Improving the Participation of Minorities in International Arbitration

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This blog post provides a summary of a YICCA workshop held on 26 September 2019 in New York. The event was jointly organized with the Blacks of the American Society of International Law (BASIL) – a task force formed in 2014 at the invitation of ASIL's former Honorary President **Gabrielle K. McDonald**).

The NY event was the second collaboration between the two organizations and arose out of a call to action by **Donald Donovan** (Partner at Debevoise & Plimpton in NY, and former ICCA President), whose firm generously hosted the workshop. The event was also supported by the ArbitralWomen; the American Bar Association's Section of International Law; the Equal Representation in Arbitration Pledge; and the New York International Arbitration Center.

The Problem

There appears to be a global consensus regarding promoting diversity. While the obligation arises out of moral and ethical considerations, it often has legal prescription attached. The extent of diversity in the legal profession is disappointing both nationally and internationally. In the United States, for example, the profession appears to be dominated mostly by white males. Unfortunately, the

problem further worsens when it comes to the area of international arbitration. International arbitration which is often considered the elite club in the legal profession performs extremely poorly in terms of diversity and minority representation.

Prof. Benjamin G. Davis (University of Toledo) opened the workshop with a keynote address surveying this phenomenon. He provided a historical background of the "color line" in international arbitration, tracing it back to the transatlantic slave trade, and touched upon the differing experiences depending upon one's privilege and background.

A Diverse Tribunal

This set the stage for a first panel of speakers to address the prompt "Can I get a…. Diverse Tribunal?" **Naana A. Frimpong** (Counsel at King & Spalding in Atlanta), **Randa Adra** (Counsel at Crowell & Moring in NY), and **Mohannad A. El-Murtadi Suleiman** (Associate at Curtis, Mallet-Prevost, Colt & Mosle in NY) spoke on this panel, which was moderated by **Ucheora O. Onwuamaegbu** (International Attorney at Arent Fox in DC).

Mr. Onwuamaegbu discussed the issue of diversity in the US context giving the example of the recent case of popular celebrity Jay-Z in which he struggled finding a person of color as a qualified arbitrator for his matter. All of the panelists unanimously emphasized the dire need of making gender inclusion a priority in international arbitration. It was mentioned on how ethnicity and country of origin should also be focused on when striving for diversity and inclusion.

Mr. Suleiman discussed how diversity is needed regarding various aspects such as education (common law or civil law training), bar admissions and languages to ensure that the disputing parties feel their views are being adequately heard and understood by the tribunal. It is often the case that parties feel alienated due to the lack of diversity in a tribunal in all these respects.

Mr. Onwuamaegbu then put forward the question, which was also raised in the Jay-Z case, as to why a diverse tribunal is even necessary to rightly decide a case? Mr. Suleiman discussed how people from different backgrounds view things differently which often leads them to different conclusions. However, he said that the

underlying problem which demands diversity is different, as it has to do with perception and legitimacy. The perception of legitimacy is crucial to the resolution of disputes. He shared the example of his home country, Libya, whose experience with arbitration involved awards being passed against the country as a consequence of its wave of nationalization in the 1970s, which led the entire country and the region to view arbitration negatively. This negativity could have been avoided or mitigated if there was more trust in the neutrality of a properly appointed arbitral tribunal and this mechanism of alternative dispute resolution, a trust which can be developed through a diverse composition of the tribunal itself. He further explained how enforcement of an award passed by a non-diverse tribunal may also be difficult due to questions of legitimacy and interpretation of law.

Ms. Frimpong explained how diversity should not be done for diversity's sake but for the benefit it brings. She said empirical studies prove how diversity is beneficial especially in a body dealing with multi-jurisdictional issues. She also spoke about the legitimacy crisis in investment arbitration due to the private nature of arbitral tribunals as opposed to being public state courts, which often results in states and their citizens having distrust in the fairness of these proceedings. This crisis could also be addressed by diversity, she suggested. She drew similarities with the International Criminal Court which faced similar legitimacy issues in Africa due to its non-diverse composition and focus on criminals in Africa while not pursuing action against actors in other parts of the world.

Ms. Adra spoke about how the demand for highly experienced arbitrators has become a major issue in the fight for diversity. She discussed how young arbitrators are heavily disadvantaged hence any minority inclusion solution should incorporate this aspect.

The panel concluded that diversity is the responsibility of all parties and stakeholders. Institutions need to play a greater role and highlight disputes which have been resolved by diverse tribunals to reduce the information vacuum that exists. There was a call for more action.

Minority Pledge

The second panel discussion was entitled "Is a 'Minority Pledge' Needed in

International Arbitration?" and involved **Apoorva J. Patel** (Associate at WilmerHale in DC), **Charline O. Yim** (Associate at Gibson Dunn in NY) and **Jordan C. Wall** (Associate at Willkie Farr & Gallagher in NY). The discussion was moderated by **Natalie L. Reid** (Partner at Debevoise & Plimpton in NY).

Ms. Reid had the speakers comment on the previous panel's remarks on what a minority was and what diversity constituted. They recognized how diversity differs for everyone, hence a broad view must be adopted towards it rather than a narrow and restricted definition. The panel agreed how merely increasing, e.g., the representation of Caucasian females in the practice does not amount to improving diversity. Acknowledging the importance of party autonomy in international arbitration, the panel further agreed that any solution towards promoting diversity must bear in mind the crucial role the parties play.

Mr. Patel discussed his journey in arbitration and how not being able to find anyone in the field who looks like him was often disconcerting and demotivating. Ms. Yim explained how she would often be confused for other Asian attorneys and told the audience about one such instance. Mr. Wall discussed his experience practicing as an LGBTQ attorney.

Turning to possible solutions, Mr. Patel noted the Rooney rule (a National Football League policy which requires teams to interview a certain number of persons from minority backgrounds for head coach and other senior position openings). Mr. Wall connected this to the Mansfield rule in the legal sector (which aims at advancing women and minorities at law firms). The panel agreed as to how both rules had been effective and that there is a need for a similar initiative in the field of international arbitration. By formulating a minority pledge, the arbitration community would give teeth to the aim of striving for minority representation in international arbitration.

Conclusion

The workshop concluded with a speed-networking session, involving several stations at which each of the panelists met with attendees in smaller groups. Debevoise & Plimpton also offered participants a cocktail reception at which conversations on diversity continued through the night. Through these conversations, it became clear that there was a unanimous consensus in the room

for increased minority representation in international arbitration – both individually and collectively. The onus now lies on the institutions, parties and each one of us who are interested in the field to make this happen.

The event was organized by **Nawi Ukabiala** (Associate at Debevoise & Plimpton in NY), **Tolu Obamuroh** (Associate at White & Case in Paris, and former YICCA Co-Chair), **Prince-Alex Iwu** (Diaz, Reus & Targ in Miami, and YICCA Events Coordinator), **Theominique Nottage** (Associate at Higgs & Johnson in Bahamas, and YICCA Co-Chair) and **Matthew Morantz** (Associate at Curtis, Mallet-Prevost, Colt & Mosle in NY, and YICCA Events Coordinator).

A video-recording of the event is available in Young ICCA's Audiovisual Library.

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