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American Diversity in International Arbitration 2003-2013

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I. Introduction

When I was approached to return to issues of diversity in international arbitration, I decided to expand on the methodology I used in the 2003-2004 period in three earlier articles on American minorities in international arbitration² by examining American diversity in international arbitration across the broader

¹ This article is adapted from a shorter article published in the American Bar Association Dispute Resolution Magazine of Winter 2014. I thank the ABA Dispute Resolution Magazine team (Gina Brown, Donna Stienstra, Nancy Welsh, and Joseph B. Stulberg) for suggesting this project to me. I thank Robert Jacoby for his research assistance. I thank Mireze Philippe, Sophie Nappert and the publisher of Transnational Dispute Management for their assistance with publicizing this project on OGEMID. I thank Mireze Philippe for her assistance in publicizing this project on ArbitralWomen. I thank Effie Silva for her assistance in publicizing this project in the Miami arbitration community. I thank Professor Llewellyn Gibbons of the University of Toledo College of Law for his suggestion of a method to review the discrete arena of domain name dispute resolution. As there has been discussion as to whether that can properly be characterized as international arbitration, I have not spread my net that far in this article, but may do so in a future article. I thank Professor Susan Martyn of the University of Toledo College of Law for her comments while drafting. All errors are the author's own.

² Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, (presented at the American Bar Association, Dispute Resolution Section Mid-Year meeting April 16, 2004), 14 *American Review of International Arbitration* (Columbia University) 461 (2004) and Benjamin G. Davis, *International Commercial Online and Offline Dispute Resolution: Addressing Primacism and Universalism* 4 *Journal of American Arbitration* (Penn State Dickinson/Tulane) 79 (2005), and *American Diversity in International Arbitration 2003-2013*, ABA Dispute Resolution Magazine (forthcoming Winter 2014); For pioneering work on diversity of women see Louise Barrington, *Arbitral Women: A Study of Women in International Commercial Arbitration*, in *The Commercial Way To Justice: The 1996 International Conference of the Chartered Institute of Arbitrators* 229-41 (Geoffrey M. Beresford Hartwell ed., 1996) (describing the lack of women in international arbitration but their increasing presence in international commercial arbitration) cited in Susan D. Franck, *The Role of the International Arbitrator*, 12 *ILSA J. Int'l & Comp. L.* 499 (2006); For excellent work on women in investment arbitration see Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 *N. C. L. Rev.* 1, 75-83 (2007). For excellent historical work on women in arbitration, see Mireze Philippe, *Evolution of Women's Involvement in Dispute Resolution in the last Thirty Years; the Institutional Experience & ArbitralWomen experience*, *ArbitralWomen Newsletter No. 8 April 2013 Special Issue on Women's Day and the other newsletters with articles available at* http://www.arbitralwomen.com/index.aspx?sectionlinks_id=140&language=0&pageName=Newsletters; Mireze Philippe, *History of the ICC Counsel, The Secretariat and the ICC International Court of Arbitration...What a Story* (International Chamber of Commerce 2013); For the most recent comprehensive discussion of gender in international arbitration see Lucy Greenwood and C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 *Arbitration International* 653 (2012) and the literature discussed therein as well as Lucy Greenwood, *Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals*, *American Bar Association International Law News*, Spring 2013 available at http://www.americanbar.org/publications/international_law_news/2013/spring/unblocking_pipeline_achieving_greater_gender_diversity_international_arbitration_tribunals.html; For excellent work on diversity of nationality, see Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator* (with survey results), 31 *Fordham Int'l L.J.* 603 (2008); A literature search has not found other work focused on American minorities, American women, American lawyers with disabilities, or American LGBTQ lawyers in international arbitration let alone all of them at once as a target population.

target population for the ABA's Goal III diversity efforts: American women, American minorities³, American lawyers with disabilities, and American LGBTQ lawyers. These four groups are the target population described in the American Bar Association's Goal III: Eliminate Bias and Enhance Diversity which has two objectives: 1. Promote full and equal participation in the Association, our profession, and the justice system by all persons. 2. Eliminate bias in the legal profession and the Justice System.⁴ In addition to sending a survey to 413 international arbitration practitioners of whom I was aware or to whom I was referred, I forwarded it to the ICC Counsel Alumni members of which I am a member as well as The International Law Discussion Space listserv, the Society of American Law Teachers listserv, as well as the Contracts, Dispute Resolution and Minority Groups listservs of the American Association of Law Schools. Further, I greatly appreciate that OGE MID and ArbitralWomen were kind enough to share the survey in their online spaces. Thus, an attempt was made to reach as broad a group of international arbitration practitioners on all five continents. Finally, based on anecdotal evidence that women may get their first appointment as an arbitrator through the appointment of an arbitral institution, I contacted a diverse group of international arbitral institutions around the world to see if they would be willing to share data on their appointments of members of the target population.

Thirty-four individuals ultimately filled out the survey and three of the international arbitral institutions provided data which will be discussed below. I thank these persons and organizations for their participation and thank the other persons and organizations for taking the time to look at whether they would participate. All of their attention to these matters in a very busy time of year is greatly appreciated.

II. Background – A Celebration of Diversity and Inclusion in International Arbitration

From my personal experience and research, I am certain that women lawyers including American women, US minority lawyers, lawyers with disabilities, and LGBTQ lawyers have been involved in some

³ Race is, of course, a social construct. The vast literature on this subject and its discussion are excellently presented in Meera E. Deo, Empirically-Derived Compelling State Interests in Affirmative Action Jurisprudence, (August 26, 2013). Hastings Law Journal, Vol. 65, No. 3, 2014; Thomas Jefferson School of Law Research Paper No. 2315787. available at SSRN: <http://ssrn.com/abstract=2315787> or <http://dx.doi.org/10.2139/ssrn.2315787>. For a concrete example, I have been socially constructed as an African-American in the United States. I have a Hispanic (from Cuba) grandmother, at least one Irish great-grandfather, a Native-American (Cherokee) great grandmother, and Chinese and Native-American (Blackfoot) ancestors according to my family lore, in addition to my ancestors of African origin whose presence in the United States dates back to at least 1800. Coming to recognize and feel ownership of that diverse history as part of living the social construct and self-identification as an African-American has been one of the most interesting aspects of this life. Coming to understand these and other diverse cultures through working with people in international arbitration is one of the pleasures of that work. I am certain that several Americans (and other Nationals) in international arbitration are similarly socially constructed as being of one race or another as they are perceived on the international plane. Experiencing these social constructs in countries with different cultures and histories can be both a liberating and constraining experience as one comes to understand opportunities and limitations in the expectations across borders. The key appears to be related to both the positive and negative impacts of explicit bias, implicit bias, and stereotype threat discussed later.

⁴ American Bar Association Goal III available at http://www.americanbar.org/about_the_aba/aba-mission-goals.html#GoalIII ; Diversity and Inclusion ABA Member Survey, Executive Summary, 2013 available at http://www.americanbar.org/content/dam/aba/administrative/diversity/ABA_DI_MemberSurveyFinal.authcheckdam.pdf

capacity in international arbitration over the past 35 or more years. It is true that, for most of that period, these persons may not have been seen in the classic roles of arbitrator, lead counsel, or leader of an international arbitral institution, but they have still been present in some aspect of arbitration working with an arbitrator, on the team of a party counsel, or within an international arbitral institution. The work of these persons in maintaining and enhancing the international arbitral edifice may have rarely been recognized openly, but I know they have been there and I take the opportunity of this article to salute their determined work.

I would like to highlight some particular pioneers. I start with Roberto Powers, the first African-American counsel in the International Chamber of Commerce in the period 1978-1986 who went on to a career in the United States Foreign Service. I have stood on his shoulders thanks to the many courtesies he provided me as I went through the hiring process at the International Chamber of Commerce International Court of Arbitration when I first joined it in 1986 and served at the Court through 1996 and then on to be a Director, Conference Programmes and Manager of the ICC Institute of World Business Law through 1999. I continue with the many women lawyers (*juristes*) and non-legally trained professionals who served as my assistants in those early years. I take this opportunity to honor Sylvie Kermaal, Tamsyn Taylor (British-American), Katharine Bernet, Irene Ezratty, and Odette Lagace all brilliant and two of them also brilliant lawyers. I also wish to honor the secretaries with whom I had the pleasure of working who pushed me to do better. When I was tasked my first summer at the ICC with writing a statement on behalf of the ICC in a case before the Obergericht des Kantons Zurich and ultimately the Swiss Supreme Court, Tamsyn's (as secretary as she then was) trenchant critique as she typed pushed me to broaden my approach and I am eternally grateful to her. I also honor the late Cynthia Scharf who helped me learn the duty to manage and Michele Clergeaud who was ahead of me in my work. I wish to also honor Rita Ortega, Françoise Barriere, Ingrid Materner, Herta Pechenard, Marie-Christine Mosdier, Genevieve Pathiaud, Paule Daudin, Elisabeth Passedat, Sylvie Picard Renault and Josette Watrin for their work in keeping the ICC Secretariat running and growing. I honor the late Corinne Jarlot, Mireze Philippe, Michele Clergeaud, and Irene Ezratty who were instrumental on the team that developed the first generation Case Management System of the ICC in the 1989-1993 period as well as, for the latter two, their crucial roles in the famous International Fast-Track Commercial Arbitration Cases in 1992. I would like to honor the interns and short-term hires who worked on my team and came through the ICC from around the world many of whom have gone on to great things such as Michael Volkovitsch, Robert Smit, Sandrine Colletier, Pascale Lorfing, Masaaki Sawano, Ram Madaan, Nader Ibrahim, and Georges Affaki. I especially mention the writing one August 1993 with Michael and Odette of an article which was one of the great experiences of my life.

We must also honor the gatekeepers who also were door-openers. First for me is Eric A. Schwartz who interviewed me as a second year law student and put my name forward for a final interview with Gene Forcione when SG Archibald and Co (as it then was) included me in their summer associate program in Paris.⁵ That summer 1982, Kathie Claret and Kristen Karsten, Thomas Jahn, as well as Christopher Seppala opened my horizons to the world of international commercial arbitration. In my contracts class,

⁵ Today this process might be easier thanks to the Vis Moot and the Vis Moot East work of Eric Bergsten and Louise Barrington that have opened the doors to international arbitration to so many around the world.

I speak each year of Christopher Seppala sitting down with me and going over word for word my first memo to him – an investment in me for which I remain indebted all these years later. I honor William L. Craig and Christopher Seppala for being references when I applied at the ICC. I honor Stephen R. Bond and Sigvard Jarvin who demonstrated the confidence to hire me as a counsel. I honor the late ICC Court Chairman Michel Gaudet and the late ICC Court Chairman Alain Plantey for their insistence on excellence while teaching what it means to be a person working on the international plane: they remain my two primary mentors. I honor the late ICC Court Chairman Robert Briner, then head of the Commission on International Arbitration Paul Gelinas and the late head of the Institute of World Business Law Serge Lazareff for their support in putting into place Gaudet Day in 1998. I honor Louise Barrington and Michele Garzon for their assistance in my moving from the ICC Court to the ICC Institute. Louise broke new ground in opening ICC Hong Kong in the mid-90's – the first overseas office of the Secretariat. I honor the other counsels and general counsels over those years from the *doyen* Jean-Jacques Arnaldez through Guillermo Aguilar Alvarez, Christophe Imhoos, Dominique Hascher, Raphael Jakoba, Michael Buhler, Eric Schafer, Hermann Verbist, Juan Ramon Iturriagoitia, Christopher Koch, Fabien Gelinas, Joachim Kuckenbun, Fernando Mantilla Serrano and other Deputy Counsel such as Corinne Nguyen, Katarina Gonzalez Arrocha, and Cheng-Yee Khong who have gone on to great things in international arbitration and beyond. I honor all of the arbitrators, counsels and members of the Court and Institute with whom I had the honor to work in those years. In addition to Roberto Powers as an African-American pioneer at the highest level of international arbitration, we can think today of Calvin Hamilton, Douglas Earl McClaren (first African-American appointed an arbitrator by the ICC I believe), and Floyd Weatherspoon for their indefatigable work as counsel and/or arbitrators.

Some of the most significant early developments for women were the appointment of Tila Maria de Hancock in 1982 to be the Director of the ICC International Court of Arbitration. Gender diversity in the assistant role increased with Sami Houerbi being the first man so named in the early 90's. A further development was the change of the title of assistants to Deputy Counsel in the early 1990's and the promotion of Anne Cambournac (as she then was) from Deputy Counsel to be the first counsel who was a woman by then Secretary General Eric Schwartz. Anne-Marie Whitesell's promotion from counsel to Deputy Secretary General in 1999 and Secretary General in 2001, a second generation appointment nearly twenty years after Tila Maria de Hancock. Another was the promotion of Jennifer Kirby from counsel to Deputy Secretary-General in 2005, as was the appointment of Mireze Philippe as Special Counsel in 2000. Mireze Philippe and Louise Barrington crystallized Arbitral Women from an informal group in 1993 to a formal creation in 2005, a further milestone on the path. I take this occasion to honor certain American women pioneers such as Sally Harpole out in Hong Kong and Karen Mills in Indonesia who were working in Asia long before so many others as well as Gabrielle Kaufmann-Kohler, Eva Horvath, Teresa Giovannini, Antonias Dimolitsa, Delissa Ridgway, Lorraine Brennan, Jane Willems, Vera Van Houtte, Nancy Turck, Nayla Comeir-Obeid, Dana Freyer, Caroline Malinvaud, Loretta Malintoppi, Sarah Francois-Poncet, Judith Gill, and so many others who started working in the vineyards of international arbitration in the 1980's and 1990's.

As this work causes men of many countries to spring to mind the *devoir de memoire*⁶ (it is an international arbitration thing) requires that I honor in what might be termed a name *collage* the late Abdelhay Sefrioui, Antonio Crivellaro, Mauro Ferrante, Lucien Simont, Otto Sandrock, Pieter Sanders, Diego Corapi, Albert J. Van den Berg, Jan Paulsson, Piero Bernardini, Giorgio Bernini, Pierre Lalive, Samir Saleh, Lord Dervaird, Spencer Boyer, Andreas Lowenfeld, Bernardo Cremades, the late Hans Smit, Tudor Popescu, Lawrence Newman, George Bermann, Antis Triantafyllides, John Beechey, Moses Silverman, Yves Fortier, Marc Lalonde, Pierre Bellet, Gerald Aksen, Nigel Blackburn, Abdul Aziz Gaballah, Theo Klein, Alain Prujiner, Pierre Tercier, John Kerr, Arthur Rovine, Toby Landau, Otto L.O. de Witt Wijnen, Jean-Louis Delvolve, Arthur Marriott, Nael Bunni, Ercus Stewart, George Bermann, Marc Blessing, William “Rusty” Park, Peter Hafter, Pierre Karrer, Claude Reymond, Robert Karrer, Harry L. Arkin, Werner Melis, Julian Lew, V.V. “Johnny” Veeder, Ahmed El-Kosheri, Hans van Houtte, Amozs Wako, Werner Wenger, Bernard Hanotiau, James Carter, Philippe LeBoulanger, Andre Faures, Fabien Gelinis, Nabil Antaki, Anton-Henry Gaede, Ottoarndt Glossner, Pierre Mayer, the late Nabih Bulos, Michael Polkinghorne, Eric Robine, Charles Kaplan, Thomas Webster, Pierre-Yves Tschanz, Axel Baum, Johan Erauw, Sir Edward Eveleigh, Edward Chiasson, the late Philippe Fouchard, Lord Wilberforce, Jacques Werner, Berthold Goldmann, Claude Bessard, Jose-Luis Siqueiros, Jean Robert, Raul Medina Mora, Gonzalo Santos, Jean-Francois Poudret, the late Neil Phillips, A.K. Bansal, David Rivkin, Emmanuel Gaillard, Charles Poncet, Mohammed Bedjaoui, Jacques Buhart, Peter Wolrich, David Brown, Aktham El-Kholy, the late George Cacoyannis, Stelio Valentini, Rene Bourdin, the late Sir Michael Kerr, Charles Brower, Howard Holtzman, Renato Roncaglia, Jacques El-Hakim, Emmanuel Jolivet, Fali Nariman, A.M. Singhvi, Andrea Giardina, Mark Littman, Toby Landau, Ignaz Seidl-Hohenveldern, D.C. Singhanian, the late Jacques Revaclier, Christopher To, Michael Pryles, Michael Hwang, Claus Von Wobeser, Karl Heinz Bockstiegel, the late Michael Hoellering, Steven Smith, Richard Horning, Bola Ajibola, Aktham El-Kholy, Roland Amoussou-Guenou, Sami Habayeb, Lord Mustill, Andre Beyly, Wang Sheng Chang, Antoine Kassis, Michel Soumrani, Khaled Kadiki, Abdel Hamid el-Ahdab, Moussa Raphael, Cecil Abraham, Michael Khoo, Michael Moser, Lawrence Boo, Philip Yang, Nigel Li, and so many others who through their example showed the path and extended courtesies to me. If I have not mentioned someone, rest assured that I have thought of you and see your face though part of your name has been lost to failing memory for which I beg your forgiveness.

Fast forward to the present and certainly the most significant developments for women – including American women - are the appointment of Meg Kinnear as the Secretary General of the International Centre for the Settlement of Investment Disputes, India Johnson as the President and Chief Executive Officer of the American Arbitration Association, Annette Magnusson as the Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce, Kathy Bryan as the President and Chief Executive Officer and Beth Trent as Senior Vice President of CPR, Teresa Cheng as the Chairman and Chiann Bao⁷ as the Secretary General of the Hong Kong International Arbitration Centre, Julie Sager, Executive Vice President and Senior Financial Officer and Kimberley Taylor Senior Vice President and

⁶ This collage of names is a work of memory, not a listing. I only indicated and only know of some who have passed - as might be said in Togo where I worked soon after my graduate studies - over to the spirit world.

⁷ I believe the first U.S. minority person to rise to this level. Her speech at the launch of Ladies in Litigation and Arbitration of October 10, 2013 in Hong Kong is remarkable.

Chief Operating Officer at JAMS, Nadia Darwazah as Secretary General of the Jerusalem Arbitration Center, Sarah Lancaster as the Registrar of the London Court of International Arbitration, Lim Seok Hui as Chief Executive Officer and Tan Ai Leen as Registrar at the Singapore International Arbitration Centre. I have been pleased also to learn recently that Megha Joshi has been named in 2012 as the Executive Secretary/Chief Executive Officer of the newly minted Lagos Court of Arbitration, another addition to the Arbitral Women. We can think of extraordinary international arbitration practitioners such as Carolyn Lamm, Abby Cohen Smutny, and Lucy Reed who have come to the fore in the 2000's. In the space of intersectionality, we can honor Gabrielle McDonald, first African-American woman appointed a judge at the Iran-United States Claims Tribunal. We can highlight Nancy Thevenin, Effie Silva, and Deborah Enix-Ross (the first African-American woman counsel at WIPO) for their pioneering roles as American minority women in international arbitration.

As inspiration to others who may have physical disabilities from childhood or later like me and to all in general, we can honor Neil Kaplan for his extraordinary work in Hong Kong as judge particularly in the transition period from British to Chinese rule, as well as for all the work as arbitrator and the personal kindnesses he extended to me. We can highlight David Larson teacher and arbitrator with all of his pioneering work in technology mediated dispute resolution. We can think of those who have surmounted deafness in one or another ear to become some of the top arbitrators and/or counsel in the world.

And, as I have become aware of you in the survey process, we can honor those counsel and/or arbitrators who are openly LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer or Questioning) as the inspiration they give to those who feel the need to hide their sexual orientation and for the encouragement of minds to open of all in international arbitration.

III. The Survey

With regard to appointments as arbitrators or in roles as counsel, the evidence from the survey suggest that there are persons of all four groups (though not necessarily Americans) present in these roles.

A. Diversity of appointments in international arbitration by International Arbitral Institutions

I contacted the American Arbitration Association, the Court of Arbitration for Sport/Tribunal Arbitral du Sport, the Chinese International Economic and Trade Arbitration Commission, CPR, the Hong Kong International Arbitration Centre, the Iran-United States Claims Tribunal, the International Centre for the Settlement of Investment Disputes of the World Bank, the International Chamber of Commerce International Court of Arbitration, JAMS, the Korean Commercial Arbitration Board, the London Court of International Arbitration, the Permanent Court of Arbitration, the Singapore International Arbitration Centre, and the World Intellectual Property Organization Arbitration and Mediation Center and asked if they could provide data for the number of US nationals appointed in international arbitrations for 2012 with a breakdown by gender and if possible by American minorities, American lawyers with disabilities and American LGBTQ lawyers. The Hong Kong International Arbitration Centre, the International Centre for the Settlement of Investment Disputes of the World Bank and the International Chamber of Commerce International Court of Arbitration responded with numbers or a means to calculate the

numbers by gender, with information on American minorities, American lawyers with disabilities and American LGBTQ lawyers not being available. The results from these three institutions are below:

Hong Kong International Arbitration Centre – Appointments by gender in 2012

Arbitrator appointments of all kinds 2012 – HKIAC	USA Nationals (Appointed/Confirmed)
Men	2 / 2
Women	Nil / 1
Total	5

International Center for the Settlement of Investment Disputes of the World Bank – Appointments by gender for cases started in 2012⁸

Arbitrator appointments of all kinds 2012 – ICSID	US Nationals	Other Nationals
Men	11	106
Women	0	11

International Chamber of Commerce International Court of Arbitration – Appointments by gender 2012

Arbitrator appointments of all kinds 2012 – ICC Court	US Nationals	Other Nationals
Appointments of Men by the ICC Court	19	536
Confirmations of Men by the Secretary General of the ICC Court	59	555
Appointments of Women by the ICC Court	3	76
Confirmations of Women by the Secretary General of the ICC Court	6	47
Total	87	1214

For American women, if these numbers can be the most favorable proxies for all the international arbitral institutions,⁹ the numbers speak for themselves: there need to be more appointments of

⁸ Due to the inability to determine exactly which year a given arbitrator was named – as opposed to the constitution of an arbitral tribunal – I include as a proxy for 2012 alone all the cases that started in 2012 knowing full well that some of the individual appointments may have happened in 2013.

⁹ This view is comforted by earlier work on appointments by gender at least. See footnote 9, Lucy Greenwood and C. Mark Baker, *supra* note 2 for 2011 reports on appointments by gender (but not by gender of Americans). (“The authors contacted the LCIA, SCC, ICDR, and the ICC requesting information on the gender of the arbitrators appointed in arbitrations administered by the institutions. In an email exchange with Lucy Greenwood on 17 February 2012 and subsequently followed up by a telephone call on 21 February 2012, the ICC confirmed that it did not maintain information on diversity. Note that Louise Barrington reported that in 1990 the ICC named 517

American women by parties and international arbitral institutions when they are seeking an American (for that matter, more women could also be appointed when Other Nationals are being considered). While at least the ICC (10.3 per cent) and HKIAC's numbers (20 per cent, admittedly on a smaller base) for Americans and ICC (10.1 per cent) and ICSID numbers (10.4 percent) for Other Nationals are significantly better than they were in earlier periods, the process of arbitrator selection has to be opened up somehow by the gatekeepers/door-openers on these decisions. For Americans in international arbitration to reflect the American population, far more women need to be named which means that far more women need to be brought on the path up to the highest levels of the profession.

Based on the survey results below and extrapolating from this information on American women for American minority lawyers, American lawyers with disabilities, and Americans LGBTQ lawyers, the situation is probably even worse – though again, better than it was in international arbitration in the 1980's and 1990's. The gatekeepers/door-openers on these decisions need to find their path to the appointment of far more American minorities, Americans with disabilities, and American LGBTQ lawyers.

B. Diversity as expressed in the survey results from thirty-three persons

Twenty-two out of the thirty-four persons responding to the survey were or had been in private practice, Twenty-three out of the thirty-four persons had acted as arbitrators. The rest were a mix of other categories (employee in an arbitral institution, in house counsel, or judge) with the principal other one (nine) being professors (more than one category could apply to a given person). Fully twenty-five of the respondents had greater than 20 years of experience in international arbitration. The range of arbitrator, counsel or arbitral institution experience ranged from one to hundreds of cases with these persons having served in over 2500 cases in these roles over the past ten years (though it is possible some were including pre-2003 cases).

Years in International Arbitration

1-5 years	6-10 years	11-15 years	16-20 years	Greater than 20
1	2	4	2	25

1) American minorities

Turning to American minorities, fourteen of the thirty-four responding had experience with American minorities in international arbitration in the following numbers:

Number of Experiences with American Minorities in International Arbitration

African-American	Middle-East or Arab-American	Asian-American	Hispanic-American	Native-American
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arbitrators, of whom 4 (0.78%) were women and in 1995, the ICC named 766 arbitrators, of whom 22 (3%) were women. Louise Barrington, *The Commercial Way to Justice* (Kluwer 1997). The Stockholm Chamber of Commerce responded to the author on 9 March 2012 that 6.5% of all appointed arbitrators (both party appointed and appointed by the SCC between 2003 and 2012) have been women and 8.4% of the arbitrators appointed by the SCC have been women. However, it did not maintain these statistics routinely. The LCIA reported to Lucy Greenwood by email on 20 March 2012 that of 336 arbitrator appointments in 2011, 22 (6.5%) were female. The ICDR did not provide statistics to the authors. The Arbitration Institute of the Finland Chamber of Commerce stated that 27 % of the arbitrators appointed by the FCC in 2011 were women, but indicated that ‘very few’ of the party-appointed arbitrators were female (email to Lucy Greenwood dated 20 June 2012).”

9	14	25 to 31	21 to 36	0
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In terms of their experience with American minorities as arbitrators, one Hispanic-American Chairman, two African-American coarbitrators, two Middle-Eastern or Arab-American coarbitrators, four Asian-American coarbitrators, two Hispanic-American coarbitrators, and one Asian-American Sole Arbitrator were noted. As to how these American minorities were appointed, those who responded noted that four were party appointments and one was a joint nomination by the parties and coarbitrators or the parties alone, and no information was provided for the others.

As to American minorities as counsels in arbitration cases, Twenty-seven African-Americans, twenty-two to twenty-four Middle-Eastern or Arab Americans, eighteen to twenty Asian-Americans, and twenty-two Hispanic-Americans were noted. As to their roles as counsel, whether Lead Counsel, Member of the Arbitration Team of the Claimant(s) or Respondent(s), Trainee/Intern, or Other, three were Lead Counsel, seven were members of the arbitration team of the Claimant(s) or Respondent(s), and two were in other roles (such as Administrative Secretary to the Tribunal).

As to American minorities as experts, three African-Americans, three Middle-Eastern or Arab-American, and two Asian-Americans were noted.¹⁰ These experts were essentially all party appointed experts with a very few being named by the Arbitral Tribunal or Sole Arbitrator, and none by an institution.

2) American Women

Twenty-six out of the thirty-four arbitration practitioners responding had experience with American women in international arbitration. At least Forty-seven to fifty-one of these experiences were with American women as arbitrators. About six of these were as Chairman and at least 30 were as coarbitrators. As to the manner of appointment (please note the numbers do not total correctly but are as indicated), at least fifty-one to sixty-one were party appointments as coarbitrator, jointly as Chair, or jointly as Sole Arbitrator. Six appointments were by arbitral institutions. As counsel, well over 204 to 217 American women were counsel (with some respondents indicating they had seen “numerous” and “dozens” of American women counsel beyond the ones indicated by those that could number them). At least twenty-one to twenty-four of these American women were lead counsel and at least 117 to 118 were members of the arbitration team of the Claimant(s) or Respondent(s). Some respondents spoke of many in these categories and an uncountable number of trainees. Turning to experts, twenty-one or twenty-two American women were named experts with (of those reporting experts) seventeen of them being party appointed experts and one being an expert in a court case.

3) American lawyers with disabilities

Only one respondent had experience with an American with disabilities in an international arbitration. A few commented that they had not seen Americans with disabilities much in the profession and others referred to non-Americans with disabilities as having been arbitrators at the “top of their game.” One person noted that “disability” might include the case of a lawyer who had retired being permitted to unretire for purposes of addressing a case – a new way of thinking of the term disability for me.

4) American Lesbian, Gay, Bisexual, Transgender, Queer or Questioning (LGBTQ) lawyers

¹⁰ There may be more than this amount based on a number indicated by one person, but it appears they are referring to themselves.

Five respondents had experience with LGBTQ American lawyers in international arbitration and the rest either saying no or not knowing. Three LGBTQ American lawyers were noted as having been arbitrators though roles were only available for one as Chair and one other as coarbitrator. Those who responded indicated that one was jointly nominated by the coarbitrators and the parties and one by an arbitral institution. As to counsel, four LGBTQ American lawyers were noted as having been counsel, with one as Lead Counsel and the other three noted as Members of the arbitration team of the Claimant(s) or Respondent(s). One was noted as an interpreter and one other was noted as a party-appointed expert in an international arbitration case.

IV. Comments

A. General

While recognizing that these samples are far from perfect and are essentially slightly more than anecdotal information only, a few thoughts do come to mind. While recognizing there may be double-counting, it appears safe to conclude that as of today there are a significant number of American women (most likely white) in international arbitration in all phases of being counsel but not so many as arbitrators. To a much lesser extent than American women, while recognizing there may be double-counting, it appears safe to conclude that as of today there are a few American minorities active in international arbitration in all phases of being counsel but even less as arbitrators. To a much lesser extent than American women and minorities (and given the paucity double-counting here is unlikely), there are an infinitesimal number of American lawyers with disabilities or American LGBTQ lawyers in international arbitration. For me, the bright aspect in this picture as compared to when I worked in the field in the 1980's and 1990's is best captured in the paraphrase of an old Negro spiritual: there are not as many as there ought to be, but it is slightly better than it was.

B. What can be done?

1) The value proposition provided by the target population

In an earlier article, I noted seven particular currents that an American minority needs to manage to make a successful career in international arbitration, to wit:

- a. Domestic US Current - how do you rise in the profession – prestigious international law firm practice
- b. Foreign Based – Current – little or no data on this example - foreign office U.S. law firm or foreign law firms
- c. Human Capital – Current – law degrees (prestige and from different countries), languages, bar memberships, nationalities, family ties, mentors – Willem Vis – Office of Legal Advisor State Department – Internships at International Arbitral Institutions
- d. Cooptation Current – marketing articles placed in key journals, speeches, advisory boards, power to choose articles etc
- e. Changing International Commercial Arbitration Current - openness to new areas in arbitration where hierarchies are not set such as (back in 2004) domain name dispute resolution, maybe investment, maybe online dispute resolution and arbitration
- f. Lifestyle Current - what price you are willing to pay (family, travel, etc)

g. Cultural Diversity Current - what are the primacist vs. universalist visions?¹¹

It appears that these seven currents remain valid and their management is a key task for any member of the four groups in the target population.

2) A little help for all my friends from neuroscience?

a) Explicit bias, implicit bias, and stereotype threat¹²

Related to these management tasks for the prospective member of the target population is a second aspect of how one gets chosen for the path to rise to the highest levels of international arbitration careers. For this, I might suggest what is being learned from neuroscience and validated cross-culturally can help inform the thinking of individual members of the target populations, as well as gatekeepers and door-openers in the legal profession and international arbitral institutions.

An emerging area in neuroscience is the study of implicit bias and stereotype threat. The subject is of concern to the legal community generally. The American Bar Association Section of Litigation has partnered with the National Center for State Courts to address the issue in the judicial system. The American Bar Association Council for Racial and Ethnic Diversity in the Educational Pipeline has deepened its efforts to understand how this affects achievement in the pipeline from K-12, college and law schools. The concepts are derived from neuroscience and psychology and refer to the process by which schemas (what might be called “mental shortcuts” or “templates of knowledge”) develop in the brain that become implicit cognitions (things we do without thinking) and may become implicit social cognitions (things that guide our thinking about social traits). These implicit social cognitions are derived from stereotypes in the sense of traits we associate with a category and attitudes (overall evaluative feelings that are positive or negative). Through the process of the schemas with these implicit social cognitions, implicit forms of bias have been seen to emerge.

A personal example of this is with regard to my name: Benjamin G. Davis. On a sufficient number of occasions to make me conclude it is possible that this is an ambient implicit bias about me, I have been mistaken for the grandson of the famous American World War II General Benjamin O. Davis, Jr. who led the Tuskegee Airmen. I am no relation, but on occasion I have heard comments along the lines of “Your grandfather would agree with that!” etc from people who could not possibly have known my maternal grandfather or paternal grandfather (who died in 1939). One theory I have had about my own life is that

¹¹ Descriptions of these in more detail of these concepts are available in Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, (presented at the American Bar Association, Dispute Resolution Section Mid-Year meeting April 16, 2004), 14 *American Review of International Arbitration* (Columbia University) 461 (2004)

¹² This description of explicit bias, implicit bias and stereotype threat borrows substantially from these excellent sources: Samuel R. Bagentsos, *Implicit Bias, 'Science', and Antidiscrimination Law*, *Harv. L. & Pol'y Rev.* 1, no. 2 (2007): 477-93; Jerry Kang, *Implicit Bias: A Primer for Courts*, prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, Aug. 2009; Project Implicit-<https://implicit.harvard.edu/implicit/>; Jeffrey J. Rachlinski and Gregory S. Parks, *Implicit Bias, Election '08 and the Myth of a Post-Racial America*, 37 *FLA. ST. U. L. REV.* (2010); *Reducing Stereotype Threat*, www.reducingstereotypethreat.org as presented in Benjamin G. Davis, *Implicit Bias and Stereotype Threat CLE*, Toledo Bar Association, April 12, 2013 (powerpoint available with the author) ; See also the discussion of implicit bias in Lucy Greenwood and C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 *Arbitration International* 653 (2012).

what success I have had may be attributable to a significant degree to persons thinking that I am the grandson of this famous general and having a favorable disposition (or implicit bias) toward me because of their belief. That favorable disposition might work even more for me simply because I never make reference to him (I have no reason to). That lack of flaunting him might be construed as modesty (“not flaunting his anointed heritage”) which could be perceived as endearing. Notice that in all of this, what I am doing is happening in ignorance of these implicit social cognitions that are occurring in the people around me. It is as if one is swimming in a sea of implicit social cognitions while living one’s life.

Explicit bias is described as stereotypes and attitudes that we expressly self-report on surveys, recognize, and embrace. Implicit bias is dissociated from explicit biases and not self-reported on surveys. Both forms of biases are related but are in fact being found to be different mental constructs. The manner of measuring implicit bias has been through the Implicit Association Test (IAT) which measures reaction times when sorting categories of pictures and words. The IAT measures the strength of associations between concepts (e.g. black people, gay people) and evaluations (e.g. good, bad) or stereotypes (e.g. athletic, clumsy). The main idea is that making a response is easier (therefore quicker) when closely related items share the same response key. Pervasive reaction time differences were found in every country tested and they were consistent with the general social hierarchies. In addition, social category may influence what sort of biases one is likely to have.

Consequences of these implicit biases have been seen in terms of frequency of callback interviews in Sweden, awkward body language in the presence of someone, friendliness of facial expressions, negative evaluations of ambiguous actions by an African-American, negative evaluations of confident, aggressive, ambitious women in certain hiring conditions, shooter bias – black vs. white in video games, and on and on.

The key feature of implicit bias is that the IAT scores appear to better predict behavior than explicit self-reports. In a sense this is suggesting how one presents oneself in self-reporting and how one seems to act in terms of implicit social cognitions are different mental constructs and that the implicit biases are more salient to suggesting one’s behavior than what one says.

That being said, implicit bias is malleable and can be changed. Depending on a person’s motivation to be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or introduction of procedural changes (such as listening to musicians behind a screen) are examples in which implicit bias has been made malleable.

Stereotype threat refers to one being at risk of confirming, as a self-characteristic, a negative stereotype about one’s group. The research has shown that performance in academic contexts can be harmed by the awareness that one’s behaviors might be viewed by others through the lenses of race, gender, or sexual orientation as well as in a number of domains beyond academics. Stereotype threat has been seen to lead to self-handicapping strategies, such as reduced practice time for a task and to a reduced sense of belonging to the stereotyped domain. Consistent exposure to stereotype threat can reduce the degree that individuals value the domain in question. Students may choose not to pursue the domain of study and, consequently, limit the range of professions that they can pursue. Research has shown that stereotype threat can harm the academic performance of any individual for whom the situation invokes a stereotype-based expectation of poor performance. In addition, within a stereotyped group, some members may be more vulnerable to its negative consequences than others; factors such as the strength of one’s group identification or domain identification have been shown to be related to one’s subsequent vulnerability to stereotype threat. Stereotype threat might interfere with performance by

increasing arousal, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort. Many different means have been used to induce and to attenuate stereotype threat.

b) Cultural bias as explicit bias, implicit bias, or stereotype threat

In the comments, some of the international practitioners have been willing to highlight some of the positive and negative cultural attitudes that different members of the target population may face. These comments from various persons were passed along on a no-names basis or were one's I heard in my years in international arbitration (I indicate the one's I heard).

General:

"As per your request, I return herewith the questionnaire. I am afraid that I am not much of assistance. I don't keep track of the arbitrators with whom I sit, nor counsel or experts appearing before me. They are all equal to me."

"Arbitrations often had no American nexus."

"For the younger practitioners who are interested in arbitration, I tend to take the old-fashioned approach of basic legal training in a broad scope of commercial matters, laying a strong foundation for career development. If that meat and potatoes approach is too boring, then I won't be offended if you find other sources. In all cases, I'm enthusiastic about arbitration as a career area. It never ceases to be fascinating."

Men

"Pale, Male and Stale" (I heard often.)

Women:

"I have seen certain cultures where women are less respected than men in business circles. One client called men by their names during a meeting, but the woman as only "the lady" or "senorita."

"I have heard clients make sexual remarks about female colleagues of mine, as if that is acceptable or the norm. Or comments about women that are derogatory."

"Foreign travel is a huge part of the work, often for more than a week or two. For women with children, this is not easy. The most challenging is travelling while the child is still breast feeding, in terms of leaving an adequate supply of breast milk behind, care for that child during that period, being able to pump while travelling etc. Law firms do not do enough to support women at this stage of their personal/professional life in my opinion."

"Male colleagues have often seen foreign travel as a time to party/let off steam. Female colleagues are sometimes seen as more conservative or prudent and a hindrance to that lifestyle. For that reason, they may not be selected for a particular trip on account of their gender."

“[In France], women are pressured to return to work after having kids. My wife, who decided to spend a bit of time with our kids, faced some very negative comments from her French female friends.”

“They are on the team. So they participate as members of the team. I am unaware of any special status or treatment.”

“[In 2007], I saw the first [ICC] case (for me) decided by an arbitral tribunal composed of three women. As I was having lunch with one very experienced (and old) French arbitrator right thereafter, I told him how pleased I was about this. His reaction was to ask me, very seriously: “What? Three women? And how was it?” ...

“I neglected to mention that there are quite a number of Nigerian women in the arbitration field, and I believe some men, but there seem to be more women. Of course they are not American. Why do you restrict your study to Americans? There are probably fewer American arbitrators than UK, European, Australian or Asian.”

“Women constitute a very high percentage of the associates in law firm arbitration groups, and there are increasing numbers of women partners, including several who lead their groups.”

“There are enough female names in America that it isn't a stretch for a lazy party to appoint.”

“Most women get their first appointment through an arbitration institution. This is true for 99% of them...”

“I believe that the reasons are gender neutral and linked to the expertise of the individual.”

“There are very few women in international arbitration. At one point, a few years ago, at a reception at the Hong Kong Vis Moot, I asked a fairly well-known international arbitrator how many women he thought there were who regularly served as international arbitrators. I suggested that there were perhaps four or five. He said, “Oh no! There are at least 10 or 12.”

Minorities

“Either not nominated by a party or not nominated by the institution. This assumes that there are American minority groups arbitrators or other related functions. I confess I have not met any in France or the UK (other than you of course).”

“In the Middle East, Far East and Latin America, I have witnessed overt racism towards “blacks” as opposed to those who are “brown” or “white” (and not to African-Americans, but usually black people from that country or working in that country). I remember one law firm in Brazil where all the lawyers were “white – ie European origin” and all the staff were black (ie Brazilian Black or Indian). Some even had to wear maid uniforms to serve tea and coffee. Whether in terms of jokes, stereotypes or otherwise, whether clients or simply getting around a city, it can be challenging due to how the local black population might be treated in that already, or what the majority of people of that country have viewed and perceived from the television of the media. Combine that with a career where you have to deal with people from different nations – and not just professionals but witnesses who may be uneducated or not used to seeing a black person – it becomes all the more challenging. I would love to recruit more African-Americans into the field, but I just do not get the resumes or interest from that

particular minority. Hispanic, Russian/CIS or Arab-Americans are plentiful in the field and I see many resumes from these minorities. I have often wondered whether African-Americans know the challenges they may face outside of the US in advance and do not choose this field as a result? Or is it something else.”

“Chinese do not like blacks.” (I was told this before my first trip to Hong Kong.)

“Indians do not like blacks.” (I was told this before my first trip to New Delhi.)

“I have found that American minorities do not gravitate toward international arbitration. In our firm’s summer associate program, for example, we always have minorities, but they are ordinarily not the ones who express interest in international arbitration.”

“Probably [lack thereof] due to lack of experience. A vicious circle!”

“They are generally present in cases where U.S. law firms are involved in representing one or other of the parties.”

“There are a few ethnic Korean Americans at the major Korean law firms, including [lawfirm A], [lawfirm B] and [lawfirm C]. ... Not many, but a few. At [Lawfirm B], several of the associates are female. At [lawfirm A], the deputy chair of the practice is Korean American. They are all playing the role of counsel. ... Very few non-Korean Americans speak Korean well enough to actually conduct business or hearings in Korean. Maybe two or three people, just because it is such a hard language to learn for foreigners.”

“They were not offered as part of the candidate pool.”

“I think there are not a lot of minorities in the law firms that typically handle international arbitration. Also, as to the lack of minority arbitrators, this is affected by the old boy network which largely rules the appointment of arbitrators. It has a paucity of minority members.”

Lawyers with disabilities

“No doubt there currently is an underrepresentation of disabled persons. This may be due to the particularities of our activity which often times requires intensive travelling.”

“One arbitrator has an arm withered by polio, so might be seen as disabled. Nevertheless, he can beat most people at tennis and is one of the most successful arbitrators I know. So I cannot consider him in any way “disabled” by his “disfigurement”.”

“Another is totally deaf in one ear. He is the busiest arbitrator and most prolific author I know, so he too is not in the least “disabled” by his physical limitation.”

“I am not sure what is meant by disabled, but I have encountered very few disabled persons in law practice generally.”

“Lack of individuals who have disability.”

“I do not think very many disabled persons practice in the kinds of firms that typically handle international arbitration.”

LGBTQ

“There is less acceptance of LGBTQ, let alone tolerance, in certain cultures.”

“I have heard jokes about LGBTQ people from clients, as if it is acceptable or the norm.”

“There is no reason in San Francisco and I believe LGBTQ are fairly represented.”

“Foreign travel – it is possible that a lawyer may feel uncomfortable travelling with a gay colleague. While he/she may profess to be “okay” with the sexual preference when in the office, that may become different on the road (though unsaid of course). He/she would just choose someone else for the trip if more senior, or profess an excuse not to travel if junior.”

“I do not know of your experiences here, but to me France is funny when it comes to diversity. It’s unbelievably racist and sexist, yet seems to have an implicit don’t-ask-don’t-tell approach to gay men in particular which means that gay men in particular do not face some barriers that they might encounter elsewhere (but on certain conditions).”

“Not apparent that candidates fit into this category even after meeting appointed persons.”

c) From cultural bias to cultural gymnastics

Recognizing from the neuroscience discussion that implicit social cognitions abound around the world and that they tend to be in the direction of the social hierarchies, one might ask what could address the types of implicit bias that may be present as members of the target population make their way toward and in this sea of schemas in international arbitration in the United States and/or overseas.

We focus first on the preparation of those of the target population for work on the international plane to get in the field. Karen Mills of Indonesia has said it best as to the kinds of preparation an American woman (and I would extend this to all Americans particularly in the target population).

“It is not that easy for a woman to break in to the arbitration field, at least not as arbitrator. The first thing she should do is join ArbitralWomen, which supports women in arbitration. But you really need to be involved in actual arbitrations which means you need to work in a firm that does them and get on the team so you can assist and observe before you have anything to sell yourself on. The Vis and other Moots are very useful and any student considering entering the field should become involved in the moots as a necessity. It is the best training a student can have.”

While there may be difficulties, being a member of the target population is not somehow an inherent block to getting on that path. To rise on that path requires what we have all come to know in the profession: hard work, pluck, luck and mentorship/sponsorship. What may be a bit more different in the international plane is that those four things may come together in different ways and may occur anywhere in the world. The key moment, that I have seen repeated for so many people in this field’s lives in some form, is the moment - usually fairly early in a career for those with high-level international arbitration careers - when someone asks them something like “Can you be in Bratislava next week?” The person may have little or no experience with Bratislava but has to have the confidence to say “Yes.” Those moments come around in cycles over one’s life and I describe them as the “international plane

calling” moments. The key is to recognize the earliest career ones and have the pluck to take the leap of faith to go toward the international plane. The first experience becomes a second and on and on as one becomes the “go-to” person for the international work. Beyond just sharing the experience with friends, to become the “go-to” person form the habit of providing written trip reports to the powers that be upon one’s return to one’s base –wherever in the world. It helps those with the power over your career to identify you for even further work on the international plane. Make it easy for someone to see you on the international plane through one’s preparation and one’s willingness to take on the gamble.

On cross-racial, cross-gender, cross-cultural or cross-whatever mentoring, as noted from my own experience described above, there are no rational reasons why more of this cannot be done. It is a question of commitment and enthusiasm of gatekeepers/door-openers. The impact of those kinds of supportive efforts in my own life, as described above, has been tremendous. And, as one rises, the impact of one on those around you can lead to opening paths for still others. One example of even modest serendipitous cross-racial and cross-cultural encouragement (let alone mentoring/sponsoring) that can open someone to this path is this note I received from a European lawyer:

“On a more personal level, your mail reminded me that you were the very person who prompted me to develop my arbitration activities and introduced me to ICC arbitration, during a conversation we had on a TGV in the mid-nineties, when we fortuitously met en route to our respective family ski holidays and engaged in a casual conversation between train neighbors... At the time, I could not have imagined that our accidental conversation would have so important consequences on my life, as I am now spending the most part of my professional activities as international arbitrator.”

From the gatekeeper/door-opener perspective, a person’s motivation to be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or introduction of procedural changes in nomination processes for counsel and/or arbitrators would seem to be approaches through which implicit bias can be made malleable. These types of efforts at malleability might take the form of reaching out to target population persons to help them gain initial experience in the field as summer associates or interns to help whet their appetite for this path. Along their path, recognizing the presence of implicit social cognitions and finding ways to address them may be ways to provide an environment that is inclusive and encourages the target population. Institutional structures to recognize implicit bias and overcome it can be found in having employees of many cultures – so that one particular set of implicit social cognitions connected to one social hierarchy does not predominate and the work space has a more fluid set of implicit social cognitions present.

For the individual in the target population, the principal lesson would be that implicit bias is malleable and can be changed – with varying degrees of difficulty in that process that may call on one’s perseverance. For the individual in the target population, the second principal lesson is to not succumb to stereotype threat when one feels at risk of confirming, as a self-characteristic, a negative stereotype about one’s group. This would include not succumbing to self-handicapping strategies, such as reduced practice time for a task and to a reduced sense of belonging to the stereotyped domain. Experience is the key and good experience is a buffer for the bad experiences. Remind oneself of the good experiences in which one has done well to create for yourself an experience of inconsistent exposure to stereotype threat and thereby not reduce the degree the one values the domain in question. Some people are simply made to work in the international plane while some come to it as an acquired taste: whatever one’s path, allow oneself to go on it.

When travelling, follow a paraphrase of Jean Monnet's advice to not carry the implicit social cognitions in the form of "advice" that others give about "those people or cultures," but go and make up one's own mind about the new place. In my work with people on five continents, it is the common humanity that shines through if recognized and encouraged. See the world when one can or little bits of it where one lives meeting foreigners and learning from their cultures. Rather than shy away out of a sense of inadequacy or whatever self-limiting schema, students might choose to pursue the domain of study of international arbitration either domestically or overseas and, consequently, expand the range of cultural experience to prepare for a profession that they might pursue.

As stereotype threat might interfere with performance by increasing arousal, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort, the individual must consciously work to recognize and attenuate stereotype threat that they feel about themselves even when others are consciously or unconsciously inducing it in them. One particularly moment for this can be in an interview. I have mentioned to students the "(X+1) game" in which one presents a resume and the person evaluating for the position asks for something that is not on the resume. That experience or background not on the resume is of course made to be seen as the crucial characteristic for the work. One should be prepared to counter such approaches – whether sincere or gamesmanship on the other persons part. No one has a perfect resume or experience, but one's experience can aid one in accomplishing more.

Finally, those rising to the international plane should be sufficiently self-aware to try to be sensitive to when their own implicit social cognitions are influencing their view of others, whether domestically or internationally. Each of us has places where we are very comfortable performing and places which stretch our abilities to cope and accomplish. Growing the space where one is comfortable is part of the path. This ability to navigate a sea of schemas is what I have come to call the ability to do cultural gymnastics whether domestically, regionally, or transnationally.

There are limits, no doubt. In the face of brutal negative stereotypes of others and one's internal sense of self-worth, the contradictions between what one thinks of oneself and what the ambient social environment is saying may be experienced as too much of a contradiction. For those times, it might help to think of such moments as not so much moments of impasse, but rather moments of breakthrough to another level of deeper meaning and to arrive at a new cognitive state – sometimes called a nascent state.¹³ Others may react favorably or unfavorably to that new self - grown through the fiery cauldron of these kinds of contradictions. Finding one's way to where one's approaches will be both recognized and valued remains the path to tread. I just hope that path is in international arbitration for more of the target population.

V. Conclusion

While preparing this article, I was asked to provide a legal training for the Secretariat of the ICC International Court of Arbitration this past September in Paris. It was in Room 12 at ICC Headquarters at 38 Cours Albert 1er, the room where so many plenary and special court sessions, PIDA's, Arbitrator Colloquia, Advanced Arbitrator Trainings and other events of memory had occurred. A few short weeks later, the ICC was moving to its new locale, so this was both a return to a very familiar place and an

¹³ See generally, the remarkable analysis of the nascent state in Francesco Alberoni, *Movement and Institution* (1977).

opportunity to say goodbye in the last training held in that room full of memories. As I walked around the room and shook hands with the counsel, deputy counsel, secretaries, and interns in a room where women held up half or more of the sky, in my mind's eye I saw the ghosts of sessions in 1980's when women would have been barely present. As now the stale male though not so pale fellow in the room full of such *jeunesse*, I was overjoyed to see the progress that had been made which gave me hope for the progress that can still be made in enhancing diversity (and especially American diversity) in international arbitration. Afterward, in one of those moments of serendipity on the international plane as I walked to my next appointment down the Cours Albert 1er, I ran into Maitre Philippe Nouel, the first lawyer that I had met on a case back in 1986. Clearly, the widening circle of international arbitration stays unbroken.

American Diversity in International Arbitration 2003-2013

By Benjamin G. Davis, Associate Professor of Law, University of Toledo College of Law¹

I. Introduction

When I was approached to return to issues of diversity in international arbitration, I decided to expand on the methodology I used in the 2003-2004 period in three earlier articles on American minorities in international arbitration² by examining American diversity in international arbitration across the broader

¹ This article is adapted from a shorter article published in the American Bar Association Dispute Resolution Magazine of Winter 2014. I thank the ABA Dispute Resolution Magazine team (Gina Brown, Donna Stienstra, Nancy Welsh, and Joseph B. Stulberg) for suggesting this project to me. I thank Robert Jacoby for his research assistance. I thank Mireze Philippe, Sophie Nappert and the publisher of Transnational Dispute Management for their assistance with publicizing this project on OGEMID. I thank Mireze Philippe for her assistance in publicizing this project on ArbitralWomen. I thank Effie Silva for her assistance in publicizing this project in the Miami arbitration community. I thank Professor Llewellyn Gibbons of the University of Toledo College of Law for his suggestion of a method to review the discrete arena of domain name dispute resolution. As there has been discussion as to whether that can properly be characterized as international arbitration, I have not spread my net that far in this article, but may do so in a future article. I thank Professor Susan Martyn of the University of Toledo College of Law for her comments while drafting. All errors are the author's own.

² Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, (presented at the American Bar Association, Dispute Resolution Section Mid-Year meeting April 16, 2004), 14 *American Review of International Arbitration* (Columbia University) 461 (2004) and Benjamin G. Davis, *International Commercial Online and Offline Dispute Resolution: Addressing Primacism and Universalism* 4 *Journal of American Arbitration* (Penn State Dickinson/Tulane) 79 (2005), and *American Diversity in International Arbitration 2003-2013*, ABA Dispute Resolution Magazine (forthcoming Winter 2014); For pioneering work on diversity of women see Louise Barrington, *Arbitral Women: A Study of Women in International Commercial Arbitration*, in *The Commercial Way To Justice: The 1996 International Conference of the Chartered Institute of Arbitrators* 229-41 (Geoffrey M. Beresford Hartwell ed., 1996) (describing the lack of women in international arbitration but their increasing presence in international commercial arbitration) cited in Susan D. Franck, *The Role of the International Arbitrator*, 12 *ILSA J. Int'l & Comp. L.* 499 (2006); For excellent work on women in investment arbitration see Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 *N. C. L. Rev.* 1, 75-83 (2007). For excellent historical work on women in arbitration, see Mireze Philippe, *Evolution of Women's Involvement in Dispute Resolution in the last Thirty Years; the Institutional Experience & ArbitralWomen experience*, *ArbitralWomen Newsletter No. 8 April 2013 Special Issue on Women's Day and the other newsletters with articles available at* http://www.arbitralwomen.com/index.aspx?sectionlinks_id=140&language=0&pageName=Newsletters; Mireze Philippe, *History of the ICC Counsel, The Secretariat and the ICC International Court of Arbitration...What a Story* (International Chamber of Commerce 2013); For the most recent comprehensive discussion of gender in international arbitration see Lucy Greenwood and C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 *Arbitration International* 653 (2012) and the literature discussed therein as well as Lucy Greenwood, *Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals*, *American Bar Association International Law News*, Spring 2013 available at http://www.americanbar.org/publications/international_law_news/2013/spring/unblocking_pipeline_achieving_greater_gender_diversity_international_arbitration_tribunals.html; For excellent work on diversity of nationality, see Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator* (with survey results), 31 *Fordham Int'l L.J.* 603 (2008); A literature search has not found other work focused on American minorities, American women, American lawyers with disabilities, or American LGBTQ lawyers in international arbitration let alone all of them at once as a target population.

target population for the ABA's Goal III diversity efforts: American women, American minorities³, American lawyers with disabilities, and American LGBTQ lawyers. These four groups are the target population described in the American Bar Association's Goal III: Eliminate Bias and Enhance Diversity which has two objectives: 1. Promote full and equal participation in the Association, our profession, and the justice system by all persons. 2. Eliminate bias in the legal profession and the Justice System.⁴ In addition to sending a survey to 413 international arbitration practitioners of whom I was aware or to whom I was referred, I forwarded it to the ICC Counsel Alumni members of which I am a member as well as The International Law Discussion Space listserv, the Society of American Law Teachers listserv, as well as the Contracts, Dispute Resolution and Minority Groups listservs of the American Association of Law Schools. Further, I greatly appreciate that OGE MID and ArbitralWomen were kind enough to share the survey in their online spaces. Thus, an attempt was made to reach as broad a group of international arbitration practitioners on all five continents. Finally, based on anecdotal evidence that women may get their first appointment as an arbitrator through the appointment of an arbitral institution, I contacted a diverse group of international arbitral institutions around the world to see if they would be willing to share data on their appointments of members of the target population.

Thirty-four individuals ultimately filled out the survey and three of the international arbitral institutions provided data which will be discussed below. I thank these persons and organizations for their participation and thank the other persons and organizations for taking the time to look at whether they would participate. All of their attention to these matters in a very busy time of year is greatly appreciated.

II. Background – A Celebration of Diversity and Inclusion in International Arbitration

From my personal experience and research, I am certain that women lawyers including American women, US minority lawyers, lawyers with disabilities, and LGBTQ lawyers have been involved in some

³ Race is, of course, a social construct. The vast literature on this subject and its discussion are excellently presented in Meera E. Deo, Empirically-Derived Compelling State Interests in Affirmative Action Jurisprudence, (August 26, 2013). *Hastings Law Journal*, Vol. 65, No. 3, 2014; Thomas Jefferson School of Law Research Paper No. 2315787. available at SSRN: <http://ssrn.com/abstract=2315787> or <http://dx.doi.org/10.2139/ssrn.2315787>. For a concrete example, I have been socially constructed as an African-American in the United States. I have a Hispanic (from Cuba) grandmother, at least one Irish great-grandfather, a Native-American (Cherokee) great grandmother, and Chinese and Native-American (Blackfoot) ancestors according to my family lore, in addition to my ancestors of African origin whose presence in the United States dates back to at least 1800. Coming to recognize and feel ownership of that diverse history as part of living the social construct and self-identification as an African-American has been one of the most interesting aspects of this life. Coming to understand these and other diverse cultures through working with people in international arbitration is one of the pleasures of that work. I am certain that several Americans (and other Nationals) in international arbitration are similarly socially constructed as being of one race or another as they are perceived on the international plane. Experiencing these social constructs in countries with different cultures and histories can be both a liberating and constraining experience as one comes to understand opportunities and limitations in the expectations across borders. The key appears to be related to both the positive and negative impacts of explicit bias, implicit bias, and stereotype threat discussed later.

⁴ American Bar Association Goal III available at http://www.americanbar.org/about_the_aba/aba-mission-goals.html#GoalIII; Diversity and Inclusion ABA Member Survey, Executive Summary, 2013 available at http://www.americanbar.org/content/dam/aba/administrative/diversity/ABA_DI_MemberSurveyFinal.authcheckdam.pdf

capacity in international arbitration over the past 35 or more years. It is true that, for most of that period, these persons may not have been seen in the classic roles of arbitrator, lead counsel, or leader of an international arbitral institution, but they have still been present in some aspect of arbitration working with an arbitrator, on the team of a party counsel, or within an international arbitral institution. The work of these persons in maintaining and enhancing the international arbitral edifice may have rarely been recognized openly, but I know they have been there and I take the opportunity of this article to salute their determined work.

I would like to highlight some particular pioneers. I start with Roberto Powers, the first African-American counsel in the International Chamber of Commerce in the period 1978-1986 who went on to a career in the United States Foreign Service. I have stood on his shoulders thanks to the many courtesies he provided me as I went through the hiring process at the International Chamber of Commerce International Court of Arbitration when I first joined it in 1986 and served at the Court through 1996 and then on to be a Director, Conference Programmes and Manager of the ICC Institute of World Business Law through 1999. I continue with the many women lawyers (*juristes*) and non-legally trained professionals who served as my assistants in those early years. I take this opportunity to honor Sylvie Kermaal, Tamsyn Taylor (British-American), Katharine Bernet, Irene Ezratty, and Odette Lagace all brilliant and two of them also brilliant lawyers. I also wish to honor the secretaries with whom I had the pleasure of working who pushed me to do better. When I was tasked my first summer at the ICC with writing a statement on behalf of the ICC in a case before the Obergericht des Kantons Zurich and ultimately the Swiss Supreme Court, Tamsyn's (as secretary as she then was) trenchant critique as she typed pushed me to broaden my approach and I am eternally grateful to her. I also honor the late Cynthia Scharf who helped me learn the duty to manage and Michele Clergeaud who was ahead of me in my work. I wish to also honor Rita Ortega, Françoise Barriere, Ingrid Materner, Herta Pechenard, Marie-Christine Mosdier, Genevieve Pathiaud, Paule Daudin, Elisabeth Passedat, Sylvie Picard Renault and Josette Watrin for their work in keeping the ICC Secretariat running and growing. I honor the late Corinne Jarlot, Mireze Philippe, Michele Clergeaud, and Irene Ezratty who were instrumental on the team that developed the first generation Case Management System of the ICC in the 1989-1993 period as well as, for the latter two, their crucial roles in the famous International Fast-Track Commercial Arbitration Cases in 1992. I would like to honor the interns and short-term hires who worked on my team and came through the ICC from around the world many of whom have gone on to great things such as Michael Volkovitsch, Robert Smit, Sandrine Colletier, Pascale Lorfing, Masaaki Sawano, Ram Madaan, Nader Ibrahim, and Georges Affaki. I especially mention the writing one August 1993 with Michael and Odette of an article which was one of the great experiences of my life.

We must also honor the gatekeepers who also were door-openers. First for me is Eric A. Schwartz who interviewed me as a second year law student and put my name forward for a final interview with Gene Forcione when SG Archibald and Co (as it then was) included me in their summer associate program in Paris.⁵ That summer 1982, Kathie Claret and Kristen Karsten, Thomas Jahn, as well as Christopher Seppala opened my horizons to the world of international commercial arbitration. In my contracts class,

⁵ Today this process might be easier thanks to the Vis Moot and the Vis Moot East work of Eric Bergsten and Louise Barrington that have opened the doors to international arbitration to so many around the world.

I speak each year of Christopher Seppala sitting down with me and going over word for word my first memo to him – an investment in me for which I remain indebted all these years later. I honor William L. Craig and Christopher Seppala for being references when I applied at the ICC. I honor Stephen R. Bond and Sigvard Jarvin who demonstrated the confidence to hire me as a counsel. I honor the late ICC Court Chairman Michel Gaudet and the late ICC Court Chairman Alain Plantey for their insistence on excellence while teaching what it means to be a person working on the international plane: they remain my two primary mentors. I honor the late ICC Court Chairman Robert Briner, then head of the Commission on International Arbitration Paul Gelinas and the late head of the Institute of World Business Law Serge Lazareff for their support in putting into place Gaudet Day in 1998. I honor Louise Barrington and Michele Garzon for their assistance in my moving from the ICC Court to the ICC Institute. Louise broke new ground in opening ICC Hong Kong in the mid-90's – the first overseas office of the Secretariat. I honor the other counsels and general counsels over those years from the *doyen* Jean-Jacques Arnaldez through Guillermo Aguilar Alvarez, Christophe Imhoos, Dominique Hascher, Raphael Jakoba, Michael Buhler, Eric Schafer, Hermann Verbist, Juan Ramon Iturriagoitia, Christopher Koch, Fabien Gelinas, Joachim Kuckenbun, Fernando Mantilla Serrano and other Deputy Counsel such as Corinne Nguyen, Katarina Gonzalez Arrocha, and Cheng-Yee Khong who have gone on to great things in international arbitration and beyond. I honor all of the arbitrators, counsels and members of the Court and Institute with whom I had the honor to work in those years. In addition to Roberto Powers as an African-American pioneer at the highest level of international arbitration, we can think today of Calvin Hamilton, Douglas Earl McClaren (first African-American appointed an arbitrator by the ICC I believe), and Floyd Weatherspoon for their indefatigable work as counsel and/or arbitrators.

Some of the most significant early developments for women were the appointment of Tila Maria de Hancock in 1982 to be the Director of the ICC International Court of Arbitration. Gender diversity in the assistant role increased with Sami Houerbi being the first man so named in the early 90's. A further development was the change of the title of assistants to Deputy Counsel in the early 1990's and the promotion of Anne Cambournac (as she then was) from Deputy Counsel to be the first counsel who was a woman by then Secretary General Eric Schwartz. Anne-Marie Whitesell's promotion from counsel to Deputy Secretary General in 1999 and Secretary General in 2001, a second generation appointment nearly twenty years after Tila Maria de Hancock. Another was the promotion of Jennifer Kirby from counsel to Deputy Secretary-General in 2005, as was the appointment of Mireze Philippe as Special Counsel in 2000. Mireze Philippe and Louise Barrington crystallized Arbitral Women from an informal group in 1993 to a formal creation in 2005, a further milestone on the path. I take this occasion to honor certain American women pioneers such as Sally Harpole out in Hong Kong and Karen Mills in Indonesia who were working in Asia long before so many others as well as Gabrielle Kaufmann-Kohler, Eva Horvath, Teresa Giovannini, Antonias Dimolitsa, Delissa Ridgway, Lorraine Brennan, Jane Willems, Vera Van Houtte, Nancy Turck, Nayla Comeir-Obeid, Dana Freyer, Caroline Malinvaud, Loretta Malintoppi, Sarah Francois-Poncet, Judith Gill, and so many others who started working in the vineyards of international arbitration in the 1980's and 1990's.

As this work causes men of many countries to spring to mind the *devoir de memoire*⁶ (it is an international arbitration thing) requires that I honor in what might be termed a name *collage* the late Abdelhay Sefrioui, Antonio Crivellaro, Mauro Ferrante, Lucien Simont, Otto Sandrock, Pieter Sanders, Diego Corapi, Albert J. Van den Berg, Jan Paulsson, Piero Bernardini, Giorgio Bernini, Pierre Lalive, Samir Saleh, Lord Dervaird, Spencer Boyer, Andreas Lowenfeld, Bernardo Cremades, the late Hans Smit, Tudor Popescu, Lawrence Newman, George Bermann, Antis Triantafyllides, John Beechey, Moses Silverman, Yves Fortier, Marc Lalonde, Pierre Bellet, Gerald Aksen, Nigel Blackburn, Abdul Aziz Gaballah, Theo Klein, Alain Prujiner, Pierre Tercier, John Kerr, Arthur Rovine, Toby Landau, Otto L.O. de Witt Wijnen, Jean-Louis Delvolve, Arthur Marriott, Nael Bunni, Ercus Stewart, George Bermann, Marc Blessing, William “Rusty” Park, Peter Hafter, Pierre Karrer, Claude Reymond, Robert Karrer, Harry L. Arkin, Werner Melis, Julian Lew, V.V. “Johnny” Veeder, Ahmed El-Kosheri, Hans van Houtte, Amozs Wako, Werner Wenger, Bernard Hanotiau, James Carter, Philippe LeBoulanger, Andre Faures, Fabien Gelinis, Nabil Antaki, Anton-Henry Gaede, Ottoarndt Glossner, Pierre Mayer, the late Nabih Bulos, Michael Polkinghorne, Eric Robine, Charles Kaplan, Thomas Webster, Pierre-Yves Tschanz, Axel Baum, Johan Erauw, Sir Edward Eveleigh, Edward Chiasson, the late Philippe Fouchard, Lord Wilberforce, Jacques Werner, Berthold Goldmann, Claude Bessard, Jose-Luis Siqueiros, Jean Robert, Raul Medina Mora, Gonzalo Santos, Jean-Francois Poudret, the late Neil Phillips, A.K. Bansal, David Rivkin, Emmanuel Gaillard, Charles Poncet, Mohammed Bedjaoui, Jacques Buhart, Peter Wolrich, David Brown, Aktham El-Kholy, the late George Cacoyannis, Stelio Valentini, Rene Bourdin, the late Sir Michael Kerr, Charles Brower, Howard Holtzman, Renato Roncaglia, Jacques El-Hakim, Emmanuel Jolivet, Fali Nariman, A.M. Singhvi, Andrea Giardina, Mark Littman, Toby Landau, Ignaz Seidl-Hohenveldern, D.C. Singhanian, the late Jacques Revaclier, Christopher To, Michael Pryles, Michael Hwang, Claus Von Wobeser, Karl Heinz Bockstiegel, the late Michael Hoellering, Steven Smith, Richard Horning, Bola Ajibola, Aktham El-Kholy, Roland Amoussou-Guenou, Sami Habayeb, Lord Mustill, Andre Beyly, Wang Sheng Chang, Antoine Kassis, Michel Soumrani, Khaled Kadiki, Abdel Hamid el-Ahdab, Moussa Raphael, Cecil Abraham, Michael Khoo, Michael Moser, Lawrence Boo, Philip Yang, Nigel Li, and so many others who through their example showed the path and extended courtesies to me. If I have not mentioned someone, rest assured that I have thought of you and see your face though part of your name has been lost to failing memory for which I beg your forgiveness.

Fast forward to the present and certainly the most significant developments for women – including American women - are the appointment of Meg Kinnear as the Secretary General of the International Centre for the Settlement of Investment Disputes, India Johnson as the President and Chief Executive Officer of the American Arbitration Association, Annette Magnusson as the Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce, Kathy Bryan as the President and Chief Executive Officer and Beth Trent as Senior Vice President of CPR, Teresa Cheng as the Chairman and Chiann Bao⁷ as the Secretary General of the Hong Kong International Arbitration Centre, Julie Sager, Executive Vice President and Senior Financial Officer and Kimberley Taylor Senior Vice President and

⁶ This collage of names is a work of memory, not a listing. I only indicated and only know of some who have passed - as might be said in Togo where I worked soon after my graduate studies - over to the spirit world.

⁷ I believe the first U.S. minority person to rise to this level. Her speech at the launch of Ladies in Litigation and Arbitration of October 10, 2013 in Hong Kong is remarkable.

Chief Operating Officer at JAMS, Nadia Darwazah as Secretary General of the Jerusalem Arbitration Center, Sarah Lancaster as the Registrar of the London Court of International Arbitration, Lim Seok Hui as Chief Executive Officer and Tan Ai Leen as Registrar at the Singapore International Arbitration Centre. I have been pleased also to learn recently that Megha Joshi has been named in 2012 as the Executive Secretary/Chief Executive Officer of the newly minted Lagos Court of Arbitration, another addition to the Arbitral Women. We can think of extraordinary international arbitration practitioners such as Carolyn Lamm, Abby Cohen Smutny, and Lucy Reed who have come to the fore in the 2000's. In the space of intersectionality, we can honor Gabrielle McDonald, first African-American woman appointed a judge at the Iran-United States Claims Tribunal. We can highlight Nancy Thevenin, Effie Silva, and Deborah Enix-Ross (the first African-American woman counsel at WIPO) for their pioneering roles as American minority women in international arbitration.

As inspiration to others who may have physical disabilities from childhood or later like me and to all in general, we can honor Neil Kaplan for his extraordinary work in Hong Kong as judge particularly in the transition period from British to Chinese rule, as well as for all the work as arbitrator and the personal kindnesses he extended to me. We can highlight David Larson teacher and arbitrator with all of his pioneering work in technology mediated dispute resolution. We can think of those who have surmounted deafness in one or another ear to become some of the top arbitrators and/or counsel in the world.

And, as I have become aware of you in the survey process, we can honor those counsel and/or arbitrators who are openly LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer or Questioning) as the inspiration they give to those who feel the need to hide their sexual orientation and for the encouragement of minds to open of all in international arbitration.

III. The Survey

With regard to appointments as arbitrators or in roles as counsel, the evidence from the survey suggest that there are persons of all four groups (though not necessarily Americans) present in these roles.

A. Diversity of appointments in international arbitration by International Arbitral Institutions

I contacted the American Arbitration Association, the Court of Arbitration for Sport/Tribunal Arbitral du Sport, the Chinese International Economic and Trade Arbitration Commission, CPR, the Hong Kong International Arbitration Centre, the Iran-United States Claims Tribunal, the International Centre for the Settlement of Investment Disputes of the World Bank, the International Chamber of Commerce International Court of Arbitration, JAMS, the Korean Commercial Arbitration Board, the London Court of International Arbitration, the Permanent Court of Arbitration, the Singapore International Arbitration Centre, and the World Intellectual Property Organization Arbitration and Mediation Center and asked if they could provide data for the number of US nationals appointed in international arbitrations for 2012 with a breakdown by gender and if possible by American minorities, American lawyers with disabilities and American LGBTQ lawyers. The Hong Kong International Arbitration Centre, the International Centre for the Settlement of Investment Disputes of the World Bank and the International Chamber of Commerce International Court of Arbitration responded with numbers or a means to calculate the

numbers by gender, with information on American minorities, American lawyers with disabilities and American LGBTQ lawyers not being available. The results from these three institutions are below:

Hong Kong International Arbitration Centre – Appointments by gender in 2012

Arbitrator appointments of all kinds 2012 – HKIAC	USA Nationals (Appointed/Confirmed)
Men	2 / 2
Women	Nil / 1
Total	5

International Center for the Settlement of Investment Disputes of the World Bank – Appointments by gender for cases started in 2012⁸

Arbitrator appointments of all kinds 2012 – ICSID	US Nationals	Other Nationals
Men	11	106
Women	0	11

International Chamber of Commerce International Court of Arbitration – Appointments by gender 2012

Arbitrator appointments of all kinds 2012 – ICC Court	US Nationals	Other Nationals
Appointments of Men by the ICC Court	19	536
Confirmations of Men by the Secretary General of the ICC Court	59	555
Appointments of Women by the ICC Court	3	76
Confirmations of Women by the Secretary General of the ICC Court	6	47
Total	87	1214

For American women, if these numbers can be the most favorable proxies for all the international arbitral institutions,⁹ the numbers speak for themselves: there need to be more appointments of

⁸ Due to the inability to determine exactly which year a given arbitrator was named – as opposed to the constitution of an arbitral tribunal – I include as a proxy for 2012 alone all the cases that started in 2012 knowing full well that some of the individual appointments may have happened in 2013.

⁹ This view is comforted by earlier work on appointments by gender at least. See footnote 9, Lucy Greenwood and C. Mark Baker, *supra* note 2 for 2011 reports on appointments by gender (but not by gender of Americans). (“The authors contacted the LCIA, SCC, ICDR, and the ICC requesting information on the gender of the arbitrators appointed in arbitrations administered by the institutions. In an email exchange with Lucy Greenwood on 17 February 2012 and subsequently followed up by a telephone call on 21 February 2012, the ICC confirmed that it did not maintain information on diversity. Note that Louise Barrington reported that in 1990 the ICC named 517

American women by parties and international arbitral institutions when they are seeking an American (for that matter, more women could also be appointed when Other Nationals are being considered). While at least the ICC (10.3 per cent) and HKIAC's numbers (20 per cent, admittedly on a smaller base) for Americans and ICC (10.1 per cent) and ICSID numbers (10.4 percent) for Other Nationals are significantly better than they were in earlier periods, the process of arbitrator selection has to be opened up somehow by the gatekeepers/door-openers on these decisions. For Americans in international arbitration to reflect the American population, far more women need to be named which means that far more women need to be brought on the path up to the highest levels of the profession.

Based on the survey results below and extrapolating from this information on American women for American minority lawyers, American lawyers with disabilities, and Americans LGBTQ lawyers, the situation is probably even worse – though again, better than it was in international arbitration in the 1980's and 1990's. The gatekeepers/door-openers on these decisions need to find their path to the appointment of far more American minorities, Americans with disabilities, and American LGBTQ lawyers.

B. Diversity as expressed in the survey results from thirty-three persons

Twenty-two out of the thirty-four persons responding to the survey were or had been in private practice, Twenty-three out of the thirty-four persons had acted as arbitrators. The rest were a mix of other categories (employee in an arbitral institution, in house counsel, or judge) with the principal other one (nine) being professors (more than one category could apply to a given person). Fully twenty-five of the respondents had greater than 20 years of experience in international arbitration. The range of arbitrator, counsel or arbitral institution experience ranged from one to hundreds of cases with these persons having served in over 2500 cases in these roles over the past ten years (though it is possible some were including pre-2003 cases).

Years in International Arbitration

1-5 years	6-10 years	11-15 years	16-20 years	Greater than 20
1	2	4	2	25

1) American minorities

Turning to American minorities, fourteen of the thirty-four responding had experience with American minorities in international arbitration in the following numbers:

Number of Experiences with American Minorities in International Arbitration

African-American	Middle-East or Arab-American	Asian-American	Hispanic-American	Native-American
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arbitrators, of whom 4 (0.78%) were women and in 1995, the ICC named 766 arbitrators, of whom 22 (3%) were women. Louise Barrington, *The Commercial Way to Justice* (Kluwer 1997). The Stockholm Chamber of Commerce responded to the author on 9 March 2012 that 6.5% of all appointed arbitrators (both party appointed and appointed by the SCC between 2003 and 2012) have been women and 8.4% of the arbitrators appointed by the SCC have been women. However, it did not maintain these statistics routinely. The LCIA reported to Lucy Greenwood by email on 20 March 2012 that of 336 arbitrator appointments in 2011, 22 (6.5%) were female. The ICDR did not provide statistics to the authors. The Arbitration Institute of the Finland Chamber of Commerce stated that 27 % of the arbitrators appointed by the FCC in 2011 were women, but indicated that ‘very few’ of the party-appointed arbitrators were female (email to Lucy Greenwood dated 20 June 2012).”

9	14	25 to 31	21 to 36	0
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In terms of their experience with American minorities as arbitrators, one Hispanic-American Chairman, two African-American coarbitrators, two Middle-Eastern or Arab-American coarbitrators, four Asian-American coarbitrators, two Hispanic-American coarbitrators, and one Asian-American Sole Arbitrator were noted. As to how these American minorities were appointed, those who responded noted that four were party appointments and one was a joint nomination by the parties and coarbitrators or the parties alone, and no information was provided for the others.

As to American minorities as counsels in arbitration cases, Twenty-seven African-Americans, twenty-two to twenty-four Middle-Eastern or Arab Americans, eighteen to twenty Asian-Americans, and twenty-two Hispanic-Americans were noted. As to their roles as counsel, whether Lead Counsel, Member of the Arbitration Team of the Claimant(s) or Respondent(s), Trainee/Intern, or Other, three were Lead Counsel, seven were members of the arbitration team of the Claimant(s) or Respondent(s), and two were in other roles (such as Administrative Secretary to the Tribunal).

As to American minorities as experts, three African-Americans, three Middle-Eastern or Arab-American, and two Asian-Americans were noted.¹⁰ These experts were essentially all party appointed experts with a very few being named by the Arbitral Tribunal or Sole Arbitrator, and none by an institution.

2) American Women

Twenty-six out of the thirty-four arbitration practitioners responding had experience with American women in international arbitration. At least Forty-seven to fifty-one of these experiences were with American women as arbitrators. About six of these were as Chairman and at least 30 were as coarbitrators. As to the manner of appointment (please note the numbers do not total correctly but are as indicated), at least fifty-one to sixty-one were party appointments as coarbitrator, jointly as Chair, or jointly as Sole Arbitrator. Six appointments were by arbitral institutions. As counsel, well over 204 to 217 American women were counsel (with some respondents indicating they had seen “numerous” and “dozens” of American women counsel beyond the ones indicated by those that could number them). At least twenty-one to twenty-four of these American women were lead counsel and at least 117 to 118 were members of the arbitration team of the Claimant(s) or Respondent(s). Some respondents spoke of many in these categories and an uncountable number of trainees. Turning to experts, twenty-one or twenty-two American women were named experts with (of those reporting experts) seventeen of them being party appointed experts and one being an expert in a court case.

3) American lawyers with disabilities

Only one respondent had experience with an American with disabilities in an international arbitration. A few commented that they had not seen Americans with disabilities much in the profession and others referred to non-Americans with disabilities as having been arbitrators at the “top of their game.” One person noted that “disability” might include the case of a lawyer who had retired being permitted to unretire for purposes of addressing a case – a new way of thinking of the term disability for me.

4) American Lesbian, Gay, Bisexual, Transgender, Queer or Questioning (LGBTQ) lawyers

¹⁰ There may be more than this amount based on a number indicated by one person, but it appears they are referring to themselves.

Five respondents had experience with LGBTQ American lawyers in international arbitration and the rest either saying no or not knowing. Three LGBTQ American lawyers were noted as having been arbitrators though roles were only available for one as Chair and one other as coarbitrator. Those who responded indicated that one was jointly nominated by the coarbitrators and the parties and one by an arbitral institution. As to counsel, four LGBTQ American lawyers were noted as having been counsel, with one as Lead Counsel and the other three noted as Members of the arbitration team of the Claimant(s) or Respondent(s). One was noted as an interpreter and one other was noted as a party-appointed expert in an international arbitration case.

IV. Comments

A. General

While recognizing that these samples are far from perfect and are essentially slightly more than anecdotal information only, a few thoughts do come to mind. While recognizing there may be double-counting, it appears safe to conclude that as of today there are a significant number of American women (most likely white) in international arbitration in all phases of being counsel but not so many as arbitrators. To a much lesser extent than American women, while recognizing there may be double-counting, it appears safe to conclude that as of today there are a few American minorities active in international arbitration in all phases of being counsel but even less as arbitrators. To a much lesser extent than American women and minorities (and given the paucity double-counting here is unlikely), there are an infinitesimal number of American lawyers with disabilities or American LGBTQ lawyers in international arbitration. For me, the bright aspect in this picture as compared to when I worked in the field in the 1980's and 1990's is best captured in the paraphrase of an old Negro spiritual: there are not as many as there ought to be, but it is slightly better than it was.

B. What can be done?

1) The value proposition provided by the target population

In an earlier article, I noted seven particular currents that an American minority needs to manage to make a successful career in international arbitration, to wit:

- a. Domestic US Current - how do you rise in the profession – prestigious international law firm practice
- b. Foreign Based – Current – little or no data on this example - foreign office U.S. law firm or foreign law firms
- c. Human Capital – Current – law degrees (prestige and from different countries), languages, bar memberships, nationalities, family ties, mentors – Willem Vis – Office of Legal Advisor State Department – Internships at International Arbitral Institutions
- d. Cooptation Current – marketing articles placed in key journals, speeches, advisory boards, power to choose articles etc
- e. Changing International Commercial Arbitration Current - openness to new areas in arbitration where hierarchies are not set such as (back in 2004) domain name dispute resolution, maybe investment, maybe online dispute resolution and arbitration
- f. Lifestyle Current - what price you are willing to pay (family, travel, etc)

g. Cultural Diversity Current - what are the primacist vs. universalist visions?¹¹

It appears that these seven currents remain valid and their management is a key task for any member of the four groups in the target population.

2) A little help for all my friends from neuroscience?

a) Explicit bias, implicit bias, and stereotype threat¹²

Related to these management tasks for the prospective member of the target population is a second aspect of how one gets chosen for the path to rise to the highest levels of international arbitration careers. For this, I might suggest what is being learned from neuroscience and validated cross-culturally can help inform the thinking of individual members of the target populations, as well as gatekeepers and door-openers in the legal profession and international arbitral institutions.

An emerging area in neuroscience is the study of implicit bias and stereotype threat. The subject is of concern to the legal community generally. The American Bar Association Section of Litigation has partnered with the National Center for State Courts to address the issue in the judicial system. The American Bar Association Council for Racial and Ethnic Diversity in the Educational Pipeline has deepened its efforts to understand how this affects achievement in the pipeline from K-12, college and law schools. The concepts are derived from neuroscience and psychology and refer to the process by which schemas (what might be called “mental shortcuts” or “templates of knowledge”) develop in the brain that become implicit cognitions (things we do without thinking) and may become implicit social cognitions (things that guide our thinking about social traits). These implicit social cognitions are derived from stereotypes in the sense of traits we associate with a category and attitudes (overall evaluative feelings that are positive or negative). Through the process of the schemas with these implicit social cognitions, implicit forms of bias have been seen to emerge.

A personal example of this is with regard to my name: Benjamin G. Davis. On a sufficient number of occasions to make me conclude it is possible that this is an ambient implicit bias about me, I have been mistaken for the grandson of the famous American World War II General Benjamin O. Davis, Jr. who led the Tuskegee Airmen. I am no relation, but on occasion I have heard comments along the lines of “Your grandfather would agree with that!” etc from people who could not possibly have known my maternal grandfather or paternal grandfather (who died in 1939). One theory I have had about my own life is that

¹¹ Descriptions of these in more detail of these concepts are available in Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, (presented at the American Bar Association, Dispute Resolution Section Mid-Year meeting April 16, 2004), 14 *American Review of International Arbitration* (Columbia University) 461 (2004)

¹² This description of explicit bias, implicit bias and stereotype threat borrows substantially from these excellent sources: Samuel R. Bagentsos, *Implicit Bias, 'Science', and Antidiscrimination Law*, *Harv. L. & Pol'y Rev.* 1, no. 2 (2007): 477-93; Jerry Kang, *Implicit Bias: A Primer for Courts*, prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, Aug. 2009; Project Implicit-<https://implicit.harvard.edu/implicit/>; Jeffrey J. Rachlinski and Gregory S. Parks, *Implicit Bias, Election '08 and the Myth of a Post-Racial America*, 37 *FLA. ST. U. L. REV.* (2010); *Reducing Stereotype Threat*, www.reducingstereotypethreat.org as presented in Benjamin G. Davis, *Implicit Bias and Stereotype Threat CLE*, Toledo Bar Association, April 12, 2013 (powerpoint available with the author) ; See also the discussion of implicit bias in Lucy Greenwood and C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 *Arbitration International* 653 (2012).

what success I have had may be attributable to a significant degree to persons thinking that I am the grandson of this famous general and having a favorable disposition (or implicit bias) toward me because of their belief. That favorable disposition might work even more for me simply because I never make reference to him (I have no reason to). That lack of flaunting him might be construed as modesty (“not flaunting his anointed heritage”) which could be perceived as endearing. Notice that in all of this, what I am doing is happening in ignorance of these implicit social cognitions that are occurring in the people around me. It is as if one is swimming in a sea of implicit social cognitions while living one’s life.

Explicit bias is described as stereotypes and attitudes that we expressly self-report on surveys, recognize, and embrace. Implicit bias is dissociated from explicit biases and not self-reported on surveys. Both forms of biases are related but are in fact being found to be different mental constructs. The manner of measuring implicit bias has been through the Implicit Association Test (IAT) which measures reaction times when sorting categories of pictures and words. The IAT measures the strength of associations between concepts (e.g. black people, gay people) and evaluations (e.g. good, bad) or stereotypes (e.g. athletic, clumsy). The main idea is that making a response is easier (therefore quicker) when closely related items share the same response key. Pervasive reaction time differences were found in every country tested and they were consistent with the general social hierarchies. In addition, social category may influence what sort of biases one is likely to have.

Consequences of these implicit biases have been seen in terms of frequency of callback interviews in Sweden, awkward body language in the presence of someone, friendliness of facial expressions, negative evaluations of ambiguous actions by an African-American, negative evaluations of confident, aggressive, ambitious women in certain hiring conditions, shooter bias – black vs. white in video games, and on and on.

The key feature of implicit bias is that the IAT scores appear to better predict behavior than explicit self-reports. In a sense this is suggesting how one presents oneself in self-reporting and how one seems to act in terms of implicit social cognitions are different mental constructs and that the implicit biases are more salient to suggesting one’s behavior than what one says.

That being said, implicit bias is malleable and can be changed. Depending on a person’s motivation to be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or introduction of procedural changes (such as listening to musicians behind a screen) are examples in which implicit bias has been made malleable.

Stereotype threat refers to one being at risk of confirming, as a self-characteristic, a negative stereotype about one’s group. The research has shown that performance in academic contexts can be harmed by the awareness that one’s behaviors might be viewed by others through the lenses of race, gender, or sexual orientation as well as in a number of domains beyond academics. Stereotype threat has been seen to lead to self-handicapping strategies, such as reduced practice time for a task and to a reduced sense of belonging to the stereotyped domain. Consistent exposure to stereotype threat can reduce the degree that individuals value the domain in question. Students may choose not to pursue the domain of study and, consequently, limit the range of professions that they can pursue. Research has shown that stereotype threat can harm the academic performance of any individual for whom the situation invokes a stereotype-based expectation of poor performance. In addition, within a stereotyped group, some members may be more vulnerable to its negative consequences than others; factors such as the strength of one’s group identification or domain identification have been shown to be related to one’s subsequent vulnerability to stereotype threat. Stereotype threat might interfere with performance by

increasing arousal, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort. Many different means have been used to induce and to attenuate stereotype threat.

b) Cultural bias as explicit bias, implicit bias, or stereotype threat

In the comments, some of the international practitioners have been willing to highlight some of the positive and negative cultural attitudes that different members of the target population may face. These comments from various persons were passed along on a no-names basis or were one's I heard in my years in international arbitration (I indicate the one's I heard).

General:

"As per your request, I return herewith the questionnaire. I am afraid that I am not much of assistance. I don't keep track of the arbitrators with whom I sit, nor counsel or experts appearing before me. They are all equal to me."

"Arbitrations often had no American nexus."

"For the younger practitioners who are interested in arbitration, I tend to take the old-fashioned approach of basic legal training in a broad scope of commercial matters, laying a strong foundation for career development. If that meat and potatoes approach is too boring, then I won't be offended if you find other sources. In all cases, I'm enthusiastic about arbitration as a career area. It never ceases to be fascinating."

Men

"Pale, Male and Stale" (I heard often.)

Women:

"I have seen certain cultures where women are less respected than men in business circles. One client called men by their names during a meeting, but the woman as only "the lady" or "senorita."

"I have heard clients make sexual remarks about female colleagues of mine, as if that is acceptable or the norm. Or comments about women that are derogatory."

"Foreign travel is a huge part of the work, often for more than a week or two. For women with children, this is not easy. The most challenging is travelling while the child is still breast feeding, in terms of leaving an adequate supply of breast milk behind, care for that child during that period, being able to pump while travelling etc. Law firms do not do enough to support women at this stage of their personal/professional life in my opinion."

"Male colleagues have often seen foreign travel as a time to party/let off steam. Female colleagues are sometimes seen as more conservative or prudent and a hindrance to that lifestyle. For that reason, they may not be selected for a particular trip on account of their gender."

“[In France], women are pressured to return to work after having kids. My wife, who decided to spend a bit of time with our kids, faced some very negative comments from her French female friends.”

“They are on the team. So they participate as members of the team. I am unaware of any special status or treatment.”

“[In 2007], I saw the first [ICC] case (for me) decided by an arbitral tribunal composed of three women. As I was having lunch with one very experienced (and old) French arbitrator right thereafter, I told him how pleased I was about this. His reaction was to ask me, very seriously: “What? Three women? And how was it?” ...

“I neglected to mention that there are quite a number of Nigerian women in the arbitration field, and I believe some men, but there seem to be more women. Of course they are not American. Why do you restrict your study to Americans? There are probably fewer American arbitrators than UK, European, Australian or Asian.”

“Women constitute a very high percentage of the associates in law firm arbitration groups, and there are increasing numbers of women partners, including several who lead their groups.”

“There are enough female names in America that it isn't a stretch for a lazy party to appoint.”

“Most women get their first appointment through an arbitration institution. This is true for 99% of them...”

“I believe that the reasons are gender neutral and linked to the expertise of the individual.”

“There are very few women in international arbitration. At one point, a few years ago, at a reception at the Hong Kong Vis Moot, I asked a fairly well-known international arbitrator how many women he thought there were who regularly served as international arbitrators. I suggested that there were perhaps four or five. He said, “Oh no! There are at least 10 or 12.”

Minorities

“Either not nominated by a party or not nominated by the institution. This assumes that there are American minority groups arbitrators or other related functions. I confess I have not met any in France or the UK (other than you of course).”

“In the Middle East, Far East and Latin America, I have witnessed overt racism towards “blacks” as opposed to those who are “brown” or “white” (and not to African-Americans, but usually black people from that country or working in that country). I remember one law firm in Brazil where all the lawyers were “white – ie European origin” and all the staff were black (ie Brazilian Black or Indian). Some even had to wear maid uniforms to serve tea and coffee. Whether in terms of jokes, stereotypes or otherwise, whether clients or simply getting around a city, it can be challenging due to how the local black population might be treated in that already, or what the majority of people of that country have viewed and perceived from the television of the media. Combine that with a career where you have to deal with people from different nations – and not just professionals but witnesses who may be uneducated or not used to seeing a black person – it becomes all the more challenging. I would love to recruit more African-Americans into the field, but I just do not get the resumes or interest from that

particular minority. Hispanic, Russian/CIS or Arab-Americans are plentiful in the field and I see many resumes from these minorities. I have often wondered whether African-Americans know the challenges they may face outside of the US in advance and do not choose this field as a result? Or is it something else.”

“Chinese do not like blacks.” (I was told this before my first trip to Hong Kong.)

“Indians do not like blacks.” (I was told this before my first trip to New Delhi.)

“I have found that American minorities do not gravitate toward international arbitration. In our firm’s summer associate program, for example, we always have minorities, but they are ordinarily not the ones who express interest in international arbitration.”

“Probably [lack thereof] due to lack of experience. A vicious circle!”

“They are generally present in cases where U.S. law firms are involved in representing one or other of the parties.”

“There are a few ethnic Korean Americans at the major Korean law firms, including [lawfirm A], [lawfirm B] and [lawfirm C]. ... Not many, but a few. At [Lawfirm B], several of the associates are female. At [lawfirm A], the deputy chair of the practice is Korean American. They are all playing the role of counsel. ... Very few non-Korean Americans speak Korean well enough to actually conduct business or hearings in Korean. Maybe two or three people, just because it is such a hard language to learn for foreigners.”

“They were not offered as part of the candidate pool.”

“I think there are not a lot of minorities in the law firms that typically handle international arbitration. Also, as to the lack of minority arbitrators, this is affected by the old boy network which largely rules the appointment of arbitrators. It has a paucity of minority members.”

Lawyers with disabilities

“No doubt there currently is an underrepresentation of disabled persons. This may be due to the particularities of our activity which often times requires intensive travelling.”

“One arbitrator has an arm withered by polio, so might be seen as disabled. Nevertheless, he can beat most people at tennis and is one of the most successful arbitrators I know. So I cannot consider him in any way “disabled” by his “disfigurement”.”

“Another is totally deaf in one ear. He is the busiest arbitrator and most prolific author I know, so he too is not in the least “disabled” by his physical limitation.”

“I am not sure what is meant by disabled, but I have encountered very few disabled persons in law practice generally.”

“Lack of individuals who have disability.”

“I do not think very many disabled persons practice in the kinds of firms that typically handle international arbitration.”

LGBTQ

“There is less acceptance of LGBTQ, let alone tolerance, in certain cultures.”

“I have heard jokes about LGBTQ people from clients, as if it is acceptable or the norm.”

“There is no reason in San Francisco and I believe LGBTQ are fairly represented.”

“Foreign travel – it is possible that a lawyer may feel uncomfortable travelling with a gay colleague. While he/she may profess to be “okay” with the sexual preference when in the office, that may become different on the road (though unsaid of course). He/she would just choose someone else for the trip if more senior, or profess an excuse not to travel if junior.”

“I do not know of your experiences here, but to me France is funny when it comes to diversity. It’s unbelievably racist and sexist, yet seems to have an implicit don’t-ask-don’t-tell approach to gay men in particular which means that gay men in particular do not face some barriers that they might encounter elsewhere (but on certain conditions).”

“Not apparent that candidates fit into this category even after meeting appointed persons.”

c) From cultural bias to cultural gymnastics

Recognizing from the neuroscience discussion that implicit social cognitions abound around the world and that they tend to be in the direction of the social hierarchies, one might ask what could address the types of implicit bias that may be present as members of the target population make their way toward and in this sea of schemas in international arbitration in the United States and/or overseas.

We focus first on the preparation of those of the target population for work on the international plane to get in the field. Karen Mills of Indonesia has said it best as to the kinds of preparation an American woman (and I would extend this to all Americans particularly in the target population).

“It is not that easy for a woman to break in to the arbitration field, at least not as arbitrator. The first thing she should do is join ArbitralWomen, which supports women in arbitration. But you really need to be involved in actual arbitrations which means you need to work in a firm that does them and get on the team so you can assist and observe before you have anything to sell yourself on. The Vis and other Moots are very useful and any student considering entering the field should become involved in the moots as a necessity. It is the best training a student can have.”

While there may be difficulties, being a member of the target population is not somehow an inherent block to getting on that path. To rise on that path requires what we have all come to know in the profession: hard work, pluck, luck and mentorship/sponsorship. What may be a bit more different in the international plane is that those four things may come together in different ways and may occur anywhere in the world. The key moment, that I have seen repeated for so many people in this field’s lives in some form, is the moment - usually fairly early in a career for those with high-level international arbitration careers - when someone asks them something like “Can you be in Bratislava next week?” The person may have little or no experience with Bratislava but has to have the confidence to say “Yes.” Those moments come around in cycles over one’s life and I describe them as the “international plane

calling” moments. The key is to recognize the earliest career ones and have the pluck to take the leap of faith to go toward the international plane. The first experience becomes a second and on and on as one becomes the “go-to” person for the international work. Beyond just sharing the experience with friends, to become the “go-to” person form the habit of providing written trip reports to the powers that be upon one’s return to one’s base –wherever in the world. It helps those with the power over your career to identify you for even further work on the international plane. Make it easy for someone to see you on the international plane through one’s preparation and one’s willingness to take on the gamble.

On cross-racial, cross-gender, cross-cultural or cross-whatever mentoring, as noted from my own experience described above, there are no rational reasons why more of this cannot be done. It is a question of commitment and enthusiasm of gatekeepers/door-openers. The impact of those kinds of supportive efforts in my own life, as described above, has been tremendous. And, as one rises, the impact of one on those around you can lead to opening paths for still others. One example of even modest serendipitous cross-racial and cross-cultural encouragement (let alone mentoring/sponsoring) that can open someone to this path is this note I received from a European lawyer:

“On a more personal level, your mail reminded me that you were the very person who prompted me to develop my arbitration activities and introduced me to ICC arbitration, during a conversation we had on a TGV in the mid-nineties, when we fortuitously met en route to our respective family ski holidays and engaged in a casual conversation between train neighbors... At the time, I could not have imagined that our accidental conversation would have so important consequences on my life, as I am now spending the most part of my professional activities as international arbitrator.”

From the gatekeeper/door-opener perspective, a person’s motivation to be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or introduction of procedural changes in nomination processes for counsel and/or arbitrators would seem to be approaches through which implicit bias can be made malleable. These types of efforts at malleability might take the form of reaching out to target population persons to help them gain initial experience in the field as summer associates or interns to help whet their appetite for this path. Along their path, recognizing the presence of implicit social cognitions and finding ways to address them may be ways to provide an environment that is inclusive and encourages the target population. Institutional structures to recognize implicit bias and overcome it can be found in having employees of many cultures – so that one particular set of implicit social cognitions connected to one social hierarchy does not predominate and the work space has a more fluid set of implicit social cognitions present.

For the individual in the target population, the principal lesson would be that implicit bias is malleable and can be changed – with varying degrees of difficulty in that process that may call on one’s perseverance. For the individual in the target population, the second principal lesson is to not succumb to stereotype threat when one feels at risk of confirming, as a self-characteristic, a negative stereotype about one’s group. This would include not succumbing to self-handicapping strategies, such as reduced practice time for a task and to a reduced sense of belonging to the stereotyped domain. Experience is the key and good experience is a buffer for the bad experiences. Remind oneself of the good experiences in which one has done well to create for yourself an experience of inconsistent exposure to stereotype threat and thereby not reduce the degree the one values the domain in question. Some people are simply made to work in the international plane while some come to it as an acquired taste: whatever one’s path, allow oneself to go on it.

When travelling, follow a paraphrase of Jean Monnet's advice to not carry the implicit social cognitions in the form of "advice" that others give about "those people or cultures," but go and make up one's own mind about the new place. In my work with people on five continents, it is the common humanity that shines through if recognized and encouraged. See the world when one can or little bits of it where one lives meeting foreigners and learning from their cultures. Rather than shy away out of a sense of inadequacy or whatever self-limiting schema, students might choose to pursue the domain of study of international arbitration either domestically or overseas and, consequently, expand the range of cultural experience to prepare for a profession that they might pursue.

As stereotype threat might interfere with performance by increasing arousal, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort, the individual must consciously work to recognize and attenuate stereotype threat that they feel about themselves even when others are consciously or unconsciously inducing it in them. One particularly moment for this can be in an interview. I have mentioned to students the "(X+1) game" in which one presents a resume and the person evaluating for the position asks for something that is not on the resume. That experience or background not on the resume is of course made to be seen as the crucial characteristic for the work. One should be prepared to counter such approaches – whether sincere or gamesmanship on the other persons part. No one has a perfect resume or experience, but one's experience can aid one in accomplishing more.

Finally, those rising to the international plane should be sufficiently self-aware to try to be sensitive to when their own implicit social cognitions are influencing their view of others, whether domestically or internationally. Each of us has places where we are very comfortable performing and places which stretch our abilities to cope and accomplish. Growing the space where one is comfortable is part of the path. This ability to navigate a sea of schemas is what I have come to call the ability to do cultural gymnastics whether domestically, regionally, or transnationally.

There are limits, no doubt. In the face of brutal negative stereotypes of others and one's internal sense of self-worth, the contradictions between what one thinks of oneself and what the ambient social environment is saying may be experienced as too much of a contradiction. For those times, it might help to think of such moments as not so much moments of impasse, but rather moments of breakthrough to another level of deeper meaning and to arrive at a new cognitive state – sometimes called a nascent state.¹³ Others may react favorably or unfavorably to that new self - grown through the fiery cauldron of these kinds of contradictions. Finding one's way to where one's approaches will be both recognized and valued remains the path to tread. I just hope that path is in international arbitration for more of the target population.

V. Conclusion

While preparing this article, I was asked to provide a legal training for the Secretariat of the ICC International Court of Arbitration this past September in Paris. It was in Room 12 at ICC Headquarters at 38 Cours Albert 1er, the room where so many plenary and special court sessions, PIDA's, Arbitrator Colloquia, Advanced Arbitrator Trainings and other events of memory had occurred. A few short weeks later, the ICC was moving to its new locale, so this was both a return to a very familiar place and an

¹³ See generally, the remarkable analysis of the nascent state in Francesco Alberoni, *Movement and Institution* (1977).

opportunity to say goodbye in the last training held in that room full of memories. As I walked around the room and shook hands with the counsel, deputy counsel, secretaries, and interns in a room where women held up half or more of the sky, in my mind's eye I saw the ghosts of sessions in 1980's when women would have been barely present. As now the stale male though not so pale fellow in the room full of such *jeunesse*, I was overjoyed to see the progress that had been made which gave me hope for the progress that can still be made in enhancing diversity (and especially American diversity) in international arbitration. Afterward, in one of those moments of serendipity on the international plane as I walked to my next appointment down the Cours Albert 1er, I ran into Maitre Philippe Nouel, the first lawyer that I had met on a case back in 1986. Clearly, the widening circle of international arbitration stays unbroken.