recognizing the issues of information asymmetry or pipeline leak is important, addressing it alone cannot solve the problem. Rather, both these issues point to an overall structural problem and the pressing need for a comprehensive reform. The screening and appointing of arbitrators, as discussed above, often takes place through word of mouth, which is severely limited in scope. As a result, diverse and qualified candidates, who are less visible or are not part of such circles, do not make the cut.[31]

2.3 The geographical problem

Arbitration suffers from a colonial hangover – there are no two ways of saying this. More than three centuries ago, the Jay Treaty was concluded between the United States and Great Britain. This treaty created a private mechanism to resolve property-disputes, which later developed into modern arbitration. Despite the passage of hundreds of years, this original Anglo – European influence on arbitration remains visible even today.[32] This can be narrowed down to the impact of decades of colonization and its consequent influence on the judicial systems of a number of countries. Additionally, even today, for most countries, a large portion of the business comes from Anglo-European countries, which has led to several bilateral agreements where the preferred institutions are mostly Anglo European, barring a few exceptions.[33] This in most instances also has to do with the commercial or investment interest that western companies bring to the poorer or less developed countries, which inevitably impacts the bargaining power. Many critics have pointed out the practices in international investment law as an attempt to maintain Anglo European hegemony in non-European states, thereby linking it with colonialism and protection of oppressive commercial interests.[34]

[30] Lucy Greenwood and C. Mark Baker, 'Is the balance getting better? An update on the issue of gender diversity in international arbitration, Arbitration International' (2015) 31 (3) Arbitration International.

[31] Gemma Anderson, Richard Jerman And Sampaguita Tarrant, Morrison & Foerster, 'Diversity In International Arbitration', Thomson Reuters Practical Law, https://Uk.Practicallaw.Thomsonreuters.Com/W-019.5028?Transitiontype=Default&Contextdata=(Sc.Default)&Firstpage=True#Co_Anchor_A663452.

[32] Investor-State Dispute Settlement, Office of The U.S. Trade Representative (2015). https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.

[33] James E. Meason & Alison G. Smith, 'Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench', (1991) 12 Northwestern Journal of International Law & Business, https://scholarlycommons.law.northwestern.edu/njilb/vol12/iss1/7/.

[34] Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (CUP 2013) 21.

Further, there is an evident cyclical pattern – the parties tend to trust arbitrators with a proven record of 'expertise' or 'experience' over their diverse background, which given the history of appointments are mostly Anglo European men. Significant to mention here, although the HKIAC and SIAC can be in many ways termed as outlier, a closer look will show that it is inevitably the Anglo European community who have dominated and contributed to its development immensely.

2.4 Comparisons with the Indian Judicial System – Policy Commonalities

We now undertake a case study of the Indian judicial system from the viewpoint of diversity. Any attempt to draw a comparison of arbitration with the Indian judicial setup can be potentially countered with argument that both these systems are vastly different, insofar as the very nature of public law is sharply distinct from private law. However, the influence of national law on arbitration as well as the concerted attempts to project arbitration as an effective alternative to courts cannot be undermined. The general understanding of arbitration has thus shifted to the point that it can no longer be considered to be a purely private law, and even in the narrowest sense will have elements of public law.[35] Considering such a perspective, it might not be completely unwarranted or unhelpful to compare and understand the dilemma surrounding diversity that has plagued many 'national' judicial systems to better innovate solutions for an 'international' system of arbitration.

Moreover, the problem of a lack of gender diversity in the judiciary is hardly an Indian one. To identify this, the UN published a Special Rapporteur report focusing on 'gender equality in the judiciary' which examined the current situation of women's representation in judicial systems. The report identified the obstacles preventing their sufficient access, advancement, and retention in the court and prosecution services, and throughout the report, pointed out the variety of obstacles women experienced in gaining entry to and succeeding in a job in the legal system. It highlighted that underrepresentation of women in decision-making positions or their restriction to particular sections of the legal system are the results of many regulatory impediments and institutional, structural, and cultural barriers that contribute to discrimination against women in the judicial system. The research also suggested that gender stereotypes were one of the primary reasons for discrepancy in the number of women judges in the various courts and tribunals,

[35] Darius J. Khambata, 'Tensions Between Party Autonomy and Diversity', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, (2015) 18 (Kluwer Law International; ICCA & Kluwer Law International) pp. 612-637.

as well as putting women judges and prosecutors at a greater risk of aggressiveness or other kinds of workplace harassment.[36]

Though the empirical survey suggested that the share of women in certain jurisdictions had already surpassed 50 percent, such as Europe, where women make up an average of 54 percent of judges, that statistic that is bolstered by countries such as Latvia (81 percent) and Romania (74 percent) (79 percent). In other parts of the world, such as in Nepal, women comprise six percent of judges and magistrates, and in Pakistan, Egypt, and the United Arab Emirates, women constitute fewer than one percent of the bench. Moreover, in 2019, Kuwait, Oman, Saudi Arabia, and Somalia had no female judges whatsoever. Another notable result of the paper was that women judges tend to congregate around courts that deal with matters deemed suitable for their gender, such as family courts at the lower levels, obfuscating the data.[37]

This study of the Indian judicial system highlights certain common elements which are often identified as root causes for the lack of diversity, which include a lack of transparency in the appointment process, historical underrepresentation, structural problems, and so on. Moreover, much like arbitration, the pipeline issue has often been cited as an important underlying reason for the lack of gender representation. However, with the passage of time, the relevance of this reason diminishes sharply.

The India Justice Report 2020,[38] which examined diversity in administrative and judicial bodies, highlighted a very significant observation: unlike other public authorities, the data for diversity in the judiciary, particularly in the lower or subordinate courts, was not available. For the higher judiciary especially in the Supreme Court, much like arbitration, although there has been some visible progress, the relative proportion even today remains low. In fact, much of this progress owes to the appointment of just two women in 2018 and another three in 2021, bringing the tally of currently serving women judges to four in the Supreme Court of the country (constituting a mere 12%.).[39]

The appointment of judges to Supreme Court is described under Article 124 (3) of the Indian Constitution, which identifies the following people to become judges -

[36] 'UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers', 26 May 2015, A/HRC/29/26/Add.3, available at: https://www.refworld.org/docid/558410d84.html.

[37] *Ibid.*

[38] 'India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid, India Justice Report 2020', https://www.tatatrusts.org/Upload/pdf/ijr-2020-overall-report-january-26.pdf.

[39] Sumant Sen, Jasmin Nihalani & Vignesh Radhakrishna, Data, 'Only 11 women Supreme Court judges in 71 years, three of them appointed in 2021', (The Hindu, Sept. 03, 2021, https://www.thehindu.com/data/only-11-women-supreme-court-judges-in-71-years-three-of-them-appointed-in-2021/article36272407.ece.

(a) *'has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or*

(b) *'has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or*

(c) *'is, in the opinion of the President, a distinguished jurist.*[40]

What is notable here is that although the President is the appointing authority, the selection is carried out by a collegium composed of the CJI and the next four senior-most judges of the Supreme Court, who consult with one another to determine the next set of judges.

To contextualize the pipeline issue in judicial appointments, we must consider the representation of women in High Courts as well as subordinate courts. For High Courts, where the appointment is once again done through a collegium, women constitute around 12-13% of the total number of judges,[41] while, in subordinate or lower courts, where the appointments take place by selection through a competitive exam, women constitute approximately 40%.[42] While the numbers for the subordinate judiciary are better, though not satisfactory, the significant dip of almost 18-20% in the higher judiciary, where all of the responsibility and discretion lies with the collegium, points to the prevailing biases within the system.

Empirical studies have identified such biases to be operative in two forms – *structural* or *systemic biases*, which reflect stereotypes based on gender, caste, class, race, ethnicity and age, and *discretionary* or *cognitive biases*, which describe the unfettered powers granted to the biased authorities making such appointments.[43]

As discussed above, structural or systemic bias refers to the institutional patterns and practices that confer advantage to some and disadvantage to others based on identity. A standard structural bias operates in the following way: the positions of power of influence are largely held by members of a dominant group, because (and also a result of which,) "merit" is commonly identified with that group. All of this causes attention to be centred on members of that group, creating

[40] Article 124, The Constitution of India, https://www.constitutionofindia.net/constitution_of_india/the_union/articles/Article%20124.

[41] Soni Mishra, 'Gender parity elusive in Indian judiciary; mere 11.96 pc judges in higher courts are women', (The Week Sept. 03,2021), https://www.theweek.in/news/india/2021/09/03/gender-parity-elusive-in-indian-justice-system-mere-11-96-pc-higher-courts-judges-are-women.html.

[42] Arijeet Ghosh, 'Tilting the Scale: Gender Imbalance in the Lower Judiciary', Vidhi Centre for Legal Policy, (Feb. 12, 2018), https://vidhilegalpolicy.in/2018/02/12/report-on-gender-imbalance-inthe-lower-judiciary/.

[43] Aishwarya Chouhan, 'Structural And Discretionary Bias: Appointment Of Female Judges In India', (2020) 21 (3) Georgetown Journal of Gender and the Law, https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2020/08/Structural-and-Discretionary-Bias_Appointment-of-Female-Judges-in-India.pdf.

a “norm” that faces little threat of disruption.[44] These norms go unexamined, creating a set of standards, expectations, assumptions and beliefs, that come to define key aspects of organizational culture. Because they uphold the “norm”, they are invisible to the dominant group, who do not understand their unearned privilege or the fact that these advantages/benefits/rewards not available to all.[45]

Discretionary or cognitive biases refer to unconscious patterns of thought which have the unintended effect of conferring advantage to some and disadvantage to others. These biases exist at the individual level, cumulatively giving rise to entrenched structural biases.[46] These biases may be causes by a variety of underlying psychological factors. Examples include confirmation bias, which refers to the human tendency to interpret information to confirm their preconceptions, essentialism wherein decisionmakers are guilty of categorizing people and things according to their “essential nature” regardless of variations, and halo effect, which refers to the tendency for one’s positive or negative traits to “spill over” from one area of personality to another in others’ perceptions.[47]

Such forms of biases are in many ways commonly associated with most countries’ judicial and legal setups and can be easily transposed to the arbitration setup as well. The reason we highlight the diversity and inclusivity issues with India’s judicial setup is to showcase that, unlike what many have asserted, the problems do not always lie with the ‘leaking pipeline’, they rather often lie with the individual – be it the parties, the arbitrators, or the institution’s representatives, as well as to the extent these individuals are willing to consider change, because in the largest number of scenarios, they are the decision-makers. The issue of arbitration is also closely connected to the judiciary in another way – a large number of these judges later go on to serve as arbitrators, which again highlights the importance of having diversity at every possible level of the legal system.

There are a number of well-documented structural obstacles to gender diversity in arbitral appointments and proceedings, as noted in the literature and commentary. These include issues that contribute to the low retention of women in the legal profession; the impact of unconscious bias on female professional development; the challenges female lawyers may face due to a lack of flexible working arrangements; and issues relating to gender-based and sexual harassment

[44] P. McIntosh, ‘White privilege: Unpacking the invisible knapsack’, (1998) Re-visioning family therapy: Race, culture, and gender in clinical practice.

[45] Rosette, Ashleigh Shelby, and Leigh Plunkett Tost. ‘Perceiving social inequity: when subordinate-group positioning on one dimension of social hierarchy enhances privilege recognition on another.’ (2013) 24 (8) Psychological science, doi:10.1177/0956797612473608.

[46] Krieger, ‘The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity’ (1995) Stanford Law Review, https://www.jstor.org/stable/1229191.

[47] Reskin, Barbara, ‘The Proximate Causes of Employment Discrimination.’ (2000) 29 (2) Contemporary Sociology 319–28, https://doi.org/10.2307/2654387.

and bullying in the workplace. These are the structural biases that prevent women from reaching or ascending in the pool of arbitrators.

However, it may be argued that discretionary bias is far more insidious in international arbitration. This owes to the fact that word-of-mouth is the most preferred source of information about arbitration candidates. Consequently, arbitration users may not have access to, or may not proactively acquire, information on new, more diverse arbitrator candidates who may be well-qualified for the post of arbitrator in a given case. Unconscious prejudice may potentially influence the parties' choice. According to a Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings, unconscious bias may impact the perception of the best candidate in favour of male applicants due to an implicit link between 'masculine' attributes and those of a successful arbitrator, such as gravity or aggressiveness.[48] Recent debates and discussions have focused on the influence of unconscious prejudice on arbitrator selection, which has been defined as one of the single most important causes for the discrepancy between male and female representation on international courts. The Report also emphasises that the strongest qualification for the position of arbitrator may be past experience, making it difficult for applicants to be appointed for the first time. This may be especially troublesome for women, since studies have shown that males are promoted based on their potential, while women are promoted based on their experience.[49]

Part III: towards a novel solution

Identifying the causes responsible for the problem only constitutes half of what is considered 'innovating' for solutions, as it is rather the construction of solutions and their subsequent implementation wherein the primary hurdle lies. At the institutional level, increased transparency through a public listing of names and cases associated with these arbitrators is surely a welcome change, but such listing alone cannot even begin to change the prevailing biases. Lucy Greenwood argues for the need to create an '*objective and descriptive list of characteristics'* that an arbitrator possesses, distinct from the prevailing system, wherein an arbitrator' capabilities are simply described using generic terms such as 'expertise' and 'influence'. This, has helped in creating an objective list of people based on the most necessary criteria, rather than depending so heavily on individual

[48] 'ICCA Reports No. 8: Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings', https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf.

[49] *Ibid.*

recommendations.[50] Another positive trend from certain institutions has been the relaxation offered to clients to select arbitrators outside the institutional pool.[51] However, any step towards creating a diverse tribunal would depend on multiple stakeholders, not only at the individual and institutional level, but also on how the parties or clients who are completely detached from these discussions perceive this issue when presented between a choice of party autonomy and diversity. Therefore, all actors involved must play a significant role in achieving diversity.[52] While any diversity in arbitration can only be maintained by balancing it with party autonomy without any conflict that harms the interests of the parties,[53] it must be recognized that any lack of concrete actions or reforms could be viewed as mere symbolic gestures to avoid repercussions towards the overall system of arbitration.

The onus must also lie with the firms and counsels, who can, within their limits, informally push to convince their clients for hiring and appointing more diverse candidates wherever possible. This can be done by enlisting the benefits of such appointments to the clients – which can depend on circumstances including lower arbitrator fees or more specific subject matter expertise.[54] Law firms can also adopt various training, sponsorship and mentorship initiatives to ensure that when called for – there is a pool of diverse candidates waiting for chances. Furthermore, networking is a significant part of the any arbitration circle – here too the firms can invite diverse candidates as delegates or speakers to boost their profile among the community.

This also holds true for the already-appointed arbitrators, who must together appoint another arbitrator. These individual players have a significant role to play in bringing organic change, so long as diversity and qualifications complement each other in the process of selection.[55] As long as such ethical conundrums are kept at bay, and clients feel reassured that they will not be confronted with an underqualified arbitrator, stakeholders can always argue for the benefits of

[50] Lucy Greenwood, 'Moving Beyond Diversity Toward Inclusion in International Arbitration', Axel Calissendorff and Patrik Schöldstrom (eds), Stockholm Arbitration Yearbook, (Wolters Kluwer 2019) Volume 1, pp. 93-102

[51] Darius J. Khambata, 'Tensions Between Party Autonomy and Diversity', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, (2015) 18 (Kluwer Law International; ICCA & Kluwer Law International) pp. 612-637.

[52] Rothman Deborah, 'Gender Diversity In Arbitrator Selection' (2012) 18 Dispute Resolution Magazine 22, https://deborahrothman.com/wp-content/uploads/2017/03/April12_ABA-Disp.Res_.J._Rothman_GenderDiversity_FINAL.pdf.

[53] Sumant Sen, Jasmin Nihalani & Vignesh Radhakrishna, Data, 'Only 11 women Supreme Court judges in 71 years, three of them appointed in 2021', (The Hindu, Sept. 03, 2021, https://www.thehindu.com/data/only-11-women-supreme-court-judges-in-71-years-three-of-them-appointed-in-2021/article36272407.ece.

[54] Paula Hodges, May Tai and Elizabeth Kantor, 'Inside Arbitration: Diversity – What Has Been Done So Far and Can the Arbitration Community Do More?', https://www.herbertsmithfreehills.com/insight/inside-arbitration-diversity-what-has-been-done-so-far-and-can-the-arbitration-community-do.

[55] Samaa A.F. Haridi, 'Towards Greater Gender and Ethnic Diversity in International Arbitration', (2015) 2 Bahrain Chamber for Dispute Resolution International Arbitration Review. 305-316.

diversity, the most significant of which might be potentially lower costs cost involved in appointment.

Another, potentially controversial means of achieving diversity is through the introduction of quotas or affirmative measures. The language of standard arbitral clauses in contracts or/and the procedure of arbitrator appointment in different institutional rules can integrate an aspect of diversity in conjunction with intersectionality to ensure a balanced panel. Such clauses could as a consequence create a mandated place for diverse arbitrators when adopted. The limitation of such an initiative though is that it can only be suggestive without stretching party autonomy. However, even though not obligatory, putting such suggestion on the rules can impact a party to 'think and consider' diverse options – which they might not otherwise. Kaufmann-Kohler and Michele Potestà in their work on 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' had suggested for similar steps by arguing that – there should be consideration of "*inserting aspirational language or quantitative targets … at least for a transitional period until such time when gender balance is achieved naturally*" if and when a multilateral investment tribunal is put in place.[56]

While many have argued against quotas or affirmative actions – as being rather symbolic and a path to moral licensing, historically it has been an effective way to increase diversity in corporate boards. If reservations to diverse candidates in tribunal selections can be provided without compromising on the quality of the appointments, it would give a seat to the people who have so far been in the pool but have been deprived of any opportunity. Over the course of time, it would be possible to create a pool of diverse and experienced arbitrators who can then serve as role models for future generations as they instantiate public values.[57] Moreover, numerous studeis show that an increased number of women in the pool does not necessarily lead to more appointments, especially when the process of selection is closed, opaque and discretionary. Studies though have shown the positive impact on women representation through introduction of mandatory quotas which in some cases could be as high as 20%.[58] A counter argument to any such initiative could be a dip in the capability or quality of the arbitrators, but for any such argument, we must remember that the current procedure appears to be keeping qualified people

[56] Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' (Report, Geneva Center for International Dispute Settlement, 15 November 2017) 41 [66] http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf archived at https://perma.cc/RY7S-CSAM.

[57] 'Quotas and The Transatlantic Divergence of Corporate Governance' (2014) 34 Northwest Journal of International Law & Business 249.

[58] Nienke Grossman, 'Shattering The Glass Ceiling in International Adjudication', (2016) 56(2) Virginia Journal of International Law, Https://Www.Ohchr.Org/Documents/Hrbodies/Hrcouncil/Advisorycom/Submissions/Annex4-UBSL.Pdf.

off the seat, and while the jury is out on such a debate, any such assumption might be counterproductive to arbitration's global image. To ensure that parties have autonomy over arbitrators, the institutions can provide a list of diverse arbitrators based on factors affecting the dispute from which the parties can label each listed arbitrator as either acceptable or not. A similar approach of pointing out a few acceptable arbitrators to the provider can be made through the use of strike and rank method.[59] Moreover, this should be a unified global institutional approach so that parties do not choose forums/institutions to escape such rules.

Changes sometimes require creativity, even at the cost of being radical. Institutions can work with firms and counsels to provide parties with the option of arbitrator panels in addition to individual arbitrators. These panels can be formed keeping in mind the subject matter, geography, experience, diversity and other significant elements of the dispute. For example, in a dispute pertaining to a shareholder dispute in Namibia, the institutions can have a readymade three-member tribunal which represents in addition to legal acumen the elements of diversity. Although radical, such ideas are not unheard of, the idea of permanent panel of arbitrators – though a little divergent from our proposal, has been tinkered with, as a means to improve selection, recruitment and diversity.[60] Additionally, while we discussed the issues with the over dependence on AI algorithms to solve problems on diversity, it is important to appreciate that the introduction of technology into arbitration is at a nascent stage and any development from here should only benefit the increase in diversity.

Conclusion

The conversations surrounding diversity have started to garner importance in all spheres of the corporate setup from boardrooms to entry level hires. With such reckoning worldwide, it is imperative that a system that presents itself as a global solution to disputes follows suit. Interestingly each of this setup identifies similar barriers for the lack of diversity of all forms – be it in corporate boards, arbitral tribunals or judicial systems. What studies around them also consistently highlight is that the introduction of diversity has helped improve performances, broadening of opinions as well as benefited setups with new perspectives and diversity of

[59] Sarah Rudolph Cole, 'Arbitrator Diversity: Can It Be Achieved?', (2021) 98 (3) Washington University Law Review. Available at: https://openscholarship.wustl.edu/law_lawreview/vol98/iss3/11.

[60] Hoffman & Lamont E. Stallworth, 'Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity', (2008) 63(1) Dispute Resolution Journal, https://arbitrationlaw.com/library/leveling-playing-field-workplace-neutrals-proposal-achieving-racial-and-ethnic-diversity.

thoughts.[61] For arbitration, diversity and inclusion are important not only because of these factors of improvement but to avoid any possible backlash that might result from the lack of it. The homogenous idea of 'male, pale and stale' does not represent the shifting trends in global economics, where many countries from Asia and Africa today demand for a greater stake. The change therefore is much rather an impending need for survival, legitimacy and adaptability for the idea of arbitration to remain relevant. The importance of having diverse ethnic, social and geographical representation in tribunals was well highlighted in the *Chevron v. Ecuador*[62] where the interim award faced criticism for its lack of understanding of the indigenous issues.

While solutions identified in the paper could definitely influence change, much of it dives down to individual responsibility. The legal system in most countries, including the judiciary in India functions in a top-down approach where a collegium of the Supreme Court decides everything – from appointment to transfer of new judges. Therefore, onus for change almost always lies with them. Similar to this, in arbitration too, the realization, conversations and ultimately change must start from counsels, arbitrators as well as institutions who presently play a major role or are very known in arbitration around the world. Any arbitrator, institution or counsel must realize that if they have any influence on a large circle of arbitrators or on the process of appointments, then they must exert their influence to take positive steps, as the onus lies on each to bring change given the nature of the problem. It is probably quiet befitting to then take the liberty to end this paper with the words Mahatma Gandhi on what should guide us towards the attitude necessary for achieving an inclusive and diverse system of arbitration, "*We but mirror the world. All the tendencies present in the outer world are to be found in the world of our body. If we could change ourselves, the tendencies in the world would also change. As a man changes his own nature, so does the attitude of the world change towards him. This is the divine mystery supreme. A wonderful thing it is and the source of our happiness. We need not wait to see what others do*".

All it could potentially take, therefore, is for the ones associated with the world of 'arbitration', be it counsels, parties or institutions – to change their attitude and not necessarily wait to see what steps others take to bring down the hegemony or biases associated with the system to make the process a truly 'international' one in letter and spirit.

[61] Stephanie, Mary-Hunter, Sakshi, Jared, 'When and Why Diversity Improves Your Board's Performance', (Harvard Business Review, March 27, 2019), https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance.

[62] Chevron v. Ecuador, Interim Award, Jan. 15, 2012.

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