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ICCA 2014. Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change

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On Monday, 7 April, at the 2014 ICCA Miami Conference, the international-arbitration community gathered to address the question, "Who are the arbitrators?" The answer, panel attendees were told, was "male, pale, and stale" – that is, a large majority of the individuals chosen to serve as international arbitrators are male, from North America or Western Europe, and generally quite senior. Whether this reality threatens the legitimacy of international arbitration and motivates the community to aspire to make arbitration more diverse and inclusive and, if so, how that goal can be reached, were the focus of the panel and the audience's spirited discourse throughout the session.

Initially, there are several fundaments on which the international-arbitration community seems to agree.

The first is that with relatively rare exceptions, the pool of typical international arbitrators is dominated by the "male, pale, and stale" profile. Women are making gains, but progress has been slow. Indeed, only 10% of arbitrators are female. In comparison, gender is an important factor in judicial selection: in the Netherlands, 50% of judges are female, and in the United States, women make up 30% of judges. The story is similar for individuals from Latin America and Asia, which have an abundance of legal talent. In recent years, for example, the ICC reported that approximately 50% of its appointments came from the United States, the United Kingdom, Switzerland, France, or Germany alone. And in most cases, an international arbitrator is senior in age and experience.

The second is that diversity in international arbitration encompasses more than gender, nationality, and age. The function of international arbitrators is almost exclusively lawyers, whether practitioners (current or former) or academics, a tendency most agree should not change. The legal system and traditions in which international arbitrators have been trained also has a bearing on diversity, as does the culture in which they were raised, live, and practice. Even the type of law firm in which the arbitrator was trained – which tends in a large majority of cases to be based in the West because, as one panelist explained, Western law firms provide the best training – can cultivate diversity.

The third is a general recognition that diversity could have benefits for international arbitration. Diversity spawns perspective, which, overall, may make arbitration more just and fair. Diversity counters the risk that an arbitral tribunal will look and act the same as its predecessors. In other words, an arbitrator's typical background will yield a typical perspective, and a predictable tribunal will act in a predictable way. Although perhaps an "insurance policy" to some, this can be problematic for international arbitration as a whole, and it could lead to the perception that international arbitrators inherently are inclined to further certain groups, including themselves. To quote Benjamin Franklin, "If everyone is thinking alike, then no one is thinking." A lack of pluralism is a denial to users and counsel of the benefit of perspective.

From here, however, opinions diverge about whether the international-arbitration community should take steps to foster diversity and, if so, what those steps should be.

On the one hand, some say the obligation lies squarely in the hands of international arbitral institutions, such as ICC, ICDR, ICSID, and others, which are duty-bound to find a way to incorporate diversity into their rules and, in doing so, affirmatively impose the burden on the user community to boost diversity. As one panelist explained, institutions have a long-term interest in finding a sustainable solution. But as another panelist cautioned, any diversity must be "good diversity" if it is to achieve the goal of improving the international-arbitration experience. That is, diversity rules cannot be fashioned in a way that they serve only to satisfy some statistical quota; rather, they must be meaningful and substantive.

As well, the international-arbitration community – including users and practitioners alike – bears a responsibility to cultivate diversity. As one panelist argued, when selecting an arbitrator, users should insist on an inclusive list of potential candidates that includes at least one woman and one younger person. Moreover, law firms should have the resources available to produce and recommend such lists. And at conferences, such as ICCA, organizers should insist on inclusive panels, congresses should propound guidelines, and males speakers should adopt a recent Scandinavian initiative and refuse to participate in conferences – or as counsel, arbitrators, or experts – unless women and other groups are also represented.

The other primary camp – which included several panel attendees – seems to argue that diversity is not an end in itself. Rather, the focus should be on promoting within the international-arbitration community and as international arbitrators the best talent, regardless of the diversity markers to which that talent may correspond. One attendee argued that the progress made to date supports this theory, pointing to the listing of two women among the world's top 10 international arbitrators and the role of women as the heads of many large international-arbitration practices around the world, as well as, anecdotally, the fact that he had been surrounded by women in his own international-arbitration practice over the years.

This school of thought is linked closely to the notion that international arbitration, as a creature of contract, is driven by the user community, and users' interest is in selecting arbitrators that will best represent their positions and rights, which includes offering predictability and consistency. So, if the "male, pale, and stale" presently

serves that interest best, the user community will draw international arbitrators from that profile pool. If users are impinged from doing so – by, for example, institutional rules that elevate diversity over freedom of choice – this interest will be frustrated and, some believe, users ultimately will be forced to look elsewhere to resolve disputes. Instead, it would seem, diversity should be fostered outside of the institutions – including in law schools, law firms, and the international-arbitration community – so that groups other than the "male, pale, and stale" are selected organically as the best talent for roles as arbitrators.

Although both of these viewpoints appear to recognize the importance of diversity, neither definitively answers the question of whether a failure to address directly diversity among international arbitrators would threaten the legitimacy of international arbitration. But in a field where trust and reputation are paramount, the international-arbitration community would be well served to continue its dialog to find the most effective ways to promote diversity. Failure to do so would truly put at risk the legitimacy that so many have worked so hard to create.

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