Lack of Diversity in Arbitration: a Cure to this Deficiency

Harshita Bajla*

Introduction

Diversity is the inclusivity of individuals of all ages, genders, ethnicities, races, religions, and sexual orientations. Historically, constituencies have taken great strides in promoting diversity in judicial systems and adjudication processes. This is because inclusivity has been long since associated with a 'just' system. However, since the appointment of arbitrators is viewed as 'private justice', it does not undergo the same public scrutiny as a judicial bench. Thus, diversity in arbitration is appalling. The International Chamber of Commerce ("ICC") reports that in 2022, only 16% of arbitrators nominated by parties were women. In terms of race, during the ICC 2018-2021 term, only 13% of appointed arbitrators were from Africa and 15% from Latin America.[1] The most represented nationalities among arbitrators were from the UK, USA, Switzerland, France, Brazil, and Germany.[2] Lately, several policies have been adopted to promote diversity, but they have witnessed little success. This article aims to establish why diversity is important, what the main reasons for the lack of diversity amongst arbitrators are, and what measures should be adopted to change this verdict. In doing so, this article focuses on gender and racial diversity to further its arguments.

Why Diversity in Arbitration is Important

Diversity is integral to the process of ascertaining justice. A lack of diversity would reduce the legitimacy of the arbitral process as an impartial and neutral mechanism. Representation is fundamental to the notion of impartiality. Individuals of different genders and races have different cognitive skills and processes. For instance, women outperform men in several measures of verbal ability and retain stronger, vivid memories of emotional events than men

1 Gemma Anderson, Richard Jerman and Sampaguita Tarrant, 'Diversity in International Arbitration' [2020] Thomson Reuters <https://uk.practicallaw.thomsonreuters.com/w-019-5028?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 12 March 2023.

2 International Chamber of Commerce, 'Dispute Resolution 2022 Statistics' (ICC 2021) <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf> accessed 12 March 2023.

do.[3] Consequently, arbitrators' decision-making skills are influenced by different biological characteristics and distinct life experiences derived from their gender. Women and men thus have varying perspectives, with neither being the sole 'correct' perspective. Women also tend to be more empathetic than men, which in turn can help increase understanding amongst stakeholders and help arbitrators arrive at a decision quickly. Such gender balance in leadership will improve efficiency and the quality of arbitral awards.[4] Furthermore, different racial backgrounds and cultures influence an individual's critical thinking skills, personal beliefs and values, which bear on their judgement. The same facts could be interpreted differently because of the arbitrator's cultural background and personal experiences. Even an unbiased arbitrator would be subconsciously influenced by their personal value system. Thus, for an arbitral tribunal to ensure that the process is impartial, different genders and races must be included to yield unbiased, conscionable results.

Additionally, the absence of diversity amongst arbitrators could also create an unfair and unbalanced process for the underrepresented. Inadequate representation of different races and genders could perpetuate unconscionable, biased stereotypes of minorities. A small, elite group of arbitrators would provide 'tailor-made justice' and dominate the Alternative Dispute Resolution ("ADR") market, thereby reforming ADR to suit their needs.[5] The arbitrators, and ultimately the award, would not reflect minority interests. This would ultimately undermine party confidence in arbitration as an unprejudiced dispute resolution mechanism. This is evidenced by *Chevron Co. v Republic of Ecuador*, an ongoing legal dispute over the environmental pollution in the Amazon Rainforest. [6] One of the issues raised by the plaintiffs was the lack of diversity amongst the appointed arbitrators. The arbitrators were accused of being chosen from a pool of white males. This arguably contributed to the lack of progress in the case. Similarly, in the famous case of *Jay-Z*, the singer argued that the lack of African American arbitrators on the American Arbitration Association's list was racial discrimination under New York state law since it left him with no choice but to choose from the list of white

3 Bruce Goldman, 'Two Minds: The Cognitive Difference Between Men and Women' [2017] Stanford Medicine Magazine <https://stanmed.stanford.edu/how-mens-and-womens-brains-are-different/> accessed 13 March 2023.

4 Caley Turner, '"Old White Male": Increasing Gender Diversity in Arbitration Panels' [2014] Pepperdine Law School.

5 Lisa B. Bingham, 'Control Over Dispute- Sytem Design and Mandatory Commercial Arbitration' (2004) 67 Law and Contemporary Problems 221 <https://www.jstor.org/stable/27592040> accessed 14 March 2023.

6 *Chevron Corporation (USA) & Texaco Petroleum Company v Ecuador*, UNCITRAL PCA Case No. 34877, Interim Award [3.21], [3.22].

Americans.[7] This led to him voiding his earlier agreement to arbitrate with Iconix, the defendant.

An unconvincing argument against diversity is that it could lead to conflicting views amongst arbitrators, interfering with the consistent interpretation of international arbitration laws. This fallacious argument is based on the premise that racial and gender differences would induce conflicting practices. However, arbitrators with the same professional qualifications and training would adhere to uniform legal practices.[8] Nonetheless, increased diversity of arbitrators from different races, cultures, and genders would bring in fresh perspectives and improve the quality of arbitral awards to accommodate the common needs of the underrepresented. These decisions would be holistic and considerate of different social, economic, and political factors.

Reasons for the Lack of Diversity

Parties often tend not to choose women or individuals from ethnic minorities due to their unconscionable bias against them. Unconscionable bias is based on the notion that individuals develop a deep-seated unconscious belief and attitude over time through repeated experiences.[9] For instance, historically, women were forced to sacrifice their careers for domestic goals. Hence, parties may be now reluctant to appoint women for arbitrations due to such prejudice. For example, parties might be of the view that a female arbitrator's ability to succeed is diminished by personal commitments (like childbearing) or that they may lack intellectual ability due to the absence of profound education or training. This is evidenced in the 2018 study by the American Bar Association which elucidated that women of all races were treated worse after having children; they were passed over for promotions, given poor-quality assignments, demoted, paid less, or unfairly disadvantaged for working part-time or flexible hours.[10]

7 Carter et al v Iconix Brand Group Inc et al, New York State Supreme Court, New York County, No. 655894/2018.

8 Prateek Joinwal,'The Menace of Ethnic Imbalance in International Arbitration' (LSE Law Review, 28 September 2021) < https://blog.lselawreview.com/2021/09/menace-ethnic-imbalance-international-arbitration> accessed on 13 March 2023.

9 Adedoyin Rhodes Vivour, 'Promoting Gender Diversity in arbitration in Africa' (Speech at Women in Arbitration Conference, Nairobi, 23 March 2018) <https://drvlawplace.com/wp-content/uploads/2020/09/ADEDOYIN-RHODES-VIVOUR-KEYNOTE-SPEECH.pdf> accessed 13 March 2023.

10 Joan C. Williams, 'New study finds gender and racial bias endemic in legal profession' (American Bar Association, 6 September 2018) < https://www.americanbar.org/news/abanews/aba-news-archives/2018/09/new-study-finds-gender-and-racial-bias-endemic-in-legal-professi/> accessed 15 March 2023.

Nonetheless, people are instinctively drawn towards individuals of similar experience and background. They are less trusting towards people from different cultures and races due to trust being associated with the feeling of familiarity. This is perhaps because ethnic minorities are already severely underrepresented and so, if individuals were to trust others from foreign cultures, it would be those who already dominate the arbitration industry. Additionally, the lack of adequate information adds to this unconscionable bias. Parties do not have sufficient information regarding arbitrator performance in arbitration and the little information they have is circulated by the elite circle of partners, big law firms, and privileged clients. This leaves parties with inadequate information to make informed decisions, thereby leading to their discretion being grounded in such implicit bias.

Additionally, women and racial minorities struggle to secure positions in arbitration. In 2019, the average percentage of female partners in the arbitration groups of the Global Arbitration Review's (GAR) 30 top arbitration law firms worldwide was approximately 17.6%.[11] For women, their ability to substantiate their career goals is influenced by an inflexible working environment that prevents them from balancing their private life and their work. This is further exacerbated by an unsafe work environment dominated by sexual harassment, bullying, or gender discrimination. Recently, a 2020 survey identified that 75% of women faced direct harassment, compared to 22% of the male respondents.[12] There is also significant evidence that women are not paid equally or promoted to senior positions as their male counterparts, despite having a better or same skillset. In 2021, only 25% of women in law firms were partners and only 21% were equity partners.[13] This created a 'pipeline leak' and women were "lost from the pipeline through voluntary termination at a rate two or three times faster than men once they reached mid-career level".[14]

Further, in terms of the working environment for racial minorities, their retention in the legal field is influenced by immigration factors; firms prefer recruiting nationals of the same country to avoid the cost of sponsoring visas, conversion exams, or additional training to support

11 Catherine Drummond, 'The Party-Appointment Process: Addressing Barriers to Equal Opportunities for Women in the Appointment of Ad Hoc Adjudicators' in Freya Baetens (ed), Identity and Diversity on the International Bench (OUP 2021) <https://doi.org/10.1093/oso/9780198870753.003.0006> accessed 15 March 2023.

12 Women Lawyers on Guard, 'Still Broken: Sexual Harassment and Misconduct in the Legal Profession' (Women Lawyers on Guard 2020) <https://womenlawyersonguard.org/wp-content/uploads/2020/03/Still-Broken-Full-Report-FINAL-3-14-2020.pdf> accessed 14 March 2023.

13 National Association for Law Placement, '2020 Report on Diversity in U.S. Law Firms' (Nalp 2021) <https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf> accessed 14 March 2023.

14 Vivour (n 9).

foreign degree-holders. This is evidenced by the fact that people of colour reportedly face increased "bias than white men regarding equal opportunities to get hired, mentoring, getting promoted or getting paid fairly".[15] This manifests a lack of opportunities for such individuals, discouraging them from striving to cement their position in the arbitration space. With a lack of diverse individuals acting as arbitrators, there will be little diversity in arbitration; leaving it to be a 'white male' dominated profession.

How to Increase Diversity

Several pledges and charity organisations have been created to increase diversity in arbitration. Although they create awareness and educate the public, they do not mandate reform and thus have low success rates. Governments perhaps need to impose legal obligations of diversity on all institutions incorporating lists of arbitrators. The duty to increase diversity in arbitrator appointments cannot be solely left to parties of arbitration. Parties are largely driven by self-interest and their priority is to succeed. Their choice of arbitrator would be from the same exclusive circle of arbitrators with the highest success rate and the greatest number of arbitrations under their belt. Hence, institutions play a significant role in promoting diversity by aiding in the appointment of arbitrators. However, this may contravene the fundamental principle of party autonomy or parties' ability to choose their arbitrators. This principle is what distinguishes arbitration from the adjudicative process – its flexibility to choose makes it a desirable dispute resolution mechanism. To circumvent this argument, a hybrid process could be adopted where parties retain their autonomy while institutions facilitate diversity.

The hybrid approach could apply to arbitral tribunals with two or more arbitrators. Each party could appoint one arbitrator of their choice, leaving the presiding arbitrator to be appointed by the arbitration institution. The arbitration institution of the seat of arbitration can be used. The presiding arbitrator must be a national from a different country than either of the parties.[16] Such a rule should be inscribed in commercial contracts, treatises, and conventions. Currently, the ICC and the London Court of International Arbitration ("LCIA") mandate similar nationality-based restrictions for sole or presiding arbitrators. Albeit these limits are for the

[15] Vivour (n 9).

16 Courtney Dolinar- Hikawa, 'Beyond the pale: A proposal to Promote Ethnic Diversity Among International Arbitrators' (2015) 12 Dealing in Diversity with International Arbitration <https://www.sidley.com/-/media/publications/tv124article17.pdf> accessed 16 March 2023.

perception of neutrality, they do advocate for diversity in the appointment of arbitrators to an extent. For example, Article 13(5) of the ICC Rules states that the "sole arbitrator or the chairman of an arbitral tribunal shall be of a nationality other than those of the parties". Article 6(1) of the LCIA Rules states that "Where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise". Furthermore, the institutions should provide a list of arbitrators suitable for arbitration from different regions, while allowing parties to continue to exercise their autonomy and take their pick from this list. The list would be specifically tailored to match the technicalities of the conflict while simultaneously providing a fair chance to arbitrators from minor ethnicities and all genders through a filtration system. This will ensure that the arbitral tribunal is reflective of its users while maintaining a just and neutral stance.

Additionally, for diversity in repeat appointments, parties to arbitration must complete feedback questionnaires that can help enhance arbitrators' portfolios. Such questionnaires should have open-ended questions regarding the arbitrator's performance.[17] For instance, 'Did the arbitrator wisely manage delays in arbitration?', 'did the award dispose of most of, if not all, the issues submitted?', 'Was the arbitrator a good listener and accommodating of parties' interests?', and 'Did the arbitration successfully deal with complex information?'. With detailed information, parties can make an informed choice and not just rely on surface-level statistics of how many arbitrations were completed by the arbitrator or what seniority they hold. This will help circumvent unconscionable biases. Although senior arbitrators have more years of experience to support their skills, a junior arbitrator may be able to perform just as well (or better) but may simply lack the years of experience to vouch for their skillset. Thus, such detailed feedback will allow for a more objective appointment of an arbitrator, testify to their skills, and develop their reputation.

Additionally, Arbitration Intelligence (AI) is an online platform which publishes such data using confidential surveys.[18] Members of AI can access such data in exchange for encouraging

17 Sarah Rudolph Cole, 'Arbitrator Diversity: Can it be Achieved?' (2021) 98 Washington University Law Review 965 <https://journals.library.wustl.edu/lawreview/article/4435/galley/21268/view/> accessed 17 March 2023.

18 Catherine A. Rogers, 'The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence' (Kluwer Arbitration Blog, 27 December 2017) <https://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators/> accessed 16 March 2023.

parties to complete such questionnaires. Such reports cost a few hundred dollars for ordinary parties to access. AI suggests that these surveys "empower users to make better-informed decisions about arbitrator selection and case strategy".[19] However, such exorbitant costs of reports will deter parties from reviewing the necessary information, persuading them to rely on their prejudice. Thus, to increase racial and gender diversity, these questionnaires should be readily provided by arbitration institutions and must be easily accessible on their websites and databases, along with the arbitrator's CV. Although a procedural cost would be attached to this, it would be a small price to pay to promote racial diversity in international arbitration in the long run. Furthermore, these AI reports must not mention the nationality and gender of arbitrators and there should be a 'blind' appointment of arbitrators. The rationale is that there should not be implicit bias based on factors such as race and gender. Arbitrators should be appointed purely based on their skills and their ability to provide justice.

Lastly, it is important to increase diversity at the grassroots level. Institutions must therefore focus on providing arbitration training, especially to marginalised groups. These individuals will then make up the roster from which arbitrators are appointed. By increasing supply, institutions would be providing clients with a range of options to choose from, which will eventually increase diversity in the appointment of arbitrators. Currently, many institutions provide training. For example, the ICC provides arbitration training per ICC rules, and the Chartered Institute of Arbitration provides online or in-person ad hoc training globally. However, the fees charged by these organisations usually range from a few hundred to a thousand dollars. This deters many young aspiring practitioners from accessing qualifying training, leaving the pool of arbitrators to be from the privileged upper class of society. In turn, organisations must provide training scholarships to women and individuals from minor ethnicities. Such scholarships would filter out deserving candidates in terms of merit, racial, and gender quotas. Organisations can also provide training in local conflict resolution organisations of different, less economically developed countries which lack significant equipment and expertise.[20] This will further break down geographical barriers and encourage women and people of colour to develop the necessary skills of arbitrators. By sponsoring and

19 Chartered Institute of Arbitration, 'A Resource Guide For The Selection of Diverse Arbitrators and Mediators' (April 2022) <https://www.ciarb.org/media/22276/revised-master-resource-guide-for-the-selection-of-diverse-arbitrators-and-mediators.pdf> accessed 16 March 2023.
20 ibid.

facilitating training, institutions would aid in creating a long-lasting impact on increasing diversity at the ground level.

Conclusion

Diversity is crucial to the process of arbitration. A lack of racial and gender diversity would reduce the legitimacy of the arbitral process as an impartial and neutral mechanism. Gender-balanced leadership in arbitral tribunals brings an array of skills to dispute resolution and results in quicker decision-making. A racially diverse tribunal would accommodate different parties' needs and result in more acceptable and readily enforceable awards. Diversity is also important to maintain the public's faith in arbitration by being representative of its diverse users. One of the biggest reasons for a lack of diversity is the unconscious bias against women and racial minorities as professionals. Women are still considered to under-deliver when compared to men due to their domestic commitments. Racial minorities are thought to have poor performance due to a lack of 'good' training and substantial experience. Such prejudice, coupled with inadequate information, influence parties to rely on their incorrect preconceptions.

Another reason for the lack of diversity is a poor working environment leading to a 'pipeline leak'. Women are discriminated against, sexually harassed, or denied flexible working hours to manage their private and professional lives. Racial minorities do not have professional opportunities due to discrimination and indirect factors such as visa and training costs. These limitations on work opportunities prevent women and ethnic minorities from cementing a career as arbitrators. Nonetheless, to fix this issue, arbitration institutions need to adopt a 'hybrid' appointment process where the presiding arbitrator is chosen from a list and belongs to a different race than the parties. There also must be detailed feedback questions with open-ended questions evaluating the arbitrator's performance. There must be blind appointments where race and gender are not mentioned on the CV or questionnaires. AI provides this facility but has its flaws; information is not very accessible due to exorbitant fees. Such insightful information of arbitrators must be readily available, free of cost.

Lastly, international organisations must sponsor arbitrator training for underprivileged women and racial minorities. By training a diverse range of individuals, parties will have a diverse range of arbitrators to choose from. Diversity in arbitration is critical in the coming era. It

should not be neglected in the name of private justice and commercialisation of arbitration as a ‘business’.

Harshita Bajla is currently pursuing her LLM at Cornell Law School. She completed her LLB at King’s College London in 2023.