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2024

Why is Diversity Among Appointed Arbitrators Lacking Given the Global Spread of Parties and Their Disputes?

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I. INTRODUCTION

International arbitration is becoming a mainstay of the civil justice system. Major corporations, across varying industry sectors, find arbitration to be the preferred method of resolving cross-border disputes.¹ Even though the use of arbitration has increased globally, diversity among appointed arbitrators is still an ongoing concern. The percentage of diverse arbitrators selected to hear a dispute is staggeringly low and does not reflect the diverse cultural makeup of the arbitration market. In response to this concern, the various arbitral bodies are now striving to become more unified in their endeavors to advance diversity among arbitrators.

It is not a surprise that the lack of diversity among arbitrators is receiving attention from key stakeholders. Most arbitral panels are markedly homogenous and predominantly consist of white males.² According to statistics released by the Stockholm Chamber of Commerce in 2019, only 23% of appointed arbitrators were women,³ and data regarding diversity of race is quite as troubling. When looking at the American Arbitration Association's arbitrator appointments, minorities only makeup around 27% of appointments.⁴ As evidenced by these statistics, much can still be done to increase diverse representation among appointed arbitrators.

Increasing diversity among appointed arbitrators will allow all participants in the arbitral process to feel that an arbitral forum is a setting where justice is done. This paper offers approaches that arbitration providers and participants in the arbitral process can adopt to enhance

¹ PwC & The School of International Arbitration, *Corporate Choices in International Arbitration*, (2013), <https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>.

² See F Peter Phillips, *Diversity in ADR More Difficult to Accomplish than First Thought*, *Dispute Resolution Magazine*, (2009).

³ Practical Law Arbitration, *SCC Publishes Caseload Statistics for 2019*, (Apr. 21, 2020), <https://uk.practicallaw.thomsonreuters.com/w-025-0847>.

⁴ Sasha A. Carbone & Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal*, 84 N.Y. ST. B.A. J. 33, 33–34 (2012); AM. ARB. ASS'N, 2018 ANNUAL REPORT & FINANCIAL STATEMENTS 6 (2019), https://www.adr.org/sites/default/files/document_repository/AAA_2018_Annual_Report_and_Financial_Statement_s.pdf [<https://perma.cc/AM42-LTVB>].

diversity in arbitrator selection. This paper will discuss why it is important for the arbitration community to focus its efforts on increasing diversity among arbitrators, it will analyze the current efforts undertaken by the arbitration community to increase diversity and why those efforts have not yet resulted in significant increases in diverse representation among appointed arbitrators, and lastly, recommendations will be made as to how arbitral organizations and participants can enhance the promotion of arbitrator diversity.

II. WHY IS INCREASING DIVERSITY AMONG APPOINTED ARBITRATORS IMPORTANT?

Improving diversity among arbitrators will help to ensure fairness, impartiality, and access to justice in the arbitration process. All participants in arbitration should have an opportunity to benefit from and contribute to the process, regardless of their background or identity. Promoting diversity, equity, and inclusion in dispute resolution will foster a more inclusive and representative arbitration community. While these notions of fairness and equity are widely accepted within society, it is also important to note that a diverse workforce helps to enhance performance. Increasing diversity among arbitrators will improve the quality of arbitral decisions because it will offer a wider range of skills, experiences, and perspectives to tap into. Diversity will also add legitimacy to the arbitration process by demonstrating that arbitration is made and administered for the benefit of all persons.

A. A diverse arbitral tribunal will improve the quality of the decision-making process.

“Diversity is about bringing together collective knowledge, wisdom and comprehension, born from an array of skills and experiences...to ensure a high-profile quality of the decisions to

be respected and followed.”⁵ A diverse arbitral tribunal will improve the quality of decision-making throughout all stages of the arbitration process because different perspectives result in better decisions. Studies conducted in the corporate setting have shown that diverse teams achieve better outcomes.⁶ Companies who built teams with individuals from underrepresented identity groups reported that their diverse teams outperformed and were more effective than their homogeneous teams at executing their work.⁷ The studies illustrated that combining different perspectives resulted in the production of higher-quality work and better decision making.⁸ The same can be expected in the arbitration setting. When disputes are decided by a diverse group of arbitrators, the arbitral tribunal will be better equipped to navigate various nuances and understand diverse viewpoints.⁹

⁵ Vikrant Pachnanda, *Importance of Diversity While Forming an Arbitration Tribunal*, India Law Journal (2023), <https://indialawjournal.org/importance-of-diversity-while-forming-an-arbitration-tribunal.php>.

⁶ Dieter Holger, *The Business Case for More Diversity*, The Wall Street Journal (Oct. 26, 2019), <https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200> (finding that fostering diverse and inclusive cultures within the workplace provided companies with a competitive edge over their peers); Sundiatu Dixon-Fyle, et al., *Diversity Wins: How Inclusion Matters*, McKinsey & Company (May 19, 2020), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters# (reporting that the most diverse companies are now more likely than ever to outperform less diverse peers on profitability. “Our latest analysis reaffirms the strong business case for both gender diversity and ethnic and cultural diversity in corporate leadership—and shows that this business case continues to strengthen. The most diverse companies are now more likely than ever to outperform less diverse peers on profitability.”); Robin J. Ely & David A. Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, Harvard Business Review (Nov.-Dec. 2020) (scholarly researchers have found that increased diversity can lead to higher-quality work and better decision making).

⁷ David A Thomas & Robin J Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, Harvard Business Review (Sept.-Oct. 1996), <https://hbr.org/1996/09/making-differences-matter-a-new-paradigm-for-managing-diversity>; David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Business Review (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter> (reporting that diverse teams may outperform homogenous teams in decision making because diverse teams are more likely to constantly reexamine facts, remain objective, and process information carefully. Research suggested that diverse teams are more likely to doge the pitfalls of conformity and engage in more innovative thinking. “[Diverse teams] may also encourage greater scrutiny of each member’s actions, keeping their joint cognitive resources sharp and vigilant,” which leads to less errors in decision-making processes.)

⁸ Holger, *supra* note 6.

⁹ Dr. Cristina Iona Florescu, *Report on the Diversity Roundtable at Vienna Arbitration Days 2018*, Law Review, Vol. VIII, Issue 1 (Jan.-June 2018) at 44; *See also* Freda J. Lavin, et al., *The Diversity Challenge Exploring the ‘Invisible College’ of International Arbitration*, Columbia Journal of Transnational Law (2015) at 496; Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, Volume 28, Number 4, Arbitration International (2012).

1. Teams comprised of individuals with varying perspectives and experiences produce better outcomes.

Greater diversity among arbitrators would allow parties to benefit from decision-makers with different perspectives that are gleaned from varying social and cultural backgrounds.¹⁰ When individuals from diverse backgrounds come together, they bring a variety of experiences and ideas to the table, which enhances teamwork, productivity, and decision-making.¹¹ For example, research has shown that mixed gender teams tend to score higher across a range of tasks due to the social sensitivity brought by women to the group.¹² A Forbes study, which analyzed 200 different business teams across a variety of companies, reported that gender diverse teams produced more profitable business decisions than all-male teams.¹³ This diversity of thought can also improve creativity and innovation in the decision-making process. A study published by Harvard Business Review stated, “companies with more women were more likely to introduce radical new innovations into the market over a two-year period.”¹⁴ These benefits are not limited to gender diversity. Companies with culturally and ethnically diverse teams are more likely to see above-average profits, indicating that cultural and ethnic diversity helps to improve outcomes as well.¹⁵

¹⁰ Apoorva Patel, *How Companies can Improve the Pipeline of Diverse Lawyers in Arbitration*, Burford Capital (Aug. 23, 2022), <https://www.burfordcapital.com/insights/insights-container/blog-nylj-diversity-arbitration/>.

¹¹ *See Id.*

¹² Dr. Ula Cartwright-Finch, *Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role in Ensuring Diversity?*, Cortex Capital (Aug. 2019), https://www.cortexcapital.org/_files/ugd/92060d_c0f194d8b22c4fefa325b4ede64770e1.pdf.

¹³ Erik Larson, *New Research: Diversity + Inclusion = Better Decision Making At Work*, Forbes (Sept. 21, 2017), <https://www.forbes.com/sites/eriklarson/2017/09/21/new-research-diversity-inclusion-better-decision-making-at-work/?sh=707562c34cbf>.

¹⁴ David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Business Review (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter>.

¹⁵ Karsten Strauss, *More Evidence That Company Diversity Leads to Better Profits*, Forbes (Jan. 25, 2018), <https://www.forbes.com/sites/karstenstrauss/2018/01/25/more-evidence-that-company-diversity-leads-to-better-profits/?sh=5ddfa6561bc7>.

Diversity also affects the legal field and the quality of judicial decisions.¹⁶ There is substantial research to show that law firms, in-house legal departments, and the judicial system as a whole benefit from diversity and inclusion.¹⁷ “A diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes.”¹⁸ Diverse teams analyze legal issues more effectively and more efficiently because of the innovative solutions they are able to come up with.¹⁹ Recent studies found that gender diverse legal departments achieve significantly higher performance ratings²⁰ and “ethnically diverse executive teams are 33% more likely to outperform their peers on profitability.”²¹ Having a diverse panel of arbitrators will benefit the arbitration process by providing a wider range of experiences that are often lacking among arbitrators who have had similar life experiences to one another.²²

2. Diverse arbitral tribunals will reduce the risk of cognitive biases tainting the decision-making process.

Additionally, increasing diversity in arbitral tribunals has been shown to reduce the risks of cognitive biases such as “groupthink” and confirmation bias.²³ Groupthink is where a group of people who are theoretically capable of making excellent decisions, nonetheless end up making poor ones because of flawed group processes and strong conformity pressures.²⁴ “Groupthink

¹⁶ American Bar Association, *Diversity in Law: Who Cares?*, (Apr. 30, 2016), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2016/spring2016-0416-diversity-in-law-who-cares/>.

¹⁷ Thomson Reuters, *The Business Case for Diversity and Inclusion in a Law Department*, <https://legal.thomsonreuters.com/en/insights/articles/law-diversity-inclusion>.

¹⁸ *Id.*

¹⁹ American Bar Association, *supra* note 16.

²⁰ Thomson Reuters, *supra* note 17.

²¹ *Id.*

²² Patel, *supra* note 10.

²³ Cartwright-Finch, *supra* note 13 at 5.

²⁴ Craig Phillips, *The Psychology of Groupthink and the Desperate, Dangerous Desire for Social Acceptance*, (Sept. 12, 2022), <https://www.pbs.org/independentlens/blog/psychology-of-groupthink-desperate-dangerous-desire-for-social-acceptance/>.

can lead to collective rationalization, lack of personal accountability and pressure to acquiesce.”²⁵ Because groupthink can cause individuals to value consensus over independent judgement, it can lead to unethical behavior, bad decision-making, and serious ethical breaches.²⁶ Such risks could gravely threaten the quality of arbitral decisions.²⁷ “A diverse group can help reduce groupthink as there is more likely to be range of experiences and opinions.”²⁸ Thus, a diverse tribunal could lead to more balanced and thoughtful decision-making.

Similarly, confirmation bias – “[the] human tendency to search for, favor, and use information that confirms one’s pre-existing views on a certain topic” – is more likely to transpire when diverse representation is lacking among decision-makers.²⁹ Confirmation bias is concerning because it is known to lead to flawed decision-making. This too can undermine the integrity of arbitral decisions and minimize arbitration’s efficacy.³⁰ Increasing arbitrator diversity will lessen the risk of confirmation bias tainting the tribunal’s decision-making processes. Diverse legal teams are more likely to dodge the pitfalls of conformity and engage in more innovative thinking.³¹ Diverse teams also tend to encourage greater scrutiny of each member’s actions, “keeping their joint cognitive resources sharp and vigilant.”³² This leads to less errors in decision-making processes.³³ Additionally, “diverse teams are more likely to reexamine facts and

²⁵ Thea Dunmire, *The Dangers of Groupthink*, <https://www.ishn.com/blogs/16-thought-leadership/post/103990-the-dangers-of-groupthink>.

²⁶ *Id.*

²⁷ Cartwright-Finch, *supra* note 13 at 5.

²⁸ Lisa Broomfield, *Diversity and Inclusion – Reducing Groupthink*, RWA Business Insight, <https://insight.rwabusiness.com/blog/posts/2021/august/diversity-and-inclusion-reducing-groupthink/#:~:text=A%20diverse%20group%20can%20help,that%20draws%20on%20multiple%20experiences>.

²⁹ Patrick Healy, *Confirmation Bias: How it Affects Your Organization and How to Overcome It*, Harvard Business School Online (Aug. 18, 2016), <https://online.hbs.edu/blog/post/confirmation-bias-how-it-affects-your-organization-and-how-to-overcome-it>.

³⁰ *Id.*

³¹ David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Business Review (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter>; American Bar Association, *supra* note 16.

³² *Id.*

³³ *Id.*

remain objective,” which is especially important in any judicial or arbitral proceeding.³⁴ By reducing tribunal homogeneity in arbitration, arbitrators can become more aware of their own potential biases that can otherwise lead them to make errors when coming to a decision. Thus, a diverse tribunal would be a more effective tribunal.

B. Diversity among arbitrators adds legitimacy to arbitration proceedings.

Diversity among arbitrators improves how arbitration is perceived across a wide array of stakeholders and can add legitimacy to the arbitral proceedings in the eyes of the users.³⁵

Arbitration should equally serve all participants, so having a diverse panel of arbitrators who can provide a wider range of experiences that are often lacking among homogenous panels can improve arbitration’s credibility among disputants. “Because the public’s perception of the legal profession often informs impressions of the legal system, a diverse bar and bench create greater trust in the rule of law.”³⁶

In a survey conducted by Queen Mary University of London and White & Case, “40% of respondents expressed the opinion that diversity across an arbitral panel would improve the quality of the tribunal’s decision-making.”³⁷ As more diverse disputants are sent to arbitration, the lack of diverse representation among arbitrators can undermine the integrity and legitimacy of this dispute resolution process.³⁸ The lack of diversity among appointed arbitrators “adds to

³⁴ Grant, *supra* note 14.

³⁵ Paula Hodges, et al., *Inside Arbitration: Diversity – What Has Been Done So Far And Can The Arbitration Community Do More?*, Herbert Smith Freehills (Feb. 22, 2022), <https://www.herbertsmithfreehills.com/insight/inside-arbitration-diversity-what-has-been-done-so-far-and-can-the-arbitration-community-do>.

³⁶ American Bar Association, *supra* note 16.

³⁷ White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, available at www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf.

³⁸ David Hoffman and Lamont Stallworth observed that “the lack of racial and ethnic diversity in the ranks of neutrals may cause society to lose confidence in the fairness of private dispute resolution, leading legislators, regulators and the courts to reverse the policies that now support ADR.” David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 DISP. RESOL. J. 37, 39 (2008).; Thomas J. Stipanowich, *Reflections on the State and Future of*

the perception of arbitration as an unfair and unbalanced process” that is geared against underrepresented groups.³⁹ This can be particularly detrimental for parties who may feel marginalized or excluded from traditional forms of dispute resolution. Given that women and minorities are the groups most often subjected to forced arbitration, improving the optics of arbitration among this subset of users will help to ensure that arbitration remains a respected means of dispute resolution.⁴⁰

Increasing diversity among those empowered to make decisions will improve the public's perception of fairness and neutrality within the arbitration process because a diverse tribunal will be able to understand its parties and lawyers better.⁴¹ Exposure to diverse perspectives can help arbitrators understand and empathize with others who are different from themselves.⁴² This can promote tolerance, respect, and understanding across different cultures, which is especially important in the resolution of cross-border disputes. A diverse pool of prospective arbitrators will also allow users to access candidates who can view the parties and the contractual dispute within a wider social, religious, or cultural context.⁴³ The tribunal will benefit from the varying perspectives, ideas, and challenges that stem from different life experiences. “A group of diverse people working together to identify, analyze, and resolve issues ensures that those collective perspectives...are voiced, considered, and represented as part of any proposed solution.”⁴⁴ Such a collaborative effort, though at times may be challenging or even contentious, will build

Commercial Arbitration: Challenges, Opportunities, Proposals, 25 AM. REV. INT'L ARB. 297, 377 (2014) (“The identity and background of decision makers makes a difference, and our growing understanding of the impact of these elements on process and product in dispute resolution must be communicated and translated into action.”).

³⁹ Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?*, 98 WASH. U. L. REV. 965 (2021) at 973.

⁴⁰ Chen, *supra* note 6.

⁴¹ Jennifer Coffman, *The American Arbitration Association's Commitment to Diversity*, 63 DISP. RESOL. J. 31 (2008).

⁴² *Id.*

⁴³ Hodges, *supra* note 35.

⁴⁴ American Bar Association, *supra* note 16.

confidence within the arbitration community that diverse opinions are valued. This can enhance the credibility of arbitral decisions among diverse disputants.

Increasing arbitrator diversity will have other benefits as well, including enhancing equal protection and equal opportunity.⁴⁵ By breaking down the barriers to entry that currently exist, there can be more frequent appearances of diverse arbitrators on rosters and more appointments of diverse arbitrators. Increasing this occurrence will help to normalize these less typical appointments and may ultimately increase the willingness of those who are responsible for arbitrator selection to step outside their comfort zone and select new, diverse arbitrators.⁴⁶

A more diverse group of arbitrators will help to promote public confidence in the arbitration process. When parties perceive the arbitral tribunal as reflecting a wide range of backgrounds and experiences, they are more likely to trust the fairness and impartiality of the process. Increasing the number of diverse arbitrators on rosters, and subsequently the arbitrators selected to hear the dispute, will benefit all who choose to participate in arbitration.⁴⁷ Given the tangible benefits of diversity, arbitrators of different gender identities and arbitrators with different racial and ethnic backgrounds should have a seat at the table.

III. WHAT EFFORTS ARE CURRENTLY BEING UNDERTAKEN TO INCREASE ARBITRATOR DIVERSITY AND ARE THEY WORKING?

The interest in increasing diversity among appointed arbitrators has heightened over the last several years. “No longer is it considered acceptable for international arbitrations to be adjudicated by a small and homogenous pool of arbitrators.”⁴⁸ Arbitration scholars, advocates,

⁴⁵ Shreya Jain, *2022 Year in Review: Diversity in the Mainstream*, Kluwer Arbitration Blog (Feb. 12, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/02/12/2022-year-in-review-diversity-in-the-mainstream/>.

⁴⁶ Id.

⁴⁷ Florescu, *supra* note 9, at 44.

⁴⁸ Sylvia Noury, *We Need More Diversity in Arbitration*, (Mar. 23, 2022), <https://www.law.com/international-edition/2022/03/23/we-need-more-diversity-in-arbitration/>.

and organizations have turned inward to analyze their own practices, perhaps in response to society's heightened focus on the importance of diversity. Now, all of the major providers are more unified in their endeavors to advance diversity among arbitrators.⁴⁹ Key institutional players are attempting to increase arbitrator diversity by expanding their rosters and introducing diversity pledges.⁵⁰ Arbitral organizations are also implementing more focused recruiting methods to bring on board arbitrators with diverse characteristics.⁵¹ While these are certainly laudable efforts, they have not yet made a significant impact on the arbitration community. This section will (1) explore some of the initiatives undertaken by various arbitral bodies to improve diversity in arbitration, and (2) identify the barriers which have prevented such initiatives from substantially improving diversity among appointed arbitrators.

A. American Arbitration Association

The American Arbitration Association (AAA) is attempting to improve diversity in the arbitration field by increasing the number of diverse arbitrators on its rosters.⁵² The AAA Diversity Committee states that diversity encompasses “gender, race, ethnicity, age, religion, and sexual orientation,” and it seeks to include on its rosters “those who have had little opportunity to participate in the dispute resolution field due to their identities.”⁵³ In 2012, before the diversity pledge was in effect, the AAA reported that its Roster of Neutrals was 23% diverse for gender and race.⁵⁴ In 2014, once the AAA began its efforts to diversify its roster, this number increased.

⁴⁹ AAA describes a recent, multi-year effort to diversify its roster, becoming much more focused on its efforts in the last five to ten years. *Diversity and Inclusion Initiatives*, AM. ARB. ASS'N (2020), <https://www.adr.org/DiversityInitiatives>.

⁵⁰ Cole, *supra* note 39 at 971.

⁵¹ American Arbitration Association, *supra* note 31; Cole, *supra* note 39 at 971.

⁵² The AAA's mission page emphasizes diversity, promoting “impartial and fair treatment of all people with whom we come in contact, regardless of gender, race, ethnicity, age, religion, sexual orientation, or other characterization.” AAA Mission, Vision and Commitment to Diversity and Inclusion, AM. ARB. ASS'N, <https://www.adr.org/MissionVisionCommitment2Diversity>.

⁵³ *Id.*

⁵⁴ Carbone & Zaino, *supra* note 4, at 34.

In 2014, the AAA reported that 25% of new arbitrators added to the roster were women and 31% were women or minorities.⁵⁵ In 2015, 41% of new arbitrators added to the AAA's rosters were diverse by race or gender.⁵⁶ In 2017, 45% of new additions to the roster were women or minorities or both.⁵⁷ These numbers evidence that since the AAA issued its diversity pledge, there have been more diverse arbitrators listed on its rosters.

However, increasing diversity on rosters does not necessarily translate to increased diversity among the arbitrators actually selected to resolve the matter. While appointment to the AAA's roster is a significant achievement because it demonstrates that you have attained a high level of industry expertise or knowledge, it does not guarantee that you will end up sitting on an arbitral tribunal. The AAA suffers from this phenomenon. Although the percentage of diverse arbitrators listed on the AAA's roster is on the rise, the number of diverse arbitrators selected from its rosters unfortunately remains fairly stagnant. In 2018, the AAA reported that only 27% of its appointments included diverse arbitrators.⁵⁸ This demonstrates that organizational efforts to diversify arbitrator rosters does not necessarily result in the selection of arbitrators with diverse characteristics.

⁵⁵ AM. ARB. ASS'N, 2014 ANNUAL REPORT & FINANCIAL STATEMENTS 14 (2015), https://www.adr.org/sites/default/files/document_repository/2014_Annual_Report_Financial_Statements_0.pdf [https://perma.cc/5VHL-MFZV].

⁵⁶ AM. ARB. ASS'N, 2015 ANNUAL REPORT & FINANCIAL STATEMENTS 14 (2016), https://www.adr.org/sites/default/files/document_repository/2015_Annual_Report_Financial_Statements_0.pdf [https://perma.cc/5VHL-MFZV].

⁵⁷ AM. ARB. ASS'N, 2017 ANNUAL REPORT & FINANCIAL STATEMENTS 14 (2018), https://www.adr.org/sites/default/files/document_repository/AAA_AnnualReport_Financials_2018.pdf [https://perma.cc/D9BX-X3T9].

⁵⁸ AM. ARB. ASS'N, 2018 ANNUAL REPORT & FINANCIAL STATEMENTS 14 (2019), https://www.adr.org/sites/default/files/document_repository/AAA_2018_Annual_Report_and_Financial_Statement_s.pdf [https://perma.cc/AM42-LTVB].

B. ICC

The ICC has also taken measures to improve diversity in arbitration. Recently, the ICC released a note on the proposal of arbitrators which stated, “[w]hen proposing arbitrators, Committees and Groups are encouraged to consider diversity...including but not limited to racial, ethnic, cultural, generational, and gender diversity.”⁵⁹ The ICC defines diversity to include racial, ethnic, cultural, generational, and gender diversity.⁶⁰ ICC Court President, Claudia Salomon, stated that “[a]rbitrator diversity in all forms is essential to the legitimacy of international arbitration.” Diversity ensures that the arbitrators represented in cases reflect the values of the global business community.⁶¹ While ICC statistics for 2021 demonstrated progress in the promotion of gender balance of arbitrators – with women making up almost 40% of appointments by the ICC Court – this number is in stark contrast to the appointments made by the disputants themselves.⁶² The appointment of women by the disputing parties was only around 17% in 2021.⁶³ Since party appointments are more frequently utilized than ICC Court appointments,⁶⁴ the total percent of ICC appointments was only 23% diverse on account of gender.⁶⁵ This demonstrates that even when an arbitral organization is committed to making more diverse appointments, the parties involved in the arbitration may not exhibit the same commitment to improving diversity among arbitrators.

However, the ICC has taken other steps to promote diversity in arbitration, including launching the ICC Court LGBTQIA+ network and the ICC Task Force on Disability Inclusion

⁵⁹ Shreya Jain, *2022 Year in Review: Diversity in the Mainstream*, Kluwer Arbitration Blog (Feb. 12, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/02/12/2022-year-in-review-diversity-in-the-mainstream/>.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Noury, *supra* note 48.

⁶⁴ Only 25% of arbitrators were nominated by the ICC Court in 2021.

⁶⁵ Id.

and International Arbitration.⁶⁶ These pledges represent the ICC’s efforts to provide services that address the needs of *all* clients in the hopes of legitimizing international arbitration as a viable method of dispute resolution for the entire global business community.⁶⁷ But even the ICC recognizes that these efforts alone are not enough to result in meaningful change. According to Salomon, “In house counsel, outside counsel and co-arbitrators all have a crucial role to play if [the arbitration community is] to see a sizable increase in the diversity of arbitrators.”⁶⁸

C. Equal Representation in Arbitration Pledge and ABA Resolution 105

The "Equal Representation in Arbitration" (ERA) pledge is another example of the arbitration community’s interest in increasing diversity.⁶⁹ ERA’s objectives are to improve the representation of women in arbitration and to appoint women as arbitrators on an equal opportunity basis.⁷⁰ As of 2021, the ERA pledge had over 4,000 signatures from parties, counsel, arbitrators, and institutions.⁷¹ “The pledge contains actionable steps to improve gender diversity, including the requirement for lists of potential arbitrators, committees, governing bodies and conference panels to include a fair representation of female candidates, and where possible, for a fair representation of female arbitrators to be selected.”⁷² The pledge also requires gender statistics for appointments to be collected and made publicly available. The American Bar Association (ABA) is also trying to raise awareness about the lack of diversity among dispute resolution arbitrators. The ABA passed Resolution 105, which identifies numerous action steps that arbitration stakeholders can take to promote the selection of diverse arbitrators, including

⁶⁶ International Chamber of Commerce, *ICC Acts to Encourage Diversity in Selection of Arbitrators*, (Nov. 3, 2022), <https://iccwbo.org/media-wall/news-speeches/icc-acts-to-encourage-diversity-in-selection-of-arbitrators/>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Ashley Jones & Stephanie Mbonu, *The ERA Pledge surpasses 4,000 Signatories*, Thomson Reuters (May 28, 2020), <http://arbitrationblog.practicallaw.com/the-era-pledge-surpasses-4000-signatories/>

⁷⁰ *Id.*

⁷¹ Hodges, *supra* note 35.

⁷² *Id.*

encouraging in-house counsel and law firms to take diversity pledges and encouraging arbitrators to appoint diverse co-arbitrators.⁷³

While significant efforts have been made to promote diversity in the arbitration field, they do not seem sufficient to overcome the major obstacle facing any prospective arbitrator on a roster – being selected to sit on the tribunal that hears the dispute. The next sub-section will explain why these efforts have not been successful in increasing the number of diverse arbitrators selected to sit on a tribunal.

D. What are the current barriers to achieving increased diversity among appointed arbitrators?

The commitment to diversifying arbitrator rosters and the utilization of diversity pledges has not been enough to change who is ultimately selected to arbitrate a dispute. Even though the diversity of the workforce has drastically changed over the years and even though arbitral organizations recognize the value of diversity in tribunals, the arbitrator pool has not evolved to reflect the diverse makeup of its market. The lack of diversity among arbitrators can be attributed to a number of factors, including a lack of access for diverse candidates, failure by arbitral organizations to promote diverse candidates beyond placement on rosters, and an arbitrator selection process that relies upon private parties to select arbitrators to serve on their cases. However, one of the most notable barriers to the lack of arbitrator diversity is the “pipeline problem.”⁷⁴

⁷³ AM. BAR ASS’N, RESOLUTION 105 (2018).; AM. BAR ASS’N, ABA RESOLUTION 105 - DIVERSITY IN ADR: SUMMARY AND ACTION STEPS V. 1 FOR STEERING COMMITTEE CONSIDERATION 3, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/aba-resolution-105-summary-and-action-steps.pdf [<http://perma.cc/RSD2-WALW>].

⁷⁴ <https://www.cpradr.org/news-publications/articles/2015-03-03--old-white-and-male-increasing-gender-diversity-in-arbitration-panels> [<https://perma.cc/68KG-SYZ7>] (“...many scholars blame what is referred to as a ‘pipeline problem’ for keeping women out of the arbitration field.”).

1. Pipeline Problem.

Many barriers to entry are non-arbitration specific, with the most notable barrier being the “pipeline problem”. “The pipeline, in its most basic sense, refers to the chain of education, experiences, associations, and job positions that can ultimately lead to a career as an arbitrator.”⁷⁵ If minority groups and women are underrepresented in the professional positions that serve as the gateway into the arbitrator world (i.e., general counsel, law firm partners, judges) then fewer women and minorities will be selected to serve as arbitrators.⁷⁶ While there are now equal numbers of men and women choosing to join the legal profession by going to law school, the representation of women drops markedly among the more senior and high-ranking members of the profession.⁷⁷ These barriers to entry can be even worse with respect to ethnic diversity because the barriers exist not only in relation to career progression, but also as early as the recruitment stage.⁷⁸

Furthermore, there has historically been poor retention and promotion of women and minorities in the legal profession, and this problem holds true in many arbitration practices. For example, in 2019, “the partners[] of...30 top arbitration law firms worldwide were just 17.6% female, on average.”⁷⁹ While the percentage of racially diverse lawyers in major arbitration practices is not readily available, it is safe to assume that the numbers are likely even smaller, given that racial minorities only make up about 11% of partners at major U.S. law firms and about 8% of UK-based partners at major British firms.⁸⁰ “One of the biggest barriers for women and diverse lawyers to attain senior roles and leadership positions in their firms is access to

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Hodges, *supra* note 35.

⁷⁸ Id.

⁷⁹ Patel, *supra* note 10.

⁸⁰ Id.

opportunities to gain the relevant experience and to promote their capabilities to prospective clients.”⁸¹

Parties are looking to appoint senior and experienced arbitrators who have an excellent track record. When there are fewer women or fewer diverse attorneys in senior legal positions, the pool of attorneys available to be appointed as an arbitrator shrinks.⁸² Additionally, if specialized knowledge or expertise on a subject matter is required to serve as an arbitrator for a particular dispute, then once again, the pipeline problem persists. Certain industries, such as the finance industry and patent law, are lacking in diversity.⁸³ This means that in certain industries, there will be fewer opportunities for underrepresented groups to develop the requisite specialization that would allow them to serve as an arbitrator on a dispute that requires specialized knowledge. This facet of the pipeline problem can also limit or prevent diverse arbitrators from being included on a candidate list. Fixing the pipeline problem and providing opportunities for women and minorities to advance their legal careers is critical to diversifying the gender and ethnicity of arbitrators selected to serve on tribunals. Potential solutions are offered in a later section of this paper.

⁸¹ Id.

⁸² Vikrant Pachnanda, *Importance of Diversity While Forming an Arbitration Tribunal*, India Law Journal (2023), <https://indialawjournal.org/importance-of-diversity-while-forming-an-arbitration-tribunal.php>; Georgia Quick & Camilia Wayland, *Gender Diversity in International Arbitration: Does the Arbitration Pledge go far Enough?*, International Arbitration Update (June 13 2018); See also Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, Volume 28, Number 4, Arbitration International (2012).

⁸³ Greg Iacurci, *While Slowly Improving, a Lack of Diversity in the Financial Planning Industry Persists*, CNBC (Feb. 15, 2022), [https://www.cnbc.com/2022/02/15/a-lack-of-diversity-still-persists-in-the-financial-planning-industry.html#:~:text=Diversity%20among%20financial%20planners%20has,according%20to%20the%20CFP%20Board; Brett Steenbarger, Why Diversity Matters in the World of Finance, Forbes \(Jun. 15, 2020\), https://www.forbes.com/sites/brettsteenbarger/2020/06/15/why-diversity-matters-in-the-world-of-finance/?sh=6d088d6a7913](https://www.cnbc.com/2022/02/15/a-lack-of-diversity-still-persists-in-the-financial-planning-industry.html#:~:text=Diversity%20among%20financial%20planners%20has,according%20to%20the%20CFP%20Board; Brett Steenbarger, Why Diversity Matters in the World of Finance, Forbes (Jun. 15, 2020), https://www.forbes.com/sites/brettsteenbarger/2020/06/15/why-diversity-matters-in-the-world-of-finance/?sh=6d088d6a7913).

2. Stakeholder Accountability.

It is also not uncommon for the same arbitrators to be appointed repeatedly, leading to a white, male dominated arbitrator pool. While it is understandable that parties want to turn to experienced arbitrators when the stakes are high, opportunities should be provided for others to gain such meaningful experience. Arbitration stakeholders such as corporations, in-house counsel, and law firms also play a role in limiting diversity among arbitrators selected to hear disputes.

Although corporations have been attentive to ensure that the law firms they retain employ diverse attorneys, this commitment to enhancing diversity has not translated to the alternative dispute resolution field.⁸⁴ Companies with robust commitments to diversity often ignore those diversity policies when their representatives are selecting arbitrators. Instead, counsel representing the companies tend to favor selecting well-known arbitrators who they think will give them the best chance of winning the case for their clients.⁸⁵ This often leads to the selection of non-diverse arbitrators. Although party-control over the arbitrator selection process is a distinguishing element of arbitration, it has also proven to be a limitation on the promotion of diverse arbitrators. Because parties tend to appoint established arbitrators – particularly in high

⁸⁴ Increasing Diversity Among Arbitrators, A Guideline to What the new Arbitrator and ADR Community Should be Doing to Achieve This Goal, https://www.adr.org/sites/default/files/document_repository/Increasing%20Diversity%20Among%20Arbitrators_0.pdf.

⁸⁵ Cole, *supra* note 39 at 984 (“It is odd that businesses who long ago committed to ensuring diversity in business and hiring practices, often abandon that commitment when selecting neutrals.”); Cheng, *supra* note 22, at 18; Cheng notes that “corporations persist in pursuing an outdated approach to the selection of diverse neutrals,” often outsourcing selection, together with the drafting of dispute resolution clauses, to outside counsel. See Cheng, *supra* note 3, at 19. Michael Z. Green, Arbitrarily Selecting Black Arbitrators, 88 FORDHAM L. REV. 2255, 2270–73 (2020); See David H. Burt & Laura A. Kaster, *Why Bringing Diversity to ADR Is a Necessity (ACC)*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (Sept. 30, 2013), <https://www.cpradr.org/news-publications/articles/2013-09-30-why-bringing-diversity-to-adr-is-a-necessity-acc> [<https://perma.cc/MJ8V-L548>].

value, complex matters – they hold back the representation of diverse candidates on arbitral tribunals.

In 2019, the ICCA Taskforce reported that the percentage of female arbitrators appointed by parties (as opposed to arbitral institutions or co-arbitrators) was only 13.9%.⁸⁶ The ICCA Taskforce also confirmed that in general, institutions appoint a greater proportion of female arbitrators than parties or co-arbitrators.⁸⁷ These statistics are to some extent unsurprising. The arbitrator selection process is led by counsel who is looking to make a decision that is in the best interests of their client. “Even when provided with candidate lists that include diverse neutrals, [counsel] seem to default to...the selection of older, white, male arbitrators, because these arbitrators likely have the most...name recognition.”⁸⁸ Corporations, in-house counsel, and law firms must bear some onus of encouraging diversity through their choice of arbitrators. While it is understandable that the disputing parties will want to select the arbitrator that they believe will best serve their interests, the arbitration community must recognize that this unmitigated discretion in selecting arbitrators is limiting diversity among appointed arbitrators.

IV. HOW CAN DIVERSITY AMONG APPOINTED ARBITRATORS IMPROVE?

To enhance diversity among appointed arbitrators, the arbitration community must focus its efforts on building upon the current diversity initiatives that are already in place, and it must consider implementing new procedures that have had a positive impact on diversity in other

⁸⁶ Carbone & Zaino, *supra* note 4.

⁸⁷ *Id.*

⁸⁸ Cole, *supra* note 39 at 984-985; Lawyers in law firms or in-house counsel control the disputes in arbitration. Because these “gatekeepers” are disproportionately white, “they tend to appoint someone like themselves, someone white, a lawyer, and usually male.” Hoffman & Stallworth, *supra* note 3, at 41. Prejudice, together with concern about the quality of minority and female neutrals, may also be an issue. Weatherspoon, *supra* note 5, at 802–04. See also Poole, *supra* note 74 (“In terms of selection, the problem stems from the fact that attorneys are typically most comfortable recommending to clients . . . [an] arbitrator they have previously worked with.”). Poole also raised the issue of supply. *Id.* Fewer minorities and women appear on JAMS rosters because JAMS draws arbitrators who are typically judges or senior partners at law firms with ADR experience, and women and minorities are underrepresented in those careers. *Id.*

sectors. While great strides have been made to advance diversity in arbitration, there may be more effective means of increasing diversity which are worth exploring. This section suggests that arbitration providers should expand diversity on their rosters and remain committed to growing and supporting the pipeline of diverse candidates. Additionally, arbitration providers should consider implementing policies that would ensure that the party-selection process does not limit the promotion of diverse candidates. Lastly, this section suggest new approaches arbitration providers could test out, such as integrating artificial intelligence into the arbitration process and incorporating the Mansfield Rule, which would require arbitral organizations to affirmatively consider a minimum of 30% diverse candidates for senior roles.

A. Expanding on efforts to diversify arbitrator rosters.

One way to promote diversity among arbitrators is for arbitrator provider organizations to expand upon their efforts in diversifying their arbitrator rosters. By adding more diverse neutrals to the total number of arbitrators available to the disputing parties, and by increasing diversity on various rosters such as employment, commercial, and labor rosters, there is a greater likelihood that a diverse arbitrator will be selected.⁸⁹ Arbitral organizations can learn from one another's successes to implement strategies that increase the number of diverse candidates on arbitral rosters.

The ICC announced in November of 2022 that it is encouraging the creation of 'nomination commissions' for proposing arbitrators to the ICC Court and notes that "Committees and Groups would take best efforts to achieve and maintain gender parity in their Nominations Commissions as well as minority representation."⁹⁰ Implementing guidelines to promote

⁸⁹ Carbone & Zaino, *supra* note 4, at 34.

⁹⁰ Shreya Jain, *2022 Year in Review: Diversity in the Mainstream*, Kluwer Arbitration Blog (Feb. 12, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/02/12/2022-year-in-review-diversity-in-the-mainstream/>.

diversity and equal opportunity on those who create arbitrator rosters, and announcing these efforts publicly, allows stakeholders to hold organizations accountable if meaningful change does not occur. Just this year, FINRA Dispute Resolution Services announced that it is embarking on a campaign to recruit new arbitrators “with a particular focus on adding arbitrators from diverse backgrounds, professions, and geographical locations.”⁹¹ FINRA is actively seeking diverse arbitrators by conducting outreach to more than 100 minority and women’s organizations, attending conferences that attract individuals of varied backgrounds, and networking and hosting event with diversity-based organizations.⁹² Mimicking these recruitment efforts can certainly help organizations find and promote qualified diverse candidates for their rosters. Arbitral organizations should share the methods that have been successful in increasing diversity on their rosters because doing so could improve diversity in the arbitration community as a whole.

Arbitral institutions can also set up programs that would match aspiring diverse arbitrators with arbitral tribunals and allow them to be silent observers. “Participants would have to meet all the necessary conflict checks and abide by confidentiality restrictions, but it would allow them to be in the room where it happens.”⁹³ This would enable diverse practitioners to gain access and exposure to relevant experiences that could enhance their likelihood of being appointed to a roster and ultimately serving as an arbitrator. Observing how tribunals operate and listening to how arbitrators think about and analyze their cases could ultimately serve as a gateway to being appointed to an arbitrator roster. It can help a candidate gain the requisite knowledge and experience to be considered a qualified candidate to serve as an arbitrator.

⁹¹ FINRA, *Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA*, <https://www.finra.org/arbitration-mediation/our-commitment-achieving-arbitrator-and-mediator-diversity-finra>.

⁹² *Id.*

⁹³ <https://iclg.com/cdr/expert-views/17192-improving-diversity-in-international-arbitration>.

B. Growing and supporting the pipeline.

Arbitral organizations also “bear a great degree of responsibility in the...maintenance of diverse neutrals.”⁹⁴ The commitment to diversifying the roster is the first step, but sponsoring organizations must also ensure that there are opportunities for advancement in the field by offering mentoring, training, and networking to diverse neutrals starting out in the field.⁹⁵ Speaking opportunities at conferences for less experienced and more diverse members of the arbitration community should also be facilitated.⁹⁶ One way to support this goal is to urge law firms, arbitral institutions, and other legal organizations to use their influence to boost the profile of diverse practitioners by insisting on diverse speaking panels. For example, if a law firm were to sponsor an event, they could stipulate that the 50% of all speakers and panelists must be members of traditionally underrepresented groups.⁹⁷ If organizers of international arbitration conferences, webinars and similar events took measures to ensure that diverse candidates’ voices are being heard, it could provide additional perspectives in panel discussions, raise the profile of diverse arbitrators, and allow diverse younger practitioners to see representation in the industry.⁹⁸

There is also an onus on those at the "top" of a profession to bring others up behind them. “Co-arbitrators are often responsible for selecting the presiding arbitrator, a role in which women and diverse candidates are consistently underrepresented.”⁹⁹ Although their role in influencing the diversity of arbitrators selected to serve on tribunals is often overlooked, co-arbitrators have a

⁹⁴ Id.

⁹⁵ Cole, *supra* note 39.

⁹⁶ White & Case, *2021 International Arbitration Survey: The Evolution of International Arbitration*, <https://www.whitecase.com/publications/insight/2021-international-arbitration-survey>.

⁹⁷ Id.

⁹⁸ Vivia Chen, *Is the White, Male World of Arbitration Ready for Diversity?*, Bloomberg Law (Aug. 13, 2021), <https://news.bloomberglaw.com/business-and-practice/is-the-white-male-world-of-arbitration-ready-for-diversity>.

⁹⁹ Gemma Anderson, *Diversity in International Arbitration*, Thomson Reuters, <https://content.next.westlaw.com/practical-law/document/1f33c73e6470311e9adfea82903531a62/Diversity-in-international-arbitration?contextData=%28sc.Default%29&transitionType=Default&firstPage=true&viewType=FullText>.

direct and powerful opportunity to introduce diversity into the tribunal and give opportunities to a wider range of arbitrators to take on the presiding role. If arbitral institutions were to set up programs that would allow aspiring diverse arbitrators to be silent observers on a tribunal (as mentioned previously), this would allow more established arbitrators to work with diverse candidates that are looking to break into the industry and learn more about their qualifications. Structuring these programs similarly to a law clerk/judge relationship will allow the experienced arbitrator to benefit from the services of the novice arbitrator, while the novice arbitrator will gain experience will be able to network with other arbitrators.

Breaking into the arbitration field is difficult, with some commentators saying, “it’s easier to go with the status quo” and “ADR is even more of small, insular club than Big Law.”¹⁰⁰ It is common for parties to select arbitrators that they have some knowledge of or with whom they have had previous experiences with, which limits the ability of new, diverse candidates to break into the field. If arbitral organizations were to invest in diverse arbitrators early on in their careers, it can increase the visibility of diverse candidates and would allow them to have greater recognition among the parties that frequent arbitration. This investment may need to begin far before an attorney decides to be an arbitrator. Arbitral organizations should begin their outreach at the law school stage because it is crucial that they inform diverse law students that a career in arbitration is a realistic option. At this early stage, arbitral organizations must also educate diverse law students by equipping them with information about the various arbitration career opportunities and the programs available that could help build their resume. It takes several years for a novice arbitrator to gain success in the field, even if the arbitrator has excellent credentials

¹⁰⁰ Chen, *supra* note 98.

and an active practice. Investing in new, aspiring attorneys can help diverse candidates get a jump start to a career in arbitration.

C. Evaluating party control of the arbitrator selection process.

Despite growing the pipeline and increasing diversity on arbitral rosters, diverse arbitrators cannot be successful unless they are regularly selected by the parties themselves. After all, “a pillar of the arbitration process is the nearly unfettered right parties have in nominating arbitrators of their choice.”¹⁰¹ Parties have the freedom to select who they want to resolve their disputes. Because this enticing feature is one of the main reasons parties elect to go to arbitration, arbitral organizations will likely never eliminate this selection process. However, arbitral organizations do bear some responsibility in ensuring that the party selection process does not limit the selection of diverse arbitrators.

Arbitral institutions should encourage parties to consider diversity in the arbitral selection process. One way to encourage parties to consider diversity in the appointment process is for arbitral bodies to draft sample diversity clauses that in-house counsel, law firms, and corporations could incorporate into their agreements to arbitrate. For example, JAMS’s sample diversity clause states “the parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.”¹⁰² While this alone may not be enough to increase diversity, it places an acknowledgement of responsibility on the parties themselves to promote diversity in the selection of an arbitrator.

¹⁰¹ Cole, *supra* note 39.

¹⁰² JAMS, Diversity and Inclusion Clause for Arbitration Agreements and Contracts, <https://www.jamsadr.com/inclusion-clause>.

Arbitral organizations could also expand their rules to permit direct appointment of arbitrators in more cases.¹⁰³ Doing so may result in greater diversity among appointed arbitrators. For example, the AAA’s consumer arbitration rules authorize the AAA to appoint an arbitrator from its national roster instead of allowing the parties to select the arbitrator using the traditional party-selection process.¹⁰⁴ Given that the AAA has increased diversity on its arbitrator roster, the expected outcome is to see greater diversity among the arbitrators actually appointed to consumer arbitration cases. And that is indeed what occurred. “[U]sing this approach, [AAA] has diversified the National Roster so that 33% of its members are women or minorities, and 32% of consumer arbitrator appointments [went] to women or minorities.”¹⁰⁵

Arbitral organizations can also consider appointing diverse arbitrators when parties cannot agree on an arbitrator, or they can select diverse arbitrators where the provider is in a position to administratively appoint an arbitrator.¹⁰⁶ Arbitral organizations could also consider using blind or semi-blind selection procedures for disputes under a certain monetary threshold. Lastly, arbitral organizations can try to increase the likelihood that the list of arbitrators they provide to the disputing parties will be more diverse. For example, the “AAA offered parties the opportunity to be provided a list of potential arbitrators that was at least 20% diverse on the basis of sex or race.”¹⁰⁷ All of these efforts are meant to be a way of implementing different processes that could improve diversity among arbitrators, while still maintaining the integrity of the party-selection process.

¹⁰³ Svetlana Gitman, *How ADR Itself Increases Diversity*, American Arbitration Association (Feb. 17, 2022), <https://www.adr.org/blog/How-ADR-Itself-Increases-Diversity>.

¹⁰⁴ See AM. ARB. ASS’N, CONSUMER-RELATED DISPUTES: SUPPLEMENTARY PROCEDURES C-4 (2005), <https://www.adr.org/sites/default/files/Consumer-Related%20Disputes%20Supplementary%20Procedures%20Sep%2015%2C%202005.pdf> [<https://perma.cc/8-DUX-G6RT>] (“Appointment of Arbitrator”).

¹⁰⁵ Cole, *supra* note 39 at 986.

¹⁰⁶ Gitman, *supra* note 103.

¹⁰⁷ Cole, *supra* note 39 at 986.

D. Artificial Intelligence.

Artificial intelligence may be the next milestone that will transform the world of arbitration, in the same way it is already beginning to transform other industries. Specifically in the legal setting, many companies and users of dispute resolution services have begun to focus on predictive justice tools. Predictive justice tools analyze large amounts of data, through Artificial Intelligence enabled technologies, to predict the outcomes of legal disputes.¹⁰⁸ Such tools are based on algorithms and quantitative data that can improve predictability and efficiency of outcomes. For example, in the U.S., these tools help judges determine which arrestees should be detained pre-trial and which arrestees should be released.¹⁰⁹ The risk-based algorithms enhance the judge's decision-making process by using statistical data to determine the likelihood that an arrestee will show up to court when required and remain law abiding while out on release.¹¹⁰ Just as judges seek increased efficiency and predictability in the resolution of first appearance determinations, a similar result may be possible in international arbitration.¹¹¹

Artificial intelligence arbitrator selection tools offer a potential avenue for improving diversity. "Diversity is an objective that data scientists can model just like any other objective. Should a client prioritize diversity in their selection, factors such as race, age, and gender can all be built into a model to suggest new candidates."¹¹² AI tools can promote diversity by increasing information and reducing subjectivity in the arbitrator selection process.¹¹³ "With the significant

¹⁰⁸ Bhishm Khanna, *Predictive Justice: Using AI For Justice*, Centre for Public Policy Research (May 2021), <https://www.cppr.in/wp-content/uploads/2021/05/PREDICTIVE-JUSTICE-USING-AI-FOR-JUSTICE-2.pdf>.

¹⁰⁹ Laura and John Arnold Foundation Pretrial Risk Assessment.

¹¹⁰ Id.

¹¹¹ Daniel Schimmel, et al., *Transparency in Arbitration, Practical Law*, https://foleyhoag.com/getattachment/f80c0169-5ea8-4b96-a943-0529193d0c2c/Transparency-in-Arbitration_Practical-Law_Mar2018.pdf?lang=en-US.

¹¹² Allyson Reynolds & Paula Melendez, *AI Arbitrator Selection Tools and Diversity on Arbitral Panels*, International Bar Association, <https://www.ibanet.org/article/97cb79fa-39e9-48c1-8cb0-45569e2e62af>.

¹¹³ Id.

volume of data that can be processed by AI tools and their machine-learning capacity, predictive analytics are the ideal tool to provide extensive information about arbitrators from every nationality, background, legal system, and location.”¹¹⁴ However, it is important to note that AI tools can replicate human biases, so if AI tools are to be used to foster more diverse arbitral panels, experienced practitioners will need to engage with some of the difficult issues surrounding implicit biases and arbitrator diversity.¹¹⁵

E. Mansfield Rule.

The Mansfield Rule certification, which requires law firms to affirmatively consider a minimum of 30% diverse candidates for senior roles, launched in 2017. This program was created with the goal of boosting diversity in leadership and diversifying the power structure of law firms and legal departments. The Mansfield Rule “broaden[s] who is considered—through appointments, elections, promotions, and other critical activities that impact the pipeline—for dozens of influential leadership committees and roles.”¹¹⁶ Law firms and legal departments that adhere to the Mansfield annual certification process must have “. . . affirmatively considered at least 30 percent women, attorneys of color, LGBTQ+ and lawyers with disabilities for . . . equity partner promotions, formal client pitch opportunities and senior lateral positions” to obtain certification.¹¹⁷ Those who wish to receive Mansfield certification must also report their verified data, and the certifications are separated by entities who are “considering diversifying their structures” from entities who have “actually achieved diversity in leadership.”¹¹⁸

¹¹⁴ Dr. Aline Tanielian Fadel, *Predictive Analytics and Diversity in International Arbitration: Friends or Foes?*, ARIA Columbia Law (Oct. 8, 2021), <https://aria.law.columbia.edu/predictive-analytics-and-diversity-in-international-arbitration-friends-or-foes/>.

¹¹⁵ *Id.*

¹¹⁶ John Iino, et al., *Diversifying Leadership: How the Mansfield Rule is Driving Change*, Bloomberg Law (Jun. 17, 2022), <https://news.bloomberglaw.com/us-law-week/diversifying-leadership-how-the-mansfield-rule-is-helping>.

¹¹⁷ Diversity Lab, *Mansfield Rule 3.0, Mansfield Rule: Boosting Diversity in Leadership*, DIVERSITY LAB, (Sept. 3, 2019), <https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/>.

¹¹⁸ *Id.*

If the arbitration community were to apply the Mansfield Rule to international arbitration, the program could encourage those with the power of selecting an arbitrator to “think ‘outside the box’ and “find ways to overcome unconscious biases that appear to operate against true diversity and inclusion.”¹¹⁹ Two years of preliminary data for firms that have achieved Mansfield certification demonstrate that this initiative has promise. “Since the launch, non-Mansfield firms increased the racial and ethnic diversity of their management committees by a tenth of one percent (.13%), while Mansfield firms increased by 4.4%—more than 30 times the rate of non-Mansfield firms. The racial and ethnic diversity of non-Mansfield firms’ partner nomination committees declined by nearly 1.0% between 2017 and 2019, while Mansfield firms increased by nearly 4%.”¹²⁰ While many pledges talk about changing the demographic makeup of arbitrators internationally, “the Mansfield Rule could create significant, measurable progress towards diversity in global ADR practitioners.”¹²¹ The arbitration community could benefit from incorporating the work that has been done and the lessons that have been learned in “big law” to the arbitration-selection process in the ADR community.

V. CONCLUSION

Encouraging all forms of diversity, equity, and inclusion in dispute resolution, with a particular focus on increasing the number of diverse arbitrators selected to arbitrate disputes should be a key area of interest for the arbitration community. The arbitration community should reflect the diversity of the broader society it serves. By promoting diversity among arbitrators, we can create a more inclusive and efficient arbitral process that better serves the needs of all

¹¹⁹ La Rue & Symonette, *supra* note 3 at 229. “We see no reason... why the Mansfield Initiative could not have application in commercial and international arbitration...”

¹²⁰ Iino, *supra* note 116.

¹²¹ Abby Schwarz, *Increased Diversity in International Arbitration*, Denver Journal of International Law and Policy (Feb. 26, 2023), <https://djilp.org/increased-diversity-in-international-arbitration/>.

parties. Although the arbitration community has demonstrated its commitment to increasing diversity among arbitrators, current efforts must be expanded upon, and new solutions should be adopted to achieve the meaningful change that has not yet been able to come to fruition.