

**DIVERSITY PROBLEM IN INTERNATIONAL ARBITRATION: PROBLEMS CAUSED BY A LACK OF DIVERSITY, REASONS FOR LACK OF DIVERSITY AND HOW IT BE FIXED\***

**Abstract**

*This paper analysed the problems caused by lack of diversity in IA. It found that the absence of diversity in IA affects the perceived legitimacy of the system. This paper argued that ‘previous experience norm’ is the mega reason for lack of diversity in IA. It also examined and evaluated the ways of fixing the problem. It argued among others that institutionalising arbitral appointments would improve the problem of lack of diversity. In concluding, this paper agrees with Greenwood and Baker that the ultimate responsibility of making a significant change in ensuring a diverse arbitral tribunal rest on the parties making the appointment.<sup>1</sup> Therefore, to fix the diversity problem in IA, it behoves all the IA participants (the parties, respondent-states, firms, institutions and arbitrators) to consider the importance of diversity and look beyond selecting the popular names when appointing arbitrators.*

**Keywords:** Diversity Problem, International Arbitration, Causes, Solutions

**1. Introduction**

The subject of diversity in international arbitration<sup>2</sup> (IA) has been a burgeoning conversation in the past few years. Specifically, IA has received so much backlash for lack of diversity amongst adjudicators. Just recently, in a trademark dispute involving the African-American rapper and entrepreneur, Jay Z, he expressed criticism in the lack of diversity of arbitrators in IA. He observes that the American Arbitration Association with over two-hundred arbitrators, yet only three out of that pool identified as African-Americans. In his view, this limited number left him ‘no choice at all’ to appoint a candidate as the party appointed arbitrator. He further suggested that this lack of diversity prevents parties from having their claims adjudicated by arbitrators that reflect their background and life experiences.<sup>3</sup> Given the level of criticism the issue has generated, it appears that if it is not urgently addressed it could impact on both the perception of the quality of the award and the perception about IA generally. Hence, it is unsurprising that the pressure to have the lack of diversity issue addressed has resulted in the proliferation of several suggestions and comments on how to increase arbitral diversity. Given the general acknowledgement of lack of diversity in IA,<sup>4</sup> this paper will not go into a voyage of re-documenting all the existing data which reflect the extent of lack of diversity in IA. Rather, this paper seeks to analyse and answer three critical questions; what are the problems caused by lack of gender-diversity in IA, what are the reasons for lack of gender-diversity in IA and how can the problem be fixed. This paper undertakes the tasks in three sections. Section one analyses the issue of gender-diversity in IA and the problems caused by it. It argues that lack of gender-diversity in IA among others contribute to the legitimacy crisis faced by the system. The reasons for lack of gender-diversity in IA is critically analysed in section two. It argues that the main reason for lack of gender-diversity in IA among others is the unwritten requirement for previous experience as a basis for future appointments. The final section proposes and evaluates ways of fixing this problem. In addition to other suggestions, it argues that institutionalising arbitral appointments would improve the problem of lack of gender-diversity. In concluding, this paper argues that the conscious participation of all the actors in IA (in this case, institutions, arbitrators, parties and law firms) is necessary to generate an impactful change in this area.

**2. The Issue of Diversity in International Arbitration**

Generally, diversity entails the inclusion of different things or people in something.<sup>5</sup> In relation to IA, Franck classifies diversity in terms of gender, nationality, age, linguistic capacity, legal training and professional experiences in arbitration related cases.<sup>6</sup> For context, the scope of this paper will examine gender-diversity in the composition of arbitral tribunals (a small piece of the diversity puzzle). To use a well-worn metaphorical cliché that is packed with a lot of information, IA is decided by a cartel of ‘pale, male and stale’ professional arbitrators.<sup>7</sup>

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<sup>1</sup> Greenwood and Mark (n 16) p 7.

<sup>2</sup> For this essay, international arbitration is viewed as both international commercial and investment arbitration.

<sup>3</sup> <<https://noticed.org.uk/herbert-smith-freehills-supports-the-african-promise/>> accessed 22 August 2021.

<sup>4</sup> Ksenia Polonskaya, ‘Diversity in the Investor-State Arbitration: Intersectionality must be part of the Conversation’ (2018) MJIL, v 19-1, p 260 <[https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0006/3152490/Polonskaya-unpaginated.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0006/3152490/Polonskaya-unpaginated.pdf)> accessed 31 July 2021.

<sup>5</sup> Cambridge Dictionary, <<https://dictionary.cambridge.org/dictionary/english/diversity>> accessed 28 June 2021.

<sup>6</sup> Susan D Franck and others, ‘The Diversity Challenge: Exploring the “Invisible College” of International Arbitration’ 53 CJTL, 429, p 440, <<https://heinonline.org/HOL/Page?handle=hein.journals/cjtl53&collection=journals&id=440&startid=&end=517>> accessed 10 June, 2021.

<sup>7</sup> Catherine A Rogers, ‘The Market of Arbitrators and the Market of Lemons’ (2020) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2020/06/10/the-market-for-arbitrators-and-the-market-for-lemons/>> accessed 5 August 2021.

The correctness of this assertion is backed-up by many empirical statistics. For instance, Franck<sup>8</sup> gathers wide a survey that international arbitrators are predominantly male and a heterogeneous group. She finds that about 82.4% were male while 17.6% were females. The survey further reveals that the median age of an average arbitrator is a 53-year-old male, a national of a developed state who has served as arbitrator in ten cases. Similarly, another survey reveals that 80% of respondents feel that tribunals had many white arbitrators, whereas 84% feel that they had many men, and 64% feel that there were too many arbitrators from Western Europe or North America.<sup>9</sup> More so, Puig's analysis of arbitral appointments at the International Centre for Settlement of Investment Disputes (ICSID) between 1972 and 2014 found that, grand old men from Europe and North America, continue to 'dominate the arbitration profession.'<sup>10</sup> Puig notes that just two women, Brigitte Stern and Gabrielle Kaufmann-Kohler have held 75% of all female appointments. The combined effect of the foregoing statistics is a clear indicator of a general acknowledgement by the global community that there is a diversity problem in IA, thereby demonstrating that there is certainly a diversity problem in IA. The problems caused by the said lack of diversity in IA are examined in the paragraphs that follow.

### **3. Problems Caused by Lack of Diversity**

#### **Threatens the perceived legitimacy of International Arbitration**

This paper argues that one of the problems caused by lack of gender-diversity in IA is that it threatens the perceived legitimacy of the system.<sup>11</sup> According to Grossman, adjudicative bodies where one sex is severely under or over-represented lack normative legitimacy because they are inherently biased.<sup>12</sup> Grossman implies that although men and women do not decide cases differently, 'sex representation matters for sociological legitimacy because relevant constituencies believe they do' and 'representativeness is an important democratic value.'<sup>13</sup> It is therefore unsurprising that the issue of arbitral diversity in investor-state dispute settlement (ISDS) among other concerns forms one of the central issues in the UNCITRAL Reform Working Group III.<sup>14</sup> Likewise, Langford and others identify evidence of lack of diversity in ISDS and suggest that it impacts on the legitimacy of the system.<sup>15</sup> Comparably, Franck shares the view that lack of diversity can affect the perceived legitimacy of a state's dispute resolution system and the quality of judicial decisions. While suggesting that identifying methods for enhancing diversity could help enhance legitimacy, public trust, and procedural justice in IA.<sup>16</sup> This paper further argues that another way of recognising the problems caused by the lack of gender-diversity in IA is by studying what is lost from not having a diverse team. Greenwood and Baker succinctly posit that a greater diversity has been shown to improve the quality of decision making in corporations, thereby suggesting that a diverse arbitral tribunal could improve the quality of arbitral process and the awards.<sup>17</sup> In contrast, some argue that a diverse arbitral team could create divergent views and possibly longer deliberations leading to stalemate.<sup>18</sup> This argument lacks persuasive force because having a diverse team is not necessary aimed at generating divergent viewpoints, in some cases, it is required to enhance deliberations. For instance, BLP observes that empirical studies reveal that 'the deliberative process before the arbitral tribunal is likely to be crucial. And thus, the diversity of views may be fundamental for a fair process and outcome'.<sup>19</sup> Bjorklund and others posit and further reinforce the argument of this essay that diverse decision-makers could be perceived as capable of producing fairer decisions which could enhance the

<sup>8</sup> Franck (n 5) 481.

<sup>9</sup> Berwin Leighton Paisner (BLP), "International Arbitration Survey: Diversity on Arbitral Tribunals, Are we Getting there?" (2016) BLP Publications, < <https://www.bclplaw.com/en-GB/insights/diversity-on-arbitral-tribunals-are-we-getting-there.html#page=1> > Accessed July 16, 2021.

<sup>10</sup> Sergio Puig, 'Social Capital in the Arbitration Market' 25 EJIL, L. 387 (2014), p 387, <<https://academic.oup.com/ejil/article/25/2/387/406287>> accessed 1 August 2021.

<sup>11</sup> Polonskaya (n 3) p 265, 270.

<sup>12</sup> Nienke Grossman, 'Shattering the Glass Ceiling in International Adjudication (2015) University of Baltimore Legal Studies Research Paper No. 2016-04, p 7, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2472054](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472054)> accessed 28 July 2021.

<sup>13</sup> Nienke Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' (2012) CJIL, vol 12, No 2 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1773015](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773015)> accessed 28 July 2021.

<sup>14</sup> Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), AQ/CN.9/935, para. 70, <<https://undocs.org/en/A/CN.9/935>> accessed 2 August 2021.

<sup>15</sup> Malcolm Langford and others, 'Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions' (2020) JWIT, p 171, 180, <<https://ssrn.com/abstract=3650890>> accessed 2 August 2021; Gabrielle Kaufmann-Kohler and Michele Potestà, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, CIDS Supplemental Report, 15 November 2017, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3457310](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457310)> accessed 1 August 2021.

<sup>16</sup> Franck (n 5) 429.

<sup>17</sup> Lucy Greenwood and Mark C Baker, 'Is the balance getting better? An update on the issue of gender diversity in international arbitration' (2015) OUP, p 413, <<https://academic.oup.com/arbitration/article/31/3/413/283295>> accessed July 14, 2021.

<sup>18</sup> Lucy Greenwood, "Tipping the balance – diversity and inclusion in international arbitration" (2017) Arbitration International, 33, 99–108, p 100, <<https://academic.oup.com/arbitration/article/33/1/99/3037962>> accessed July 15 2021.

<sup>19</sup> Berwin Leighton Paisner (n 8).

sociological legitimacy of IA.<sup>20</sup> Therefore, lack of diversity among arbitrators may impact on the perception of the users regarding the award and the perceived legitimacy of IA at large.

### **Not reflective of the make-up of the users**

Beyond the issue of legitimacy, this essay argues that a non-diverse arbitral tribunal is problematic because it does not reflect the true makeup of its users. For instance, majority of investor-state cases emanate from non-western states.<sup>21</sup> Necessarily, the tribunal ought to be constituted by arbitrators that represent this makeup and different viewpoints. Diverse viewpoints and problem solving with diverse perspective would altogether reflect the makeup of the users. According to BLP 'a system serving the needs of a particular constituency, in this case, participants in international commerce should reflect the makeup of that community'.<sup>22</sup> Lack of diversity among the adjudicators casts doubts on the fairness of the arbitral awards. Bjorkund and others observe that instead of being viewed as fair, just and devoid of bias, awards are sometimes viewed as the product of adjudicators that share a particular world view.<sup>23</sup> Likewise, Franck<sup>24</sup> posits that the benefits of diversity go beyond age, rather, the parties who are involved in the dispute may benefit from the diversity. She hypothesizes that parties may not always fully identify or feel fully heard. In her view, a diverse tribunal would reflect the society and help in gaining the people's confidence. Harten also shares the view that having a diverse team could reflect the makeup of those affected by the decisions.<sup>25</sup> These viewpoints underscore the argument of this paper that lack of gender-diversity among arbitrators in IA is problematic because it does not reflect the makeup of the users. The natural query that arises therefore is, what is the reason for the lack of gender-diversity in IA.

### **4. Reasons for Lack of Diversity**

Greenwood suggests and rightly so that the answer to the question of why women are not appointed in IA tribunals is not straightforward. This is expected, given that various reasons for the gap in this area are hypothesised by different commentators.<sup>26</sup> This section critically analysis the reasons for lack of gender-diversity in IA in the paragraphs that follow.

#### **Insufficient qualified females**

Greenwood and Baker argue that the reason for the low representation of women in IA tribunals is the lack of women making it to the top of the profession. In their illustration, they reckon that only about 20% of females make it to partner level despite 65% of graduate trainees in the United Kingdom being women. They attribute the reason for this to 'pipeline leak', (influenced by factors like, office climate, lack of female role models, lack of flexible work options etc). The effect of the pipeline leak in IA, in their view results in not having enough qualified women to be appointed as arbitrators,<sup>27</sup> thereby suggesting that they are not enough qualified females for selection as arbitrators in IA. Likewise, Harhay suggests that they are insufficient qualified individuals emerging out of the developing world, resulting in lack of diversity.<sup>28</sup> In contrast, other commentators argue that there are in-fact enough qualified females in IA that are eligible for appointment into arbitral tribunals. According to Philips, there are many well-experienced and qualified female professional dispute resolution experts who do not get hired.<sup>29</sup> By analysing data on women participation in investment arbitration against the number of appointments that they receive, St. John, Behn, Langford and Lie argue that the idea of not having enough qualified women is unsupported. Their finding suggests that the proportion of women working in investment arbitration is around

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<sup>20</sup> Andrea K Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' (2020) JWIT 410–40, p 3, <<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/5-diversity.pdf>> accessed 2 August 2021.

<sup>21</sup> Malcolm Langford, Daniel Behn and Maxim Usynin, 'Does Nationality Matter? Arbitral Background and the Universality of International Investment Regime' (2018) PluriCourts Working Paper, p 6, <<https://www.jus.uio.no/ior/english/people/aca/malcolml/paper---does-nationality-matter---esil-2018-%2820-august%29.pdf>> accessed 31 July 2021 – the authors observe that developing states are respondents in 74.6% of ICSID registered cases.

<sup>22</sup> Berwin Leighton Paisner (n 8).

<sup>23</sup> Bjorklund (n 19) p 1.

<sup>24</sup> Franck (n 5) 495-496.

<sup>25</sup> Gus Van Harten, 'The (Lack) of Women Arbitrators in Investment Treaty Arbitration' (2011) FDI Perspectives, <<https://ssrn.com/abstract=2005336>> accessed 28 July 2021.

<sup>26</sup> Lucy Greenwood and Mark C Baker, 'Getting a Better Balance on International Arbitration Tribunals' (2012) Arbitration International vol 28, No. 4 LCIA, p 656, <<https://academic.oup.com/arbitration/article/28/4/653/244491>> accessed July 14, 2021.

<sup>27</sup> Greenwood and Baker (n 25) p.

<sup>28</sup> Leah D Harhay, 'Investment Arbitration in 2021: A Look to Diversity and Consistency' (2011) 18 SJIL 89, <<https://heinonline.org/HOL/P?h=hein.journals/sjlt18&i=93>> accessed July 13, 2021.

<sup>29</sup> Peter F Phillips, 'Diversity in ADR: More Difficult to Accomplish than First Thought' (2009) 15 Disp Resol Mag 14, p 3, <<https://heinonline.org/HOL/Page?handle=hein.journals/disput15&collection=journals&id=104&startid=&endid=106>> accessed July 12 2021.

30% which is significantly higher than the proportion of appointments that women receive.<sup>30</sup> Similarly, Langford, Behn and Lie observe that five of the twenty-five most active legal counsel in investment arbitration are women and majority of the twenty-five most active tribunal secretaries are women.<sup>31</sup> Thus, further casting doubts on the notion that the reason for lack of gender-diversity in IA is due to lack of qualified women.<sup>32</sup> Therefore, the idea that there are not enough qualified women for appointment into IA tribunal lacks persuasive force as the main reason for lack of gender-diversity in IA.

### **Informal appointment procedure and prior experience norm**

Informal norms with appointment and repeat appointments have also been widely acclaimed as a mega reason for the lack of diversity in IA. On this note, St. John, Behn, Langford and Lie examine the procedure of appointing arbitral tribunals in investment arbitration and propose the explanation that the absence of female arbitrators is linked to the ‘prior experience’ norm. Their illustration suggests that legal counsel and their clients rely on the conduct of arbitrators in prior investor-state arbitration cases to appoint individuals that counsel feel they can better predict.<sup>33</sup> The parties’ presumption is that the conduct of an arbitrator in previous cases demonstrates competence, thereby qualifying them for other future appointments. Greenwood and Baker however do not share the view that previous appointments make arbitrators more efficient. They posit that those numerous appointments do not make a person more efficient or a better arbitrator. To them, it simply makes the person busier, thereby causing delay in the arbitral process which ultimately undermines the initial perception that arbitration is faster than litigation.<sup>34</sup> Additionally, Langford, Behn and Uysnin theorise that the proportion of female arbitrators has not increased because of the ‘prior experience norm’ in investment arbitration given that majority of new appointments go to arbitrators sitting in previous cases.<sup>35</sup> Comparably, Harhay shares the view that the reason there is no new entrant in international arbitral tribunal is caused by lack of trust in those that have not yet proven themselves (by experience) as arbitral veterans.<sup>36</sup> Piu also observes that arbitrators who have been appointed more frequently are more likely to attract further appointments.<sup>37</sup> Bjorklund and others explain that the selection of arbitrators based on prior experience led to no female arbitrators receiving appointments in the early days of the system (1990s -2000s), resulting in few women gaining known track-records from whom to select save for Kaufmann-Kohler and Stern, who both entered the system early.<sup>38</sup> Waibel further explains that the party driven appointment system and particularly the possibility of repeated appointments constitute ‘a barrier to entry’ for many candidates in investment arbitration.<sup>39</sup> Hence, the major reason for lack of gender-diversity in IA is reliance by appointing authorities on previous experience of arbitrators for future appointments.

### **Solicited feedback loop**

Information asymmetry and the problem of the ‘solicited feedback loop’ is also suggested as one of the causes of lack of diversity in IA.<sup>40</sup> It is suggested that the solicited feedback loop arises when counsel, co-arbitrators, chair, potential arbitrators and potential counsel also make up the group that give feedbacks to parties considering arbitral candidates.<sup>41</sup> This would inevitably result in the recommendation of the usual suspects (as opposed to looking into appointing a more diverse group). According to Rogers, arbitrator research based solely on person-to-person inquiries and the subjective nature of arbitrator assessments creates an information bottleneck. This is because there are only a limited number of individuals that can provide such information and an assessment as to the reputation of the arbitrator, thereby stifling the ability of newer and more diverse arbitrators to develop international reputations.<sup>42</sup> She suggests that an arbitrator could have a fantastic reputation, yet no one could know

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<sup>30</sup> Taylor St. John, Daniel Behn, Malcolm Langford, and Runar Lie. ‘Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration’ (2017) Pluricourts Working Paper, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3782593](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782593)> accessed 28 June 2021.

<sup>31</sup> Malcolm Langford, Daniel Behn and Runar Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20(2) JIEL p 1 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2978531](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2978531)> accessed 29 June 2021.

<sup>32</sup> Grossman (n 9) p 29 – agrees that the notion of not having enough qualified women for appointment lacks persuasive force, she argues that the limited pool argument fails to explain why some global courts with similar qualifications requirements and subject matter jurisdictions exhibit stark differences in the percentages of female.

<sup>33</sup> St. John and others (n 29).

<sup>34</sup> Greenwood and Baker (n 25) p 659.

<sup>35</sup> Langford, Behn and Uysnin (n 20) p 12.

<sup>36</sup> Harhay (n 27).

<sup>37</sup> Puig (n 9) p 387.

<sup>38</sup> Bjorklund and others (19) p 16.

<sup>39</sup> Michael Waibel, ‘ICSID Arbitrators: The Ultimate Social Network?’ (29 July 2018) EJIL: Talk! <<https://perma.cc/X9ZJ-PL76>> accessed 1 August 2021.

<sup>40</sup> Greenwood (n 17) p 99.

<sup>41</sup> Greenwood (n 17) p 105.

<sup>42</sup> Catherine A Rogers, ‘The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence’, Kluwer Arbitration Blog, (2017), <<http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators/>> accessed July 11, 2021.

about it, thereby suggesting that lack of knowledge about the arbitrators inevitably prevent them from getting appointments which results in lack of diversity in IA.

## **5. How to Fix the Problem**

This section examines the ways of fixing the problem of gender-diversity in IA. It acknowledges existing solutions targeted at addressing the issue. An instance is the signing of the Equal Representation in Arbitration Pledge (the Pledge). If for nothing, it has been applauded for stimulating the capturing of data on diversity in IA by signatory arbitral institutions.<sup>43</sup> For instance, Alison reports that the LCIA marked five years of signing the pledge and recorded that the percentage of female arbitrators appointments in cases administered by LCIA has gone up to 33% in 2020 from 15.8%.<sup>44</sup> While the pledge is a laudable effort, other tailored and focused ways of fixing the problem are discussed in the subsequent paragraphs.

### ***Institutionalisation of Arbitral Appointments***

The analysis of the reason for lack of gender-diversity in IA largely suggests that the mega reason for lack of gender-diversity in IA is linked to the procedure of appointment. Consequently, the problem of lack of gender-diversity in IA could therefore be fixed by those that have the power to appoint arbitrators (in this case, the parties and arbitral institutions). Interestingly, institutions are said to appoint a more diverse team than the parties do. Sadly, the parties are responsible for making most of the appointments. To solve the problem of lack of gender-diversity in IA, it is therefore suggested that arbitral institutions should be responsible for pointing arbitrators.<sup>45</sup> Or at-least provide a diverse list for selection to law firms and the parties. According to St. John, Behn, Langford and Lie, if the process of appointing arbitrators becomes more formal, the number of women being appointed will rise.<sup>46</sup> While this method may help in fixing the problem, this paper observes that it could attract resistance by parties. This will be unsurprising, given that corporations suggests that greater autonomy in the selection of arbitrators is one of the attractions for arbitration.<sup>47</sup> As an extension of institutional appointment, it is suggested that the use of a mandatory roster could further help in addressing the problem.<sup>48</sup> Harten infers that the use of a mandatory roster would promote a publicly accountable and deliberative process of appointment, thereby reducing the barrier of participation by women. Additionally, Harten suggests that states could move to mandatory representation of particular groups on the roster, where the roster itself did not achieve the desired end. Langford, Behn and Malaguti also share the view that an improvement can be made in this area if all appointments are required to be made from a roster made up of diverse individuals.<sup>49</sup>

### ***A system of blind appointment***

Alternatively, a system of appointing arbitrators blindly could increase gender-diversity in IA. According to Greenwood, a system of blind appointments is a way of fixing the gender imbalance in arbitral tribunal. She considers that female arbitrators are still at a disadvantage even when a diverse list is provided by firms or institutions to the parties for selection. She infers from several studies and illustrations that women and men do not evaluate men and women equally in professional capacities. She suggests that when firms or institutions remove the names and genders of arbitrators and send a standardised list to parties for selection, the parties could likely appoint a female rather than a male arbitrator. She theorises that the realisation of the need to engage in the blind appointment may also counteract the effect of implicit gender bias.<sup>50</sup>

### ***Arbitrator Intelligence Report***

Perhaps increasing the level of information regarding arbitrators could further help in solving the problem of gender-diversity in IA. Rogers suggests and this essay agrees that the key to resolving the issue is better intelligence on arbitrators. In her view, having more information about arbitrators could be used to identify qualified arbitrators and implement changes.<sup>51</sup> Likewise, Greenwood suggest that increased transparency and

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<sup>43</sup> Greenwood (n 17) p 103.

<sup>44</sup>Ross Alison, 'LCIA Marks Five Years of the Pledge' (2021) Global Arbitration Review, <<https://globalarbitrationreview.com/diversity/lcia-marks-five-years-of-the-pledge>> accessed 28 July 2021.

<sup>45</sup> Bjorklund and others (n 19) p 19.

<sup>46</sup> St. John and others (n 29).

<sup>47</sup>School of International Arbitration at Queen Mary University of London and White & Case, '2010 International Arbitration Survey: Choices in International Arbitration' (Survey Report, 2010) <<https://perma.cc/2778-TT8E>> accessed 1 August 2021.

<sup>48</sup> Gus Van Harten (n 24).

<sup>49</sup> Malcolm Langford, Daniel Behn and Maria Chiara Malaguti, 'The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement' (2019) Academic Forum on ISDS Concept Paper <<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/langford-behn-malaguti-models-trade-offs-isds-af-isds-paper-12-draft-14-october-2019.pdf>> accessed 2 August 2021.

<sup>50</sup> Lucy Greenwood, 'Could "Blind" Appointments Open Our Eyes to the Lack of Diversity in International Arbitration?' (2015) TDM vol 12, issue 4, p 6 <<https://www.transnational-dispute-management.com/article.asp?key=2248>> accessed July 18, 2021.

<sup>51</sup> Rogers (n 41) p 2.

access to information about candidates that are being considered for appointment will solve the issue of information asymmetry and ‘solicited feedback loop’.<sup>52</sup> According to Rogers, this would be implemented through the utilisation of the Arbitrator Intelligence Questionnaire (AIQ). When parties and counsel complete an AIQ at the end of each arbitration, Arbitrator intelligence will then compile the information collected about arbitrators, analyse it, and compile it into Arbitrator Intelligence Reports (AI Reports) on individual arbitrators. The reports will then be made available (for a fee) through Wolters Kluwer. Polonskaya observes however that despite this purported commitment to diversity, Arbitrator Intelligence has a board of directors that includes only one woman (Catherine Rogers), the other five directors are men.<sup>53</sup> This is not encouraging, a more diverse board could have been more exemplary given the sensitivity of the topic in consideration. A more radical suggestion has also been argued as the way of solving the diversity issue. It is suggested that a panel that is diverse (having at-least one female arbitrator) should be recognised and embraced as the norm whereas a panel that is not diverse should be identified as deficient, abnormal, and unacceptable.<sup>54</sup> Benton states that the awareness and acknowledgement of what is a normal or a defective panel of arbitrators will be positioned to implement a standard that addresses the situation. Interestingly, Benton did not provide any robust justification for this radical suggestion and how this will fix the problem.

### ***Compulsory retirement age for arbitrators***

Finally, this paper proposes that having a compulsory retirement age for arbitrators could also help in fixing the issue of diversity. If nothing, it could help in ‘flushing-out’ the male, pale and stale category and allow new entrants. A practical way of implementing this would be for institutions to provide rules regarding mandatory retirement of arbitrators after a certain age just like judges in state judiciaries.<sup>55</sup> This essay is optimistic that the approach could be viable. Given that unlike in times past where arbitrating was taken as a part-time job, arbitrating is viewed as a profession nowadays. Hence arbitrators should be subject to compulsory retirement like other professional adjudicators. According to Gillard, there has been an emergence of a class of professional arbitrators. He reckons that arbitrator has become a socio-professional category of its own.<sup>56</sup> Therefore, having a retirement age like other adjudicating professionals would create room for new entrants and help in solving the problem of lack of gender-diversity in IA.

## **6. Conclusion**

This paper analysed the problems caused by lack of diversity in IA. It found that the absence of diversity in IA affects the perceived legitimacy of the system. This paper argued that ‘previous experience norm’ is the mega reason for lack of diversity in IA. It also examined and evaluated the ways of fixing the problem. It argued among others that institutionalising arbitral appointments would improve the problem of lack of diversity. In concluding, this paper agrees with Greenwood and Baker that the ultimate responsibility of making a significant change in ensuring a diverse arbitral tribunal rest on the parties making the appointment.<sup>57</sup> Therefore, to fix the diversity problem in IA, it behoves all the IA participants (the parties, respondent-states, firms, institutions and arbitrators) to consider the importance of diversity and look beyond selecting the popular names when appointing arbitrators.

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<sup>52</sup>Greenwood (n 17) p 99.

<sup>53</sup> Polonskaya (n 3) p.

<sup>54</sup>Gary L Benton, ‘Let’s Stop Talking About the Arbitrator Diversity Problem’ (2018) Kluwer Arbitration Blog <<https://svamc.org/wp-content/uploads/Benton.Lets-Stop-Talking-About-Arbitrator-Diversity.Kluwer1.14.185b35d.pdf>> accessed 28 June 2021.

<sup>55</sup> This suggestion has not been tested, it is a novel suggestion of this essay and should be subjected to further research and analysis.

<sup>56</sup>Emmanuel Gaillard, ‘Sociology of International Arbitration’ (2015) OUP, *Arbitration International* 31, 1–17, p 4, <<https://academic.oup.com/arbitration/article/31/1/1/252881>> accessed 27 July 2021.

<sup>57</sup> Greenwood and Mark (n 16) p 7.