

DEALING IN GENDER: IMPLICIT BIASES AND ARBITRATOR APPOINTMENTS

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Across jurisdictions, the community of arbitrators remains resistant to gender diversity. Despite recent gains, it is dominated by male arbitrators. The proportion of non-male arbitrators who do not benefit from social privileges relating to caste, race, and class is lower. The Indian legal system fares even poorer in comparison, with the maleness of the Indian judicial bench cyclically transferring to the realm of arbitration as judges retire. This predicament raises difficult issues. Across jurisdictions and systems, arbitrators are appointed through myriad processes. These processes entail the participation of various disputing parties, their lawyers, arbitral institutions, and national courts. The common thread that nonetheless unites these processes and actors is a systemic preference for male arbitrators, especially those with heightened social privilege. This article explores the reasons behind this uniformity. And in doing so, it furthers the conversation triggered by Yves Dezalay and Bryant Garth in 1996, and thereafter Thomas Schultz and Robert Kovac in 2012, about the characteristics of different generations of arbitrators. It argues that the root-cause for the lack of gender diversity in the arbitrator community relates to implicit gender biases of patriarchal origin about the assumed (in) capacities of non-male genders. These biases cut across geographical, jurisdictional, and cultural barriers, to ensure that non-male candidates do not readily conform to the evolving imaginations of an ideal arbitrator. With respect to the present generation, Schultz and Kovacs demonstrate that parties generally prefer their arbitrator to have a firm hand, display natural authority, and exert a visible sense of control during the arbitral process. This desire for authority - synonymized by Schultz and Kovacs as managerial abilities - allows implicit gender biases about stereotypical masculine and feminine traits to creep into the selection process. It activates unfounded assumptions that associate competence with masculinity. Simply put, an arbitrator's competence is supplemented by their perceived

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authority, and their authority is wrongly equated with masculinity. The prior experience norm – according to which male arbitrators appointed more frequently in the past are likely to attract additional appointments – also compounds this situation. Therefore, the quest for gender diversity in arbitrator appointments must not be confined to institutional adjustments or mere procedural tweaks. It also requires one to consciously move away from abstract imaginations of ideal arbitrator traits – be they based on social prestige, appearance of meritocracy, or managerial abilities – which are vulnerable to external implicit biases.

I. INTRODUCTION

The demographic composition of the community of international arbitrators has, for years, been a source of controversy due to its resistance to diversity. It is a common and accurate refrain that a reasonable “observer from planet Mars may well observe that the international arbitration establishment on Earth is white, male and English speaking”.¹ Admittedly, some progress has been made in recent years, as evidenced by the 2022 update of the International Council for Commercial Arbitration (ICCA) Report No. 8 on Gender Diversity in Arbitral Appointments and Proceedings. Since 2015, the proportion of female arbitrators has more than doubled, rising from 12.6 percent in 2015 to 26.1 percent in 2021.² These figures are consistent with the update provided in 2021 by the International Chamber of Commerce (ICC) stating that female arbitrators represented around 23 percent of all its confirmed appointments, rising from 21.1 percent in 2019.³ Other institutions paint a similar picture, with the 2022 Caseload Statistics published by the Singapore International Arbitration Centre (SIAC) confirming that of the 145 arbitrators appointed by SIAC, 67, i.e., 46.2 percent, were female.⁴ The admiration for SIAC’s progress, however, is marred by the knowledge that eight of its ten Board of Directors remain male.⁵

But these statistics present an incomplete picture and must be perceived in an appropriate context. For instance, they fail to incorporate the nuances of repeat appointments. In investment arbitration, to take one example, any optimism is caveated by the fact that two veteran arbitrators, Brigitte Stern and Gabrielle

¹ KVS Nathan, ‘Well, Why Did You Not Get the Right Arbitrator?’ (2000) 15 Mealey’s International Arbitration Reports 24.

² ICCA Cross-Institutional Task Force, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (Report No. 8, 2022) 24.

³ International Chamber of Commerce, ‘ICC Celebrates 5 Years of Progress Since Arbitration Gender Pledge’ (*News and Publications*, 19 May 2021).

⁴ Singapore International Arbitration Centre, ‘*Annual Report 2022*’, 28.

⁵ *ibid.* 2.

Kaufmann-Kohler, receive the majority of female appointments.⁶ And once these appointments are factored in, most of the optimism usually disappears. Even otherwise, the analysis conforms to a binary understanding of gender. International arbitration is yet to even grapple with the representation of transgender persons who do not conform to this understanding and therefore, are yet to feature in any mainstream discourse. It is ostensibly for these reasons that merely less than a third of the respondents to the White & Case International Arbitration Survey 2021 believed that there has been progress in respect of geographic, age, cultural, and particularly, ethnic diversity.⁷ Finally, there is the critical consideration of intersectionality, which unearths these statistics to be “a half-truth”.⁸ It ignores how several of the female arbitrators belong to states in Europe or North America, which subtly reinforces the historic marginalisation of females who do not share this privilege. And although this marginalisation affects all genders, its impact on those who have and continue to suffer from patriarchal assumptions is greater. Ignoring these nuances implies that a problem is being addressed, while ignoring the immanent limitations of the solutions being offered. For these reasons, in September 2021, three Indian lawyers put these statistics in the right perspective by adopting the intersectional lens. They demonstrated that the proportion of female arbitrators belonging to or residing in Asia or Africa is likely to be significantly lower than their European or American counterparts.⁹ Therefore, despite some recent signs of progress, there is hardly any reason to rest on one’s laurels.

The Indian legal system is not an exception to this global trend. It arguably fares poorer in comparison. In 2018, Aparna Chandra, William Hubbard, and Sital Kalantry noted that despite the structural changes to the system of appointment of judges to the Supreme Court of India and the High Courts, there is no statistically significant difference in the proportion of female appointees or those belonging to the scheduled castes.¹⁰ Again, while the marginalisation on the basis of one’s caste affects all genders, its impact on persons of non-male gender

⁶ Catherine Drummond, ‘The Party-Appointment Process: Addressing Barriers to Equal Opportunities for Women in the Appointment of Ad Hoc Adjudicators’ in Freya Baetens (ed), *Identity and Diversity on the International Bench* (Oxford University Press 2020) 114–115; see also Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25 *European Journal of International Law* 387, 404; Robert Kovacs and Alex Fawke, ‘An Empirical Analysis of Diversity in Investment Arbitration: The Good, the Bad and the Ugly’ (2015) 12 *Transnational Dispute Management* 1, 11.

⁷ White & Case, ‘2021 International Arbitration Survey: Adapting Arbitration to a Changing World’ QMUL 15.

⁸ Archismita Raha, Juhi Gupta and Shreya Jain, ‘Growing Gender Diversity in International Arbitration: A Half Truth?’ (*Kluwer Arbitration Blog*, 28 September 2021).

⁹ *ibid.*

¹⁰ Aparna Chandra, William Hubbard and Sital Kalantry, ‘From Executive Appointment to the Collegium System’ (2018) 51 *Law and Politics in Africa, Asia and Latin America* 273, 283; For a record of the Supreme Court of India’s dismal history of appointing judges from Backward Castes, see Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press 2014) 256–257.

is unsurprisingly more severe. The authors reaffirmed this conclusion in 2023, indicating a systemic malaise.¹¹ Ironically, in recent months, the judges of the Supreme Court of India including the Chief Justice¹² have themselves complained of a lack of gender diversity in arbitral appointments in India.¹³ Although caste was, unfortunately, still not on their mind, the basis of their complaints is unsurprising. While acting as the default appointing authority under the Arbitration & Conciliation Act, 1996,¹⁴ it is routine for Indian courts to appoint arbitrators near-exclusively from an informal pool of retired judges of the Supreme Court of India or High Courts of India.¹⁵ Indian arbitration institutions are perceived to share a similar bias towards retired judges.¹⁶ This contributes to Shubhankar Dam's identification of arbitration as a lucrative constituent of "a buffet of career options [that] awaits India's Supreme Court justices".¹⁷ Simultaneously, it naturally enables the maleness in the Indian judicial bench to be cyclically transferred to the realm of arbitral decision-making. It is the same actors who, at different junctures of their professional life, wear different hats.

The rampant lack of gender diversity in arbitrator appointments is unfortunate. It triggers many questions about its underlying causes and how these can be adequately addressed over time. This is a challenge that is both unique and daunting. Across jurisdictions and systems, arbitrators are appointed through a variety of ways. The varied appointment processes entail the participation of disputing parties, their lawyers, arbitral institutions acting as appointing authorities, and national courts. The common thread that nonetheless unites these processes and actors is a preference for appointing male arbitrators, especially those who benefit from further socio-economic or cultural privileges. But what sustains this uniformity? This article attempts to provide some answers. And this logically requires venturing beyond a scrutiny of the appointment procedures, socio-economic factors, or *dramatis personae* in a particular country or institution. After all, the aim is to not only concern oneself with the nuts and bolts of the issue of underrepresentation, but identify the hidden contributory factors which transcend geographical barriers, institutions, and legal systems.

¹¹ Aparna Chandra, Sital Kalantry and William Hubbard, *Court on Trial: A Data-Driven Account of the Supreme Court of India* (India Viking 2023) ch 5.

¹² Sheryl Sebastian, 'Most Arbitrators are Men, this is Indicative of Our Unconscious Gender Bias: CJI DY Chandrachud' (*Live Law*, 18 September 2023).

¹³ Debayan Roy, 'Supreme Court Judge Justice Hima Kohli Flags Lack of Gender Diversity among International Arbitrators' (*Bar and Bench*, 8 October 2023).

¹⁴ The Arbitration & Conciliation Act 1996, s 11.

¹⁵ Badrinath Srinivasan, 'Appointment of Arbitrators by the Designate under the Arbitration and Conciliation Act: A Critique' 49 *Economic & Political Weekly* 59, 61.

¹⁶ BN Srikrishna, Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017) 29.

¹⁷ Shubhankar Dam, 'Active After Sunset: The Politics of Judicial Retirements in India' (2023) 51 *Federal Law Review* 31, 37–38.

The goal of this article is not novel in itself. Scholars have previously scrutinized the range of factors that contribute to the skewed demographic composition of the international arbitrator community. This article adopts the framework detailed by two such works, namely Yves Dezalay and Bryant Garth's seminal book titled - *Dealing in Virtue* - published in 1996, and Thomas Schultz and Robert Kovac's article mapping the rise of a third generation of arbitrators in 2012, to argue that the root-cause for inadequate appointment of female arbitrators is structural. It emanates from implicit gender biases of patriarchal origin about the (in)capacities of non-male genders, and which cut across territorial boundaries, jurisdictions, and societies. Until such root-cause is acknowledged and addressed, the goal of attaining gender parity in arbitrator appointments is likely to remain an unfulfilled prophecy. While this analysis focuses only on gender, its underlying approach hopes to provide additional benefits beyond exploring the role of gender in arbitration processes. It hopes to encourage and supplement further interrogations as to the non or under-representation of other marginalised communities based on their identities, histories, and stereotypes. This constitutes an additional reason to couch this analysis in a language which travels beyond technical, procedural, or jurisdiction-specific confines. Instead, it perceives international arbitration as a system which, despite its varied rules and processes, is ultimately characterized by the persons who constitute it.

In this context, Part II details Dezalay and Garth's identification of the first and the second generation of arbitrators. Part III delves into what Schultz and Kovacs described as the rising third generation of arbitrators, which continues to exist. On such basis, Part IV argues that the notion of gender – although not seriously explored by these scholars – was a critical factor that defined the composition of each generation of arbitrators, and whose influence is observable even today. Part V concludes.

II. THE FIRST AND SECOND GENERATIONS OF ARBITRATORS

In *Dealing in Virtue*, Dezalay and Garth mobilized their respective backgrounds in social sciences and law to study not the practice, but instead, the practitioners of international arbitration. Their intention was two-fold: *first*, to open to outsiders the closed doors of this arcane world, and *second*, to better inform the insiders about their chosen field of practice.¹⁸ To them, the appointment of an arbitrator played a decisive role in winning or losing a case, and understanding

¹⁸ Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996) 4; John Beechey, 'Book Review: Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order by Yves Dezalay and Bryant G Garth' (1997) 24 *Journal of Law and Society* 569.

the “operation of the market in the selection of arbitrators therefore provide[d] a key to understanding the justice that emerges from the decisions of arbitrators”.¹⁹

This approach was not only relatively novel at the time, but also far-sighted. Its significance was enhanced over the next decades by empirical research affirming the influence of an arbitrator’s identities, experiences, and ideologies over decision-making processes and outcomes. For instance, it recently inspired a thought-provoking insight into the sociology of international arbitration²⁰ and the collegial patterns of investment tribunals,²¹ both of which directly built on Dezalay and Garth’s work. Likewise, with a view to more reliably explain how arbitral decision-making operates beyond legal processes – as indicated by Dezalay and Garth – empirical and other scholars have also begun to scrutinize the skewed demographic composition of investment treaty arbitrators community.²² Among other things, these findings revealed how the structural framework of investment arbitration perpetuates an inaccessible system which prevents persons from developing countries from effectively shaping jurisprudence.²³ Scholars are also discovering that the demography of arbitrators has an influence on arbitral outcomes and the jurisprudential progress of the regime.²⁴ This is unsurprising. If “the community of investment arbitrators is dense and homogenous”, with little representation across gender, socio-economic, political, and geographical spectrums, “one would expect a more narrowly informed body of doctrine”.²⁵ These findings,

¹⁹ Dezalay and Garth (n 18) 8–9.

²⁰ Emmanuel Gaillard, ‘Sociology of International Arbitration’ (2015) 31 *Arbitration International* 1.

²¹ Todd Tucker, ‘Inside the Black Box: Collegial Patterns on Investment Tribunals’ (2016) *Journal of International Dispute Settlement* 1,4.

²² Leon Trakman, ‘Enhancing Standing Panels in Investor-State Arbitration: The Way Forward?’ (2017) 48 *Georgetown Journal of International Law* 1145, 1174–1175; Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, ‘Empirical Perspectives on Investment Arbitration: What Do We Know? Does it Matter?’ (2020) 21 *The Journal of World Investment & Trade* 188, 237–238; Susan Franck, ‘Empirically Evaluating Claims about Investment Treaty Arbitration’ (2007) 86 *North Carolina Law Review* 1, 78–79; Susan Franck, ‘Development and Outcomes of Investment Treaty Arbitration’ (2009) 50 *Harvard International Law Journal* 435, 458–459; Monika Prusinowska, ‘Analysing Appointments in International Arbitration: Nationality, Ethnicity, Race, and Legal Training of Arbitrators’ in Freya Baetens (ed), *Identity and Diversity on the International Bench: Who is the Judge?* (Oxford University Press 2020) 145; Susan Franck and others, ‘The Diversity Challenge: Exploring the “Invisible College” of International Arbitration’ (2015) 53 *Columbia Journal of Transnational Law* 429, 439; Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017) 28.

²³ Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart Publishing 2018) 180–181.

²⁴ Antony Anghie, ‘Rethinking International Law: A TWAIL Retrospective’ (2023) 1 *European Journal of International Law* 60; M Sornarajah, ‘The Unworkability of “Balanced Treaties” and the Importance of Diversity of Approach Among the BRICS’ (2018) 112 *AJIL Unbound* 223, 226; Shari Seidmand Diamond, ‘Psychological Aspects of Dispute Resolution: Issues for International Arbitration’ in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer Law International 2003) 341.

²⁵ Sattorova (n 23) 180; see also Puig (n 6) 401.

stemming from Dezalay and Garth's work, played a critical role in facilitating conscious efforts to improve diversity, including on the lines of gender, in international arbitration. For this reason, despite its vintage, the analytical framework put forth by Dezalay and Garth remains both relevant and celebrated.²⁶

Returning to 1996, Dezalay and Garth deciphered the characteristics essential to becoming an international arbitrator at the time. They observed that arbitration creates "a market in symbolic capital – the social class, education, career, and expertise that is contained within a person".²⁷ This is because for selecting their arbitrator, counsels have to determine "who from France is equivalent to a retired justice of the House of Lords, or who in Sweden is equivalent to an elite professor of contracts and commercial law from the United States".²⁸ And while values that enhance a person's symbolic capital are not static and evolve over time, the presence of "cosmopolitan social capital"²⁹ was a trait common to the elite international arbitrators of the period. A successful arbitrator was, in a nutshell, a person who could translate his socio-economic and professional prestige in another discipline to convey his reliability as a decision-maker. The authors defined this as "the generation of the 'grand old men' of arbitration",³⁰ referring to Pierre Lalive, Gunner Lagergren, and William D. Rogers as examples. However, despite their acknowledgment that "there were no women"³¹ in this generation, the authors did not assess how the construct of gender – maleness in a patriarchal world – was an essential trait to join this club. Instead, they focused on an arbitrator's educational credentials, affinity to European and American universities and firms, and good family pedigree³² as the noteworthy contributing factors for becoming a successful arbitrator.³³

In contrast to these grand old men, Dezalay and Garth proceeded to point to an "emerging generation" of arbitrators, who were "specialists in a field of law" such that their symbolic capital came entirely from activities in the field of international commercial arbitration.³⁴ They pointed to Jan Paulsson and Albert Jan van den Berg as some of the prominent examples of this generation, who showed that the profession had moved away from the grandeur of old men to the generation of "technocrats".³⁵ Becoming an arbitrator now required its stakeholders to

²⁶ Thomas Schultz, 'Celebrating 20 Years of "Dealing in Virtue"' (2016) 7 *Journal of International Dispute Settlement* 531.

²⁷ Dezalay and Garth (n 18) 18.

²⁸ *ibid.*

²⁹ *ibid* 21.

³⁰ *ibid* 20, 34–35.

³¹ *ibid* 35.

³² *ibid* 23, observing that: 'The son of a nobleman could become a bishop of the church simply because of family background and social prominence... There is a similar phenomenon in arbitration.'

³³ *ibid* 19–24.

³⁴ *ibid* 23–24.

³⁵ *ibid* 34, 36–38.

accumulate symbolic capital by demonstrating their expertise in and commitment to international arbitration. However, this was by no means a straightforward task independent of the notions of politics and privilege. Despite a generational transition, the imagery of an elite arbitrator remained Europe or western-centric. This was evident from the experiences of few “well-known arbitrators from third-world countries”, such as Mohammed Bedjaoui and Ahmed El-Kosheri, who not only had to develop expertise, but simultaneously “find a way to gain access to and credibility with the center”.³⁶

Therefore, even with the second generation, international arbitration remained “a symbolic field” and its internal battles were to be “fought in symbolic terms among moral entrepreneurs”.³⁷ Again, Dezalay and Garth could only cite examples of male arbitrators. But this did not encourage them to explore why, despite a generational shift, the gender of a successful international arbitrator remained unchanged.

III. THE THIRD GENERATION OF ARBITRATORS

Dezalay and Garth dealt with virtue, but not gender. This was a noticeable omission which could not have been missed. Therefore, when Schultz and Kovacs revisited this question in 2012, wondering whether a new generation of arbitrators had now emerged,³⁸ one could have reasonably expected them to fill this gap. This was not to be. While the authors’ sociological analysis and the consequent identification of a new third generation of arbitrators remains compelling, it primarily focuses on how international arbitration has become “over-proceduralized or over-judicialized”.³⁹ The notion of gender was, again, conspicuous by its absence.

Nevertheless, Schultz and Kovacs painted “a picture of a new generation of arbitrators as managers of dispute resolution processes”.⁴⁰ They concluded that while appointing arbitrators, the parties seemingly attach vast importance on “the management capabilities of their designees”, i.e., their organizational skills, propensity to quickly and accurately identify salient (but not necessarily legal) issues, and their ability to deal with underlying emotions.⁴¹ This was, to them, a consequence of the evolution of arbitration into “another business problem to be dealt with – ‘managed’ – just as another business problem”.⁴²

³⁶ *ibid* 25.

³⁷ *ibid* 33.

³⁸ Thomas Schultz and Robert Kovacs, “The Rise of a Third Generation of Arbitrators?: Fifteen Years after Dezalay and Garth” (2012) 28 *Arbitration International* 161, 162.

³⁹ *ibid*.

⁴⁰ *ibid*.

⁴¹ *ibid*.

⁴² *ibid* 163.

This analysis derived from a survey of lawyers and arbitrators engaged in international arbitration on the attributes they deem important when appointing international arbitrators.⁴³ On such basis, Schultz and Kovacs inferred three “primary criteria”⁴⁴ of greatest importance, namely: (i) specialisation in the law and practice of arbitration, (ii) management abilities, and (iii) experience as arbitrator.⁴⁵ Notably, numerous participants “listed additional or nuanced forms of management skills, making such skills the most discussed and emphasized type of attributes sought after” in the desired arbitrator.⁴⁶ In the same vein, while all three criteria remained relevant when it came to the appointment of a chairperson or presiding arbitrator, “almost systematically the participants placed greater emphasis on case management skills and human management abilities”.⁴⁷ These skills again included traits relating to the organization of arbitral procedure and tribunal deliberations, such as the ability to manage proceedings, authority over or respect from the co-arbitrators, management of parties, collegiality, administrative experience, to cite a few examples.⁴⁸

Therefore, while being a specialist in arbitration remained a necessary credential, it was no longer sufficient to become a successful arbitrator.⁴⁹ This was particularly true when it came to the appointment of a chairperson or presiding arbitrator.⁵⁰ What was required was the demonstration of heightened managerial skills. And while Schultz and Kovacs did not explicitly provide examples of the famed arbitrators that define this generation, a survey of the reports published by a plethora of arbitral institutions and organizations fills this gap. Reviewing the composition of the SIAC’s Court of Arbitrators is a reliable illustrative indicator of the arbitrators that define this generation. As in 2022, of the thirty-seven members, only ten are women. The male cohort boasts names of noted arbitrators, such as Cavinder Bull, Toby Landau, Bernard Hanotiau, and prominently from India, Harish Salve.⁵¹ This does not mean that this generation does not have any female arbitrators globally recognized as elite. Indeed, names such as Lucy Reed, Yas Banifatemi, Catherine Amirfar, and Claudia Annacker dispel any such illusion and provide ample cause for optimism. Yet, it does not disturb the inference that despite noticeable gains, this generation of international arbitrators continues to be dominated by male arbitrators.

⁴³ *ibid* 164.

⁴⁴ *ibid* 165, describing ‘primary criteria’ as those factors ‘that the practitioners who were surveyed consistently tagged as considerably important’.

⁴⁵ *ibid* 166.

⁴⁶ *ibid*.

⁴⁷ *ibid* 169.

⁴⁸ *ibid*.

⁴⁹ *ibid* 170.

⁵⁰ *ibid*.

⁵¹ ‘Annual Report 2022’ (n 4) 3.

This poses a critical question. If the attributes that make a successful arbitrator are routinely evolving, why does the community of international arbitrators remain male-dominated across its generations? A closer scrutiny of the analysis by Schultz and Kovacs itself provides some answers. To this, we then turn.

IV. UNPACKING THE ROLE OF IMPLICIT GENDER BIASES

The first generation of international arbitrators was defined by grand old men, the second by men who were technocrats or specialists in this field, and the third by men perceived as capable managers of dispute resolution processes. While these traits and the underlying methods of their accumulation have evolved, the gaze of the proverbial observer from Mars is largely unchanged. One must, therefore, wonder if there exists an invisible link between the construct of gender and the process of becoming a successful international arbitrator that transcends generations.

The centrality of gender to the first generation of arbitrators is obvious. The identity of an international arbitrator was primarily linked to socio-economic prestige and professional grandeur in other disciplines. This enabled men, who have historically benefitted from patriarchal structures, to leverage their social capital to emerge as the seemingly ideal arbitrators. They were aided in this quest by the arbitrariness of gender roles that positioned men as the bread-earners and women as homemakers,⁵² as well as by the exclusion of women from professional and socio-political circles. When Dezalay and Garth published their analysis in 1996, for instance, the Supreme Court of the United States had only two women judges, Sandra Day O'Connor and Ruth Bader Ginsburg. The Supreme Court of India, whose overall strength is greater, likewise had a single woman judge at the time, Sujata Manohar. She was herself only the second woman judge in the history of the court following the retirement of Fathima Beevi in 1992.⁵³ Simply put, barring men, not many had yet had any comparable opportunity to accumulate the symbolic capital necessary to project reliability and gain recognition as an elite arbitrator.⁵⁴

The transition to the second generation of technocrat arbitrators brought little progress. It is unsurprising that even in this generation, Dezalay and Garth could only offer examples of male arbitrators. Even in this generation, becoming a successful arbitrator required a consistent display of expertise or specialization in the field of arbitration. This, in turn, could only be attained through

⁵² Justin D Levinson and Danielle Young, 'Implicit Gender Bias in the Legal Profession: An Empirical Study' (2010) 18 *Duke Journal of Gender Law & Policy* 1, 9.

⁵³ Chandrachud (n 12) 257–258.

⁵⁴ For a similar argument with respect to the inadequate representation of women in the Indian judiciary, see Aishwarya Chouhan, 'Structural and Discretionary Bias: Appointment of Female Judges in India' (2020) 21 *Georgetown Journal of Gender and the Law* 725, 730.

affiliation with prominent universities, law firms, or arbitration organizations such as the ICC or the ICSID, each of which were primarily based in European or other western states. Again, most of these opportunities remained inaccessible or not as readily accessible to non-male persons. The predicament of those in newly independent states that had only gained independence a few decades ago was even more challenging. They not only had to accumulate ample expertise, but also receive validation from institutions and persons in European or other western states.⁵⁵ This was hardly a reasonable expectation then and remains that way.

To cite one example, though the law department at Harvard University was set up in 1817, the first class of women graduated from the Harvard Law School only in 1953.⁵⁶ Many European academic institutions reflect a similar, though marginally better, history.⁵⁷ Even otherwise, Indian universities, and particularly the country's legal profession, did not also provide much cause for hope in this regard. The initial attempts by women in the early twentieth century to participate in legal practice were dismissed by all-male benches of the Calcutta High Court and the Patna High Court, quipping that the 1879 Legal Practitioners Act only envisaged practitioners who were well-known and established, i.e., men.⁵⁸ It was only upon the enactment of the 1923 Legal Practitioners (Women) Act that women in India could become legal practitioners.⁵⁹

Accordingly, while the emergence of a second generation offered a seemingly meritorious path to success, the access to the means required to actually traverse this path was determined by an interplay of several social and political constructs, including that of gender. In the Indian context for instance, patriarchal structures ensure that non-male lawyers face more barriers in accumulating experience as arguing counsels. This, in turn, affects their chances of being elevated to the bench as judges. Simply put, the “more cases they argue in court, and the more experience they have as advocates, the higher is the likelihood of climbing up the ladder towards potential judgeship”.⁶⁰ As such, “merit” is a loaded term that does immense political work.⁶¹ In isolation, it lacks objectivity and remains vulnerable to the influences of political and social constraints.

⁵⁵ Dezalay and Garth (n 18) 25.

⁵⁶ ‘Through the Years: Women at Harvard Law School’ (*Harvard Law Today*, 16 March 2023).

⁵⁷ Romy Van Der Lee and Naomi Ellemers, ‘Perceptions of Gender Inequality in Academia’ in Bastiaan T Rutjens and Mark J Brandt (eds), *Belief Systems and the Perception of Reality* (Routledge 2018) 65.

⁵⁸ Chouhan (n 54) 731.

⁵⁹ *ibid* 732.

⁶⁰ Siddharth Peter De Souza and Medha Srivastava-Kehrer, ‘The Lack of Women in the Indian Judiciary: The Inadequacies of the Judicial Appointment Process’ in Tanja Herklotz and Siddharth Peter De Souza (eds), *Mutinies for Equality: Contemporary Developments in Law and Gender in India* (Cambridge University Press 2021) 47.

⁶¹ Ajantha Subramanian, *The Caste of Merit: Engineering Education in India* (Harvard University Press 2019) 17.

The idea of merit or meritocracy being a popular disguise to conceal socio-political biases is not new.⁶² In 2002, Maureen Scully challenged that the American management schools' claims to being a "meritocracy" needed correction because they reproduced inequality.⁶³ In 2011, Marieke van den Brink and Yvonne Benschopp built on this encouragement. Through empirical methods, they questioned the notion of "excellence" in Dutch universities and observed that "women tend to lose when competing with men because they are perceived as less equipped or because they are not labelled as excellent in all areas".⁶⁴ In 2020, scholars reached a similar conclusion when studying the professional practices of Canadian corporates. They noticed that corporations largely referred to the notion of "merit", independently from the accompanying social constructs, as a means to "legitimate their current practices and avoid change".⁶⁵ And specifically with respect to gender, the idea of merit was found "to be conflated with masculine characteristics and values", which makes it easier for men to appear as meritorious candidates.⁶⁶ Similar studies and outcomes can be located across industries and jurisdictions; thereby, contextualizing the idea of meritocracy in any society.

Closer to the Indian legal system, Professor M. P. Singh's dissection of the idea of "merit" in judicial appointments effectively brings home the point. Discussing the views expressed by the then-Chief Justice of India in 1999, i.e. that the Indian "Constitution envisages that merit alone is the criterion for all appointments to the Supreme Court and High Courts,"⁶⁷ Professor Singh went on to dissect the very concept of "merit". He explained that the term "merit" does not refer to a "fixed or set standard", but generally means "qualities relevant for the purpose of achieving certain goals and objectives".⁶⁸ Therefore, the constitutional goals of equality and the clear emphasis on the protection of marginalized sections through representation must inform the idea of "merit" in the appointment of judges.⁶⁹ The implication here being that there is no concept of merit, or traits desirable for attaining a particular goal, that exist in isolation. To the contrary, what is meritorious and what is not is intrinsically linked to the underlying social context. Consequently, for the Indian judiciary to be considered meritorious, it must necessarily be diverse.

⁶² See generally Christopher McCrudden, 'Merit Principles' (1998) 18 *Oxford Journal of Legal Studies* 543.

⁶³ Maureen A Scully, 'Confronting Errors in the Meritocracy' (2002) 9 *Organization* 396, 398–401.

⁶⁴ Marieke Van Den Brink and Yvonne Benschop, 'Gender Practices in the Construction of Academic Excellence: Sheep with Five Legs' (2012) 19 *Organization* 507, 513.

⁶⁵ Walid Ben-Amar and others, 'Gendering Merit: How the Discourse of Merit in Diversity Disclosures Supports the Gendered Status Quo on Canadian Corporate Boards' (2021) 75 *Critical Perspectives on Accounting* 1, 17.

⁶⁶ *ibid* 5.

⁶⁷ MP Singh, "Merit" in the Appointment of Judges' (1999) 8 *SCC Journal* 1.

⁶⁸ *ibid* 8.

⁶⁹ *ibid* 12.

From this perspective, the conclusions offered by Dezalay and Garth, while important, are rooted to an unrealistic and false idea of merit which shaped the second generation of arbitrators. Once corrected, it reveals that the generation was defined not only by the arbitration specialists or technocrats, but primarily by men who could accumulate the necessary credentials on account of their gender privilege.

The sociological deconstruction offered by Schultz and Kovacs, however, ought to provide more reasons for optimism. It shows that the community of international arbitrators has continued to move away from social grandeur. Likewise, the demonstration of arbitral expertise, while critical, is now supplemented by managerial traits that may, at least in theory, be acquired without affiliation to European or other western institutions. Finally, as the decolonisation movement continues to gather momentum, the development of local educational institutes and professional opportunities in newly independent states is hoped to mitigate the diversity concerns in international arbitration, even if at a snail's pace. Viewed in isolation, many of these considerations, coupled with increasing consciousness about gender diversity and efforts at improvement, would suggest to an optimistic that the present third generation of arbitrators has overcome many of the extant hurdles. And that the process of becoming an elite international arbitrator is now equally accessible to all persons. However, quite predictably, this hypothesis does not withstand scrutiny. It remains at odds with the realities discussed above. While the statistics reported by arbitral institutions paint a relatively promising picture in comparison to the previous generations, it is still objectively underwhelming. What then accounts for the continued relevance of gender in this third generation of arbitrators? The answer may lie in understanding the overarching yet subtle influence of implicit gender biases over the appointment of arbitrators.

Scholars have studied the influence of implicit bias, i.e. "informal institutional structures that may also affect arbitral decision-making,"⁷⁰ in varied contexts. Stavros Brekoulakis encourages arbitration law and practice to move beyond the notion of apparent bias of an individual arbitrator, and decipher the influence of an implicit bias at a systemic level.⁷¹ Embracing this encouragement, Daniel Behn, Tarald Laudal Berge, Malcolm Langford analysed the outcomes in all the concluded investment treaty arbitration cases, as of 1 January 2017.⁷² Among other things, they questioned if "developing states may be more likely to lose in

⁷⁰ Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) 4 *Journal of International Dispute Settlement* 553, 557.

⁷¹ *ibid* 583.

⁷² Daniel Behn, Tarald Laudal Berge and Malcolm Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration' (2018) 38 *Northwestern Journal of International Law & Business* 333, 354.

an [investment treaty arbitration] case due to some form of implicit arbitrator bias and/or foreign investor selection bias”.⁷³ The authors noticed that the claimant-investor win rates differed across the development status of the respondent states.⁷⁴ While foreign investors won in 17 percent of the cases against high-income states, their success rate against lower-income states jumped to 62 percent; giving them a four times better chance of success.⁷⁵ But despite repeated empirical affirmations of gender disparity in arbitral appointments, barring certain exceptions,⁷⁶ the influence of implicit gender bias in this regard is underexplored.

First, to recall, according to Schultz and Kovacs, a primary criterion considered important by the parties while appointing their arbitrator is their management abilities. This included, among other things, the arbitrator’s ability to manage the arbitration proceedings, i.e. to control the parties and their counsel as well as to manage the deliberations between the tribunal members.⁷⁷ As to the desired personality traits which evidenced the presence or extent of such ability, the stakeholders surveyed gave several examples. They preferred their ideal arbitrator to have a firm hand, display a natural authority, conduct meetings efficiently, and cut to the chase quickly.⁷⁸ As such, the parties generally preferred their appointed arbitrator to exert a visible sense of control and authority during the arbitral process. And they looked for these traits while assessing arbitrator candidates.

Once this allure of authority of an ideal arbitrator - synonymized by Schultz and Kovacs as management ability – is unraveled, the reasons for the continued dominance of male arbitrators become clearer. A patriarchal society portrays the male gender as a natural harbinger of force and authority, while associating the non-male genders with passivity and weakness. In other words, it celebrates masculinity and conflates femininity with subordination; both stereotypical perceptions affecting one’s analysis of the suitability of a given candidate for a particular role.⁷⁹ This framework positions men as the stereotypical aggressors capable of and expected to exercise authority, while reducing non-male persons to passive subjects.⁸⁰ Resultantly, where a function or responsibility, such as the task of an international arbitrator, is understood in terms of the ability to exert authority or control, stakeholders are likelier to implicitly associate it with masculinity, and thus, the male gender. This way, the perception of the func-

⁷³ *ibid* 347.

⁷⁴ *ibid* 368–369.

⁷⁵ *ibid* 370.

⁷⁶ For instance, see Lucy Greenwood, ‘Could “Blind” Appointments Open Our Eyes to the Lack of Diversity in International Arbitration?’ (2015) 12 *Transnational Dispute Management* 1.

⁷⁷ Schultz and Kovacs (n 38) 161, 166.

⁷⁸ *ibid*.

⁷⁹ Levinson and Young (n 52) 12.

⁸⁰ Harshad Pathak, ‘Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law’ (2016) 11 *Asian Journal of Comparative Law* 367, 390.

tion of an international arbitrator in predominantly managerial terms can activate unfounded assumptions that associate competence with masculinity and compounds an implicit preference to appoint male arbitrators.⁸¹ Indeed, despite accepting the risk of reinforcing stereotypes, scholars note that for some appointing parties, “it does appear that the masculine communication style, which is more direct and powerful, and seen as correlating with more objective and logical thinking, fits the ideal of a successful arbitrator.”⁸²

This influence of implicit gender bias in the appointment of arbitrators is also corroborated by research scholarship and anecdotal evidence.⁸³ In 2010, scholars at the University of Hawaii conducted an empirical study to test if implicit gender bias drove the continued subordination of women in the legal profession. They devised an Implicit Association Test to assess if people held implicit associations between men and judges, and women and paralegals.⁸⁴ The outcome of the study was predictable. A diverse group of male and female law students implicitly associated judges with men, and not women.⁸⁵ And the more strongly male participants associated judges with men, the more they preferred that appellate judges possess masculine, and not feminine, characteristics.⁸⁶ A recent study based on interviews with select retired judges suggests that Indian judges also shared some of these implicit biases.⁸⁷

Traces of similar biases can be located in the community of international arbitrators, if one pays heed to the experiences of the successful female arbitrators who swam against the tide. At the 13th Geneva Global Arbitration Forum in 2007, Professor Nayla Comair-Obeid elaborated her struggles to gain the trust of her colleagues.⁸⁸ She recounted a specific incident when her name was proposed as the chairperson in an arbitration, only to be met with the protests of a male arbitrator who did not want to be chaired by a woman.⁸⁹ While one hopes such incidents denote an aberration and not the norm, the reality is likely otherwise.⁹⁰ Arbitral rooms, judicial corridors, and law offices across societies and jurisdictions

⁸¹ Joan Williams, ‘The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the Cluelessness Defense’ (2003) 7 *Employee Rights and Employment Policy Journal* 401, 407.

⁸² DR Demeter, P Eastal and N Nelson, ‘Gender and International Commercial Arbitrators: Contributions to Sex Discrimination in Appointments’ (2015) 12 *Transnational Dispute Management* 1, 6.

⁸³ Greenwood (n 76) 3–5.

⁸⁴ Levinson and Young (n 52) 3.

⁸⁵ *ibid* 28.

⁸⁶ *ibid* 3.

⁸⁷ Chouhan (n 54) 751–754.

⁸⁸ Nayla Comair-Obeid, ‘The 13th Geneva Global Arbitration Forum December 6, 2007’ (2008) 9 *The Journal of World Investment & Trade* 87, 88.

⁸⁹ *ibid*.

⁹⁰ For similar anecdotes concerning the Indian judicial system, see De Souza and Srivastava-Kehrer (n 60) 47–48.

are filled with similar instances, which unfairly disadvantage non-male candidates. The predicament is made more challenging by few female arbitrators themselves reinforcing gender stereotypes, for instance, by suggesting that “mediation is a process which is much more natural for women, following as it does the typical temperament of a woman”.⁹¹

This tendency, of course, is not exclusive to the domain of international arbitration.⁹² For instance, an analysis published in 2020 about the appointment of judges in India noted that “only six judges out of nineteen [retired judges who were interviewed] could deny outright any gender bias in judicial appointments”.⁹³ Rather, the straightforward point is that international arbitration, where arbitral appointments are driven by subjective-value judgments and private networks,⁹⁴ is also not immune from the influence of implicit gender bias in appointment processes.⁹⁵ To borrow words from two seasoned stakeholders of the prevalent system: “In international arbitration, the client is advised by counsel as to the selection of an appropriate arbitrator. This often results in an unsophisticated brainstorming session, which plays to unconscious bias against appointing diverse candidates”.⁹⁶

Second, given this framework, the fact that men have historically dominated the community of international arbitrators across its generations also reinforces the stereotype of an elite arbitrator and creates a systemic inertia which is not easy to displace.⁹⁷ This proves an additional obstacle in the quest to attain greater gender diversity in arbitral appointments.

It is no longer controversial that a recurring preference to appoint from the same pool of elite arbitrators is a structural consequence of the “prior experience norm”,⁹⁸ according to which the arbitrators appointed more frequently are likely

⁹¹ Elizabeth Birch, ‘Women in Arbitration’ (2004) 1 *Transnational Dispute Management* 1, 1.

⁹² Williams (n 81) 408–409.

⁹³ Chouhan (n 54) 751.

⁹⁴ Nathalie Allen, Leonor Díaz Córdova and Natalie Hall, “If Everyone Is Thinking Alike, Then No One Is Thinking”: The Importance of Cognitive Diversity in Arbitral Tribunals to Enhance the Quality of Arbitral Decision Making’ (2021) 38 *Journal of International Arbitration* 601, 604; Runar Hilleren Lie, ‘The Influence of Law Firms in Investment Arbitration’ in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration* (Cambridge University Press 2022) 103–104; Daphna Kapeliuk, ‘The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators’ (2010) 96 *Cornell Law Review* 47, 67.

⁹⁵ M Philippe, ‘Speeding up the Path for Gender Equality’ (2016) *Transnational Dispute Management* 1, 8.

⁹⁶ Lucy Greenwood and C Mark Baker, ‘Is the Balance Getting Better? An Update on the Issue of Gender Diversity in International Arbitration’ (2015) 31 *Arbitration International* 413, 423.

⁹⁷ Levinson and Young (n 52) 13, citing Diane L Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, (1997) 4 *Virginia Journal of Social Policy & the Law* 581, 604.

⁹⁸ For instance, see Schultz and Kovacs (n 38) 166, observing that a survey of 58 practitioners and arbitrators from 23 countries revealed the ‘experience as arbitrator’ as one of the three primary criteria considered to be of greatest importance while appointing an arbitrator.

to attract further appointments.⁹⁹ This, in turn, discourages the appointment of any person who does not conform to the image of an experienced, male arbitrator.¹⁰⁰ Ultimately, a party-appointed arbitrator is routinely viewed as a translator of the legal culture of the appointing party, and is selected due to their perceived predisposition towards that party and its legal position.¹⁰¹ This, in turn, reinforces the litigant's perceived need to appoint an arbitrator from an elite network which, with few exceptions, is largely male, to maximize their likelihood of persuading co-arbitrators. A "newcomer" may not, as per traditional wisdom, hold a similar sway during tribunal's deliberations.¹⁰² Each such factor discourages a party from looking beyond the grand old men or technocrats that continue to also be perceived as superior managers of the arbitral process. A similar argument can be made in the Indian context as well. The existence of a "seniority norm" informally facilitates the appointment of more male, as opposed to the non-male, judges.¹⁰³

Ultimately, as Dezalay and Garth argued, history remains a key legitimator in the field of arbitration which, like aristocracy, ends up underscoring traditional participants as established elite and the others as newcomers.¹⁰⁴ Unfortunately, in international arbitration, the composition of the established elite has been consistently determined on the basis of gender and gender-privilege. The longer we then subscribe to the historical perceptions of a successful arbitrator – be it grand old men or technocrats or managers – the greater the challenge posed to the object of attaining gender diversity. What is clear is that a confluence of history (as experience) and implicit gender biases about a candidate's ability to exert authority as an arbitrator are some of the invisible markers that influence the selection of an ideal arbitrator. This implies that solutions to the problem of gender disparity in the appointment of arbitrators must not only be found in institutional rules or practices, but equally in our imagination of who is an ideal arbitrator and for what reasons.

V. CONCLUSION

It was in early 2017, in a classroom in Geneva, that Thomas Schultz habitually encouraged his students – including this author – to delve into the philosophical aspects of international dispute settlement. One of the many questions

⁹⁹ Puig (n 6) 423.

¹⁰⁰ Malcolm Langford, Daniel Behn and Maxim Usynin, 'The West and the Rest: Geographic Diversity and the Role of Arbitrator Nationality in Investment Arbitration' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration* (Cambridge University Press 2022) 298; Drummond (n 6) 94–95.

¹⁰¹ Kapeliuk (n 94) 67.

¹⁰² Bonnitcha, Poulsen and Waibel (n 22) 64; see also Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109 *American Journal of International Law* 761, 787.

¹⁰³ Chouhan (n 54) 734–735.

¹⁰⁴ Dezalay and Garth (n 18) 45.

he raised was the need to interrogate not only the text of a legal instrument, but equally the identities of those who interpret it. Schultz's encouragement was a mere repetition of what critical scholarship had consistently proclaimed - that the content of law is inseparable from its politics.¹⁰⁵ And to understand this politics, one must identify the actors who, as decision-makers, practice their politics through law. This ensemble includes the community of international arbitrators, and brings to light concerns about their historical resistance towards the inclusion of non-male genders.

Given this context, while there is much to admire about Schultz and Kovacs' identification of a third generation of arbitrators, their ignorance of the role of gender in shaping this generation is puzzling. Yet, it is their analysis itself that also provides a reliable set of tools, or vocabulary, to infer the structural reasons which contribute to the predominantly-male identity of this generation of arbitrators. The association of a successful international arbitrator with their managerial ability essentially serves as a pseudonym for the arbitrators' ability to exert control and authority over the arbitral process. The greater the projection of such authority, or the capacity to exert such authority during the arbitration, the more ideal the candidate appears as a prospective arbitrator. However, this co-relation is vulnerable to gender stereotypes linked to masculinity and femininity. It allows considerable room for implicit gender biases to influence a party's perception of an ideal arbitrator. Simply put: an arbitrator's competence is supplemented by its perceived authority, and its authority is equated with masculinity. Unless these assumptions are outweighed by a competing factor - such as the experience of a non-male candidate or their opinion on an anticipated legal argument - the subtle influence of implicit gender biases cannot be comfortably negated.

What does then one make of this analysis? Depending on one's perspective, the answer is either straightforward or awkward. Taken to its logical conclusion, this analysis showcases that the ongoing efforts by practitioners and institutions to address gender disparity in the appointment of arbitrators must be supplemented by a conscious reimagining of the role of an ideal arbitrator. This requires one to move away from abstract notions - be they of social prestige, appearance of meritocracy, or managerial abilities - that are not resistant to implicit gender bias. To a cynic, this response may itself appear abstract, and therefore, awkward. But to an optimist, it would suggest that the solution to this systemic problem lies, in some way, within our minds and thus, within our grasp.

Additionally, another significant contribution this analysis hopes to make is to spark honest and candid conversations about the processes by which arbitrators are appointed and by whom, especially in India. Gender is one of the

¹⁰⁵ Joseph Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *The Yale Law Journal* 1, 5; Joan Williams, 'Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells' (1987) 62 *New York University Law Review* 429, 430.

several social constructs which influences the appointment of an arbitrator. The temporary stay obtained by Jay-Z in 2018 over an arbitration administered by the American Arbitration Association due to inadequate number of African-American candidates on its panel highlights the significance of race in the appointment process.¹⁰⁶ Likewise, in the Indian context, the justices of the Supreme Court are yet to adequately complain of a lack of caste diversity in both judicial and arbitrator appointments. The many obstacles faced by transgender persons are also absent from the discourse. As such, the issues addressed in this analysis merely reflect the tip of the iceberg. Conversations about addressing gender disparity must not be isolated or confined to making procedural tweaks. Rather, they must be articulated in a language that is also capable of acknowledging and addressing the several constraints which lower the legitimacy and potential of arbitral decision-making across jurisdictions and societies. In other words, given the complexities of diversity, intersectionality must remain at the heart of any related discourse.¹⁰⁷

In summary, this analysis - while itself dealing solely in gender - is equally an invitation to undertake similar introspective inquiries about the diversity of extra-legal constraints that implicitly shape our imagination of an ideal arbitrator. It asks the present and future stakeholders to deal not only in gender, but also how race, caste, religion, and other social barriers, may influence arbitral processes and how.

¹⁰⁶ Cosmo Sanderson, 'Jay-Z Highlights Lack of Diversity among Arbitrators', *Global Arbitration Review* (29 November 2018).

¹⁰⁷ De Souza and Srivastava-Kehrer (n 60) 53.