Can’t Knock the Hustle … [To Broaden Diversity in Arbitration]

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Begin at the Beginning

On November 28, Rapper Jay-Z filed a petition in Manhattan Supreme Court pertaining to an ongoing arbitration administered by the AAA-ICDR. He sought (i) a temporary restraining order to halt Iconix from pursuing claims in arbitration; (ii) a preliminary injunction staying arbitration for a period of ninety days for the parties to find *suitable* African-American arbitrator candidates; and (iii) a permanent stay of the arbitration.

A flurry of press reported on the matter, of arbitration under fire. On November 30, Judge Scarpulla, sitting in for Judge Ostrager, ordered the proceedings on hold until December 11, when Judge Ostrager could conference with the parties.

According to the Petition filed by Counsel for Jay-Z, the AAA-ICDR did not “ensure a diverse slate of arbitrators” on a preliminary arbitrator selection list (NYSCEF Doc. No. 1 – Petition ¶7). Ironically, at Exhibit 4 of the Petition, the list of 12 arbitrator candidates includes diversity on several fronts. However, the particularity of Jay-Z’s petition is rather curious – the ask was not a battle cry for diversity generally but rather for the inclusion specifically of male African-American candidates, of whom there were two on the list (and one African-American female). Even more curious in light of his argument is that Jay-Z’s legal representation includes no African-American lawyers.

The Transcript of the proceedings on November 28 begins with Judge Scarpulla's reminder of the supremacy of party autonomy in arbitration:

> *You voluntarily choose AAA, you know what AAA has … why are you alleging now something that you chose, that you've agreed to, and now you're dissatisfied because you think that African-American arbitrators are somehow going to decide a commercial dispute differently than Asian-Americans, than women, than gay arbitrators, than all of the other protected classes? What is that about? (NYSCEF Doc. No. 18 – Transcript 5: 16 – 23).*

On November 30, Counsel for Iconix replied and discussed Opposing Counsel's delay tactics within its Affirmation, "After business hours on the Strike List Deadline, the Carter Parties contacted the AAA *ex parte* to complain, for the first time, that they "*could not identify a single arbitrator of color with suitable experience*" (NYSCEF Doc. No. 28 – Affirmation of C. Flanders ¶16). If diversity of the nature desired and described by Counsel for Jay-Z was indeed paramount, it begs the question why it was not raised on the October 31 administrative conference call or prior to the November 12 deadline to select an arbitrator.

On December 6, the AAA-ICDR sent a Letter to the parties responding to their queries, confirming that metrics on race and ethnicity are provided at the *discretion and self-identification* of the arbitrator, with "priority to identify and recruit diverse candidates" and optionality for parties to mutually agree and select party-appointed arbitrators that fit "particular expertise and backgrounds" (NYSCEF Doc. Nos. 31, 50 – Letter pp. 1, 2). Of note, 89 of 152 candidates, or 58.5%, self-identified as African-American and "were appointed to a case in 2017" (*Id*. at 4).

On December 7, Counsel for Iconix filed its Memorandum of Law in Opposition, arguing that:

> *The implicit premise behind the Carter Parties' race theory is that an arbitrator who shares the same race as a litigant … is inherently less likely to be biased toward that litigant; while arbitrators of different racial background are prone to inherent bias. This is a patently false presumption … By analogy, the race or ethnicity of a presiding judge is not the basis for recusal (NYSCEF Doc. No. 47 – Memorandum of Law in Opposition p. 20).*

On December 9, Counsel for Jay-Z filed a Letter with Judge Ostrager withdrawing their motion to enjoin the arbitration, and noting in the opening paragraph:

> *Following the filing of the Petition in this action, the American Arbitration Association ("AAA") has committed to work with Petitioners to identify and make available African-American arbitrators … (NYSCEF Doc. No. 50 – Letter p. 1).*

AAA-ICDR's commitment to diversity arguably did not change in the 11 days elapsed between November 28 and December 9. Notwithstanding, perhaps something did change in Counsel for Jay-Z's attitude and posturing of the case, and even the cognition that arbitration was the previously selected and more appropriate forum for the dispute rather than a public showdown (with public access to all filings referenced repeatedly in this blog).

This unfinished story hits at the crux of working definitions of diversity and unconscious bias. Put a different way, are clients of arbitration modifying the system from alternative *dispute* resolution to alternative *diversity* resolution?

The issue of diversity or lack thereof is a collective action problem. While much pressure has been placed on arbitral institutions in ensuing years, it is a shared burden amongst all practitioners. As preliminary considerations, how do we define diversity? How are metrics culled within the community to identity diversity? How do we reply to examples like Rachel Dolezal, the white woman who posed as black? And then, what of the pool who abstain from designation?

Empire State of Mind: There's Nothing You Can't Do

Most arbitral institutions have implemented diversity initiatives to respond to the perceived gaps within the arbitrator pool. This is a starting point. A snapshot of these innovations is provided from an institution operating within Jay-Z's Empire State and under fire by Jay-Z, the AAA-ICDR, their Mission and Vision Statement demonstrating a "shared commitment" to diversity with arbitrator lists "that comprise at least 20% diverse panelists where party qualifications are met" (AAA-ICDR Roster Diversity & Inclusion). For example, "87% of lists sent to parties [in 2017] met that goal" (NYSCEF Doc. Nos. 31, 50 – Letter p. 4). The list provided by the AAA-ICDR to the afore-mentioned parties included 7 of 12 arbitrator candidates

from diverse categories of gender, race, ethnicity, and sexual orientation, or 58%. This does not consider other diversity categories including social background, age, religious beliefs, and other ideologies, necessarily increasing the diversity percentage. Separate from this, the AAA-ICDR spearheads the Higginbotham Fellows Program, a reason for which the AAA-ICDR was honored in 2015 by the *NYLJ's* Diversity Initiative Project. The AAA-ICDR also created a Foundation to address funding needs on projects increasing access to alternative dispute resolution.

The AAA-ICDR is one amongst many in New York advancing diversity thought leadership, including: the ICC and its North America Office, SICANA (focused on gender parity and a recent cultural diversity initiative with ICC interns); the CPR (issuing an annual Diversity Award and offering a Young Lawyer Rule and Diversity Statement; JAMS (offering a Diversity Inclusion Rider) and FINRA (hosting an annual Diversity Summit). These institutions embrace transparency, disclosing available statistics and creating pipeline initiatives. Admittedly, this is only a small snapshot of the hard work advanced by leading arbitral institutions in the global marketplace.

The larger arbitral community must also buttress the case for diversity and encourage apt candidates. Distinct from the arbitral institutions, many affinity groups have suggested solutions to address diversity in the practice. One example tethered to the Empire State was the inaugural launch of the ArbitralWomen DiversityToolkit ™ on November 8, in commemoration of ArbitralWomen's jubilee celebration of 25 years bringing together global women of dispute resolution. The Toolkit is noteworthy in defining a training module whereby trainers lead participants through various exercises to recognize the moral, equal access, and business case for diversity, problem solve in dialogue, and brainstorm ideas for critical change. Of special mention, a headline supporter of the Toolkit was the Equal Representation in Arbitration (ERA) Pledge, launched in 2015 in recognition of the under-representation of women on international arbitral tribunals and also offering an Arbitrator Search platform from the databases of leading arbitral groups. As of December 7, there are 3,250 organization and individual signatories, numerically demonstrative that our system is dynamic and constantly improving from the inside.

Where Do We Go from Here?

The Jay-Z arbitration headlines created undue hysteria. Now, in the aftermath, the arbitration community must come together thoughtfully and productively in response, to change the rules of the game. The lack of diversity falls on global communities, to recharge and reinvigorate for market demands. Gender parity is one case for diversity gaining momentum, but what of the other diversity categories that also need support and community leadership to flourish?

International lawyer Gary Born aptly noted during his 2018 Freshfields Lecture that "the ending [to arbitration] hasn't been written yet – it depends on us; it depends on you." This applies equally to the state of diversity in arbitration and the perpetual query: are we getting there? Does our system improve diversity at a sufficient rate across fluid categories each quarter, each year, each decade? Our ending is far from being written, as new law graduates join the practice and redefine how we look at education, the law, and representation. A famous quote of Jay-Z's parlays opportunely here, as a reminder to be "hungry for knowledge. The whole thing is to learn every day, to get brighter and brighter." With the calls for change growing ever louder, learn we will, and change we will enact, together.