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Diversity in Action

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This article, which is based on the keynote speech delivered to open the 2022 edition of the Paris Arbitration Week, addresses the steps to be taken by international arbitration stakeholders individually (users, arbitral institutions, outside counsel, and arbitrators) to provide an urgent global response to the diversity gap in international arbitration. A failure to take responsibility will impede the quality, efficiency, and legitimacy of international arbitration as a self-standing means of dispute resolution, in which the public expects to see a reflection of its own diversity.

> He who is different from me does not impoverish me – he enriches me. Our unity is constituted in something higher than ourselves – in Man... For no man seeks to hear his own echo, or to find his reflection in the glass.
>
> Antoine de Saint-Exupéry

Introduction

While a decent start has been made over the last couple of years[1] to diversify the field of arbitration, it very much remains work in progress. Where the issue was approached in the past as a matter of choice, it has become a matter of necessity, on which the future of arbitration as a self-standing means of dispute resolution depends.

Inequality and discrimination are as old as humanity. The accumulation of property comes with inequality because those owning property gain power over those who do not.[2] The tendency of those who own property to want to concentrate it in the hands of like-minded people is as old as humankind.

During the 20th century, much effort was made by governments to reduce the inequalities exacerbated by the industrial revolution.[3] Irrespective of race, gender, and class, people were given social protection, access to education, healthcare and the right to vote. Apart from the need for a productive workforce, the rationale of those policies was that equal rights and opportunities would lead to the economic prosperity of populations and societies as a whole.[4]

At the outset of the 21st century, the internet manifested itself as one of the most empowering means of exercising the right to equal opportunity, allowing people access to vast amounts of information. People living in the most remote areas of the world can follow what happens anywhere around the globe. As such, the internet bridges the gaps between continents and connects people and businesses. However, while globalization and the internet have united the world horizontally, they may have divided it vertically.[5]

1 P. Hodges QC, M. Tai, E. Kantor, '**Inside arbitration: diversity – what has been done so far and can the arbitration community do more?**', Herbert Smith Freehills (22 Feb. 2022); C. Albanesi, M. Noseda Zorrilla de San Martín, C. Warner and S. Lee (Linklaters), '**Guest blog: Gender diversity in arbitral tribunals – The challenges ahead**' (https://iccwbo.org, 9 Dec. 2021): 'In 2020, ICC made 1,520 appointments and confirmations. With 355 women arbitrators confirmed or appointed by the ICC Court, the percentage of women sitting in ICC arbitral tribunals reached 23.4% in 2020, a record for the arbitral institution. Last year also saw female appointees make up 37% of the ICC Court's total arbitrator appointments, 28% of co-arbitrator chair appointments and 16% of party appointments, all figures seeing an increase compared to 2019.'; D. Sabharwal, M. Wright, '**The Diversity Dilemma in Arbitrator Appointments**' (Kluwer Arb. Blog, 30 July 2018): 'A less positive story emerged in relation to the other aspects of diversity we profiled: a third or less of respondents agreed that progress has been made over the past five years in relation to age (35%), geographic (34%), cultural (31%) and especially ethnic (24%) diversity'.

2 J.J. Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (1754).

3 E.H. Hunt, 'Industrialization and Regional Inequality: Wages in Britain, 1760–1914', (1986) 46 *The Journal of Economic History* 4, pp. 935–966.

4 A. D'Amato, 'International Human Rights at the Close of the Twentieth Century', (1988) 22 *The International Lawyer* 1, pp. 167–177.

5 Y.N. Harari, *Sapiens: A Brief History of Humankind* (McClelland & Stewart, 2014), p. 369.

Today, in 2022, the world is more globalized than ever. Everything and everyone is connected. The COVID pandemic, climate change, a container ship blocking the Suez Canal, and the Ukraine-Russia crisis are all examples of circumstances that may not have originated in our home countries, but quickly affected our daily lives and changed the parameters of the manner in which we conduct our business. Supply chain challenges, food scarcity, rising energy prices, shortage of raw materials and migration are the tangible consequences of those developments. As humankind is now fully interconnected, people no longer have the luxury of ignoring crises elsewhere in the world as their lives and business are likely to be affected at some point.

The international arbitration community is tasked with the resolution of the disputes that the global economy generates. Arbitration, as an organized form of dispute resolution, has existed for approximately 120 years.[6] It is based on the parties' voluntary submission to the jurisdiction of an arbitral tribunal, waiving their fundamental right of access to the state court, afforded by law.[7] The legitimacy of arbitration as a self-standing means of dispute resolution stands or falls with the trust that the users place in the decision-makers, the quality of the process they conduct and the fairness of the decisions they render.[8] The role that arbitrators play in the administration of international justice comes with tremendous responsibility.

Over the last 120 years, that responsibility has been exercised principally from the calm, comfort, and confidentiality of private hearing rooms. With the onset of the internet, the public at large found out that in the context of investor-state dispute settlement (ISDS) sovereign interests were being decided by private arbitrators. As a result, the arbitration system itself became subject to public scrutiny and criticism.[9] The confidentiality of arbitration – a feature that used to be one of its valued tenets – caused indignation and public outrage in the ISDS context.[10]

As public scrutiny threatened to compromise the trust of the users and the legitimacy of the system, transparency initiatives were launched to safeguard the credibility of arbitration, not only in the investment treaty setting but also in the commercial context.[11] In addition to challenging the confidentiality of arbitrations, public criticism also focused on the very limited and homogeneously composed pool of 'private judges' who regularly serve as arbitrators and decide the large majority of international disputes. While there are diverging views in the arbitration world as to whether that perception is right or wrong, it has become obvious that calls for more diversity can no longer be ignored.

The reality of today's globalized world is that the public expects to see a reflection of its own diversity in government, business, media, boards and the judiciary.[12] There is no reason why arbitration would be shielded from that development. In order for the users to maintain confidence in the administration of justice through arbitration and for the system to be perceived as legitimate by the public at large, the international arbitration sector must reflect the world whose disputes it resolves. Given that roughly 60% of the world's population is Asian, 50% of the world's population is female and 15% of the world population is affected by some form of disability,[13] it is readily apparent that the arbitration community does not yet mirror the world whose disputes it resolves.

Diversity is no longer 'nice to have', as it has long-time been treated, but it is a necessity without which arbitration will no longer be capable of catering for the needs and meeting the expectations of its users.

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6 F.D. Emerson, 'History of Arbitration Practice and Law', (1970) 19 *Cleveland State Law Review* 1, pp. 155–164.

7 A.M. Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012); United Nations, 'Alabama claims of the United States of America against Great Britain', in *Reports of International Arbitral Awards* (2012), Vol. XXIX, pp. 125–134.

8 J. Karton, 'Diversity in Four Dimensions: Conceptualizing Diversity in International Arbitration', in G. Colombo, J. Karton, F. Balcerzak, S. Ali (eds.), *Sustainable Diversity in International Arbitration* (Edward Elgar, 2022), pp. 8-9.

9 L. Malintoppi, A. Yap, 'Challenges of Arbitrators in Investment Arbitration: Still Work in Progress?', in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd ed., Oxford University Press, 2018), p. 153.

10 C. Knahr, A. Reinisch, 'Transparency versus Confidentiality in International Investment Arbitration – The *Biwater Gauff* Compromise', (2007) *The Law and Practice of International Courts and Tribunals* 6, p. 97.

11 Dr F. Adeleke, *The Role of Law in Assessing the Value of Transparency and the Disconnect with the Lived Realities under Investor-State Dispute Settlement*, Working Paper No. 06/2015, p. 9; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, para. 22: 'Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function.'; C.A. Rogers, 'Transparency in International Commercial Arbitration', (2006) 54 *University of Kansas Law Review* 1301; S. Kumar, R. Pratap Singh, 'Transparency and Confidentiality in International Commercial Arbitration', (2020) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 86, Issue 4 (2020), pp. 463–481.

12 S. Haridi, 'Towards Greater Gender and Ethnic Diversity in International Arbitration', (2015) 2 *BCDR International Arbitration Review*, pp. 305-307.

13 UNFPA, Population trends, available at **https://asiapacific.unfpa.org/en/populationtrends**; World Bank, Statistics Population, available at **https://data.worldbank.org**; World Health Organization, Statistics, available at **https://www.who.int/news-room/fact-sheets/detail/disability-and-health**.

The good news is that the international arbitration sector embarks on the diversification process from a position of relative strength. International arbitration is inherently diverse as it brings together parties, lawyers, and arbitrators from different countries, who generally apply multiple sets of applicable laws. Navigating the cultural and legal differences in international arbitrations requires not only solid knowledge of the law and of the case file, but also interpersonal skills, judgment and a level of gravitas to conduct the proceedings. In order to overcome those differences and to make the arbitral process work, open-mindedness is essential.

And that is where it becomes tricky. Most arbitration practitioners are convinced that they are open-minded. Yet, everyone is biased in their own way. Everyone sees the world and approaches business through their own frame of reference. People naturally gravitate towards people with a similar appearance, a similar education, a similar social background and similar professional experience. All actors in the arbitral process are loaded with bias. Because every person is biased in some shape or form, it is imperative to stop thinking that others prevent the arbitration sector from diversifying. As we are all responsible for and perpetuate the flaws in the system, we all carry responsibility for fixing the flaws of system too.

In order to redress the lack of diversity in the international arbitration sector, three steps must be taken: we must raise awareness of the issue[14] (I); we must recognize and focus on the benefits of diversity (II); and we must take action (III).

I. Raising awareness

In the arbitral process, there are several barriers that limit diversity. The principle of party-autonomy – another valued tenet of international arbitration[15] – is one of the most important limiting factors. When asked to select counsel or an arbitrator for a bet-the-company case, everyone looks for candidates in their own circles of like-minded people. Inhouse counsel and private practitioners seek predictability and look for professionals whom they can trust because they received a similar education, they gained similar professional experience and they go about decision-making in a similar manner as they do. In that process, practitioners tend to rely on the information and experience of other valued colleagues whom they trust and – more often than not – resemble. For important cases, in-house counsel, external counsel, arbitrators and arbitral institutions will always seek out seasoned arbitrators, with a gilded track-record and stellar rankings, who are necessarily part of the international arbitration establishment, because – as the saying goes – nobody ever got fired for buying IBM.

Although no one is against diversity – or at least not openly – the noble diversity efforts tend to be reserved for smaller, less complex and lower value cases. In those cases, parties apparently find it easier to appoint women, less seasoned arbitrator, professionals from a different ethnic background, or differently abled persons. A frequently heard excuse for homogenously composed tribunals is that diversity can never come at the expense of quality. In those instances, it is routinely assumed that there are no suitable female arbitrators, younger arbitrators or arbitrators from a specific region with the requisite qualification for a particular dispute. However, that assumption is not rooted in the lack of available talent in the rapidly growing arbitrator pool, but rather in the lack of effort and willingness to look beyond the familiar circles.[16] As such, the real question is by what standard suitability must be defined and whether those outside the relatively homogeneously composed international arbitration establishment can simply be dismissed as non-suitable.

Lawyers are trained to ask questions, to be rigorous, to investigate and to verify facts. That same rigor must be applied in selecting counsel and arbitrators with more diverse profiles. The internet provides unrivalled tools to identify and contact potentially suitable candidates. A good faith effort to identify diverse candidates will reveal that there is no shortage of talent and that the pool of suitably qualified arbitrators is much larger than assumed. Arbitration practitioners have a permanent duty to query whether a candidate is someone they feel comfortable with or whether they are objectively the best qualified person for the role.

14 *ICCA Reports Series No. 8* **Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings** (2020), p. 78.

15 C. Chatterjee, 'The Reality of The Party Autonomy Rule in International Arbitration', (2020) 20 *Journal of International Arbitration* 6, pp. 539–540.

16 S. Haridi, supra note 12, pp. 313–314.

II. Focus on benefits

The guilt-ridden approach that diversity is the morally right thing does not advance matters much. Rather, the focus should be turned to the fact that diversity comes with tangible and quantifiable benefits. There is ample sociological research that proves that diversity improves the quality of the decision-making process and its outcome.[17] There are three main reasons why diverse groups – which include arbitral tribunals – make better, more balanced decisions and systematically outperform homogeneously composed groups.[18]

First, a diverse group focuses on facts. Shared assumptions come with shared blind spots. For that reason, like-minded people are subject to the same cognitive biases. As a result, they tend to drift towards the same beliefs and adopt a mode of thinking that leads to self-righteousness, the pursuit of less rational courses of action and delusions of certainty. Because members of a diverse group do not share the same social code and references, they focus on the relevant facts, which greatly reduces the risks of 'group-thinking'.[19]

Second, diverse teams process facts more carefully. In the absence of a common frame of reference and values, diversely composed groups examine a wider array of information and process facts in a more careful and systematic manner. As people with different training and different experience ask different questions, they also systematically challenge each other's views and force each other to test the relevant facts and consequences from different angles.[20] Challenged in their assumptions and opinions by their co-arbitrators, members of a diversely composed tribunal will have to better justify their own conclusions. In that process, arbitrators are forced to also focus on facts and aspects they had not initially considered relevant and to break away from entrenched thinking patterns.[21]

On the other hand, members of a diversely composed tribunal will feel less comfortable than the members of a homogenously composed tribunal and will have to work harder to reach a decision. Yet, that should not be an issue as arbitrators are service providers who are paid to render a quality professional service.

Thirdly, as follows naturally from the first two reasons, a diversely composed group generates a better work product. Cognitive and cultural diversity leads to a more comprehensive analysis of arguments and the available evidence and thus to more balanced decision-making.[22] Consequently, the quality of the decision of a diversely composed tribunal is likely to be superior to the decision rendered by a tribunal entirely constituted of persons from a limited pool of arbitrators who regularly sit together and decide a disproportionately large number of arbitrations. As the quality of decision-making increases through diversity, so will the users' confidence in the arbitration sector. Litigants who are satisfied that they have had an opportunity to present their case and who feel heard, are more likely to abide by the rule of law and to respect the outcome of the arbitration. Consequently, diversity enhances legitimacy.[23]

Cynics might point out that it is not the role of one-off arbitration users to salvage the legitimacy of the system, and that their only objective is to win the case they are involved in. While that inclination is understandable, it would be short-sighted to ignore the importance of diversity in arbitration. Concerns about diversity may ultimately translate into public policy concerns about the legitimacy of the award, which, in turn, have the potential of undermining the enforceability of awards. From the perspective of procedural economy, the worst possible outcome is that all the time and costs invested in an arbitration are wiped out by the annulment of the ensuing award or the refusal to enforce it.

As the cynics are unlikely to be convinced by anything other than self-interest, the next sections will focus on what each of the stakeholders of the arbitration stands to gain from more diversity in the arbitral process. The stakeholders can be divided roughly into four categories: (1) the user, (2) the arbitral institution, (3) the outside counsel, and (4) the arbitrator.

17 E. Larson, **'New Research: Diversity + Inclusion = Better Decision Making at Work'**, (www.forbes.com, 2017); C. Albanesi, M. Noseda Zorrilla de San Martín, C. Warner and S. Lee, supra note 1; D. Sabharwal, M. Wright, supra note 1.

18 P. Chatterjee, V. Desai, **'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?'**, (Kluwer Arb. Blog, 1 Mar. 2020): 'Research and reports have suggested that 87% of times teams with age, gender and geographic diversity and inclusive approach achieve the best results.'

19 S. Haridi, supra note 12, p. 309; N. Allen, L. Díaz de Córdova, et al., 'If Everyone Is Thinking Alike, Then No One Is Thinking: The Importance of Cognitive Diversity in Arbitral Tribunals to Enhance the Quality of Arbitral Decision Making', (2021) 38 *Journal of International Arbitration* 5, pp. 621–624.

20 N. Allen, Leonor Díaz de Córdova, et al., supra note 19, at pp. 609–619.

21 D. Sabharwal, M. Wright, supra note 1; P. Hodges QC, M. Tai, E. Kantor, supra note 1; J. Karton, 'Four Dimensions of Diversity in International Arbitration', (2022) CJCA, p. 3; *ICCA Reports Series*, supra note 14, p. 14.

22 J.J. van Haersolte-Van Hof, 'Diversity in Diversity', in A.J. van den Berg (ed), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Vol. 18 (ICCA & Kluwer Law International, 2015) p. 642.

23 P. Hodges QC, M. Tai, E. Kantor, supra note 1; J. Karton, supra note 8, at pp. 8–9.

1) What is in it for the user?

Quality matters. A more diversely composed tribunal provides the user with a better end product.[24] If diverse arbitration is on offer and leads to better-quality awards, it is difficult for the management of a company to justify to its board, to its shareholders and to its stakeholders that it opted for and invested significant time and money in a process of a lower standard. For the same reasons it is indefensible for in-house counsel to retain a homogeneously composed counsel team and appointed a tribunal composed of ultra-busy arbitrators who regularly sit with each other.[25]

2) What is in it for the arbitral institution?

Arbitral institutions carry responsibility for access to and the administration of justice on the international plain, comparable to the responsibility of a ministry of justice and the judiciary in the national system. It is a tremendous responsibility towards the international business community.

International dispute resolution is a competitive business. If an institution does not ensure that its arbitral tribunals are diversely composed and render awards of the highest possible quality, the competition will. It will only be a matter of time for the market to recognize that the competitors' awards are of a superior quality, which will subsequently drive users to resolve their future disputes under the auspices of different institutions.

It is thus not surprising that arbitral institutions have been among the staunchest supporters of diversity in international arbitration, as well as the most effective actors in achieving change.[26] For instance, the overall percentage of female arbitrators sitting in International Chamber of Commerce (ICC) arbitral tribunals reached 24.3% in 2021[27] (up by nearly one percentage point from 23.4% in 2020),[28] representing 17.5% of party appointments and 39.5% of appointments by the ICC Court (up from 37% in 2020). The London Court of International Arbitration (LCIA) reported in 2021 that the overall percentage of female arbitrators amounts to 32%: with only 16% of party-appointed female arbitrators[29] and 47% of the arbitrators selected by the LCIA Court. The Stockholm Chamber of Commerce (SCC) reported over 2021 that the total number of women appointed as arbitrator amounted to 29%, with 17% female party-appointed arbitrators in 2021 and 49% of the SCC appointments.[30] The Singapore International Arbitration Centre (SIAC) reported that, in 2021, 35,8% of the overall number of arbitrators appointed were female.[31]

While gender diversity is relatively easy to track and report on, because if the sensitive personal data involved, it is much more complicated to generate reliable statistics about other aspects of diversity necessary to diversify the arbitrator pool, such as ethnicity, LGBTQ and disability/different ability.[32]

3) What is in it for counsel?

In the short term, the objective of outside counsel is to win the case for their client. In the long run, it is to build a track-record that will enhance their reputation as successful arbitration counsel, with a thriving practice, which will enable them to attract additional clients to grow their business.

If counsel do not recruit lawyers and bring in team members from diverse backgrounds, other law firms will. Considering that the opponent will benefit from a wider range of perspectives and richer input, there is a substantial risk that the opponent's diversely composed legal team will outsmart the homogenously composed counsel team. The counsel team that is not sufficiently diverse is likely to lose the arbitration, setting the development of its track record and reputation two steps back.

4) What is in it for the arbitrator?

An arbitrator is appointed by the user, by counsel, by the arbitral institution or a combination thereof. Although arbitrators are often assumed to have a peripheral role only in the diversification process, their impact can be significant. In the vast majority of cases, co-arbitrators play a role in the appointment of the presiding arbitrator because they are either requested to appoint the president themselves or in consultation with the appointing parties, and their counsel. Through the candidates that they suggest and the opinions they express on the identified candidates, they can play a key role in the diversification process.[33] However, in order to make a meaningful contribution, arbitrators should

24 P. Hodges QC, M. Tai, E. Kantor, supra note 1.

25 J.J. van Haersolte-Van Hof, supra note 22, at p. 642.

26 C. Albanesi, M. Noseda Zorrilla de San Martín, C. Warner and S. Lee, supra note 1; D. Sabharwal, M. Wright. supra note 1.

27 The author of this article was given advance notice of this statistic, prior to its publication.

28 C. Albanesi, M. Noseda Zorrilla de San Martín, C. Warner and S. Lee, supra note 1.

29 LCIA, 2021 Annual Casework Report, available at **https://www.lcia.org/lcia/reports.aspx**.

30 SCC Statistics 2021, available at **https://sccinstitute.com/statistics/**.

31 SIAC, Annual Report 2021, available at **https://siac.org.sg/wp-content/uploads/2022/07/SIAC-AR2021-FinalFA.pdf.** The report does not provide information as the number of party or institution appointments.

32 **'The ICCA-IBA Roadmap to Data Protection in International Arbitration'**, *ICCA Reports* No. 7 (Sept. 2022), sections I.D and II.B.3.

33 G. Anderson, R. Jerman, S. Tarrant, 'Diversity in international arbitration' (Thomson Reuters, 2020), p. 4.

not content themselves by suggesting names from the small pool of colleagues with whom they routinely sit arbitrators but consider the particular characteristics of the dispute and identify the factors that are relevant to determine the suitability of a candidate for the particular case. It is good practice to articulate those factors and map the field of potentially suitable candidates.

As stated above, open-mindedness is an indispensable quality for an arbitrator. An open mind is not only essential when considering and deciding the issues in dispute; it is also critical in enabling users, counsel and arbitral institutions to constitute diversely composed tribunals, capable of rendering the prime quality awards that the parties need and expect. Apart from the fact that also arbitrators will want to check the diversity box and report that they live by the policies they preach, there is also a clear business case for their efforts towards diversely composed tribunals. If arbitrators fail to approach the composition of tribunals with an open mind, they will end up turning around in the closed circle of like-minded arbitrators and they will deprive the users and themselves of the prime quality awards that diversity and inclusion generate, while other arbitrators will.

III. Action

With the first two steps addressed – awareness and benefits of diversity – the third and last step that needs to be taken is action.

It is often suggested that diversification is a natural process that will take its course. But where is that process today? In the mid-nineties, the arbitrator-pool was composed exclusively of middle-aged and elderly Caucasian men.[34] In fairness, a lot has changed since then and the arbitration world has made serious efforts towards the diversification of the arbitrators' pool.

Starting in the mid-1990s, *ArbitralWomen* was founded to, among others, advance the interests of female practitioners and to promote women and diversity in international alternative dispute resolution.

In the early 2000s, arbitration institutes started appointing younger lawyers in order to give them an opportunity to gain experience and build a track record as an arbitrator.

Ten years later, around 2015, members of the arbitration community came together and drew up the 'Equal Representation in Arbitration' (ERA) Pledge, with the aim of increasing, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve fairer representation in the short term, and full gender parity in the longer term.[35] At the time, it was estimated that about 12% of the arbitrators were women.[36] According to the statistics of the leading arbitral institutions, in 2021, some have doubled or even tripled that percentage in 2021.[37] While the growth rate over this seven-year window may appear impressive at first glance, one cannot ignore the fact that in absolute terms only very few female arbitrators are appointed in those arbitration.

Change did occur as a result of the ERA Pledge. The arbitration community was compelled to address the over-representation of men and the under-representation of women, because institutions, law firms and clients were put under pressure not only to sign the Pledge, but to report on how the Pledge undertaking is being implemented in practice.[38] While many leading arbitral institutions have significantly increased the number of women appointed, the reality is nevertheless that party appointments – which make up the majority of arbitral appointments – continue to lag far behind.[39]

In September 2019, the international arbitration community was called to action again, this time to address the under-representation of African arbitrators in tribunals. A group of academics and practitioners launched the *African Promise*, asking signatories to commit to improving the profile and representation of African arbitrators, especially in arbitrations with a link to Africa.[40]

34 L. Greenwood, C.M. Baker, 'Getting a Better Balance on International Arbitration Tribunals', (2012) 28 *Arbitration International* 4, p. 653 (quoting the description of the majority of international arbitrators as 'pale, male and stale').

35 *ICCA Reports Series*, supra note 14, pp. 64, 114; P. Hodges QC, M. Tai, E. Kantor, supra note 1; C. Albanesi, M. Noseda Zorrilla de San Martín, C. Warner and S. Lee, supra note 1; Indu Malhorta, 'Diversity in Treaty Arbitrations', in G. Banerji , P. Nair, et al. (eds.), *International Arbitration and the Rule of Law: Essays in Honour of Fali Nariman* (PCA, 2021), pp. 455–468.

36 *ICCA Reports Series*, supra note 14, pp. 41–42; E. Vicente Maravall, 'Increasing Transparency and Diversity in Arbitrator Election: The Givers' Proposal', in C. González-Bueno (ed.), *40 under 40 International Arbitration* (Dykinson, S.L. 2018), p. 52.

37 See percentages mentioned above at II.2: 'What is in it for the arbitral institution?'

38 E. Vicente Maravall, supra note 36, at p. 56; A. Raha, S. Jain, J. Gupta, '**Growing Gender Diversity in International Arbitration: A Half Truth**?'(Kluwer Arb. Blog, 28 Sept. 2021).

39 C. Albanesi, M. Noseda Zorrilla de San Martín, C. Warner and S. Lee, supra note 1.

40 P. Hodges QC, M. Tai, E. Kantor, supra note 1; J. Ballantyne, 'African Promise aims to promote diversity on tribunals', *GAR*, 8 Oct. 2019.

In 2020, the International Council for Commercial Arbitration (ICCA) published the Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings, which explored the underlying issues causing women to leave the legal profession.[41] In this report, the ICCA Taskforce reported that women comprised just over 20% of all arbitrators, up from around 10% in 2015. By way of comparison, the UK annual Diversity of the Judiciary Report for the year 2021 revealed that 33% of partners in UK law firms are women (and only 25% for equity partners).[42]

As of January 2021, regional and ethnic diversity has also been placed on the arbitration agenda.[43] Under the motto 'Let's Get REAL Arbitration', the arbitration community has been called to order by a movement called REAL: Racial Equality for Arbitration Lawyers.[44] REAL has formulated six strategic goals to foster racial equality in the ranks of counsel and arbitrators, and to combat racial bias and discrimination.[45] To date, unfortunately, attempts to foster ethnic and regional diversity in arbitration have seen limited global success.[46] While the REAL initiative is just as worthy of the arbitral community's support as the call for gender diversity, the arbitration community is yet to embrace the REAL initiative in the manner it embraced the ERA Pledge. In order to ensure the genuine understanding of cultural, legal and commercial aspects of a dispute, the natural solution is to appoint arbitrators who have roots in the relevant cultures, jurisdictions and businesses.

Lastly, as recently as January 2022, the inclusion of professionals with disabilities – or rather, differently abled persons – is put on the agenda. The ICC Commission on Arbitration and ADR has established a Task Force whose mission is to facilitate and enable disability inclusion in international arbitration, to raise awareness of the issues encountered, and to identify the adaptations that can be made to enable persons with special needs to do their jobs in the international dispute resolution sector.[47]

Conclusion

The lack of diversity in international arbitration is a global problem that requires a global response. However, as arbitration is a decentralized sector involving many different actors, with many different interests, based in different countries and jurisdictions around the world, the power to address the issue is unfortunately fragmented too. While some progress has been made on age and gender diversity, the diversity spectrum is broad and requires careful consideration and action by all.

The Dutch saying goes: 'Improving the world, starts with yourself'. In order to safeguard the well-balanced administration of international justice through arbitration, all players in the arbitration sector have to start taking responsibility for diversity and inclusion, in their own cases, their own firms, their own departments, their own companies and in their own arbitral institutions. Waiting for others to solve the arbitral community's diversity problem is not an option. The diversification of arbitration is a global problem that can be solved by means of wide-spread individual actions. If individual actors do not rise to the occasion, there is the risk – like with climate change – that the system will sink before an adequate solution is put in place. Pledge-like commitment and affirmative action (wherever possible) towards diversity goals, as well as regular reporting on progress toward those goals, are indispensable means to deliver on the diversity challenge.

If the arbitration community fails to take responsibility and make the necessary changes quickly, it is unlikely that the international arbitration sector will be capable of continuing to meet the demands and expectations of its users. The urgency of action towards diversity is reinforced by the fact that the arbitration community is already years behind the judiciary of many countries,

41 *ICCA Reports Series*, supra note 14.

42 P. Hodges QC, M. Tai, E. Kantor, supra note 1; Ministry of Justice of the United Kingdom, **'Official Statistics Diversity of the judiciary: Legal professions, new appointments and current post-holders – 2021 Statistics',**

43 A. Kamath, 'The Path to Becoming a Modern International Arbitrator: Implications for Diversity and Systemic Legitimacy', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (Kluwer Law International 2021, Vol. 87 Issue 3) p. 314.

44 N. Allen, L. Díaz de Córdova, et al., supra note 19, at p. 602; REAL website, available at **https://letsgetrealarbitration.org/**.

45 B. Acevedo, **REAL Gets Real: Launch of Racial Equality for Arbitration Lawyers** (Kluwer Arb. Blog, 20 avr. 2021).

46 White & Case, **Diversity on arbitral tribunals: What's the prognosis?**, 6 May 2021: 'Ethnic diversity, in particular, continues to be an area where respondents feel there is a distinct need for improvement. As in our 2018 survey, the statement that recent progress has been made in relation to ethnic diversity had the least agreement among the five listed aspects of diversity, with only 31% of respondents agreeing'.

47 This Task Force aims to study and analyse the ways in which ICC can meet the needs of those in the international arbitration community who may need accommodations or changes for the way they work. For more information, see **'ICC names new Disability and Inclusion Task Force leadership'** (www.iccwbo.org, 3 Dec. 2021); and **www.iccwbo.org/commission-arbitration-ADR.** In 2022, ICC received the GAR **Award for Equal Representation in Arbitration Pledge**, recognising ICC's work to make arbitration more inclusive. Latest initiatives include the launch of a disability task force, the building of a **LGBTQIA network**, and the **'Hold the Door Open' programme** aiming to give young arbitration practitioners in Africa an opportunity to gain practical experience by observing arbitration hearings.

which understood that litigants who use the justice system expect to see a cross-section of society reflected on courts and diversified their judiciary accordingly.[48]

The distinguished Madeline Albright, who sadly passed away in March 2022, famously remarked in the context of the emancipation of women that '(t)here is a special place in hell for women, who don't help other women'.[49] The same is true for arbitration lawyers. Arbitration lawyers who do not help other arbitration lawyers to seize their opportunity, to participate in and to contribute to our inspiring, fascinating and diverse international arbitration world, do not deserve their seat at the table. *Noblesse oblige*. The members of the arbitration community need to think outside the box, go the extra mile and get out of their own comfort zone. All actors in the arbitration sector need to open their minds, invest time and work with people beyond their known professional circle. If everyone plays their part, arbitral tribunals will soon be more diverse, they will render better, higher quality awards and diversity will no longer be the Achilles heel but rather a widely acknowledged tenet of international arbitration.

48 J.J. van Haersolte-Van Hof, supra note 22, at p. 646. See also Commission on Women in the Profession, '**How Unappealing An Empirical Analysis of the Gender Gap among Appellate Attorneys**', ABA (2021); The Law Society of England and Wales, '**Advocating for change: Transforming the future of the legal profession through greater gender equality: International Women in Law Report**' (2019).

49 M. Albright, Keynote speech at Celebrating Inspiration Luncheon with the WNBA's All-Decade Team (2006).