



**Is increasing gender and ethnic diversity in arbitral tribunals a valid concern and should arbitral institutions play a greater role in ensuring diversity?**

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**Introduction**

These questions will be analysed from the perspectives of economics and performance. In particular, this essay considers the market forces facing arbitral institutions in view of the changing demands of users as well as increased competition from national and international courts. It also examines the psychology of group performance and how diversity can improve the decision-making of three-member tribunals.

This essay argues that increasing gender and ethnic diversity on arbitral tribunals is a valid concern because the parties using arbitration are increasingly demanding that arbiters reflect their own characteristics. Separately, scientific evidence shows that increased diversity can help reduce cognitive biases to which homogenous groups are susceptible and improve the intelligent performance of three-member teams.

Statistics on nationality and gender balance in arbitral appointments show steady progress over recent years in large part due to measure taken by arbitral institutions. There is, however, work still to be done and arbitral institutions are uniquely placed to promote changes. This essay argues that if institutions continue to champion diversity in tribunals, it would give international arbitration an important



competitive advantage over new and existing alternative dispute resolution fora in the global market.

Gender diversity and ethnic diversity are separate issues presenting their own distinct challenges. They are therefore treated separately within this essay. In addition, because of the way demographic statistics are currently reported by arbitral institutions, nationality is taken as a proxy for ethnicity in arbitration users and appointed arbitrators.

### **1. Is increasing gender and ethnic diversity in arbitral tribunals a valid concern?**

This section considers the significance of diversity in tribunals: (A) from the perspective of the users of arbitration; and (B) in relation to the quality of arbitral decisions.

#### **1(A) The users' perspective**

Gender balance in users is not easily measurable because the majority of parties opting for arbitration at the leading arbitral institutions are corporate or state entities. The following analysis therefore focuses on ethnic diversity to illuminate this issue.

According to data reported by arbitral institutions, there is increasing ethnic diversity among the parties using arbitration. Singapore International Arbitration Centre ("SIAC"), for example, is handling cases from an increasingly broad range of party



backgrounds and the proportion of international (cf. domestic) cases is growing. Parties from 65 different jurisdictions filed cases at SIAC in 2018, compared to 58 jurisdictions the year before, despite a smaller overall number of new cases (402 in 2018 cf. 452 in 2017). In addition, the proportion of international to domestic cases has remained very high in recent years (84% in 2018, 83% in 2017, 80% in 2016) and the make-up of the top 10 foreign users continues to shift each year.<sup>1</sup>

The International Chamber of Commerce (“ICC”) handles arbitrations involving parties from a hugely diverse range of backgrounds. In 2018, for example, ICC statistics reported cases involving 135 different countries and independent territories worldwide.<sup>2</sup> While the ICC has no “home” jurisdiction and therefore no equivalent international versus domestic party figures, its statistics do reveal increasing diversity among the parties filing cases generally. For example, the proportion of parties from Central and West Asia increased by 25% from 2017 to 2018 and by 27% from 2017 to 2016. Similarly, parties from Sub-Saharan Africa increased by 40% from 2016 to 2017 and again by 9% from 2017 to 2018.<sup>3</sup>

Similar patterns of increasing diversity among the users of arbitration are seen across all of the other major arbitral institutions. Increasing ethnic diversity on arbitral tribunals would therefore serve to reflect the increasing diversity in the users of arbitration themselves.

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<sup>1</sup> SIAC Annual Reports 2018 & 2017.

<sup>2</sup> ICC Dispute Resolution Statistics 2018.

<sup>3</sup> ICC Dispute Resolution Statistics 2018 & 2017.



Moreover, the parties choosing arbitration are telling institutions that this is what they want. In 2017, rap artist and entrepreneur, Shawn “Jay-Z” Carter, applied to the New York Courts for an injunction and a permanent stay of an ongoing arbitration relating to the sale of his Rocawear clothing brand because the list of 200 arbitrators provided by the American Arbitration Association (“AAA”) contained only three African-Americans, one of which was conflicted.<sup>4</sup> Jay-Z argued that the lack of diversity on the AAA’s list of proposed candidates left him with “no choice at all” and constituted racial discrimination under New York law, rendering the arbitration agreement void under public policy. Jay-Z withdrew his complaint before the case was ultimately decided, because the AAA allowed the dispute to be heard by a three-member panel rather than a sole arbitrator, and offered Jay-Z five African-American candidates from which to choose. According to Jay-Z’s counsel, the AAA also agreed to consider Jay-Z’s list of 11 African-American candidates to handle big arbitrations.

This case reveals that users have greater confidence in the outcome of arbitration where the panel determining the dispute reflects the personal characteristics of the parties, in this case along ethnic lines. It also exposes the strong desire and the reasonable expectation held by users of arbitration that arbitral tribunals reflect their own diversity – and that they are unwilling to arbitrate in its absence.

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<sup>4</sup> *Carter et al v Iconix Brand Group Inc et al*, New York State Supreme Court, No. 655894/2018.



## **1(B) Quality of arbitral decisions**

Parties often opt for three-member tribunals because they believe they will receive a better decision when three minds are applied to the case. Evidence from psychological research suggests that arbitral decisions would be better still if they were made by tribunals with greater diversity. In particular, diverse groups are less susceptible to certain cognitive biases suffered by homogenous groups and diversity itself can bring performance benefits within group contexts. Gender diversity is the primary focus of the following discussion, reflecting the available evidence in this area.

Arbitral tribunals composed of individuals with very similar backgrounds and experience may be more susceptible to certain biases in decision-making, such as groupthink. “Groupthink” is where a group of people who are theoretically capable of making excellent decisions nevertheless end up making poor ones as a result of flawed group process and strong conformity pressures.<sup>5</sup> Several different structural and situational factors create the conditions for groupthink. Among these, group homogeneity is strongly predictive of the effect.<sup>6</sup> Increased diversity in tribunals can therefore help to overcome this potential cognitive bias by reducing homogeneity within the group.

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<sup>5</sup> Janis, 1972.

<sup>6</sup> McCauley 1989.



Further, relatively new research in the field of collective intelligence has shown that teams score more highly across a range of tasks if they have more women in them.<sup>7</sup> This study assessed collective intelligence within teams of three or four people by measuring their performance across a series of tasks involving different skill sets (e.g. generation, choice, negotiation, execution). According to the results, collective intelligence was significantly correlated with the proportion of women in a group – i.e. groups that included more women scored higher across all of the different tasks than groups with fewer women. Further analyses revealed that this effect was mediated not by gender *per se*, but by individuals’ levels of social sensitivity. Specifically, women were found to increase the collective intelligence of the group because women generally scored more highly than men on measures of social sensitivity. This means that increasing gender diversity on arbitral tribunals is likely to increase the collective intelligence of that tribunal because it is likely to increase social sensitivity across the group.

Other studies have provided evidence that ethnic diversity can also bring benefits in the context of team performance.<sup>8</sup> While these effects have not yet been replicated within the context of arbitration, existing scientific evidence suggests that increasing diversity on tribunals would improve their decision-making as a group.

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<sup>7</sup> Woolley, Chabris, Pentland, Hashmi & Malone, 2010; “collective intelligence” refers to the measurable intelligence of a group of individuals acting together.

<sup>8</sup> For example, in an experimental study conducted on teams of student entrepreneurs, Hoogendoorn and van Praag (2014) found that if at least the majority of individuals are from different ethnic backgrounds, teams’ businesses performed better across a range of measures.



Increasing diversity in arbitral tribunals is clearly a valid concern in view of the changing demands of users of international arbitration. Diversity may also bring potential decision-making benefits according to psychological research on group performance.

## **2. Should arbitral institutions play a greater role in ensuring diversity?**

This section examines what arbitral institutions are doing already to improve diversity and what effect those measures have had to date on arbitral tribunals. It then considers the potential competitive advantage that diverse tribunals can bring to institutions as a choice for resolving commercial and investment disputes.

### **2(A) Progress so far**

Arbitral institutions do not generally publicise the process by which they select arbitrators for appointment. It is therefore difficult to evaluate the extent to which diversity is a factor in their decision-making. However, arbitral institutions have taken various measures directly and indirectly to increase gender and ethnic diversity over recent years.

Most leading arbitral institutions are signatory to the Equal Representation in Arbitration Pledge, which calls for enhanced diversity in international arbitration more broadly. Many institutions have also stated express intentions to do more with respect to gender diversity on arbitral tribunals. In its 2017 Annual Report for example, SIAC stated that it is *“ever mindful of the need to do more to promote*



*diversity*” in the context of its statistics on gender. Similarly, one of the ICC Court’s stated objectives for its current mandate is “*further inclusion [in terms of gender] across the board in ICC tribunals*”.<sup>9</sup> Many arbitral institutions have also started disclosing statistics on the gender balance of arbitral tribunals, heralding a positive first step and demonstrating the institutions’ commitment to diversity and increasing transparency.

The ICC and SIAC are also leading by example by addressing the gender diversity within their respective courts. The ICC Court will enjoy full gender parity for the term 2018-2021 following the landmark decision of the ICC World Council to appoint 88 men and 88 women. After a round of new appointments in June 2019, 30% of the SIAC Court is now women (10 of 33). Whilst the revised constitution of these Courts does not directly impact gender diversity in SIAC and ICC tribunals, it signals the seriousness with which the institutions view diversity and the actions they themselves are prepared to take.

These measures have had visible effects on the gender balance in arbitral appointments. The proportion of women appointed to arbitral tribunals has increased year-on-year since the institutions began disclosing the statistics. For example, of the arbitrators appointed by SIAC, the percentage of female arbitrators has risen steadily over 2016, 2017 and 2018 (22.8%, 29.7% and 34.3% respectively).<sup>10</sup>

The ICC does not provide separate gender statistics for arbitrators appointed by the

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<sup>9</sup> ICC Dispute Resolution Bulletin 2018 (Issue 2).

<sup>10</sup> SIAC Annual Reports 2016, 2017 & 2018.



ICC itself. However, of all arbitrators appointed or confirmed by the ICC (including both those appointed by the ICC and those nominated by the parties), figures also show a steady positive trend towards increased representation of women on tribunals (14.8% female arbitrators in 2016, 16.7% in 2017 and 18.4% in 2018).<sup>11</sup> There is, however, a long way to go before equal representation is achieved.

In relation to ethnic diversity, some of the major arbitral institutions have established regional centres to address ethnic inclusivity within their user-base and to foster the continued growth of international arbitration as a means of resolving cross-border disputes. For example, the ICC has recently established a “Belt and Road Commission” and an “Africa Commission”. It has also opened a new hearing centre in Sao Paolo to support disputes in the region, and a new Secretariat in Singapore – the ICC’s fourth overseas case management office. SIAC has also undertaken a series of measures in recent years promoting international and ethnic diversity. In the context of the Belt and Road initiative, SIAC has organised joint conferences and seminars, and signed Memoranda of Understanding with numerous other arbitral institutions across Asia.

At present, institutions do not typically report on the ethnic make-up of arbitral tribunals. However, the breadth of nationalities covered by arbitral appointments is expanding. The number of jurisdictions represented by ICC arbitrators, for example, has risen steadily from 75 in 2016, to 85 in 2017 to 87 in 2018.<sup>12</sup>

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<sup>11</sup> ICC Dispute Resolution Statistics 2017 & 2018.

<sup>12</sup> ICC Dispute Resolution Statistics 2016, 2017 & 2018.



However, as with statistics on gender, and as the Jay-Z case clearly reveals, more can and should be done. While parties and counsel should naturally share responsibility for increasing diversity in arbitral appointments, institutions are uniquely positioned to bring about swift changes because they appoint arbitrators more regularly.

## **2(B) Competitive advantage**

One of the challenges arbitral institutions face is the rise of national commercial courts and international investment courts as alternative fora for resolving disputes. Over the last few years, international commercial courts have opened in Dubai, Singapore, China and France, with Belgium to follow suit. The International Court of Justice (“ICJ”) remains a popular choice for state-to-state disputes and multilateral investment courts may also emerge in future.

However, gender diversity in the judicial benches of these courts is relatively low. At the ICJ, for example, only 13% of the judges are women (2 of 15). The gender split in Dubai is similar (12.5% or 1 of 8 judges). The specialist Courts in Asia are more balanced in terms of gender although equality in these judiciaries remains an aspiration. In Singapore, for example, 22% of the judges are women (8 of 36), and in China, the figure is 28.6% (4 of 14).

Ethnicity statistics in these judiciaries is not generally available. Many have relatively little diversity in terms of legal background, however. In Singapore, only 5% of the



judges are from civil law backgrounds compared to the vast majority of common law lawyers. The ICJ has a better balance of legal backgrounds (60% civil law; 33% common law; 7% other) whereas in China, the law requires that all the judges are Chinese nationals and Chinese law qualified.

A significant feature of these national and international courts is that judges are typically appointed for long terms. This contrasts with arbitral tribunals which (usually) arise and dissolve with each arbitration. As a result, it will take considerably longer to change the diversity of the bench in these courts compared to the swift changes that institutions are able to generate. Increasing diversity in tribunals would therefore confer a significant advantage on arbitral institutions over these competing alternative fora for resolving international disputes.

### **Conclusion**

Increasing gender and ethnic diversity on arbitral tribunals has the potential to bring myriad benefits to institutions, parties and tribunals themselves. Diversity expressly remains a focus for arbitral institutions and they have achieved steady and significant progress in this area in recent years. However, given their unique power as appointing authorities, they can and should do more. Disputing parties have “99 Problems”<sup>13</sup>; tribunal diversity shouldn’t be one.

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<sup>13</sup> Jay-Z, 2003.