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THE DIVERSITY ISSUE IN ARBITRATION

Tanuja Krishna

Millions of Americans are subject to forced arbitration agreements.¹ This means that they are barred from suing in court and are required to pursue their claims through arbitration proceedings. As much as proponents of arbitration argue that this process is a more efficient way to resolve disputes, there are a number of issues associated with it.² However, aside from the commonly discussed fairness aspect, a bigger problem lies within arbitration: diversity. According to a new report from the American Association for Justice (“AAJ”), arbitrators at three of the largest arbitration service providers in the country—JAMS, the American Arbitration Association, and the Financial Industry Regulatory Authority—are mostly male and overwhelmingly white.³ In addition, “female arbitrators make up less than a third of the overall arbitrators employed by the three organizations, while less than 1 in 5 arbitrators identify as Asian, Black, Hispanic[, or] races other than white.”⁴

With forced arbitration clauses present in so many different contractual agreements—such as employment contracts, cell phone agreements, and credit card agreements—the lack of diversity in arbitration proceedings can make pursuing a claim extremely difficult for employees and consumers. For instance, having a pool of arbitrators consisting mostly of white men may prevent employees from pursuing their discrimination claims against their employers.⁵ “The lack of diversity in the arbitrator pool may cause [B]lack employees to not pursue their discrimination claims out of a feeling that it would be futile in such a questionable system,” says Michael Green, Professor of Law and the Director of the Workplace Law Program at Texas A&M University School of Law.⁶ Arbitrators have the sole power to decide whether racial discrimination occurred, and they are paid to make this decision by the company defending the discrimination claim.⁷ Arbitrators are hired “primarily upon the unregulated and private whims of the parties[,] especially the party with the most bargaining power, the employer.”⁸ Arbitrators can even refuse to allow employees to take depositions, acquire documents, and prove their case through other measures—a huge distinction between arbitration and trial by jury.⁹

¹ Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/> [https://perma.cc/LU47-XLU9].

² Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (Jan. 30, 2020), <https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/> [https://perma.cc/9MRE-PL4C].

³ Megan Leonhardt, *The Huge Diversity Issue Hiding in Companies’ Forced Arbitration Agreements*, CNBC (June 7, 2021, 1:54 PM), <https://www.cnbc.com/2021/06/07/arbitrators-are-male-and-overwhelming-white-heres-why-it-matters.html> [https://perma.cc/A4LZ-2F86].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Jean Hyams & Hilary Hammell, *Opinion: Black Workers Matter, So End Forced Arbitration*, WASH. POST (June 30, 2020), <https://www.washingtonpost.com/opinions/2020/06/30/black-workers-matter-so-end-forced-arbitration/> [https://perma.cc/32KZ-FV5D].

⁸ Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Claims*, 4 J. AM. ARB. 1, 13 (2005).

⁹ *Id.*

The gender of an arbitrator can also impact the outcome of a case.¹⁰ According to AAJ's report, female arbitrators rule in favor of employees more often than male arbitrators, and typically award higher settlement amounts.¹¹ Research has shown that, even when women are available for arbitrator positions, companies do not agree to select female arbitrators as often.¹² As a result, male arbitrators preside over more cases per person than female arbitrators, according to AAJ.¹³ This lack of diversity raises genuine concerns and must be addressed in order to provide a diverse panel that includes, and better represents, minorities.

Regarding potential redress in cases where arbitrator bias was present, the Federal Arbitration Act ("FAA") only allows an employee very limited recourse: an award may only be vacated where "there was evident partiality or corruption in the arbitrators."¹⁴ As a result of this limited ability to challenge rulings, arguments raised by employees regarding a systematic problem of diversity are often not taken seriously.

A famous saying is worth noting in regard to this discussion: "[I]f everyone is thinking alike, then no one is thinking."¹⁵ Diversity in arbitration plays an extremely important role in enhancing decision-making in the arbitration process: diverse arbitrators bring new perspectives, views, and analyses of the legal issues at hand.¹⁶ An arbitrator's unique cultural background brings different values and approaches, which could result in more variety in—and enhancement of—fact-finding methods.¹⁷ Diverse pools of arbitrators also help to ensure that the perspectives of minority groups are considered and represented.

The overwhelming amount of research relating to the gender and ethnic inequality in arbitration shows that diversity isn't just a concern—it is *essential* for competency and fairness. The key to successful dispute resolution is in incorporating empathy, solution-oriented approaches, and "the human element."¹⁸ Thus, the need for ethnic and gender diversity in arbitration is critical. The objective of arbitrators should be to ensure that the group has come to a well-thought-out decision, after taking into consideration various socio-political factors, perspectives, and cultural backgrounds.¹⁹

Unlike the court system, there are no mechanisms for holding the arbitration system accountable.²⁰ As a result, it is imperative that we address this issue and implement diversity into

¹⁰ Leonhardt, *supra* note 3.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Green, *supra* note 8.

¹⁵ Naimeh Masumy, *Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role Ensuring Diversity?*, FORDHAM INT'L L. J., <https://www.fordhamilj.org/iljonline/2020/11/23/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern-and-should-arbitral-institutions-play-a-greater-role-ensuring-diversity> [https://perma.cc/H9EP-ZWT7] (last visited Jan. 21, 2022); *see, e.g.*, Michael Joe Murphy, *If Everyone is Thinking Alike, Then Somebody Isn't Thinking*, HARTFORD COURANT (Nov. 15, 2017, 9:55 AM), <https://www.courant.com/os-ed-what-do-i-know-november-151115-story.html> [https://perma.cc/HAY2-HBJQ].

¹⁶ Masumy, *supra* note 15.

¹⁷ *Id.* "Within arbitration proceedings, the same set of facts could be attributed different meanings because of the fact-finder's cultural background. The existence of diverse panels helps further the aims of meticulous and accurate fact-finding approaches." *Id.*

¹⁸ Payel Chatterjee & Vyapak Desai, *Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?*, KLUWER ARB. BLOG (Mar. 1, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/03/01/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern/> [https://perma.cc/TRB4-HMPH].

¹⁹ *Id.*

²⁰ Leonhardt, *supra* note 3.

arbitration panels. “We live in a society where there is white male dominance, and so that’s going to permeate every system,” said Tanuja Gupta, advocate and leader of Googlers for Ending Forced Arbitration.²¹ Hence, increasing diversity in arbitration should be seriously considered, as it is the key to promoting fairness in arbitration proceedings.

²¹ *Id.*