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Multiculturalism in International Arbitration: A Hard Knock Lesson or a Renegade Decision?

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In recent years, there has been a drive in the international arbitration community to further diversify the pool of professionals who work in international arbitration (arbitrators and counsel alike). Most recently, this has taken form in the publication of gender diversity statistics (see, e.g., the ICC's dispute resolution statistics 2020 or the ICCA's 2022 Gender Diversity Task Force report). Similarly, ethnic and cultural diversity is also increasing through various policies and initiatives. This is apparent in the establishment of international groups, such as Racial Equality for Arbitration Lawyers (REAL), and efforts such as the Equal Representation in Arbitration Pledge. Most recently, arbitral institutions such as the Belgian Centre for Arbitration and Mediation (CEPANI) and the Scottish Arbitration Centre (SAC) have introduced rules with express reference to diversity. The discussion on ethnic and cultural diversity in international arbitration is by no means a 'new' conversation, with the topic being considered in 1991.

Recent statistics on racial diversity taken from Berwin Leighton Paisner's 2019 Report on diversity in arbitral tribunals, indicate that the international arbitration community has far to go in achieving reasonable levels of ethnic and cultural diversity. The Report notes that '*80% of respondents thought that tribunals contained too many white arbitrators*', and that 26% of participants believed that ethnicity and national identity was a factor that was either important or very important to consider when appointing an arbitrator. Additionally, 70% of participants believed that it was desirable for arbitral institutions to publish transparent arbitrator diversity statistics, and 28% indicated that the content of those statistics would influence their choice of institutional rules in future disputes.

Diversity has been argued to be an important factor in confirming the legitimacy of arbitration, a key justification being the need for the arbitral community to reflect those who utilise it (a sentiment which extends to the wider judicial community). It is arguable that parties are more likely to accept a decision made by a tribunal that is reflective of, and understands, the parties.

However, the question remains as to whether the significance of maintaining a diverse group of arbitration practitioners goes beyond statistical analysis and can present real and practical issues for parties attempting to resolve their dispute through an arbitral process. One illustrative instance involved a New York-seated arbitration and subsequent court proceedings heard before the Supreme Court of New York, as discussed below.

Case study: *Carter v Iconix Brand Group Inc*, No 655894/2018 (NY Sup Ct, 2018)
The African-American musician Shawn C Carter (better known as Jay-Z) and associated companies (the **Jay-Z Parties**) had a dispute with the Iconix Brand Group (**Iconix**). The dispute was referred to arbitration pursuant to a standard arbitration clause. It was administered by the American Arbitration Association (**AAA**) in accordance with its Commercial Arbitration Rules and governed by New York law.

The parties were to nominate candidates from the AAA's list of arbitrators for 'Large and Complex Cases'. Of those 200-plus arbitrators, the Jay-Z Parties were '*unable to identify a single African-American arbitrator with the necessary qualifications to oversee the Arbitration*', and so raised their concerns with the AAA, asking that the AAA provide a list of arbitrators who were '*neutrals of color*'. The AAA responded with six arbitrators, of whom '*… Only three of the proposed neutrals appear[ed] to be African-American*', with one being conflicted by virtue of working for the law firm representing Iconix in the underlying arbitration.

The Jay-Z Parties then filed an application for an interim restraining order preventing the arbitration from proceeding, on the basis that '*the AAA's failure to represent Petitioners by providing African-American neutrals with experience in large and complex cases*' breached New York's equal protection laws, causing the arbitration agreement be contrary to public policy and thus void.

Justice Scarpulla of the Supreme Court of New York granted the interim restraining order and scheduled a final hearing for 11 December 2018. Despite the outcome being touted as a significant decision, when placed in its context, the granting of the interim order does not carry much jurisprudential significance in and of itself. Despite her Honour's acceptance of the importance of arbitral diversity, the transcript shows that Justice Scarpulla was reluctant to make a finding that equal protection laws might negate an arbitration agreement between two private parties, and did not express any views as to the merits of those arguments.

Ultimately, the final hearing did not take place, with the Jay-Z Parties withdrawing their application as the AAA provided a list of further candidates and gave an undertaking to diversify its pool of arbitrators.

Broader application: considerations for Australia and other Model Law jurisdictions
The case study discussed above is confined to the jurisdiction of New York. Nevertheless, the case has potential relevance extending to Model Law jurisdictions, such as Australia.

The crux of the Jay-Z Parties' application for the interim restraining order was that the lack of ethnic and cultural diversity in the AAA's pool of arbitrators, reflective of Mr Carter's African-American background, violated '*constitutional and statutory protections*' and thus rendered '*the arbitration clause … void as against public policy*'. This argument is reflective of those typically raised when disputing the validity or the enforcement of an arbitral award based on articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, respectively. The Model Law was adopted in the statutory regime governing the Australian judiciary's supervision of arbitral proceedings, in the form of the *International Arbitration Act 1974* (Cth) (the **Act**).

Under the Model Law, parties have near unlimited freedom to stipulate the appointment process as they might see fit, save for two caveats:

1. the procedure must '*secure the appointment of an independent and impartial arbitrator*' (art 11(5)); and
2. the '*parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*' (art 18). This caveat under the Model Law must be contrasted with the standard under Australian law, that provides that the parties must be given a '*reasonable opportunity*' to present their case (cf s 18C of the Act).

Should the appointment process fall foul of the above caveats, a party can '*request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment*' (art 11(4)(c)). One such measure a court can take is to issue interim measures (such as interlocutory injunctions) pursuant to art 17J, and '*exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration*'.

Reframing the arguments from *Carter v Iconix Brand Group Inc* in the Model Law context, for there to be judicial intervention, an arbitral institution's lack of ethnic and cultural diversity must have the consequence of preventing:

1. a potential arbitrator from being '*independent and impartial*';
2. parties from being '*treated with equality*'; or
3. parties from being '*given a full* [or reasonable in the case of Australia] *opportunity*' to present their case.

Although not phrased in this way, these considerations appeared to be reflected in Justice Scarpulla's comments and reluctance to issue the interim restraining order.

As to the first ground, s 18A of the Act provides some further guidance: '*there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration*'. In the abstract, and depending on the subject matter in dispute, a lack of diversity in a pool of potential arbitrators may very well reveal a '*real danger*' of bias.

As to the second, some may argue that a party has not been treated equally if it has not been afforded the choice of selecting or shortlisting arbitrators who are reflective of their cultural background, when the pool of arbitrators reflects the culture of other parties. This was the main argument in the Jay-Z Parties' interim restraining order proceeding.

As to the third ground, the position that a lack of diversity has prevented a party from being provided a '*reasonable opportunity*' would be a more difficult argument. Other jurisdictions which have retained the Model Law's wording of a '*full opportunity*' could offer better prospects in this regard.

To the extent that a challenge to an arbitration agreement itself was heard in an Australian court, the effect and application of domestic laws could come into play. At the federal level, these include, inter alia, the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). Depending on the seat of the arbitration, certain state laws such as the *Anti-Discrimination Act 1977* (NSW) or the *Equal Opportunity Act 2010*

(Vic) could be of relevance.

In summary, when considered against Australia's statutory framework, there may be potential (at least theoretically) for arguments like those raised by the Jay-Z Parties. However, without a test case in Australia – specifically, resolving the question of whether such provisions could affect the operation of an arbitration agreement – any prediction is an act of crystal ball gazing.

Conclusion

As ground-breaking as the legal arguments raised in the *Carter v Iconix Brand Group Inc* case were, in the absence of a judicial decision on the merits, the consequences for the wider arbitration community may be limited. While a full and well-reasoned judgment could have provided the first instance of mandated tribunal diversity in accordance with the public policy of a forum, it is doubtful that such an outcome would have transpired had the matter proceeded to final hearing, no matter the acknowledged desirability of diversity in dispute resolution.

In any case, diversity (including multiculturalism) continues to be a critical consideration for arbitral institutions and their participants and stakeholders. Even though the Jay-Z proceedings may not have heralded a legal revolution in the interpretation of the law and practice of arbitration, the bold articulation of arguments based on diversity as a salient concern in the arbitral process has no doubt sparked a conversation on how courts will consider the practical significance of diversity in international arbitration in the future. Certainly, the dispute prompted a re-evaluation by the AAA of its own approach, which, along with more recent rule changes by institutions, is something that has been carefully noted by the arbitration community at large as it seeks to develop further initiatives.

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