

Kluwer Arbitration Blog

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The opening piece of this Issue ‘Challenging Homogeneity in International Arbitration: Towards Greater Diversity and Inclusion in Counsel Teams’ by Eliane Fischer and Roopa Mathews offers an interesting and informative perspective on a widely discussed, yet still not universally well-managed issue of diversity and inclusion in arbitration.

‘Diversity’ and ‘inclusion’, have been in our minds in dispute resolution for many years. The importance of a dispute resolution industry that could be described as diverse and inclusive has become the topic of numerous initiatives, reports, pledges, groups, events, and speeches and even scholarly writings on regional and international levels.

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It is not unjustified that in arbitration, diversity in appointments has become the stumbling block. But the complex prism of diversity and inclusion, will, and, indeed, should refract the light of equality we have been shedding on the legal sector for decades and emphasize areas, other than the oft discussed arbitral appointments, that should be taken into consideration and improved. One of these, as highlighted by the authors, is diversity and inclusion in counsel teams.

The article explains the importance of diversity in counsel teams and how it affects the overall productivity, innovation, creativity and quality of the legal representation a team provides. It covers gender and ethnic diversity as well as bar admissions, introduces the topic from a regional standpoint, offers a comprehensive view on the most common barriers to diversity and inclusion, and, finally, examines possible ways to overcome them. One such barrier is linguistic discrimination and how the current use and perception of languages, even accents, in arbitration can create professional obstacles for representatives of diverse backgrounds.

Eliane and Roopa’s article is the result of a profound, detailed and up-to-date research of the market. The available research data on matters of global importance is comprehensive and, while it

does not necessarily affect our understanding of their importance, we often end up being overwhelmed by it, rather than focused on analysis and problem-solving. I wonder, for example, how different would our view of recycling be if, instead of global coverage of the waste crisis, we were offered information on the percentage of non-recyclable waste in our own neighbourhood on a weekly basis? By analysing relevant statistics publicly shared by more than three dozen well-known law firms, as well as numerous relevant studies, Fischer and Mathews make the topic much more familiar and the relevant tendencies more traceable.

We are happy to report that the latest issue of *Arbitration* is now available and includes the following:

ARTICLES

Eliane FISCHER & Roopa MATHEWS, *Challenging Homogeneity in International Arbitration: Towards Greater Diversity and Inclusion in Counsel Teams*

Despite its name, international arbitration has long been dominated by a relatively homogenous crowd. And although the lack of diversity in the field has been the subject of significant criticism, much of the focus has been on the lack of diversity in the appointment of arbitrators. While the appointment of arbitrators from diverse backgrounds remains an important issue, with still some way to go, this article addresses a topic that has attracted less attention thus far: diversity in counsel teams. Counsel teams in international arbitration cases tend to be marginally more diverse than the arbitrators they appoint. But the reality is that they too suffer from a lack of diversity. As diverse teams tend to perform better than homogenous ones, greater diversity among counsel is important to enable law firms to deliver the best possible client service. Improving the diversity of counsel will also lead to greater diversity in the next generation of arbitrators, given that senior practitioners at law firms represent a sizeable pool for potential new arbitrator candidates. This paper considers some of the barriers to diversity and inclusion in counsel teams and offers practical proposals to promote diversity and inclusion in the international arbitration practices of major international law firms.

Botond PETRES, *A Choice Between Pandora's Box and a Procrustean Bed? Internationalizing the Rate of Pre-award Interest in International Arbitration*

The cornerstone of every arbitral award is the quantum of damages awarded. Yet, the principal must be brought forward in time, and that procedure involves the application of interest. International treaties, Bilateral investment treaties ('BITs') and national legislations all have their views on interest. However, determining the exact rate of interest often comes down to a case-by-case basis, where both quantum experts and lawyers have their say. A multitude of different approaches have been deployed in international arbitration. These include recourse to borrowing rates, or theories like the 'coerced loan' or the 'alternative investment'. This article overviews the main approaches regarding the rate of pre-award interest and questions their suitability. A potential portfolio approach and other alternatives are assessed in case of the alternative investment theory, to balance the deficiency of the risk-free rate. The article also discusses the future of Interbank

rates, after the London Inter-Bank Offered Rate ('LIBOR') cessation.

Dan DAYE, *The Only Game in Town: Five Years of Adjudication Under the Irish 'Construction Contracts Act 2013'*

Five years have now passed since the Construction Contracts Act 2013 came into force in Ireland on 25 July 2016. This article seeks to examine in the context of recent Irish case law, with the focus on the operation of the adjudication, what impact the Act has made in its primary policy objectives of, firstly, providing a prompt payment regime to improve recognized issues with cash flow and, secondly, introducing a process for the swift resolution of payment disputes. Drawing comparisons with the similar statutory regime in the UK, this paper reviews developments in adjudication under the Act in its first five years of existence in the context of recent consideration by the Irish courts, and identifies what challenges the regime may face in the future.

Alexander LOJAN, *Sua Sponte Investigations on Corruption Allegations Under the English Arbitration Act: Powers and Conflicts*

As corruption affects international commerce at various levels, international commercial arbitration is not spared from corruption. One way to combat corruption in international commercial arbitration is to include arbitral tribunals into the fight against corruption and grant them *sua sponte* powers. Since this power may look different from jurisdiction to jurisdiction, this article addresses the question whether an arbitral tribunal has the power under English law to make use of its *sua sponte* powers in light of corruption. The follow-up question of conflicts arising from a proactive approach which might limit the power is also addressed.

By interpreting the relevant provision from the English Arbitration Act (EAA) 1996 and considering the role arbitral tribunals have and ethical considerations, this article shows why tribunals should make use of their *sua sponte* powers in order to investigate allegations of corruption. This power leads also to conflicts with a danger of *ultra petita* awards and due process. These conflicts are considered as restrictions to avoid an unlimited power of the tribunal and to preserve the parties' rights as well as the fundamental principles of international arbitration.

BOOK REVIEWS

Gordon BLANKE & Farhan SHAFI, *International Commercial Arbitration in Sweden*, Kaj Hobér. Second edition. Oxford University Press. 2021. 527 pp. ISBN: 978-01-92896-73-5.

Mika SAVOLA, *Arbitration: The Art & Science of Persuasion*, Donald E. Vinson & Klaus Reichert. Oxford University Press. 2022. 222pp. ISBN: 978-0-19-286790-2.

The Editor welcomes the submission of articles for consideration for publication in the Journal. All prospective contributions should be in accordance with the guidelines set out


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