

# AMERICAN DIVERSITY IN INTERNATIONAL ARBITRATION: A NEW ARBITRATION STORY OR EVIDENCE OF THINGS NOT SEEN

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## INTRODUCTION

Thence also many Guineamen and other negroes, taken by force, and some by barter of unprohibited articles, or by other lawful contract of purchase, have been sent to the said kingdoms. . . . [A]nd to reduce their persons to perpetual slavery . . . .

—Pope Nicholas V<sup>1</sup>

As this Symposium was held in 2019, more than four hundred years after Africans first arrived in America, I was drawn to a longer view of diversity by focusing on the presence of black people in international trade. So, I went back in time and asked myself: Why were Africans enslaved in Jamestown in 1609? As I went further back in time, I discovered the 1455 papal bull that granted Christian dominion and religious sanction to reduce Africans to objects of commerce and perpetual slavery.<sup>2</sup> Jamestown in 1609, then, became a way station in a process whereby Africans were objects in international trade that started over 150 years earlier. The best way to capture this flow of humans and labor out of Africa to the New World is in a short video entitled “The Atlantic Slave Trade in Two Minutes.”<sup>3</sup> I encourage the reader to watch this now before reading further.

Once in the New World, the labor of these enslaved Africans was extracted to create wealth, which in turn flowed back to international trade in goods such as cotton. When there was a dispute between merchants on an American wharf about the quality of the cotton being loaded, an arbitrator might have

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1. *Papal Bull*, Romanus Pontifex (*Nicholas V*), January 8, 1455, in COLONIAL LATIN AMERICA: A DOCUMENTARY HISTORY 37, 38 (Kenneth Mills et al. eds., 2004).

2. *Id.*

3. Andrew Kahn & Jamelle Bouie, *The Atlantic Slave Trade in Two Minutes*, SLATE (June 25, 2015, 1:35 PM), [http://www.slate.com/articles/life/the\\_history\\_of\\_american\\_slavery/2015/06/animated\\_interactive\\_of\\_the\\_history\\_of\\_the\\_atlantic\\_slave\\_trade.html](http://www.slate.com/articles/life/the_history_of_american_slavery/2015/06/animated_interactive_of_the_history_of_the_atlantic_slave_trade.html) [<https://perma.cc/5BMC-ZZQC>].

come in to resolve the dispute.<sup>4</sup> In those cases, some unseen enslaved African almost certainly picked that cotton, baled it, and put it on some means of transportation to get it to that port where the dispute arose. This Essay suggests that the unseen presence of blacks and other underrepresented groups (such as women, minorities, LGBTQ individuals, and persons with disabilities) in the shadows of the development of international arbitration law in the United States helps us to see that diversity, while unrecognized, has been inherent in American international arbitration for hundreds of years.

### I. COTTON WAS KING

One could invert the traditional view of financing, insuring, and supporting slavery in the antebellum period by placing enslaved Africans who created the wealth at the center and all those international business actors who extracted surplus from them at the periphery. But taking on that struggle is too much for this Essay. Similarly, taking on the oppression of the late nineteenth- and twentieth-century subjugation of the ostensibly free blacks and placing them again at the center is also too much for this Essay. This Essay instead aims to explain how wealth creation drove developments in American arbitration.

At the turn of the twentieth century, complex court processes and common-law hostility to arbitration clauses concerned Americans engaged in interstate and international trade.<sup>5</sup> Domestic and foreign counterparts could not be sure that an American party would not simply walk away from the arbitration agreement until there was an arbitration award.<sup>6</sup>

In the early twentieth century, New York was the center of U.S. international trade, so these concerns were particularly acute for the New York business community.<sup>7</sup> At the center of significant efforts to address the problem of unenforceable arbitration clauses and enforcement of arbitral awards—as luck would have it for purposes of this Symposium in New York—was a New York *cotton* merchant of German origin named Charles Leopold Bernheimer, the father of (American) commercial arbitration.<sup>8</sup> The travails of a cotton merchant importing and exporting that cotton are a central story in the development of modern arbitration laws.<sup>9</sup> Formerly enslaved and then subjugated blacks grew and harvested the cotton at the center of

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4. See Wayne D. Brazil, JAMS Mediator & Arbitrator, Address at the Fordham Law Review Symposium: Achieving Access to Justice Through ADR: Fact or Fiction? (Nov. 1, 2019).

5. IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 27, 30 (2013); see also Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 269–70 (1926).

6. See Cohen & Dayton, *supra* note 5, at 270 (“Unfortunately, business has become so used to the doctrine of revocability of arbitration agreements that these clauses are not regarded in the same light as other contractual obligations, and the party who refuses to perform his agreement frequently does not realize that he is violating his plighted word.”).

7. For example, in 1914, 47 percent of U.S. international commerce flowed through New York. SZALAI, *supra* note 5, at 56.

8. *Id.* at 25.

9. *Id.*

disputes, which provides a leitmotif of the ever-present—but unseen—blacks in American international commercial disputes.

## II. FROM THE NEW YORK ARBITRATION LAW TO THE FEDERAL ARBITRATION ACT

Bernheimer was inspired by German arbitration law and other sources. Thanks to the significant efforts of Bernheimer and others, New York adopted its first modern arbitration law in 1920<sup>10</sup>: the New York Arbitration Law.<sup>11</sup> The New York Arbitration Law was the model for the Federal Arbitration Act<sup>12</sup> (FAA), which made arbitration agreements valid, irrevocable, and enforceable “save upon such grounds as exist at law or in equity” to invalidate any contract.<sup>13</sup> The enactment of the FAA was a significant development, but, in hindsight, it had two complications. First, at least until *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>14</sup> in 1967, the first chapter of the FAA was originally understood as a procedural rule for the federal courts and therefore not applicable in state courts.<sup>15</sup> Second, the FAA was not considered a source of federal question jurisdiction and was only applied in federal court if there were independent federal questions or diversity of citizenship among the parties.<sup>16</sup> So, in 1958, if a case was in state court and could not be removed to federal court on the basis of federal question jurisdiction or diversity, one would have to look back to the state law on arbitration. At that time, if a state arbitration law still included common-law hostility toward arbitration clauses, arbitration would have confronted the same problems seen in New York at the turn of the century. Of course, through the U.S. Supreme Court’s pro-arbitration jurisprudence since *Prima Paint*, the FAA has been made to apply in both federal and state courts under the Supremacy Clause.<sup>17</sup>

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10. *See id.* at 83–88. The saga of Bernheimer’s and others’ work is well worth the read in Professor Imre Szalai’s excellent book.

11. 1920 N.Y. Laws 803.

12. 9 U.S.C. §§ 1–16 (2018).

13. *Id.* § 2.

14. 388 U.S. 395 (1967).

15. “Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate.” *Id.* at 405; *see also* STEPHEN J. WARE & ALAN SCOTT RAU, *ARBITRATION* 170 (4th ed. 2006).

16. *See* WARE & RAU, *supra* note 15, at 170.

17. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1982) (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”); *see also* *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) (“Surely this makes clear that the House Report contemplated a broad reach of the Act, unencumbered by state-law constraints.”).

### III. ENTER THE NEW YORK CONVENTION OF 1958 AND THE U.S. DELEGATION REPORT

In 1958, an international conference with delegates from over forty countries was held to review an International Chamber of Commerce (ICC) proposal to create a treaty that would replace the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.<sup>18</sup>

The original draft of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention) only focused on recognizing and enforcing foreign arbitral awards—and improving on some of the problems associated with the 1927 Geneva Convention’s enforcement mechanisms for foreign arbitral awards (such as double *exequatur*).<sup>19</sup> However, it became clear that there would be a problem if the proposed new treaty did not address arbitration agreements, as there would be two regimes and possibly different signatories to the 1923 Geneva Protocol and the proposed 1958 convention. Thus, late in the proceedings, a draft on arbitration agreements was included (now article II of the New York Convention). As detailed in the U.S. delegation’s report:

The purpose of [article II] is to round out the convention by providing an appropriate treaty rule with respect to agreements or contracts to arbitrate. The inclusion of such a rule was occasioned partly by a desire for logical completeness and partly by the need to define the relationship of the new convention to the Geneva Convention. The latter is closely interlocked with the Protocol on Arbitration Clauses signed at Geneva, September 24, 1923. The Geneva instruments together form a unit, and if the Convention were to be replaced, it would be necessary either to define the relationship between the new convention and the Protocol or to provide for replacement of the latter instrument also.<sup>20</sup>

Without article II, one could imagine that different countries might have been parties to the Geneva Protocol and the proposed New York Convention, and different regimes would have applied to arbitration clauses and arbitration awards. This problem was averted by article II, as a signatory state to the New York Convention now has a stand-alone pro-international commercial arbitration structure for arbitration clauses and arbitration awards subject to the treaty.

Although present at the 1958 conference, the United States was a passive or functionally absent participant. This passivity was not due to some inadequacy of the delegation members but rather was in accordance with the delegation’s instructions.<sup>21</sup> The U.S. delegation “did not attempt to exert a strong influence on the content of the convention, confining itself to

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18. *1958 Report of the U.S. Delegation to the United Nations Conference on International Commercial Arbitration*, 19 AM. REV. INT’L ARB. 91, 94 (2008) [hereinafter *1958 Report*] (republishing the U.S. delegation’s 1958 report).

19. *Id.* at 106–09.

20. *Id.* at 100.

21. *Id.* at 109–10.

exposition of its views on matters of basic principle and emphasizing the value of the pragmatic as opposed to the multilateral convention approach to progress in arbitration.”<sup>22</sup>

At the end of the conference, the U.S. delegation strongly recommended that the United States *not* sign or adhere to the New York Convention.<sup>23</sup> A significant reason was that many U.S. states still retained the common law’s unenforceability of arbitration agreements. The New York trend had not yet reached many state courts by 1958. And as noted above, at that time, the FAA applied only in federal court.<sup>24</sup> It was not seen to apply in state courts, where arbitration agreements were subject to state law.<sup>25</sup> Some states, like New York, adopted the modern approach, whereas other states retained the common-law hostility.

The U.S. delegation therefore stated its opposition:

1. The convention, if accepted on a basis that avoids conflict with State laws and judicial procedures, will confer no meaningful advantages on the United States.
2. The convention, if accepted on a basis that assures such advantages, will override the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedures.
3. The United States lacks a sufficient domestic legal basis for acceptance of an advanced international convention on this subject matter.
4. The convention embodies principles of arbitration law which it would not be desirable for the United States to endorse.<sup>26</sup>

The U.S. delegation was concerned that this multilateral convention, if adopted, would exacerbate federal-state tensions by preempting state law.<sup>27</sup> The delegation was further concerned with appearances, stating:

Hence, adherence to the convention would be looked upon as a sudden Federal intrusion in an area in which it hitherto had failed to exercise its constitutional legislative authority to the full limits. The fact that this intrusion would be accomplished by the treaty power and would affect arbitrations otherwise lying outside Federal jurisdiction seemingly might imply that the motive was more to curtail *State rights* than to facilitate foreign trade arbitrations.<sup>28</sup>

This concern leads us to ask: What were the principal federal-state tensions in the immediate period leading up to 1958 that implicated an international multilateral treaty?

Let us start at World War II. In the aftermath of the Holocaust, Nuremberg trials, and signing of the United Nations Charter, the United States signed the

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22. *Id.* at 95.

23. *Id.* at 115.

24. *See supra* Part II.

25. *See WARE & RAU, supra* note 15, at 170.

26. *1958 Report, supra* note 18, at 95.

27. *Id.* at 116–17.

28. *Id.* at 116 (emphasis added).

Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”) in 1948.<sup>29</sup> This convention greatly concerned the proponents of the Southern way of life, such as segregationists, and they pushed for the Bricker Amendment in 1953 to weaken the treaty power of the federal government.<sup>30</sup> The Bricker Amendment was ultimately defeated when President Eisenhower promised not to sign any other human rights treaties or bring them for Senate advice and consent after the Genocide Convention.<sup>31</sup> The long shadow of those concerns is demonstrated by the fact that the Genocide Convention was ultimately ratified on November 25, 1988 (forty years later)—right after the 1988 elections and between the end of the Reagan administration and the start of the George H. W. Bush administration.<sup>32</sup>

In 1954, just four years before the New York Convention, the Supreme Court decided *Brown v. Board of Education*,<sup>33</sup> which outlawed segregation in schools and triggered enormous upheaval. But because *Brown* was argued in 1952, just six years before the New York Convention, its impact was felt throughout the early 1950s. From 1955 to 1956, the Montgomery Bus Boycott took place.<sup>34</sup> In 1957, President Eisenhower federalized the Arkansas National Guard when the Little Rock Nine attempted to integrate Little Rock Central High School that fall.<sup>35</sup> And there was the birth or rebirth of massive resistance to racial integration in this period.<sup>36</sup>

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29. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277. The United States signed the convention on December 11, 1948. *Id.* at 310.

30. JEFFREY DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 252 (3d ed. 2015) (“These efforts, collectively known as the Bricker Amendment after Senator John Bricker of Ohio, grew out of conservative senators’ concerns over the UN Charter and early human rights treaties, such as the Genocide Convention. Some Bricker Amendment supporters feared that the Charter’s human rights provisions would give Congress power to enact civil rights legislation otherwise beyond its constitutional powers. In addition, many amendment supporters, including conservative Southern Democrats, believed that the Genocide Convention and other human rights treaties could be interpreted in a way that could override racially discriminatory state laws.”).

31. *Id.*

32. *Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4) [<https://perma.cc/2ZHN-3TGK>] (last visited Apr. 12, 2020) (showing that the United States ratified the Genocide Convention on November 25, 1988).

33. 347 U.S. 483 (1954).

34. *Montgomery Bus Boycott*, STAN. U. MARTIN LUTHER KING JR. RES. & EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/montgomery-bus-boycott> [<https://perma.cc/3C6V-BLXQ>] (last visited Apr. 12, 2020).

35. *Little Rock Nine*, HISTORY (Feb. 10, 2020), <https://www.history.com/topics/black-history/central-high-school-integration> [<https://perma.cc/FSS4-MVG9>]; *Little Rock School Desegregation*, STAN. U. MARTIN LUTHER KING JR. RES. & EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/little-rock-school-desegregation> [<https://perma.cc/F9BE-MALQ>] (last visited Apr. 12, 2020).

36. *See Massive Resistance*, VA. MUSEUM HIST. & CULTURE, <https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/massive> [<https://perma.cc/YFQ9-KRAU>] (last visited Apr. 12, 2020).

The U.S. delegation's recommendation against the United States signing or adhering to the New York Convention made in fear of exacerbating federal-state tensions seems somewhat revelatory. In the context of the black American civil rights struggles at that time and the white-hot federal-state tensions regarding segregation, federal preemption in the arbitration arena seemed a bridge too far. And so, the United States was not an immediate signatory.

In this new story, the oppression and struggle for civil rights of black Americans is another leitmotif of federal hesitancy to signing multilateral treaties generally and exacerbating federal-state tensions in particular. That leitmotif redounds in the American international commercial arbitration space in the U.S. delegation's strong opposition to the New York Convention. We see the traces of this worry in the delegation report's carefully chosen words, which echoed themes of states' rights, federal overreach, and excessive use of the treaty power.

#### IV. THE UNITED STATES' 1968 ACCESSION TO THE NEW YORK CONVENTION

The United States only signed the New York Convention in 1968 due to a substantial effort by businesses and legal communities to pass pro-arbitration legislation as state laws,<sup>37</sup> the United States' agreement to participate in the Hague Conference on Private International Law, and the competitive disadvantage experienced by U.S. businesses because the country was not a signatory to the New York Convention.<sup>38</sup>

While difficult, passing pro-arbitration state laws reduced the risk of federal-state tension as a pillar of resistance to accession to the New York Convention.<sup>39</sup> At the same time, the international competitive environment pushed the U.S. business and legal communities to encourage the United States to join the other major trading nations in adopting a modern regime for international commercial arbitration.<sup>40</sup> The Supreme Court's pro-arbitration decision-making also moved forward in *Prima Paint* and strengthened the federal law edifice for arbitration. Another dimension can be added to this new story: between 1958 and 1968, many things changed in the civil rights arena,<sup>41</sup> with the federal government exercising its authority in these areas of federal-state tension that had engulfed the 1950s. In 1970,

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37. Thirty-six states had arbitration laws that enforced arbitration agreements, thereby reversing the common-law hostility. S. EXEC. REP. NO. 90-10, at 7 (1968) (statement of Richard D. Kearney, member of the International Law Commission of the U.S. Department of State).

38. *Id.* at 4-7.

39. *Id.* at 7-8.

40. *Id.* at 4-5.

41. Some changes included the Civil Rights Act of 1964, the Voting Rights Act of 1965, and all of the school desegregation cases.

the United States finally acceded to the New York Convention—coming into line with other modern trading partners.<sup>42</sup>

#### V. RETELLING THIS SAME STORY THROUGH OTHER LENSES

As a thought experiment to take American international commercial arbitration out of its restrictive traces, I have recited a story that brings to light or suggests the unseen presence of blacks in the development of American international commercial arbitration. This new story places blacks closer to the center of the action rather than in the usual vision of an “underrepresented group.” This approach raises the tantalizing issue of whether blacks are underrepresented or just unseen in the conventional story of American international arbitration. This issue also concerns other groups that are considered underrepresented in the American legal profession: minorities, women, lawyers with disabilities, and LGBTQ lawyers.<sup>43</sup> It is beyond the scope of this Essay to focus on the international commercial arbitration space regarding all of those groups and their possibly unseen—as opposed to underrepresented—presence in the conventional story of American international commercial arbitration.

Just as the 1920 New York Arbitration Law was a turning point in the twentieth-century reform movement across the courts, I hope this story causes those uninvolved in international commercial arbitration to rethink their previous views of themselves. If one senses what one’s forebearers have done in a given field, one can feel a sense of belonging in that arena and move forward in it with confidence. At least, that has been the case for me.

I can imagine that the same retelling of a story might be done for Asian Americans, Hispanic Americans, and Native Americans if one were able to trace the paths of these Americans in international commercial arbitration as clearly as slavery can be traced to enslaved Africans. This Essay highlights that one’s sense of one’s race as being newly represented in the field of international commercial arbitration may be just as much a social construct as race is. Moreover, when one knows who has come before, one has a sense of ownership of the history that is different from seeing oneself as a post-1970 new entrant.

For example, without drifting too far into personal stories, I was honored to attend Harvard Law School in 1979 and graduate in 1983. I know now that my sense of that experience would have been very different if I had known that the Royall family’s original grant to create the school had been

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42. *Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/countries> [<https://perma.cc/V3F7-CSLY>] (last visited Apr. 12, 2020).

43. See AM. BAR ASS’N CTR. FOR RACIAL & ETHNIC DIVERSITY, DIVERSITY AND INCLUSION ABA MEMBER SURVEY: EXECUTIVE SUMMARY (2013), [http://www.americanbar.org/content/dam/aba/administrative/diversity/ABA\\_DI\\_MemberSurveyFinal.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity/ABA_DI_MemberSurveyFinal.authcheckdam.pdf) [<https://perma.cc/WPU9-LLE4>]; ABA *Mission and Goals*, A.B.A., <http://www.americanbar.org/about-the-aba/aba-mission-goals.html#GoalIII> [<https://perma.cc/DR53-G25F>] (last visited Apr. 12, 2020).

financed by selling enslaved blacks they owned in Antigua.<sup>44</sup> If I had known that then, in some almost mystical sense, I would have seen each brick, professor, book, and experience as something that was more my own—if we can speak of owning the law school experience. Similarly, I developed a more circumspect vision of human rights law when I learned that one of the fathers of human rights law, Bartolomé de las Casas, suggested enslaving blacks from Africa to save the Native Americans<sup>45</sup> and when I found the 1455 papal bull that served as a justification for bringing enslaved Africans to in Jamestown in 1609. That sense of ownership encourages a sense of independence and autonomy; even if you seem to those around you to be a new entrant, you know that others like you have been here before.

## VI. BACK TO THE INTERNATIONAL PLANE

In 1998, I stood next to an older Frenchman named Michel Gaudet, former president of the ICC International Court of Arbitration, who was being honored on “Gaudet Day.” He was, according to the current adage, “pale, male, and stale.”<sup>46</sup> He was one of the founders of the European Community and its first legal advisor back in 1958, and he had a long, distinguished career before becoming president of the ICC International Court of Arbitration. Also present was Fali Nariman, vice-chair of the ICC International Court of Arbitration and a very distinguished Indian lawyer, who can rightly be called one of the fathers of the Indian Conciliation and Arbitration Act of 1996. Thanks to his leadership of many courageous Indian jurists in the early 1990s, with the adoption of the United Nations Commission on International Trade Law’s Model Law on International Commercial Arbitration, India took a great leap forward of easily fifty years in its international commercial arbitration law. Next to him was Paul-A. Gélinas, a Canadian lawyer in Paris who was the chair of the ICC

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44. See *A Brief Timeline of Our First Two Centuries*, HARV. L. SCH., <https://hls.harvard.edu/about/history/> [<https://perma.cc/43Y9-V3Z5>] (last visited Apr. 12, 2020).

45. Dani Anthony, *Bartolomé de las Casas and 500 Years of Racial Injustice*, ORIGINS (July 2015), <http://origins.osu.edu/milestones/july-2015-bartolom-de-las-casas-and-500-years-racial-injustice> [<https://perma.cc/WN5J-PV9B>] (“For instance, [las Casas] originally advocated the use of African slaves instead of indigenous Americans because Spaniards considered them to be hardier than natives.”). In addition, maybe to aid those interested in retelling their stories, my maternal grandmother emigrated from Cuba to the United States with her siblings and mother in 1910. My Native American heritage flows from my paternal grandmother who was half-Cherokee and half-white (I have Irish and Irish-American ancestry on both sides of my family). I also have Blackfoot and Asian ancestors in my family. Through me, black, Hispanic, Native American, and Asian stories are maybe now made seen. And one more—my Cuban grandmother was named Qualo. Her ancestors, the Qualos, emigrated from Brazil to the Caribbean to escape the Spanish Inquisition. Qualo was a modification of the Portuguese “Coelho,” which, in English, is Cohen. So, I am also Jewish, according to a late rabbi friend and colleague, Rabbi Alan M. Sokobin. May he rest in peace.

46. Susan D. Franck et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429, 452 (2015); see also *Women in Arbitration*, ARB. J. (Mar. 12, 2019), <https://journal.arbitration.ru/news/women-in-arbitration/> [<https://perma.cc/WD75-S4YG>] (explaining that the usual suspects in the arbitration field are “pale, male, and stale”).

Commission on International Arbitration and a member of the ICC International Court of Arbitration. Mr. Gélinas invited President Seydou Ba of the Common Court of Justice and Arbitration to the event under the auspices of the Treaty on the Harmonization of Business Law in Africa (OHADA).

While they may have been stale and male, these white, brown, and black men were not all pale. Over the years, I had the honor of working with President Gaudet. He always believed in me and had high expectations for my work at the ICC. I had similar experiences with Fali Nariman and Paul Gélinas. So, as I look back as someone who is stale and male but not so pale, I write of these leaders in the field of international commercial arbitration who helped me get on my way and did not seem to be troubled by the fact that they were doing cross-racial, cross-cultural, and cross-national mentoring.

In particular, I want to reflect on Michel Gaudet. I took the seat of another black American lawyer—Roberto Powers—who left the ICC after eight years to work for the U.S. Department of State. For a period of roughly eighteen years, from 1978 to 1996, the American legal counsel at the ICC International Court of Arbitration was a black American. Moreover, in the mid-1970s, President Gaudet appointed a woman named Tila Maria de Hancock to be the director of the secretariat of the ICC International Court of Arbitration. Again, about forty years ago, this white Frenchman was putting forward women and black Americans on the international plane. For white people, he should serve as a reminder to reflect on what could and should have been done to advance women and minorities in their careers and also what they should be doing today to help open the path to diversity in international commercial arbitration. For American women or minorities, these memories may help them to not view themselves as new entrants even if peers, who are unaware of this history, perceive them in that way.

All of the people described above from the event in 1998 were male. That leads us to another moment, five years before that, when two women, Mirèze Philippe (French and Lebanese) and Louise Barrington (Canadian), noticed the dearth of women in significant roles in international commercial arbitration in the late 1980s and 1990s. They resolved to do something about it by creating ArbitralWomen<sup>47</sup>—an international nongovernmental organization. Founded in 1993, ArbitralWomen works to continuously advance the interests of women in dispute resolution.<sup>48</sup> From its modest beginnings, the organization's network has grown to nearly one thousand women.<sup>49</sup> Philippe and Barrington have become preminent practitioners in the field by dint of their hard work and determination. Their efforts show how non-American women found a way to advance on the international commercial arbitration plane. Hopefully, by speaking of them, I again give

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47. ARBITRALWOMEN, <https://www.arbitralwomen.org/> [<https://perma.cc/6PSK-8BGM>] (last visited Apr. 12, 2020).

48. *Id.*

49. *Id.*

a sense of ownership of the field and instill the confidence that encourages others to step out of their comfort zones and take on these challenges.

A great secret of the “great men” in arbitration in the 1980s and 1990s is that, while at their law firms, behind them were a number of unsung “great women,” who worked alongside the “great men.” These women were unseen in the arbitration hearings—few were arbitrators and maybe more were counsel—but women were instrumental in making sure that the men were prepared for their tasks. I remember a moment, circa 1994, when the first woman was appointed as counsel at the ICC International Court of Arbitration. Before that, men used to discuss quite openly whether a woman could do that job—as opposed to serving as deputy legal counsel or, before that, an assistant—questioning whether a woman would be respected by arbitrators or parties’ counsel from certain regions of the world. Today, over half of the counsel are women<sup>50</sup> and, of course, ICC arbitration is doing just fine. And so, we learn, as with many things, that discussions of women’s limits by men are only discussions of the limits in men’s minds and not realities as to women’s capabilities.

To emphasize this latter point, I fast-forward to October 2019 at a dinner in Sarajevo, Bosnia and Herzegovina, where I was the only stale male. I was surrounded by the all-female leadership of the Association Arbitri, a Bosnian arbitration association. The association’s leadership invited me to speak at its conference about the many facets of diversity in international commercial arbitration. Diversity is not just an “American thing,” for, in Bosnia and Herzegovina, a country of great religious diversity, there are many facets of the issue. I particularly enjoyed these courageous women opening up to me about the issues that they had confronted in starting this association five years before. They told me about the presence of women as judges in the courts in numbers and at levels that are currently unimaginable in the United States. At the same time, these women, passionate about international commercial arbitration, told me about some of the significant difficulties they had to overcome. For example, women in the legal profession had to act dumber than they were in order to get jobs. Also, a stale, pale, male once reproached one of these great women for her passion about international commercial arbitration by telling her that she had “crazy eyes” and needed to calm down. The hurdles were high, but the Bosnian legal and business communities were coming around to their vision of what they wanted international commercial arbitration in Bosnia and Herzegovina to become.

In sum, in three moments from 1993 to 1998 to 2019, the unseen became seen and allowed us to recognize that an individual considered to be underrepresented is actually a symbol of the continuation of a flow of persons from that group that goes back decades or possibly centuries.

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50. *Contact Management Teams of the International Court of Arbitration*, INT’L CHAMBER COM., <https://iccwbo.org/contact-us/contact-management-teams-international-court-arbitration/> [<https://perma.cc/X7L7-H47B>] (last visited Apr. 12, 2020) (listing the names and contact details for the arbitration and alternative dispute resolution management teams and showing that over half of today’s counsel appear to be women).

## CONCLUSION: FINISHING WITH SOME STATISTICS

From my research, I have noted a few statistics on American diversity in international commercial arbitration, summarized as follows: (1) a significant number of American women (most likely white) participate as counsel in international arbitration but not so many as arbitrators;<sup>51</sup> (2) a few American minorities are active in international arbitration in all phases as counsel but few serve as arbitrators;<sup>52</sup> (3) so few American lawyers with disabilities were noted that it seems they constitute a very small number;<sup>53</sup> and (4) so few self-identified American LGBTQ were noted that it seems they also constitute a very small number.<sup>54</sup>

Stepping away from the United States and looking at gender diversity in international commercial arbitration appointments, the statistics for 2018 suggest that women have made significant progress over the past twenty years in being appointed by arbitral institutions and lesser progress in appointment by parties.<sup>55</sup> It should be noted that in this study we do not know the race of women arbitrators or whether the number of appointments is of repeat women arbitrators. And one can note that the percentage of women arbitrators appointed by the arbitral institutions is generally less than the percentage of women arbitrators appointed by the parties. So, one sees the resistance that women are confronting, but one also sees that progress has been made since the 1990s. The story is less sanguine for minorities, lawyers with disabilities, and LGBTQ lawyers, although these categories are not captured statistically on the international plane (and it may even be illegal in some countries to try to capture them).

Hopefully this Essay can serve a different function than the typical law review article about international commercial arbitration. Hopefully the lenses through which I discuss this topic provide more of the unseen, underrepresented persons a sense that they are seen. As I have told my students when they have done something extraordinary and are a bit embarrassed about it, it is time to own one's greatness. And part of owning one's greatness is realizing that one is not a unicorn but a person standing on the shoulders of many people who, for one reason or another, have remained unseen. Perhaps, in providing evidence of things not seen, this Essay provides substance for things hoped for.

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51. Benjamin G. Davis, *American Diversity in International Arbitration 2003–2013*, 25 AM. REV. INT'L ARB. 255, 262 (2014).

52. *Id.* at 261.

53. *Id.* at 262.

54. *Id.*

55. Markus Altenkirch & Malika Boussihmad, *International Arbitration Statistics 2018—Another Busy Year for Arbitral Institutions*, BAKER MCKENZIE GLOB. ARB. NEWS (July 2, 2019), <https://globalarbitrationnews.com/international-arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/> [<https://perma.cc/QH9M-9DFZ>].