IS INTERNATIONAL ARBITRATION TRULY INTERNATIONAL - THE ROLE OF DIVERSITY

1st Keynote Address presented by 'Funke Adekoya SAN at the 3rd Annual Conference on Energy Arbitration and Dispute Resolution in the Middle East and Africa on 6th March 2018.

1. Arbitration developed as an alternative to the delays and risks inherent in submitting claims to state courts for adjudication. The term "international" implies that more than one country is involved[1]. Anything that is international therefore requires interaction beyond national boundaries. Foreign parties' preference for arbitration is usually based on their discomfort when submitting their claims to the state courts in the countries where they operated, which they felt were inadequately equipped to deal with foreign parties, foreign law and foreign claims. Adherents of international arbitration promote it as a commercially viable and convenient means of international dispute resolution which is acceptable worldwide.

2. So what do we mean when we use the term "International Arbitration"? Within the arbitration community, it is generally understood to connote the use of arbitration by parties from different nations, linguistic, religious, legal and cultural backgrounds to resolve their dispute in a final and binding way.

[1] http://dictionary.cambridge.org/dictionary/english/international

3. The world currently produces over 92 million barrels of crude oil per day, with Africa and the Middle East contributing 9.4% and 34% Percent respectively [close to ½ of the world's daily total]. The biggest purchasers of African and Middle Eastern crude oil are Japan, China, India, USA and Singapore [also comprising nearly ½ of the world's population]. Obviously where there is trade, disputes follow. Noting the extent of impact the trade in the natural resources of these regions has on the world's population, with the possibility of resulting disputes, what is the extent of participation by the Middle East and Africa in the arena of international arbitration?

4. According to the ICSID Case Load Statistics -Issue [2018-1], the International Centre for Settlement of Investment Disputes registered a total of 650 cases as of 31st December 2017 [2]. Of this number, cases emanating from Sub-Saharan Africa constitute 15% while cases from the Middle East & North Africa make up 11%[3]. In effect ¼ of the cases registered at ICSID came from these areas.

5. Confirming these percentages in its Special Focus Africa – May 2017 report, ICSID revealed that as of May 2017, 22% of the cases it had registered involved African State parties, while 4% involved Middle Eastern State parties[4].

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[2] The ICSID Caseload – Statistics (Issue 2018-1) page 11.
[3] Ibid at page 11
[4] The ICSID Caseload – Statistics – Special Focus – Africa (May 2017) @p.7

6. 33% of the ICSID cases involving African State parties relate to disputes in Oil, Gas and Mining, while 4% relate to Electric power and other forms of energy.

7. The ICC Court of Arbitration also notes an increase in disputes from the Middle East and Africa.

8. The London Court of International Arbitration [LCIA] has been very upfront and open in publicising its arbitration caseload on an annual basis. In 2016 it the recorded a total of 303 cases with African and Middle Eastern cases accounting for 15% of the total [up from 11.5% the previous year] [5], divided as follows:

- Saudi Arabia: 1.7%
- Nigeria: 1.6%
- Other African Countries: 6.3%
- United Arab Emirates (UAE): 3%
- Other Middle Eastern Countries: 3.4%

22.53% of the cases relate to disputes arising from Energy and Natural Resources transactions.

9. So, it cannot be said that as disputants, these regions are absent from any of the recognised international arbitration arenas. When we look at participation as counsel and arbitrators however, the figures are very different. Of the 496 arbitral appointments made by

[5] Facts and Figures 2016: A Robust Caseload (The London Court of international Arbitration) @p.5 & 9

the LCIA that year, 180 (35.3%) were non-British arbitrators while 321 (64.7%) were British arbitrators.[6]

10. Regardless of the increase in the number of arbitration proceedings emanating from the Middle East and Africa in recent times, it appears that there is little growth in the ethnic diversity of arbitrators being appointed in these disputes. To what extent then can international arbitration be truly international if the arbitrators do not reflect the disputes in somewhat similar proportions? The impression to an observer [and even to many involved with international arbitration] is that it is the exclusive domain of a selected few.

11. Some believe that the disproportionate number of arbitrators from the Western hemisphere is because international commercial arbitration was established there, and moved elsewhere, following the incursion of its merchant seamen and other trading activities into other parts of the globe. Those who take this position are unaware that mediation and customary arbitration as a dispute settlement mechanism existed in the Middle East and Africa, long before the incursion of western civilisation.

12. Be that as it may, the arbitration community has been described as *"a tightly-knit, Anglo-European (plus the odd American) gentlemen's club, where everyone knew everyone else, either personally or by reputation, where arbitrators and counsel regularly lunched or golfed together, and where everyone was usually familiar with the*

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[6] Ibid, p 12

style and proclivities of the other members" [7]. *"Arbitrators in the past have been predominantly male and Anglo-Europeans. To borrow an expression that captures the perceived lack of diversity, "Pale, male and stale"* [8].

13. In 2013 less than 15% of the arbitrators appointed in ICC administered arbitrations were from Africa, Asia and the Pacific, even though these geographical regions made up 32.3% of the parties to the proceedings.[9] In 2015, there were 221 Arab parties involved in ICC cases, but only 54 Arab arbitrator appointments were made.[10]

14. Of the "35 Most in Demand Arbitrators" globally in 2015, as listed by Chambers & Partners, only 2 were female and the majority of the 33 males were white Europeans. Why is this? A participant in a recent international arbitration survey was of the view that *"Established practice in international arbitration is acknowledged to block change and keep new entrants out - the same arbitrators are chosen again and again"* [11]. This cannot help the expansion of a diverse arbitral database.

15. Permit me to quote extensively from the results of the BLP Survey on Diversity in arbitration because their report really paints a picture by reviewing the statistics of the major arbitral institutions. *"SIAC's Annual Report for 2015 reports that the number of women*

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[7] Rana Rashida and Barrington Louise - ArbitralWomen/TDM Special Issue on 'Dealing with Diversity in International Arbitration'

[8] Berwin Leighton Paisner's report on International Arbitration Survey: Diversity on Arbitral Tribunals, *Are We Getting There? Page 02.*

[9] The 2013 Statistical Report (August 2014), ICC International Court of Arbitration Bulletin, Vol 25, No 1

[10] 3 "We lag behind on diversity, Ziadé warns," Global Arbitration Review, Nov. 18, 2016,

[11]" Berwin Leighton Paisner's report on International Arbitration Survey: Diversity on Arbitral Tribunals, *Are We Getting There? Page 02*

appointed as arbitrators accounted for just under a quarter of appointments. ICC statistics for 2015 indicate that women represented 10% of all appointments and confirmations, and that women were more frequently appointed as co-arbitrators (43%) rather than sole arbitrators (32%) or tribunal presidents (25%). ICC data on arbitral appointments for 2016 shows that, to November 2016, only 20% of arbitrators appointed were women. LCIA statistics are more encouraging. In 2015 (compared to 2014) there was an increase in the number of female candidates put forward by the parties (6.9% compared to 4.4% in 2014) and selected by the LCIA (28.2% compared to 19.8% in 2014). SCC statistics indicate that, in 2015, 14% of arbitrators appointed were women, although the percentage fell to 6.5% where the parties themselves made the appointment. Statistics from the Chartered Institute of Arbitrators indicate that, of the 222 arbitrators qualified to be on the panel from which presidential appointments are made, only 16 (7%) are women. There are few statistics on minority ethnic and racial representation on tribunals but it is suggested that the majority of men appointed (the number of women being small in number) are Caucasian men of advancing years and that minority ethnicities and candidates of non-Western geographic origin are blatantly under-represented, as are younger practitioners. There is a dearth of statistics but one commentator has examined the issue by looking at the region from which appointed arbitrators are chosen in ICSID arbitrations. He found that in 289 closed cases from January 1972 to May 2015, in nearly half of cases (45%), the tribunals were composed of all Anglo-European arbitrators. In 84% of the cases, two or more of the tribunal members were Anglo– European, or the sole arbitrator was

Anglo–European. Only 11 cases (4%) were arbitrated by entirely non-Anglo-European tribunals."[12]

Does diversity matter?

16. Noting that arbitration is a wholly private process and the end goal for parties will be the speedy resolution of disputes by competent hands, parties to a dispute will be interested in appointing experienced, efficient and capable arbitrator(s) who will determine the dispute fairly. Does it matter if the vast majority of arbitrators appointed are from one major racial group? In other words, while it may be evident that the arbitration community is dominated by Anglo-European males, if they are more than capable of competently discharging their duties as arbitrators, why do the proponents of diversity seek to change the status quo? Is there any benefit to the international community's clamour for diversity in international arbitration?

17. To put it in other words, *"as long as that objective is achieved do they really care that equally able candidates may have been excluded from consideration? If a party chooses to appoint an elderly white man because they regard him as an experienced and respected arbitrator whose decision they will accept and/or because they believe he will carry weight with other members of the tribunal, then why should party autonomy not prevail? For the most part, parties have one opportunity to have a dispute determined in their favour*

[12] BLP- Diversity on Arbitral Tribunals – Survey Report (1).pdf at page 4.

and, for wholly legitimate reasons, they will have a very short-term self-interested view of the appointment process"[13].

18. We must remember that international arbitration involves individuals and organisations in different jurisdictions. It is widely believed that the inclusion of people from various varied racial, ethnic, gender and social backgrounds gives a public value to the concept of arbitration as being truly international as it should be seen to be open to participants from all over the world. It has been suggested that *"A system serving the needs of a particular constituency - in this case, participants in international commerce - should reflect the make-up of that community."*[14]

19. Concerns have been voiced that a lack of diversity may also affect the quality of arbitral awards. Empirical studies are cited as finding that *"the deliberative process before the arbitral tribunal is likely to be crucial and, therefore, the diversity of views may be fundamental for a fair process and outcome"*[15]. To take a very simple example, to an arbitrator from a culture where 'silence means consent', the non-reaction to a letter may be taken to mean consent to its terms; an arbitrator from a culture where age is reverenced, may understand the non-reaction to result from an unwillingness to contradict an elderly person. A diverse tribunal will have access to these differing points of view, when determining the weight to attach to the non-responsive attitude being relied upon by one of the parties.

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[13] Carol Mulcahy in Berwin Leighton Paisner's report on International Arbitration Survey: Diversity on Arbitral Tribunals, *Are We Getting There? Page 2*

[14] Ibid, *page 3*

[15] Ibid page 7

20. There is also the strongly held view that increasing the pool of arbitrators through the appointment of younger arbitrators will lead to the sustainability of the arbitration pool. It will also lead to increased legitimacy of the system in the eyes of stakeholders as it will give greater array of choice and lead to fewer conflicts, remove the imbalance in information available to different parties and (in view of the greater competition for appointment) encourage greater efficiency, as well as bring about new perspectives on the dynamics of a dispute.

21. The end result of increased diversity will be continued acceptability and legitimacy of the arbitration process. It is also believed that a gender-balanced/ diverse tribunal will be better prepared and produce a better output that a non-diverse tribunal as research has shown that there is a relation between gender balance and improved performance in a commercial environment. Research has shown that gender mixed teams performed better than all-male teams because of greater cooperation and more variety in team members' approaches to communication.

22. To make an informed decision on the choice of arbitrator, parties and practitioners need sufficient information about new or lesser known arbitrators to assist them in making an informed choice from the pool of available arbitrators. It is therefore necessary for arbitrators trying to break into the market to build their profile and portfolio and ensure that these are accessible to parties.

How to increase diversity in international arbitration.

23. Appointments as arbitration counsel are made by the parties. Middle Eastern and African counsel seeking international arbitration appointments must acquire the requisite legal knowledge and the human capacity to undertake such assignments. Because most energy disputes in these two parts of the world tend to involve State owned oil corporations, our governments also have a role to play. For as long as our countries look first to the West when appointing arbitration counsel in energy disputes, the skills and human capacity acquired will not be utilised and the oft touted "lack of expertise" as the reason for appointing non-nationals as arbitration counsel will not be addressed. Cooperation and co-counsel arrangements between law firms in the North and the South is one way of ensuring adequate representation, whilst at the same time redressing any perceived skills deficit.

24. Depending on whether the proceedings are ad hoc or administered, the appointment of the arbitrator is the responsibility of either the parties or the institution. For party appointments, the in-house counsel will usually request its external arbitration counsel to provide arbitrator CVs. Obviously technical expertise, availability and human interpersonal skills weigh highly when selecting an arbitrator. The arbitration counsel should also consider diversity when drawing up a list of possible arbitrators, especcially where part of the dispute may have a cultural undertone. Providing the parties with a wide enough selection list from which to make the appointment is a step towards ensuring diversity on the panel.

25. In similar fashion, where an arbitral institution is the appointing authority, it should also add diversity to its pre-qualification list. The role of arbitral institutions in pushing for greater diversity in arbitral appointments was aptly put as follows by Anselmo Reyes *"Arbitral institutions have a responsibility constantly to analyse its list, its panel of arbitrators, to work out the composition and make up, what diversity is there, how many women arbitrators are there on the panel, the list, and then possibly depending on the result of the analysis, the institution could invite more arbitrators, especially young arbitrators in order to make up the diversity or in order to ensure that there is as wide a range of arbitrators as possible. It is not enough just to expand the list, the institution should also be providing networking opportunities where lawyers, clients, parties can meet with new arbitrators especially younger arbitrators, especially women arbitrators, just meet with new people, to see what is available in the market and get a better idea of what the options are for everyone."*[16]

26. This is because even though the arbitral institutions make only a small proportion of appointments, they are in the best position to increase diversity, since ttheir knowledge base of potential arbitrators is usually much wider than that available to the parties or their counsel. They have the opportunity to appoint younger, less well known, ethnically diverse arbitrators, which the arbitration counsel or the in-house counsel may be loath to recommend in the absence of a verifiable track record.

[16] Anselmo Reyes on diversity in Arbitral Institutions at the Hong Kong Arbitration Week 2016, - https://www.youtube.com/watch?v=eVqLeGg7msU (Published on Oct 18, 2016)

27. The international community as a whole has a duty to commit to diversity in international arbitration. It was in recognition of this duty that the Equal Representation in Arbitration (ERA) Pledge was launched. The ERA pledge came into existence on 18 May 2016 in London, by the international ADR community, to commit to increase the number of female arbitrators on an equal opportunity basis. Their website states plainly that *"In Recognition Of The Under-Representation Of Women On International Arbitral Tribunals, In 2015, Members Of The Arbitration Community Drew Up A Pledge To Take Action."*[17] The Pledge has 2599 signatories as of 28 February 2018.[18]

28. ERA has focused on diversity from the gender perspective, and within 2 years of its formation, it has achieved formidable results, by drawing attention to the gender inequality which exists and encouraging individuals, law firms and arbitral institutions to promote gender equality in international arbitration. Many arbitral institutions have reported an increase in the appointment of female arbitrators in 2015, when compared with previous years.

29. In January 2018, the campaign for increased diversity in international arbitration revved up to another level with the launch of The Alliance for Equality in Dispute Resolution. The Alliance states on

[17] http://www.arbitrationpledge.com/ accessed on 1 March 2018

[18] Ibid.

its website[19] that it *"was formed to advocate for increased diversity in the international dispute resolution community"*. It aims to *"promote inclusivity in all aspects of the dispute resolution world"* and *"strive for equality of opportunity regardless of sex, location, nationality, ethnicity or age"*. In addition to dealing with the under-representation of women, it plans to *"focus on addressing the lack of diversity in relation to ethnicity and geography in international arbitration"*. The Alliance therefore focuses on increasing diversity in the international arbitration arena in all its ramifications.

30. All of us are here because we are interested in deepening arbitration practice in the Middle East and Africa in the energy sector because that is a major natural resource in those geographical areas. I therefore encourage us all to join the Alliance, if not from the perspective of altruism, then from the standpoint of enlightened self-interest.

CONCLUSION

31. Donald Donovan, the ICCA President speaking on how we might make international arbitration truly international, said *".... If the impact of international arbitration is to be international, the composition of those acting in the system as arbitrators, as advocates, and as administrators must be as well. That is, the profile of the participants must reflect diversity by way of nationality,*

[19] https://www.allianceequality.com/

ethnic origin and gender of those who have a stake…what is truly exciting about the future of international arbitration is the increasing capacity of lawyers and law firms in Brazil and Mexico, in Ghana and Egypt and Nigeria and South Africa, in Japan and Korea and Hong Kong, in Singapore and of course in Beijing and elsewhere in China."[20]

32. In essence, what Donald Donovan was saying is that if we want international arbitration to be truly international, it is left to all of us to make it more inclusive for all of us.

I thank you for your attention.

[20] Donald Donovan, in his address at the China Arbitration Summit of September 2016 - http://www.arbitration-icca.org/news/2016/304/icca-president-donald-donovan-on-making-international-arbitration-truly-inter