Can I Get A … Diverse Tribunal?

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Jay-Z changed the rap game. Can he change the arbitration game? In a new lawsuit, the rap star (legal name: Shawn C. Carter) seems to be trying. Carter has recently won a temporary order staying arbitration for a dispute in New York. The memorandum of law in support of the petition for a stay (filed by a team from Quinn Emanuel's New York office led by Alex Spiro) makes for memorable reading. It is in some ways a local particularity, a case with an Empire State of mind, but the arguments raised have potentially global ramifications.

Hip-hop fans will remember Jay-Z's famous line, "I'm not a businessman; I'm a business, man!". The dispute relates to one of Mr. Carter many commercial enterprises outside of his music career. In 2007, Mr. Carter sold a clothing brand that he had developed ("Rocawear") along with a set of associated trademarks to Iconix, a brand-management company that owns and licenses a portfolio of consumer brands. After disputes arose over the use of certain trademarks by a different entity founded by Mr. Carter after the 2007 transactions ("Roc Nation"), several of the associated entities entered into a Master Settlement Agreement in July 2015, which contained an arbitration clause submitting any disputes to arbitration in New York, administered by the American Arbitration Association (AAA) under the AAA's Commercial Arbitration Rules and governed by New York law. Iconix commenced arbitration according to this provision.

The arbitration clause called for three arbitrators "unless the parties are able to agree on a single arbitrator". If the parties could not agree, the AAA would appoint all three arbitrators. During an administrative conference call between the parties and the AAA, the parties agreed that if they could not decide on a sole arbitrator, they would each submit four names from the AAA's roster of arbitrators for "Large and Complex Cases", a subset of the AAA's National Roster of Arbitrators. The AAA would then add four more names and return that longer list to the parties, who could strike the names of individuals they found to be unsuitable.

The trouble came when the lawyers representing Mr. Carter and his businesses tried to identify four arbitrators from the AAA's Large and Complex Cases roster that they felt comfortable nominating. They reviewed more than 200 potential arbitrators on that roster who are based in the New York area but found—allegedly to their surprise—that not a single one who possessed the necessary expertise was African-American. Noting that Mr. Carter is black, they asked the AAA to provide the names of some "neutrals of color" whom they could vet, and the AAA responded by providing the names of six additional potential arbitrators. Of these, three appeared to be African-American—two men and one woman—and one of the men was a partner in the law firm representing Iconix. Mr. Carter's counsel profess themselves unable to determine whether the other two proposed arbitrators have similarly disqualifying conflicts of interest, nor could they confirm whether the individuals suggested by the AAA are actually listed on the AAA's Large and Complex Cases roster. (The AAA does not publish its arbitrator lists, partly in order to maintain its ability to provide tailored lists of potential arbitrators for

a fee.)

At this point, the AAA suggested that Mr. Carter could make selections from the arbitrators already identified, or else the AAA would select four candidates on his behalf. The AAA then proceeded to choose those four candidates, which included the two not-obviously-conflicted African-Americans on the list of "neutrals of color" it had previously provided to Mr. Carter. It combined that list with four candidates proposed by Iconix and four that it itself proposed, and sent the list of twelve candidates to the parties, inviting each to strike up to four names. The AAA set a deadline of November 30, 2018 for the parties to make their strikes, after which the AAA would appoint the tribunal itself. Mr. Carter and his associated entities turned to New York Supreme Court (a first-instance court of general jurisdiction), seeking a temporary restraining order enjoining arbitration.

Mr. Carter alleges that the arbitration agreement is void for violating New York's public policy against racial discrimination, a policy is enshrined in the state constitution and statutory law. The legal argument is both simple and complex. It is simple because, if anything amounts to public policy, constitutional rights would seem to fit the bill. It is complex because it is not at all clear that a lack of potential arbitrators who share characteristics of an arbitrant constitutes racial discrimination (as a lack of diversity would clearly do in other contexts, such as in the composition of juries in criminal trials). It is even less obvious that arbitral institutions like the AAA have an obligation to provide diverse panels of potential arbitrators—the petition invokes "the AAA's failure to associate with African-American arbitrators with the expertise to decide complex commercial disputes". Nevertheless, the petition was successful; on November 28, the court issued a temporary restraining order staying arbitration until a full hearing on December 11.

Some may dismiss this petition as a clever tactical gambit made on behalf of a wealthy litigant—an American Gangster no less. But it raises important and potentially painful questions for arbitration around the world. For all the attention that the issue of arbitrator diversity has garnered, an aspect that is often overlooked is fairness *to arbitrants* (aside from the allegation of pro-investor or anti-developing-state bias in investment arbitrators). We have seen extensively discussed, especially with respect to gender, the unfairness to *potential arbitrators* who may be shut out of the profession, the danger that "group think" will compromises the quality of tribunal decisions, and the threat to popular legitimacy of international arbitration (especially investor-state arbitration) presented by the continuing dominance of "pale, stale, and male" arbitrators.

What often goes unaddressed is the reason for that risk to perceived legitimacy: that homogeneous panels of arbitrators may be unable to appreciate the concerns of arbitrants from minority or disadvantaged backgrounds, even when they are open-minded and willing to try. Mr. Carter's argues that lack of access to African-American arbitrators with sufficient expertise to resolve complex commercial disputes "deprives litigants of color of a meaningful opportunity to have their claims heard by a panel of arbitrators reflecting their backgrounds and life experience, and all but excludes the voices of diverse decision makers in the arbitration process." The petition goes on to note that homogeneous panels risk "unconscious bias in decision-making because 'negative images of "the others" is pervasive … [and] arbitrators are not exempted from its negative influences'" (quoting Larry J. Pittman, "Mandatory Arbitration: Due Process and Other Constitutional Concerns", 39 Cap. U. L. Rev. 853, 862 (2011)). Parties on the losing end of an arbitral process tainted by unconscious bias may well conclude that the industry is shady, it needs to be taken over.

It is often noted that parties appear to be the worst offenders when it comes to arbitrator diversity, frequently opting for the "usual suspects" over diverse appointees. But even if that phenomenon is real, some parties may rationally prioritize factors such as race—as Mr. Carter seems to have done in this case—for the same reasons that other parties appoint arbitrators with particular professional or national backgrounds: to ensure that at least one member of the tribunal will understand (and

presumably be sympathetic to) their perspective. In a party-driven system like international arbitration, arbitrants are entitled to that.

Applications for temporary restraining orders are made *ex parte*, so the allegations in Mr. Carter's petition will not be contested until the hearing on December 11. It is therefore not clear how far this line of argument will proceed, although in granting the order, the court will have found that Mr. Carter was likely to succeed on the merits of his claim that the arbitration agreement violates New York public policy. Regardless of the final disposition of the case, arbitration lawyers and especially arbitration institutions should consider themselves put on notice: arbitration agreements may be subject to attack based not on drafting defects in the agreements, but on the complexion of the pool of potential arbitrators from which the tribunal will be appointed. Institutions that operate "closed" lists of arbitrators (where only arbitrators on the list may be appointed), such as the Court of Arbitration for Sport, should immediately consider the composition of those lists and vet them for diversity. In particular, sufficient numbers of arbitrators from a wide range of communities should be represented in the lists, so that even if some are conflicted or unavailable, diverse tribunals may still be formed. (The issue is particularly acute where, as with the AAA, the institution does not publish its lists, but could potentially be raised even where the lists are publicly available.) Institutions that fail to adapt may find themselves guilty until proven innocent.

The whole arbitration world should also be aware that incremental improvements on arbitrator diversity are no longer sufficient (if they ever were). Lack of diversity is not something we can brush off our shoulders. If the arbitration community cannot make real progress on arbitrator diversity (not just, for example, increasing the numbers of white, European women on tribunals), parties will increasingly force the point. This lawsuit provides a blueprint for minority arbitrants—whether genuinely concerned about lack of diversity or cynically employing defensive tactics—to derail arbitrations on the basis of lack of representativeness in the available pool of arbitrators.

Stay tuned….