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June 29, 2021 [Barbara Warwas](#)

## Diversity in Arbitration: The lack of racial diversity in international arbitral tribunals

**This blog is co-authored by Barbara Warwas and Suela Dervishi, Paralegal at Ebiquity**

### Introduction

Calls for greater diversity, especially in relation to the appointment of arbitrators, have been prevalent for some time in the international arbitration community<sup>[1]</sup>, followed by several initiatives being set up to address the issue. While the primary focus of the diversity debate has been on gender, there have also been calls to expand and diversify the profile of the arbitrator pool to include more non-Western and non-White arbitrators.<sup>[2]</sup> For several years, scholars and practitioners have argued for countless benefits of increased racial diversity, such as an increased acceptability and legitimacy of the arbitration process.<sup>[3]</sup> There is a consensus that in a deliberative process like ADR, practitioners should reflect their claimants' demographics. The existence of diverse panels helps further the aims of meticulous and accurate fact-finding approaches. Similarly, they argue that the lack of racial diversity may directly and negatively affect the quality of arbitration awards.

This blog post will focus on the lack of diversity of African arbitrators appointed to resolve international arbitration proceedings, as well as initiatives that are being set up to address such issues. The focus on African ethnicity is given for two reasons: 1) African countries are no strangers to arbitration. Nearly 100 arbitral institutions exist across Africa. 2) There has been an increase of arbitration proceedings emanating from African regions, while there has been a minimal growth in the ethnic diversity of arbitrators appointed to resolve these disputes.

### Lack of diversity in arbitration

Despite the pervasive concern regarding the lack of diversity in arbitration, together with all the great benefits that increased racial diversity could introduce, the underrepresentation of African-appointed arbitrators in international arbitral institutions still exists. Between 1998 and 2007, a total of 472 parties from Sub-Saharan Africa arbitrated their disputes before the International Chamber of Commerce (ICC).<sup>[4]</sup> But over the same period, only 64 arbitrators from the same region were appointed by the ICC. In 2018, even rapper Jay-Z publicly criticized the "Large and Complex Case" database of the American Arbitration Association (AAA), which included only 3 "token" African Americans (one of whom was conflicted out) in a list of more than 200 qualified arbitrators.<sup>[5]</sup> Moreover, a 2015 survey for the National Academy of Arbitrators' Research and Education Fund found that of more than 400 practicing employment arbitrators, 74 percent were male and 92 percent were non-Hispanic white.<sup>[6]</sup>

It has been argued that the lack of diversity in arbitration is an issue of supply, in that the pool of potential ethnically diverse arbitrators is not sufficiently large.<sup>[7]</sup> However, nearly 100 arbitration institutions exist across Africa. Secondly, the largest arbitral African institutions, such as LCA, CRCICA, NCIA and KIAC, have adopted similar rules to LCIA and ICC.<sup>[8]</sup> This means that African arbitrators are familiar with international arbitral institutions' rules. Thirdly, African respondents to a survey chose to prefer to resolve their disputes under the ICC and LCIA as the top two institutions. The 2018 SOAS

Arbitration in Africa survey indicated that 82% of the 191 African arbitration practitioners that responded did not sit as an arbitrator in international arbitration between 2012 and 2017, and 59% did not act as counsel in international arbitration.<sup>[9]</sup> So why is it argued that the pool of potential ethnically diverse arbitrators is not sufficiently large?

The survey's respondents blame poor perception of African arbitration practitioners by their foreign colleagues, as lacking in expertise and experience.<sup>[10]</sup> Another scholar argued that the consistent lack of ethnic diversity among arbitrators is rooted both in Anglo-Europeans' historical influence in arbitration and in the arbitrator appointment procedures, which make it difficult for newcomers to establish themselves in the field. Even when the broader pool is available, parties and their legal counsel often opt for the repeat nomination of individual arbitrators. The LCIA Registrar's Report 2013 indicates that throughout 2013, only 16.5% of appointments were made to candidates who had not previously been appointed in LCIA arbitrations.

### **Initiatives that are being set up to address the diversity issue**

What can be done to ensure better representation of African practitioners in international arbitration tribunals? There have been several initiatives set up to address the diversity issue. These include the Racial Equality for Arbitration Law (R.E.A.L), ICCA Diversity and Inclusion Policy; ICCA Diversity and Inclusion Implementation Plan; and The African Promise.

REAL is a group of global lawyers practicing in international arbitration and striving to achieve racial equality for arbitration lawyers. REAL aims to focus on racial equality and representation of un(der)represented groups within one's own country and at the international level more generally. The website of REAL is available [here](#).

In June 2020, ICCA announced the release of the first formal ICCA Diversity and Inclusion Policy, ICCA Diversity and Inclusion Implementation Plan, and an updated ICCA Non-Discrimination and Harassment Policy. The 2020 Diversity and Inclusion Policy reaffirms ICCA's "commitment to the two mutually reinforcing values of diversity and inclusion and pledges to uphold them in our mission, activities and practices." The Policy and Plan both record current practice within ICCA and develop an ongoing, iterative process for realizing the values of diversity and inclusion in all of ICCA's activities—including ICCA Congresses and events, publications, projects, and Young ICCA initiatives. The website of ICCA is available [here](#).

The African Promise is committed to improving the profile and representation of African arbitrators especially in arbitrations connected to Africa in order to achieve fair representation as soon as practically possible. To achieve this, The African Promise encourages participants in the arbitral process to ensure that, wherever possible, statistics for nominations and appointments (split by party and other appointment) of African arbitrators especially in relation to arbitrations connected with Africa are collated by arbitral institutions and made publicly available. The website of the African Promise is available [here](#).

### **Future steps to increase the diversity pool**

To encourage diversity, all stakeholders should expand the pools from which they select arbitrators, and not merely rely on repeat nomination of individual arbitrators. Again, and in line with our previous blog

on diversity in this forum, we see particular work to be done in this regard by arbitral institutions. Most of our previous recommendations regarding the role of arbitral institutions in increasing gender diversity in arbitration apply here too. This concerns education and training by arbitral institutions, including scholarships for representatives of minorities, “unified regulations of paid internship programmes promoting diverse candidates”, and the revision of institutional arbitration rules to require appointments of diverse arbitrators [. . .] as a norm of the selection process.”<sup>[11]</sup> That being said, the responsibility lies among other arbitration actors too. To that end, raising awareness regarding the need for, and advantages of, diversity as well as general educational activities are key.<sup>[12]</sup> We also recommend the proposals by Chris Campbell, including those suggesting increased engagement with minority organizations or ethnic bar associations and legal societies.<sup>[13]</sup>

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<sup>[1]</sup> White & Case, ‘2021 International Arbitration Survey: Adapting arbitration to a changing world’ (6 May 2021) <<https://www.whitecase.com/publications/insight/2021-international-arbitration-survey/diversity-arbitral-tribunals>> accessed 24 June 2021.

<sup>[2]</sup> Arbitration Institute of the Stockholm Chamber of Commerce, ‘Diversity in arbitrator appointments in SCC cases 2015-2019’ <[https://sccinstitute.com/media/1792483/rapport\\_diversity-7.pdf](https://sccinstitute.com/media/1792483/rapport_diversity-7.pdf)> accessed 24 June 2021.

<sup>[3]</sup> Susan D. Franck, ‘The Diversity Challenge: Exploring the “Invisible College” of International Arbitration’ (2015) Columbia Journal of Transnational Law, <<https://scholarlycommons.law.wlu.edu/wlufac/488/>> accessed 24 June 2021.

<sup>[4]</sup> Emilia Onyema, ‘Too few of Africa’s commercial disputes are resolved by African arbitrators – why this must change’ (2019) <<https://theconversation.com/too-few-of-africas-commercial-disputes-are-resolved-by-african-arbitrators-why-this-must-change-125038>> accessed 24 June 2021.

<sup>[5]</sup> Armeen F. Mistry, ‘Lack of diversity continues to hurt alternative dispute resolution’ (26 May 2020) <<https://www.troutman.com/insights/lack-of-diversity-continues-to-hurt-alternative-dispute-resolution.html>> accessed 24 June 2021.

<sup>[6]</sup> Ibid.

<sup>[7]</sup> Naimeh Masumy, ‘Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role Ensuring Diversity?’ Fordham International Law Journal <<https://www.fordhamilj.org/iljonline/2020/11/23/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern-and-should-arbitral-institutions-play-a-greater-role-ensuring-diversity>> accessed 24 June 2021.

<sup>[8]</sup> White Case, ‘Comparative chart of the arbitration rules of the most active institutions in Africa’ <<https://www.whitecase.com/sites/default/files/2020-09/13-africa-focus-comparative-chart.pdf>> accessed 24 June 2021.

<sup>[9]</sup> Emilia Onyema, ‘Too few of Africa’s commercial disputes are resolved by African arbitrators – why this must change’ (2019) n(4).

<sup>[10]</sup> SOAS Arbitration in Africa Survey, 'Domestic and International Arbitration: Perspectives from African Arbitration Practitioners' (2018) <<https://eprints.soas.ac.uk/25741/1/SOAS%20Arbitration%20in%20Africa%20Survey%20Report%202018.pdf>> accessed 24 June 2021.

<sup>[11]</sup> Barbara Warwas and Delilah van Tol, "What can arbitral institutions do to increase gender diversity in arbitration?", <https://commercialarbitrationineurope.wordpress.com/2021/04/13/what-can-arbitral-institutions-do-to-increase-gender-diversity-in-arbitration/>, 13 April 2021, accessed 22 June 2021.

<sup>[12]</sup> Queen Mary University of London and White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration' <<http://www.arbitration.qmul.ac.uk/research/2018/>> accessed 24 June 2021.

<sup>[13]</sup> Christopher Campbell, "[Speak Louder About Arbitrator Diversity: Reflections From MLK Day](#)", Kluwer Arbitration Blog, 26 January 2018, accessed 22 June 2021.