THE COLOR LINE IN INTERNATIONAL COMMERCIAL ARBITRATION: AN AMERICAN PERSPECTIVE

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Abstract

The color line is the line in society between areas in which U.S. minorities have a presence of some kind and areas which non-minorities dominate essentially to the exclusion of U.S. minorities. This paper examines from an American perspective the color line in international commercial arbitration: a vital arena due to increasing globalization. Based on the survey results the paper concludes that a

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[*] Associate Professor of Law, University of Toledo College of Law. The author thanks Ms. Peggye Cummings for her research and administrative assistance with this project and Professor Michael Z. Green for his idea to hold a session on these topics at the American Bar Association Dispute Resolution Section Annual Meeting of April 2004, entitled "Perspectives on Race and ADR from Law Professors of Color and Teachers of Dispute Resolution." The author also thanks Professor Llewellyn J. Gibbons and Professor Isabelle R. Gunning for their participation in the session, and Ms. Jannice Hodge-Bannerman and the American Bar Association Dispute Resolution Section for permitting the session. The author thanks all survey participants for their time. In many ways, this paper renders homage to all the people of good will that I have met from around the world in international commercial arbitration over the years. Thank you for all your kindnesses and for your love of the best in international commercial arbitration while fighting to eliminate the worst. The author thanks Dean and Professor Philip J. Closius, Associate Dean and Professor Beth A. Eisler, Professor William M. Richman, Professor Joseph E. Slater, Professor David B. Wilkins and Ms. Wendy Larzelere for their insightful assistance. Any errors and the views expressed are the author's own and do not engage the responsibility of the University of Toledo or *The American Review of International Arbitration*. The author dedicates this work to his mother Mrs. Muriel C. Davis, to his African-American-European or European-African-American (or whatever) children Anne-Laure and Daniel, and to his Greek-Jamaican-German-French-American (or whatever) wife Christina. My mother fought to open doors for me and my wife and I fight that those doors are not closed for our children but are opened wider and transnationally for them and all children. Our children (and our students) deserve nothing less.

EDITORS' NOTE: This article differs from those the *Review* generally publishes, which focus primarily on legal analysis and practical utility. We publish it principally for two reasons: First, it provides the perspective of an author who has had a most distinguished career in the administration of international arbitration; and second, it highlights aspects that thus far have not attracted sustained consideration. It thus accommodates our efforts to be all-encompassing in our treatment of international arbitration. Of course, as is the case with everything we publish, it reflects the views of the author and not necessarily those of the editors of the *Review*.

color line does exist in international commercial arbitration. The interaction between seven currents (U.S. current, Foreign-based U.S. minority current, Human Capital current, Cooptation current, Changing International Commercial Arbitration current, Lifestyle current, and Culture current) that determine the presence of U.S. minorities is analyzed. Recommendations for how to eliminate the color line are made.

"Let those who wish to see what is to be the future of America, as relates to races and race relations, attend, as I have attended, during the administration of President Hayes, the grand diplomatic receptions at the executive mansion, and see there, as I have seen, in its splendid east room, the wealth, culture, refinement, and beauty of the nation assembled, and with it the eminent representatives of other nations, — the swarthy Turk with his "fez," the Englishman shining with gold, the German, the Frenchman, the Spaniard, the Japanese, the Chinaman, the Caucasian, the Mongolian, the Sandwich Islander, and the negro, — all moving about freely, each respecting the rights and dignity of the other, and neither receiving nor giving offense."[1]

"The problem of the twentieth century is the problem of the color-line: the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea."[2]

Table of Contents

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[1] Frederick Douglass, The Color Line, May 1881 *available at* http://etext.lib.virginia.edu/toc/modeng/public/DouColo.html (Last visited on March 31, 2004).

[2] W.E.B. DuBois, *The Souls of Black Folk*, (February 1903).

I. INTRODUCTION

A. *The Color Line*

In my family, the first contact with international commerce occurred as cargo. Just over 200 years ago, a young woman named Barbary born free (at least I like to believe that) in Africa in 1787 was sold into slavery at the age of fourteen and shipped from West Africa to North Carolina. While – over the next 50 years – her lineage intertwined with two American Presidents and a signer of the Declaration of Independence, the color line then relegated her to the status of property.

A little under 100 years ago my grandfather taught mathematics and Greek at Morehouse College in Atlanta – an elite black college, the best available under segregation – preparing Morehouse men to go forth in the world. A little over 60 years ago my late Aunt Dovey Madelyn Davis went to school at the Palmer Memorial Institute in Sedalia, North Carolina, "The Groton and Exeter of Negro America." They both were at the edge of possibility for black Americans in that era of separate but equal.

A little over 50 years ago, in 1952, my father – a graduate of Morehouse and Columbia – went to Liberia (founded by repatriated slaves in 1847) to work in President Truman's Point Four program, the precursor program to the United States Agency for International Development. He was one of the first black Americans in the Foreign Service at the edge of then possibility of the color line.

While my father was working in Africa fifty years ago, *Brown* v. *Board of Education*[3] was decided, outlawing separate but equal. When the family sought to return to the United States in 1959, my parents sought to have my sister enter a private school in New Jersey to start first grade. Their school of choice – "The Carteret School" – was interested in my sister when my father was writing to enquire from the American Embassy in Tunisia, his new posting. When my mother brought my sister to the school to visit, however, her qualifications (the quality of my sister's English) were questioned and the school denied her admission. Learning of this denial, my father wrote to the Governor of New

[3] Brown v. Board of Ed. of Topeka, Shawnee County, Kan., et al. 347 U.S. 483, 74 S.Ct. 686 (1954).

Jersey protesting that decision and my parents filed a complaint alleging racial discrimination with the New Jersey State Board of Education. In fact, as my father wrote to friends at the time, several New Jersey private schools refused to admit my sister because, as the school masters told my father, the parents and/or the board would not accept that a black child go to the school. Ultimately, my sister was tested by the local Board of Education and it was determined she had the necessary qualifications to attend any of these schools. After some haggling, a consent order was entered with the first school (The Carteret School) at which my sister had sought admission saying that she could reapply and be reconsidered. In the meantime, she was accepted at another private school (Brookside Academy) and her issues with The Carteret School ended. However, when it came time for me to go to first grade in 1961, I went to the Carteret School. My sister and I have since learned that we may have been test cases for integrating private schools in New Jersey.

In 1965, my sister and I were two of the first blacks to go to Sidwell Friends School in Washington, D.C. another elite private school. In 1970, when Phillips Exeter Academy (founded in 1781) went coed, I was one of the first group of significant numbers of minority students admitted at the same time there. Exeter was one of the institutions to which my aunt's alma mater, the Palmer Memorial Institute in the segregated South had been compared and my admission and that of others marked a further advancement of the color line. This life on the edge of possibility continued at Harvard College (1977), Harvard Business School and Harvard Law School (1983). I continued on this path along the color line when I went to work in Paris in international trade with the International Chamber of Commerce. The counsel I replaced was a black American so in some sense I was helping to maintain what I thought was a modest forward point of people of color. Even today, as a law professor I feel privileged to be at a forward position on the color line.

That advance guard at the forward points on the color line, to use W.E.B. Dubois' term in the *Souls of Black Folk*, lives its life at the intersection of races and cultures, particularly when it arrives at the international or transnational level. At each point on the color line in my career, I was at a position where few black Americans had ever been. The name for our condition as blacks in America may have morphed from property, separate, separate but equal, separate is inherently unequal, affirmative action and now to diversity under *Grutter*.[4] At the same time and more broadly, over the past 200 years, the color line has also morphed nationally (the South versus the North and now the South again), economically (access to "good jobs"), psychically (some intermarriage) and spiritually (integration of places of worship in a way that Absalom Jones would have had a hard time imagining). Progress, evolution and mutation of the status of blacks in

[4] Grutter v. Bollinger, 539 U.S. 306, 123 S.Ct. 2325 (2003).

the United States is undeniable. At the same time, as we move closer to the light and progress, we also find new challenges to be addressed as our society and the world around us evolve, progress and mutate.

B. *U.S. Minorities in International Commercial Arbitration*

Much like the T-shirt of a Harvard Space Society student (Front: The meek shall inherit the earth, Back: The rest of us are going to the stars), as I worked on the international plane I thought I was the farthest forward on the color line, as globalization and its discontents dawned for all. In the world of international commercial arbitration over 13 years, where one interacted with the world as in that magical meeting Frederick Douglass described at the White House, I rarely met American people of color. I only saw a black American counsel for a party in an arbitration in one case. She was a third year associate at a distinguished law firm. I also saw two Asian-Americans – a partner in one small California firm and an associate in a big Paris international law firm. I saw one young Hispanic-American associate from a prestigious New York firm. Throughout the 1000 international commercial arbitrations I personally supervised on a day-to-day basis and the 4000 other arbitrations of my colleagues that I indirectly learned about, in the colloquia, seminars, commission meetings and conferences, I never ran into minority Americans who were arbitrators in international commercial arbitration and very rarely into persons who acted as counsel. This state of affairs troubled me.

I made efforts to encourage the few minorities I met at seminars to go to the places and do the kinds of things I saw non-minority Americans doing to get into international commercial arbitration. During my tenure my efforts were possibly too weak, and, in any event appear to have been to little avail. As a professor, I now have the ability to study this topic and I thought this session on minorities and ADR was an excellent occasion to examine the color line in international commercial arbitration.

C. *Reaching Back for a Model*

In the days before diversity was talked about, in the days before affirmative action was talked about, two white men had a phone conversation – one at Harvard and one at Columbia. In 1960, Louis Toepfer, who was originally from Wisconsin farm country and who became an assistant dean and protégé of then Dean Erwin Griswold at Harvard Law School, asked then Assistant Dean Walwer of Columbia Law School, "How many Negroes are at Columbia Law School?"[5]

[5] Anecdote told to me by Dean Frank Walwer (retired), Texas Wesleyan University School of Law, Spring 2003.

And after hearing that question, and while the civil rights movement was ongoing, Dean Walwer visited several predominantly black colleges, identified five black students with potential to contribute to the school and the profession, increased the size of the class by five, and admitted them. Why? Dean Walwer believed it was essential to broaden the ranks of the law schools and thus enrich the profession and system of justice. It was as simple as that. Whether that analysis was a normative-based social justice approach, a market-based approach, or a color-segregationist approach, by his action it was clearly the approach of an activist to the problem: find blacks and admit them.

Embracing that activist mantle, rather than talk about race as a factor to be taken into account, or speak of diversity as a goal, or use any of the other phrases we learn about even most recently, I am drawn back to that Wisconsin country boy's simple question – how many Negroes are there? I want to ask that question in every part of today's life in America to see the measure of where Negro America is. How many blacks live in comfortable middle class neighborhoods? How many blacks are applying to the prestigious universities? And if we find that the numbers are going down rather than up (or up too slowly), then we should ask the question that implicitly Dean Walwer asked himself – what can we do about it.

This study asks that simple question on the international level and not just for Negroes, but for all U.S. minorities, "How many U.S. minorities are found in international commercial arbitration?"

D. *The Burden Underlying the Question*

Having posed what I (at first) thought was a simple question, I find that in fact it is a peculiar question. For one U.S. minority to be sitting as an arbitrator or counsel implies the intersection of several currents that are rarely thought about together.

The first current is the effort to integrate minorities into all aspects of United States society and – particularly – the legal profession broadly stated.[6] Arbitrators are typically from law firms, professors, or are retired judges. Obviously, party counsel (except barristers) are typically from law firms. So the presence of minorities in international commercial arbitration would typically imply that they were in the corporate departments (transactional or litigation) of law firms, professors in law schools, or retired from the judiciary. The literature on

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[6] Rachel F. Moran, *The Elusive Nature of Discrimination***,** 55 STAN. L. REV. 2365 (2003); Book Review, reviewing THE LAW AND ECONOMICS OF CRITICAL RACE THEORY CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002) 112 YALE L. J. 1757 (2003); Devon W. Carbado & G. Mitu Gulati, *Why are There so Few Black Lawyers in Corporate Law Firms*? *An Institutional Analysis*, 84 CAL. L. REV. 493 (1996).

advancement of minorities in corporate law, the judiciary, and law schools would be an important source of ideas to inform answers to the question, but with an international commerce twist. In the law firm setting, whether the U.S. office of a U.S. law firm or the U.S. office of a foreign law firm, international commercial arbitration with its emphasis on the cross-border arena would appear to be an interesting environment for non-U.S. lawyers to practice in the U.S. and demonstrate their comparative advantage and their marketability as employees and partners.[7] Thus, access to U.S. law firm positions by non-U.S. international lawyers should form a particularly relevant part of the subject matter to be addressed in attempting to understand the reasons for the presence or absence of U.S. minorities in international commercial arbitration. This foreign-U.S. rivalry and the more traditional rivalries discussed in majority-minority rivalry, gender rivalry, and inter and intra-minority rivalry fill out the tableau of the Darwinian struggle for success in the U.S. law firm.[8] For purposes of this study we will call all of these interacting themes the "U.S. current."

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[7] Judge Howard A. Levine, *The Regulation of Foreign-educated Lawyers in New York: The Past, Present, and Future of New York's Role in the Regulation of the International Practice of Law*, 47 N.Y. L. SCH. L. REV. 631 (2003); Cynthia L. Fountaine**,** *Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules,* 81 WASH. U. L. Q. 737 (2003)**;** Jay Krystinik, *The Complex Web of Conflicting Disciplinary Standards in International Litigation*, 38 TEX. INT'L J. 815 (2003)**;** Henry H. Drummonds, *Transnational Small and Emerging Business in a World of Nikes and Microsofts (A Retrospective Article on the 1998 Lewis & Clark Law Forum and the Message of Seattle)*, 4 J. SMALL & EMERGING BUS. L. 249 (2000).

[8] To help the reader understand the various permutations of individual nationality, firm nationality (U.S. and non-U.S.) and firm location (U.S. location and U.S. firm, U.S. location and non-U.S. firm, non-U.S. location and U.S. firm, non-U.S. location and non-U.S. local firm, and non-U.S. location and non-local third-country firm), some concrete examples of persons are presented for illustrative purposes only. However, it is important to emphasize that these examples are presented for illustrative purposes only as the nationality of the lawyer is known, the name of the law firm may in practice only partially reflect the U.S. or non-U.S. nature of the firm. One location of a U.S.-affiliated foreign office may be essentially dominated by local nationals and have a distinctly local culture. Another may be dominated by third country nationals with a distinctly international flavor. A third may be dominated by U.S. nationals and have a distinctly U.S. culture. Similar statements may be said for non-U.S. law firm offices. Parsing those variations is beyond the scope of this work. An example of a U.S. minority lawyer in international commercial arbitration and in the U.S. office of a U.S. law firm is Arif Hyder Ali of Fullbright and Jaworski – Houston Office, http://www.fulbright.com/index.cfm?fuseaction=attorneys.detail &emp_id=10933&site_id=357&sitesearchstring=Arif%20Ali (Last visited on April 1, 2004). An example of a foreign lawyer in international commercial arbitration in the U.S. office of a U.S. law firm is Horacio Grigera Naon at White and Case – Washington, D.C. Office, http://www.whitecase.com/naon_horacio.html (Last visited on April 1, 2004).

A second current focuses on the foreign land where the U.S. minority might be working, as do many other American practitioners of international commercial arbitration: in the foreign office of an American law firm[9] or in the non-U.S. office of a foreign law firm. In either case, the issues surrounding the credentialing of U.S. lawyers to practice as foreign lawyers in foreign countries

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An example of a U.S. lawyer in international commercial arbitration in the U.S. office of a non-U.S. law firm is Lucy Reed, Freshfields Bruckhaus Derringer – New York Office, http://www.freshfields.com/lawyers/pf_lawyers.asp?personnelID=1510&languageID=11 (Last visited on April 1, 2004). An example of a U.S. lawyer in international commercial arbitration in the foreign office of a U.S. law firm was William Laurence Craig (now retired), Coudert Freres – Paris, http://www.coudert.com/lawyers/default.asp?action=partnerdetails&id=1128 (Last visited on April 1, 2004). An example of a U.S. lawyer in international commercial arbitration in the local foreign office of a local non-U.S. law firm is Alexander B. Blumrosen, Bernard-Hertz-Bejot – Paris Office, http://www.bhbfrance.com/frameset/assocpart.htm (Last visited on April 1, 2004). An example of a U.S. lawyer in international commercial arbitration in the local foreign office of a third-country national non-U.S. law firm is Michael Moser, Freshfields Bruckhaus Derringer – Hong Kong Office, http://www.freshfields.com/lawyers/pf_lawyers.asp?personnel ID=4175&languageID=11, (Last visited on April 1, 2004). An example of a local national foreign lawyer in international commercial arbitration in the foreign office of a U.S. law firm is Emmanuel Gaillard, Shearman and Sterling – Paris Office, http://www.shearman.com/lawyers/partners/gaillard.html, (Last visited on April 1, 2004); An example of a third national foreign lawyer in international commercial arbitration in the foreign office of a U.S. law firm is Michael Buehler, Jones Day – Paris Office, http://www1.jonesday.com/attorneys/bio.asp?language=English&AttorneyID=10660, (Last visited on April 1, 2004). An example of a U.S. minority lawyer in international commercial arbitration in the foreign office of a U.S. firm has not been found. An example of a U.S. minority lawyer in international commercial arbitration in the local foreign office of a non-U.S. local law firm has also not been found though some outside of international commercial arbitration have been noted. An example of a U.S. minority lawyer in international commercial arbitration in the local foreign office of a third national law firm is Stefan Naumann, Denton Wilde Sapte – Paris Office, http://www.martindale.com/xp/Martindale/Lawyer_Locator/Search_Lawyer_Locator/search_result.xml?PG=0&STYPE=N&LNAME=Naumann&FNAME=Stefan&FN=&CN=&CTY=&STS=&CRY=71&LSCH= (Last visited on April 1, 2004).

[9] "83 percent of Baker & McKenzie's attorneys are in non-U.S. offices (according to 2002 figures), Coudert Brothers has 62 percent, White & Case has 60 percent, Altheimer & Gray has 47 percent and Cleary, Gottlieb, Steen and Hamilton has 35 percent." Brian Zabcik, *Diversity Scorecard, Familiar Faces*, MINORITY L. J. (Summer 2003) *available at* http://www.minoritylawjournal.com/summer03/texts/familiar.html (last visited on March 31, 2004). These firms have more than one-third of their lawyers practicing outside the United States.

have to be addressed.[10] But beyond credentialing, issues of hiring and promotion of those U.S. minorities similar to those in the U.S. current are relevant. The question of whether a U.S. minority has been posted to work in any foreign offices of the law firms needs to be addressed. These issues are further enriched by the perception of the foreign country's legal community of U.S. minority lawyers as one segment of American lawyers in their country and possibly as a further (no doubt privileged) subpart of the broader group of immigrant workers that may be present in the country. These foreign views on hierarchies about nationality and race may be relevant. Even in overseas offices of ostensibly U.S. law firms, the actual group of partners in a given office may consist of few, if any, Americans. In addition, the partnership track in a foreign office of a U.S. law firm for non-Americans may have its own perils for a foreigner. Those perils could also influence the reaction of the foreigners to American lawyers as a group and U.S. minority lawyers as a subgroup against whom they have competed or whom they must evaluate. The partnership track for the U.S. national in the foreign location of a foreign law firm would present similar though not identical concerns. In addition, the interaction between U.S. minorities and minority nationals of the foreign country (possibly the first post-colonial entrants) who are competing for positions in the same firm is of relevance. Finally, the situation may be further complicated by the presence of third-country nationals (*i.e.* neither American nationals nor nationals of the country where the office is located) and their attitudes towards U.S. minorities acting in the international commercial arbitration arena. For the purpose of this study we will call this complex web of rivalries and interactions overseas the "Foreign-based U.S. minority current."

A third interrelated current concerns the types of human capital that U.S. minorities bring to their career in international commercial arbitration. Degrees in more than one legal tradition, internships and access to them at prestigious international arbitral institutions, languages in addition to English, specific legal sector expertise, one's wealth (or access to wealthy potential clients), familiarity with practitioners of international commercial arbitration, even dual or multiple nationalities are examples of types of human capital that might influence a minority's access to work in international commercial arbitration. These types of themes would be called the "human capital current."

A fourth interrelated current is how U.S. minorities market themselves as international commercial arbitration practitioners. Effectiveness might mean, for example, participation in the appropriate groups where decision-makers on selecting arbitrators and/or counsel are likely to be present. This effectiveness requires some interaction on the international level, such as the conspicuous

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[10] Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189 (2003).

consumption (to borrow from Veblen) of seminars.[11] For example, being on the circuit would entail Committee D of the International Bar Association, an Arbitration Committee of the U.S. Council for International Business, participation in seminars of the international arbitral institutions such as the Joint ICC-AAA-ICSID[12] event that rotates between Paris, New York, and Washington, D.C., the American Bar Association Dispute Resolution Section and Section on International Law and Practice, regular presence at such events and participation as a speaker on panels, organization of such events, membership in Institutes such as the Institute of World Business Law of the International Chamber of Commerce or the Institute for Transnational Arbitration of the Center for American and International Law, and participation in arbitration-related activities on the public international level, such as UNCITRAL.[13] These activities and the process of being placed in those positions we might call "the cooptation current."

A fifth aspect is cultural diversity – a term that must be used very carefully as it carries many different meanings. Cultural diversity as I am trying to describe it is partially cultural diversity as described in the U.S. It is also cultural diversity as has been discussed in the international commercial arbitration community.[14] It

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[11] One person estimated spending $6000/year on the circuit of conferences and seminars trying to become a member of the international commercial arbitration community.

[12] ICC = International Chamber of Commerce; AAA = American Arbitration Association; ICSID = International Centre for the Settlement of Investment Disputes of the World Bank.

[13] United Nations Commission on International Trade Law.

[14] To contrast the domestic and international vision of cultural diversity, compare Kenneth L. Karst, *The Revival of Forward Looking Affirmative Action*, 104 COLUM. L. REV. 60 (2004); Kevin Noble Maillard, *Parental Ratification: Legal Manifestations of Cultural Authenticity in Cross-Racial Adoption*, 28 AM. INDIAN L. REV. 107 (2004); Note, *Trump Card or Trouble*? *The Diversity Rationale in Law and Education*, 83 B.U. L. REV. 1171 (2003); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption*?, 77 ST. JOHN'S L. REV. 837 (2003); *but see,* Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT'L L. J. 331 (2003); Rosabel E. Goodman-Everard, *Cultural Diversity in International Arbitration-A Challenge for Decision Makers and Decision Making*, 7(2) ARB. INT'L 155 (1991); John W. Head, *For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 U. KAN. L. REV. 241 (2004); Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT'L L. 349 (2004); Michael J. Glennon, *International Law under Fire: Self-determination and Cultural Diversity*, 27 FLETCHR F. WORLD AFF. 75 (Fall 2003); Astrid Stadler, *The Multiple Roles of Judges and Attorneys in Modern Civil Litigation*, 27 HASTINGS INT'L & COMP. L. REV. 55 (2003); Charles H. Koch, Jr., *Envisioning A Global Legal Culture*, 25 MICH. J. INT'L L. 1 (2003); Luca Enriques, *Bad Apples, Bad Oranges: A Comment From*

is diversity as to race and nationality and legal tradition. Race may be perceived as playing a role across nationality. Legal tradition may also be seen as playing a role across nationality. Nationality may also play a role (evidence of neutrality for example) across race and legal tradition.

International commercial arbitration is a place of conflicts of law, conflicts of jurisdiction, conflicts of interests, and, some say, conflicts of culture. The discussion of cultural diversity in international commercial arbitration has for the most part focused on culture flowing from national experience and legal tradition in the context of the specificities of international commercial arbitration. Race has not, at least overtly, been discussed in the literature relating to cultural diversity. For the purposes of this study, we will describe this current as the "cultural diversity current."

A sixth aspect is the evolution of international commercial arbitration. Over the past 30 years disputants from more countries, arbitrators from more countries, and counsel from more countries are participating in international commercial arbitration. The range of subject matters addressed by international commercial arbitration is mutating from traditional sales of goods, through construction contracts, through investment disputes, on to new areas related to intellectual property, consumer international disputes, or internet topics such as domain name disputes (even if seen as a form of ersatz arbitration). Arbitration without privity in investment treaties and North American Free Trade Agreement instruments has emerged. The competing or complementary roles of litigation and ADR have come to be a source of discussion. This dynamic environment and the emerging subject matters, institutions, and changing legal environments form themes that could be called the "changing international commercial arbitration current."

A final current, as we are speaking of people, is the constraint on any given minority due to his/her personal situation. This relates to the choices made in living a life (family, children, schooling, lifestyle, etc). For the purposes of this study we will call this the "lifestyle current."

Old Europe On Post-Enron Corporate Governance Reforms, 38 WAKE FOREST L. REV. 911 (2003); Lynne L. Dallas, *The Multiple Roles Of Corporate Boards Of Directors,* 40 SAN DIEGO L. REV. 781 (2003); Marleen A. O'Connor, *The Enron Board: The Perils Of Groupthink,* 71 U. CIN. L. REV. 1233 (2003); Elisa Westfield, Note, *Resolving Conflict In The 21st Century Global Workplace: The Role For Alternative Dispute Resolution*, 54 RUTGERS L. REV. 1221 (2002); David Kennedy, *New Approaches To Comparative Law: Comparativism And International Governance*, 1997 UTAH L. REV 545 (1997); Viktor Mayer-Schönberger, *The Shape Of Governance: Analyzing The World Of Internet Regulation,* 43 VA. J. INT'L L. 605 (2003); Urs Martin Lauchli*, Cross-Cultural Negotiations, With A Special Focus On Adr With The Chinese,* 26 WM. MITCHELL L. REV. 1045 (2000).

There may be other currents at work in international commercial arbitration but some aspect of these currents is likely present in these seven currents. These currents themselves are heavily interrelated but this heptagonal paradigm helps me to organize the separate areas for strategic analysis of U.S. minorities in international commercial arbitration. This macro vision of the forces at work for participation in international commercial arbitration helps the reader see the background for each actor – person or institution – in international commercial arbitration.

The complexity of the interaction of the streams of themes in each of the above seven currents as well as these currents' interaction worldwide is an extraordinary broad, rich and complex macro-tableau. The burden of analysis (separately and together) of each of these themes underlying what I thought was a simple question is enormous. Suggestions I might make with regard to tinkering with one aspect or another of these currents raises concerns similar to those in quantum mechanics with the uncertainty principle: measuring the extent of one aspect versus another would also change the subject as international commercial arbitration would evolve and mutate. I can only present a partial image of the past and a highly imperfect set of predictions for the future on even one theme of one of the seven currents. I will most likely fail to capture the dynamism of these currents. While seeing the issues at a macro-level, I feel the tug of the approach of Dean Walwer at the micro-level: keeping it simple. So let us start with "cherchez la femme."

E. *Cherchez la femme*

When I think of the above seven currents and of my goal of having an international career in Paris, I am amazed by either my naiveté or my sheer audacity back in 1982. As I headed into my Christmas break in the winter of 1982-83 of my final year of Business and Law Schools, I had excellent offers in New York from two prestigious Wall Street firms with international practices (White and Case and Coudert Brothers). I had also fallen in love with an American woman living in Paris during my summer associate experience the previous summer in Paris with a firm that did not hire its summer associates. Over the Christmas holidays I went to visit my beloved in Paris, and while there, contacted the Paris office of the firm I preferred. I explored informally the possibility of coming directly to the Paris office. I had also spoken with someone in the New York office of the other firm about the possibility. The message I consistently received was "go to New York and work there for a couple or three years, then we will see."

With the Business degree, I did have another option to get to Paris: forsake the law and find a business job. I job-hunted in that direction. I was offered a position for far less pay than the law firms with an international development

consulting firm (Louis Berger and Company) as an economist working from Paris in West Africa. The choice was starkly put: the golden Wall Street road for higher pay and that vision of a future (and a possibility two to three years out of maybe going to the Paris office) or leave the law and go the business route to immediately get to Paris.

Unconscious or imperfectly conscious of the seven broad currents described above and being the first lawyer in the extended family with very little knowledge of law firm life, I fell back on the advice of my Contracts Professor Todd Rakoff, to my First year section – "after law school do what you want to do." What I wanted to do is have the international career overseas in Paris. Assessing the risk, I thought that when it came to the time to decide who would be sent to Paris two or three years after I entered the New York law firm, for whatever reason real or imagined, the powers that be in either of the law firms would not send me – this black guy. There would be someone whose mother was French, whose parents were rich, or the large number of partners who would love to be posted to Paris, or whatever, but my dream would be deferred and the international person in me would surely be killed. On the other hand, taking the consulting job would at least put me overseas in Paris immediately so I would begin living my dream. Later, no one would be able to deny I had international experience.

So, I went to Paris with the development consulting firm. One year later, after taking the February 1984 New York bar, when I was reassessing whether I would come back to the States, I was fortunate to have an offer on Wall Street (this time again on the business side, but in banking at J.P. Morgan Company where I had been a summer intern in 1980) as well as an offer with a French consulting firm in Paris (Dominique Mars and Company). I remember having explored law possibilities in Paris with American lawyers in Paris offices of American law firms and the message again was to "go back to the United States and see after that." Again, I turned away from home and decided to stay in Paris living another version of the dream and accepted the French consulting firm's offer.

Two years after that when I was again reassessing whether I would come back to the States, I spoke with American lawyers I had known and after three years the message in 1986 was again "go back to New York." By then, for me to go back to New York was to admit failure in making my way internationally. Anecdotal evidence seemed to show that significant numbers of the American expatriates gave up being overseas after three years. I persisted in Paris and I received the offer with the ICC International Court of Arbitration to work as a legal counsel.

This work was purely international law work in Paris working with parties from 100 countries, arbitrators from 60 countries, and on arbitrations going on in any of 30 to 40 countries at any time. Founded in 1923, the ICC International Court of Arbitration provides the highest level of supervision of international commercial arbitrations through the procedures under its rules. The Secretary General (an American), the General Counsel (a Swede) and the five counsels

(German, French, Mexican, Spanish and I, the American) each supervised around 100 to 150 cases at any one time. We prepared the drafts of key decisions of the Court in the course of the arbitration. We advised the Court and communicated with the parties, the arbitrators and experts on ministerial tasks such as financial matters through to more complex procedural issues about the rules, and with regard to decisions on the arbitral awards made by the Court. On occasion, such as for a case with Zurich as the place of arbitration, a case with Washington D.C. as the place of arbitration, or a third case with Honolulu as the place of arbitration, we prepared positions of the ICC International Court of Arbitration as regards the decisions made by the Court in a given matter. We gave and participated in seminars around the world promoting international commercial arbitration and the changing of national laws to be more arbitration friendly. The Secretariat of the ICC International Court of Arbitration was considered by many practitioners as the center of international commercial arbitration worldwide. Even with the increase in the number of international arbitral institutions and their caseloads, it still plays a preeminent role at the preeminent institution.

Upon hearing I had an offer from the Court, the American lawyers I had known no longer suggested I return to New York. Some thought the job was beneath me but saw it as a good place to start as I was at the center of the field. The issue then became how long I would stay at the ICC.

During those ICC years I met many great lawyers from American law firms and worked with them both intimately or more indirectly in international arbitrations. I had great success and unparalleled international experience worldwide. Unlike my European, Latin American colleagues, or non-minority American colleagues, however, I was never able to translate this familiarity into a position with any of these firms back in the U.S. or in a Paris office. I was not co-opted into the law firms.[15] That route up appeared shut. I did not seek to go to the Paris office of a French or francophone firm as I was concerned about moving into a dominant Francophone culture environment. One Moroccan lawyer (the late Maître Abdelhay Sefrioui) proposed a position to me in his firm, but my concern was that he was a very domineering personality and, though I liked him as a brilliant lawyer, I declined. I had learned from my years in consulting that the immigrant-national-third national relationship was complex. In addition, even though I would be outside of the United States, I worried that I was likely to be in a French environment focused on domestic issues where my international set of

[15] This took place both before the merger of the French legal profession and after, when to practice American lawyers had to become *avocat* (with the possibility of pleading before the French courts) as opposed to *conseil-juridique* (legal counselor) with the possibility of advising clients and, most importantly, acting in international commercial arbitration.

skills might be of marginal advantage as had been the case in the French consulting firm.

As I neared 40 years of age, when I started to think about what I wanted to do the rest of my life, I decided law teaching was where I really could do far more with what I had learned over those years. And, I found I could do more with my experiences in law teaching in the United States than if I were to teach at a French law school. Getting on the tenure track in the French system would be extremely difficult and would most likely involve getting a French law degree and, essentially, starting over. I could work as an adjunct, but as a husband with two children that was too precarious a lifestyle. I could give back to the law students, write about subjects that interested me, and do service in an environment of great autonomy – something that was precious to me. I had noted that, while not necessarily the richest, American law professors were the happiest bunch of all the lawyers I met working in international commercial arbitration.

F. *Alone at the Front*

Through all this time, I never met a U.S. minority international commercial arbitration arbitrator and extremely few as counsels of parties. I never met a U.S. minority who had been hired in the Paris office of an American law firm. I did meet some U.S. minorities outside of international commercial arbitration working in French firms, one of whom has recently begun to have some work in international commercial arbitration. At the same time, I did meet and work with several U.S. non-minority lawyers coming from the Paris and other offices of U.S., French and third-country law firms in international commercial arbitration at the ICC. It goes without saying that I met still others who were working outside of international commercial arbitration.

Looking back at the seven currents described above, I find it simply amazing that I found work for thirteen years in international commercial arbitration at such a high level. However, the U.S. current, the Foreign-based U.S. minority current, the human capital current, the cooptation current, the cultural diversity current, the changing international commercial arbitration current and the lifestyle current together did not appear to produce any minority arbitrators and only a few counsel in international commercial arbitration. All they produced were two or three U.S. minorities in international arbitral institutions – first at the ICC and later at the World Intellectual Property Organization.

G. *Why is the Progress of Minorities in this Area an Important Question?*

The purpose of this paper is to see to what extent U.S. minorities have grown in new roles as international commercial arbitration actors. To use an upward mobility paradigm, it is to see if, whether through contest mobility, sponsor

mobility, or structural mobility as presently practiced or any other means necessary, U.S. minorities are in fact achieving a presence in this crucial arena of international trade.[16] Put another way, it is to see where the color line stands today.

At first blush, international commercial arbitration in Paris, France might seem extremely far removed from the battles for integration of the past 50 years in the United States. However, I believe the answer to my simple question would to some extent show us one very forward point, 50 years after *Brown v. Board of Education*, of U.S. minorities. The arena of international commercial arbitration is a rarefied atmosphere – a place where the dance of states, conflicts of jurisdictions and the absence of a "juge ordinaire" has created a need for a binding dispute resolution structure that is culturally and juridically different from that in the domestic court or domestic arbitration arena.[17] The practitioners – "masters of the universe" or "usual suspects" – are entrusted with enormous responsibility to find the appropriate solution to many difficult and complex disputes between companies and between governments within the broad discretion granted them by arbitration agreements, institutional and ad hoc rules, modern arbitration laws, pro-arbitration international conventions such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and increasingly – at least on the international plane – deferential national courts. These practitioners deal in virtue and are viewed as creating a transnational legal order. [18]

From what I have seen, participating in international commercial arbitration are persons situated at the highest levels of the legal profession in their respective countries, helping to peacefully resolve the world's most complex commercial disputes. The actors in international commercial arbitration are also found in expert panels of the World Trade Organization, under the North American Free Trade Agreement,[19] among members of the International Court of Justice in the Hague as examples of their work. They handle many of the most difficult matters in their countries. They are the people called upon to judge difficult and contentious cross-border disputes at the Iran-U.S. Claims Tribunal, the Claims Resolution Tribunal for Dormant Accounts, the International Commission on

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[16] On contest mobility, sponsored mobility, and structural mobility see Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV 113, 123 (2003).

[17] Pierre Lalive, *Sur des dimensions culturelles de l'arbitrage international*, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOR OF KRYSZTOF SKUBISZEWSKI 777 (1996).

[18] YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

[19] They even participated in developing the dispute resolution mechanisms of NAFTA on all three sides.

Holocaust Era Insurance Claims, and public international law tribunals such as the one for the France-New Zealand dispute concerning the Rainbow Warrior. They become ministers in governments, attorney generals, European commissioners, or judges. To paraphrase Frederick Douglas, these persons "move about freely" across borders, requested to respect the rights and dignity of all they judge, and, as counsel for parties, fighting fiercely without receiving nor giving offense. Manipulating law and procedure of different jurisdictions is second nature for them. They write the arbitration laws of the world in UNCITRAL and advise countries on developments in their arbitration law. In short, they are mortals with a worldwide dispute resolution mission – building and keeping running the transnational legal order. They are the arbitrati. If U.S. minorities are active in this heady atmosphere, surely we will have come close to the highest possible levels of achievement in the legal profession in this world.

II. INTERNATIONAL COMMERCIAL ARBITRATION

There is an extensive literature on international commercial arbitration – an adjudicatory method by which a private tribunal resolves a dispute between parties.[20] This section only seeks to highlight certain salient features of the international commercial arbitration system.

Parties: At the heart of this form of arbitration are the parties. The parties may be individuals, partnerships, corporations, state-owned enterprises and governments. The parties come from around the world. These parties enter into contracts. The international nature of the contract may be derived from the fact that the parties are from different countries or there is some connection between the contract and international trade. In their contract the parties typically agree to

[20] For more background on International Commercial Arbitration, note the websites and publications of the International Chamber of Commerce International Court of Arbitration (www.iccwbo.org), the American Arbitration Association and its Global Centre for Dispute Resolution (www.adr.org), the Arbitration and Mediation Center of the World Intellectual Property Organization (www.wipo.int), the Permanent Court of Arbitration in the Hague (www.cpa-pca.org), the Hong Kong International Arbitration Center (www.hkiac.org), as examples of institutional systems. For reading on specific topics, see YEARBOOK COMMERICAL ARBITRATION OF THE INTERNATIONAL COUNCIL FOR COMMERICAL ARBITRATION, THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION, THE JOURNAL OF INTERNATIONAL ARBITRATION, ARBITRATION INTERNATIONAL, THE REVUE DE L'ARBITRAGE, THE REVUE SUISSE DE L'ARBITRAGE, ALAN REDFERN ET. AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (4th. 2004), Doug E. Mclaren, *Party-Appointed v. List-Appointed Arbitrations: A Comparison,* 20(3) J. INT'L ARB. 233-245 (2003).

submit some or all of their future disputes to arbitration.[21] If they specify an institution under whose rules the arbitration will be conducted it is termed institutional arbitration. If the parties do not designate such an institution, the arbitration is termed an ad hoc arbitration.

Counsel: Subject to any constraints at the place of arbitration, parties are generally free to select the counsel of their choice to represent them in the arbitration. While many arbitrations go forward in specialized sectors without counsel, at the highest levels of international commercial arbitration it is typical to find a party represented by counsel of its choice.

Technical assistance/Supervision: Where a party is resisting the arbitration procedure, the party that wants the arbitration to go forward has to seek assistance. If the parties have selected an institution's rules, those rules empower the institution to take certain steps in the procedure – particularly the appointment of the arbitral tribunal. Depending on the rules of the institution selected, the institution may essentially serve only as an appointing authority for the arbitral tribunal with minimal rules that guide the conduct of the arbitration on through to the institution supervising every aspect of the arbitration including the determination of the arbitrators' fees. In exchange for its services, the institution is paid by the parties.

Absent such a designation of an institution or rules provided in the arbitration clause, the party seeking arbitration may be obligated to request technical assistance of a state court to get the arbitral tribunal constituted, to provide interim or conservatory measures pending the constitution of the arbitral, or any other decision that permits the arbitration to proceed. There are arbitration-friendly jurisdictions with modern arbitration statutes and/or pro-arbitration decisions that facilitate the arbitration process through technical assistance by the state court. There are also arbitration-unfriendly jurisdictions in which the state court intervenes to a substantial extent in the arbitration – hampering or constraining party autonomy and arbitral tribunal discretion.

Arbitrators: To have an arbitration one needs arbitrators – usually one or three but not always one or three. It is said that arbitration is only as good as the arbitrators. Arbitrators are typically appointed by the designation of each party, by the joint designation by the parties, by an arbitral institution, by an appointing authority designated by the parties, or by a state court. The selection of arbitrators is the subject of a rich literature also, but for the purposes of this discussion the key point to be noted is that independence, impartiality, and neutrality are key attributes examined when arbitrators are designated. Arbitrators, like parties, come from around the world.

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[21] This brief general presentation applies equally well to disputes pursuant to a submission agreement.

The arbitration procedure: Whether there is an institutional or an ad hoc arbitration, the arbitration generally includes five essential steps: (1) the notice of the arbitration, (2) the constitution of the arbitral tribunal, (3) the arbitral procedure, (4) the arbitral award, and (5) any recognition and enforcement procedures for the arbitration award. There is great procedural diversity in international commercial arbitration so that each aspect of this procedure may be very simple (for example, a one-page notice or an arbitration procedure on documents alone) or very complex (for example, 40 cartons of documents forming a Request for Arbitration or large numbers of hearings and documents in several languages with interpreters and translation). No two arbitrations are alike but all of them that go to completion roughly follow the above steps.

Award Enforcement: Some arbitrations are settled or withdrawn without an award, others proceed to the award (and if by agreement an award by consent). A party seeking to resist an award usually can seek to annul the award at the place of rendition or resist recognition and enforcement of the award at a place of enforcement. Some nations have systems that provide for a unitary approach to arbitration, having the same legal regime apply to arbitrations determined to be domestic and arbitrations determined to be international or non-domestic. Other nations have systems that have essentially separate regimes for domestic arbitration and international commercial arbitration. Some nations have arbitration-friendly rules that generally show great deference to the decision-making of the arbitral tribunal. Others have less arbitration-friendly rules, with greater judicial supervision of the work of the arbitral tribunal and intervention in the arbitral procedure.

The role of this form of adjudication of disputes has expanded steadily over the past 50 years. No doubt a key watershed was the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed at New York in 1958 ("the New York Convention") which has provided a mechanism for recognition of arbitration clauses and recognition and enforcement of arbitral awards around the world. In addition, regional treaties have developed that assist arbitration. Third, in agreements such as Bilateral Investment Treaties, arbitration is supported as a means of dispute resolution between the parties of two nations.

Arbitration law is evolving. In places such as the UNCITRAL, practitioners develop recommendations for model laws or procedures. Countries are changing their laws to make them more investor-friendly and practitioners participate in the process of drafting those laws. New methods such as fast-track arbitration are developed in practice and build a following as a means of dispute resolution.

Arbitration is evolving also as the types of matters subject to arbitration keep growing. Sports arbitration has grown significantly. Arbitration of consumer disputes is a subject of controversy. Arbitration of public international law disputes also occurs. Arbitration appears to be here to stay as it is a mechanism that provides the means for dispute resolution in a transnational arena with an

enforceable award. Arbitration has sufficient flexibility so that it comfortably intersects with other forms of dispute resolution (for example, negotiation and mediation).

III. MINORITY PROGRESS IN CORPORATE LAW, THE JUDICIARY AND LAW TEACHING

There is a vast literature on U.S. minorities and the Corporate Bar, in the judiciary, and in law teaching, the key principal areas from which participants in international commercial arbitration (as counsel, arbitrators, or in institutions) are chosen.[22] The general tenor of those analyses, with some nuances, is that 50 years after *Brown v. Board of Education* the presence of U.S. minorities is better than it was but is still dismally low in the Corporate Bar, in the judiciary, and in law teaching. The reasons for this reality are debated. One aspect that has not been serious studied is the presence of U.S. minorities in the overseas Corporate Bar. Statistics or analysis of the situation of these expatriate U.S. minorities in foreign offices of U.S. law firms, foreign offices of non-U.S. law firms, foreign companies or on their own are inexistent.[23]

IV. THE SURVEY

A. Methodology

To begin to answer my simple question, I felt the best way to proceed – as this approach went to the core of the matter – was to contact as many people as I knew from around the world who acted as counsel, arbitrators and/or experts at the highest levels of international commercial arbitration. Defining international commercial arbitration as broadly as possible (*i.e.,* no preexisting definition but rather leaving that determination to each respondent), I culled a list of persons from the index of *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*,[24] members of the prestigious International Council for Commercial Arbitration, people I remembered from my 13 years at the ICC International Court of Arbitration, and people from the Institute for Transnational Arbitration of the Center for American and International Law of the Southwestern Legal Foundation (a U.S. meeting place for these "gods of arbitration" each June). I also tried to make sure I selected those

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[22] *See* notes 6, 7 and 14 *supra* for a partial list.

[23] *See* David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548,1582 n. 141.

[24] *Supra* note 18.

that I was sure or pretty sure had actually served in international commercial arbitrations in some capacity (*i.e.,* not just arbitration "wannabe's"). I came up with a master list of 219 names.

I tried to contact essentially all persons that I knew were at least until recently considered to be at the highest level of international commercial arbitration acting as arbitrators, counsel of parties, and/or experts. My theory was that it would be most interesting to see if those at the top of this part of the profession are seeing any American minorities in their practice. If these "gods of arbitration" were seeing American minorities, that might imply that American minorities were present at lower levels in the hierarchy – or pipeline to the highest levels – of international commercial arbitration. If American minorities were not present at this highest level, the reasons suggested by these persons would provide possible leads as to how this state of affairs came about and the impact of the various currents. To this core group, I added a few people who were possibly less far along in their career but appeared to be clearly part of the next generation coming up. I thought this second group's perception of what was going on around them might also be of interest to this discussion. I culled e-mails or telefax numbers for all of these persons from the internet and invited them to fill out the questionnaire attached as Annex 1. I asked that they only take 20 minutes to complete the questionnaire as I felt that a request for more time for a response from these busy partners of major law firms, distinguished professors, judges, and heads of arbitral institutions would result in no answers. I am deeply indebted to all who took the time to respond to me – even if the response was that they declined to participate in the study.

In order that my analysis not be limited to the complex echo chamber of intra-American race relations, I felt it important to seek as many other nationals as possible in my sample. In learning from them of the extent to which Americans as a whole were present or absent in international commercial arbitration, I thought I might have a better sense of what were the limits for possible penetration by U.S. minorities in the international arena. Also, burdened differently by American and their own national history, the non-Americans might provide several other different lenses through which we can observe this aspect of the peculiar American experience in the world. It was hoped that the meeting of these different views would in itself help provide deeper insight on the issues.

B. *Results*

In this section, I present the results for each question that was asked. After the results, I include a comments section with the comments that the participants in the survey made in response to each of those questions. Names are omitted.

Of the 219 invitations sent out, responses were received from 64 international commercial arbitration professionals or a response rate of 29.2 percent. This

response rate compares very favorably with other types of response rates and I am greatly appreciative of the time these busy professionals took to respond to the questionnaire. Of the 64 responses, 20 of them (31.2 percent) came from persons who had U.S. nationality as their sole or one of their nationalities (*i.e.* U.S. Nationals) and 44 responses (68.8 percent) were from persons who did not have U.S. nationality as their sole or one of their nationalities (Other Nationals).

Table 1 – Responses by Nationality

	Number of Responses	**Percent of Responses**
U.S. as sole or one of nationalities	20	31.2
Other Nationals	44	68.8
Total	64	100

Source: International Commercial Arbitration Survey

I. *Nationality*

Twenty-two nationalities from five continents were represented in the 64 responses. Some of the respondents had multiple nationalities. The nationalities of the respondents are shown in Table 2.

Table 2 – Number of each type of Nationality
(including persons with multiple nationalities)

Nationality	**Number**
U.S.	20
Austria	2
Brazil	1
Canada	4
China	1
Denmark	1
Egypt	1
France	12
Germany	3
Ireland	1
Italy	1
Jamaica	1

Lebanon	4
Mexico	2
Singapore	1
Spain	1
Sweden	2
Switzerland	7
Syria	1
Tunisia	1
United Kingdom	4
Uruguay	1
Total	64 from 22 countries with 72 nationalities

Source: International Commercial Arbitration Survey

II. *Employment*

Respondents were asked to best describe their employment. Some of the respondents indicated one employment and others listed several types of employment (over their career or held simultaneously). Respondents were preponderantly in private practice (45 responses) and/or professors in universities (18 responses) with the U.S. nationals primarily in private practice (14 responses) as opposed to professor (3 responses). A number of respondents listed the category "other" (11 responses). The comments made under that category are listed below after Table 3.

Table 3 - Employment

Type of employment	**U.S.**	**Other Nationals**	**Total**
Private practice in a Law Firm	14	31	45
In House Counsel for a Company	0	2	2
Employee of an Arbitral Institution	1	3	4
Professor in a University	3	15	18
Judge	1	2	3
Other (see below)	4	7	11

Source: International Commercial Arbitration Survey

Comments of the respondents:

Of those who responded under the "professor in a university" category, one non-U.S. national respondent specified that he was a former lecturer in international and air law at a university in a Middle-Eastern country.

Of those who responded under the "Judge" category, were included judges of international tribunals such as the Iran-U.S. Claims tribunal and retired judges.

Of those who responded under the "Other" category, several were self-employed as neutral, arbitrator, engineering, regulatory work with a corporation, or with arbitral institutions.

U.S. National Comments under "Other"

- Neutral
- Regulatory practice in a corporation
- Retired (of counsel) to a law firm
- Retired Partner of a law firm, now engaged as an individual in an international and national arbitration practice
- "Judge of (…) Claims Tribunal, (…), as well as member, (…) Chambers, (….), and Special Counsel"

Other National Comments under "Other"

- "Engineer dealing with prevention and resolution of disputes and acting as an independent with a partner in a private entity for sharing the costs"
- "I was civil servant of (African) State till (date). I consult in arbitration for a (…) Law Firm"
- "Individual practice as a law firm supported by a small legal and administrative staff"
- Chairman of an International Arbitration Institution
- International Arbitrator
- Former Judge/Professor now arbitrator
- Fulltime international arbitrator
- Arbitrator in international commercial arbitration
- Self-employed working from home
- Self-employed member of the English bar
- Also a part time professor of commercial arbitration and of civil procedure.
- "+ Arbitrator and 18 years as practicing attorney in (European Country)"
- "Now retired from two previous employments, I now concentrate on arbitration"
- "I have been a full time Professor of Law in (…) for over 35 years. Before emigrating in (….) I articled and practiced in a major Middle East law firm for (...) years. I have always been in some personal private practice in parallel to my academic activity. I am a new full time Attorney in a middle size law firm in (…) since yesterday!"

III. *Years involved in international commercial arbitration*

As a group, the respondents have extensive experience in international commercial arbitration. Ninety percent of the Americans responding had over 10 years of experience in international commercial arbitration and fully 50 percent of the Americans responding had greater than 20 years experience in international commercial arbitration. Ninety-three percent of the Other Nationals responding had over 10 years experience in international commercial arbitration with 66.7 percent having over 20 years experience in international commercial arbitration. Some of the respondents added comments which are noted below Table 4.

Table 4 - Years of Experience in International Commercial Arbitration

Number of yrs.	U.S.	Other Nationals	Total
1-5 years	0	0	0
6-10 years	2	3	5
11-15 years	4	4	8
16-20 years	4	8*	12*
Greater than 20 years	10	30*	40*
Total	20	45*	65*

* Adds up to more than 64 because one person noted "16-20 years" in international commercial arbitration and "Greater than 20 years" in domestic arbitration in a Middle-Eastern Country

Source: International Commercial Arbitration Survey

U.S. National Comments:

- "mostly IP law (litigation and advisory work) some arbitration (ICC, WIPO domain name)"

Other Nationals Comments

- "5 years as judge or arbitrator and 10 as counsel for a party"
- "10 years at (international arbitration institution) as (job title), 2 years as Staff Attorney at (law firm)"
- "Greater than 20 years (in domestic arbitration (in Middle Eastern country))"
- "Over time my practice has evolved from complex, commercial litigation to more international commercial arbitration – both as an arbitrator and as a counsel"
- "My involvement started as a partner in a law firm, acting for clients in both UK and international arbitrations and now continues as an arbitrator"
- "Advocate, arbitrator, judge, full time arbitrator"
- "I have founded the (Arbitration Institution) in (date) and acted as its Legal Counsel for 15 years. I had also an extensive experience in teaching international arbitration to practitioners."

IV. *Number of international commercial arbitrations interventions*

In the next section we attempted to get a sense of the number and type of international commercial arbitration interventions that made up the experience of the survey participants. An arbitration intervention is defined as one intervention by one person in one arbitration in some manner. Due to the manner in which participants responded it was only possible to present a minimum number of interventions. While there is some risk of overlap in the counting, it is likely that a significantly higher numbers of interventions have actually been undertaken by these individuals.

As is noted in Table 5 below, as a group these persons had at least 10,781 international commercial arbitration interventions in their experience. One way of thinking of this is that in its first 75 years the ICC International Court of Arbitration had approximately 10 000 cases. If each of those cases is considered as an intervention, then this group has the equivalent of the first 75 years of ICC experience in international commercial arbitration from the founding of the Court in 1923 through to the introduction of the revised ICC Rules of Arbitration in 1998.

Of course, that figure may overstate the actual number of years due to the acceleration in the number of international commercial arbitrations over the past 20 years. Therefore, another way of thinking of these figures is to note an institution like the ICC has approximately 500 cases in a given year's docket. Using that bench mark, the persons in this study have the equivalent of five ICC docket years of experience as arbitrator, a bit over three ICC docket years as Counsel for a party, about 2/5 of an ICC docket year as expert, about 4/5 of an ICC docket year as judge, and about twelve ICC docket years of other experience for a total of at least twenty-two ICC docket years.

The average number of interventions for the total group is 170 international commercial arbitration interventions/person (10871/64) with the figure for the Americans being 57.6 international commercial arbitration interventions/person (1152/20) and for the Other Nationals 220.9 international commercial arbitration interventions/person (9719/44). Even if the 5000 cases at one arbitration institution are excluded the numbers for the Other Nationals average at 107.2 international commercial arbitration interventions/person (4719/44). Thus of the two groups, the Other Nationals present nearly twice the arbitral experience measured in interventions as the average American. This differential might be explained by two developments. First, as noted in Table 4, two-thirds of the Other Nationals had over 20 years of experience in international commercial arbitration while half of the Americans had over 20 years experience. The Other National arbitral experience may be significantly longer than that of the Americans. Alternatively, the legal cultures of the Other Nationals may as a whole have a greater experience in international commercial arbitration.

Table 5 - Number of international commercial arbitration interventions

Type of Intervention	**U.S.**	**Other Nationals**	**Total**
As Arbitrator	At least 434	At least 2130	At least 2564
As Counsel for a Party	At least 564	At least 1127	At least 1691
As an Expert	At least 27	At least 190	At least 217
As a Judge	At least 106	At least 329	At least 435
In any other capacity	At least 21	At least 5943*	At least 5984*
Total Interventions	At least 1152	At least 9719	At least 10871

* Includes 5000 at one arbitral institution

Source: International Commercial Arbitration Survey

Several of the participants in the survey made comments which are presented below to give some texture to these numbers.

U.S. National Comments

- "Chairman or co-arbitrator * Judge at Iran-U.S. Claims Tribunal**"
- "as other 'hundred in supervisory capacity at (arbitral institution)'"
- "as other (arbitral institution) 2-4 Ct. Secretariat-clerk"
- "My focus is nearly exclusively to engage in academic commentary"
- "In other" (As a drafter of international commercial arbitration agreements)
- "Arbitrator for Claims Resolution Tribunal for Dormant Accounts in Switzerland (based in Zurich) and International Commission on Holocaust Era Insurance Claims (based in London), which were organized by Paul Volcker (CRT) and Lawrence Eagleburger (ICHEIC) to address, respectively, claims to dormant bank accounts and insurance policies by victims of Nazi persecution and their heirs. For the CRT, I was involved in several hundred claims. For ICHEIC, which is just beginning, I have been involved in a dozen"
- "In judges (of (….) Claims Tribunal)"Numbers are approximations"

Other Nationals

- "counsel" as technical counsel

- "Other - Supervision with the Counsel of over 100 arbitration cases submitted to (arbitral institution)"
- "(1) member of the (arbitral institution) Arbitral Annulment Ad Hoc Committee, President of (arbitral institution) Arbitral Tribunals, and 4 cases of Inter-states arbitration of boundary disputes"
- Other Vice-Chairman of (arbitral institution)
- As expert, several hundreds as employee in an arbitration institution
- "As other 40 as Administrator"
- "As other – as a practitioner I represented clients who were seeking the recognition and enforcement of foreign arbitral awards rendered outside (Latin American country)"
- " a few as counsel and Judge for five years i/c Arbitration list"
- "Other: 357 as secretary to the arbitration committee of the (arbitral institutions). The secretary in stock and commodity arbitration proceedings undertakes most of the tasks which are normally reserved to the presiding arbitration, i.e. to draft the procedural orders, or conduct the hearings and to draft the arbitral awards"
- "Several hundreds as judge" and 5000 as lawyer working for an arbitration institution
- "These figures apply only to last 10 years"

V. *In your time participating in international commercial arbitration, have you ever participated with a member of an American minority group (i.e. African-American, Middle-Eastern or Arab American, Asian American (including South Asia), Hispanic American or Native American) serving in any capacity in any of the international commercial arbitrations?*

Table 6 is a paradox. Over 80 percent of the U.S. Nationals state they have participated with a U.S. minority in an international commercial arbitration. At the same time over two-thirds of the Other Nationals state that they have not. Part of the answer may come from the reasons provided in Question VI below.

From the review of the comments under Question V and Question VI, there appear to be several reasons for the lack of presence of U.S. minorities in international commercial arbitration. I divide those reasons into those that might be considered objective – that is affecting all Americans in a similar manner and those that might be considered more subjective or peculiar to the U.S. minority predicament.

Some reasons that might be considered more objective as they would be expected to affect the presence of U.S. nationals as a group would be:

- Cases where common law other than U.S. law is being applied. In those situations, there might be a natural preference in the Commonwealth to seek English law specialists over U.S. law specialists.
- Cases where something other than common law is the applicable law. American lawyers trained in Louisiana or with degrees from civil or other law universities appear to be very rare and thus Americans are less likely to be selected for these types of cases.
- Cases where there is no U.S. party so that it is unlikely that a U.S. lawyer or arbitrator might be named. Of course U.S. arbitrators could be named as the Chair or Sole Arbitrator but if there is a non-U.S. common law, the tendency might be to select in those cases for someone from a Commonwealth background.
- Cases where the place of arbitration is not in the U.S.

In addition to these possibly objective criteria the comments also present other reasons that appear more subjective:

- Americans in international commercial arbitration (and arbitration more generally) constitute a closed club made up of a small group in the eastern part of the United States.
- U.S. minorities are not based outside of the United States.
- Lack of selection of U.S. minorities by international arbitral institutions.
- Differential U.S. minority presence depending on their ancestry though this does not appear to work for African-Americans or work against non-minority Americans.
- Party lack of selection or law firm lack of promotion of U.S. minorities for international commercial arbitration.
- Lack of gravitation of U.S. minorities to the international commercial arbitration practice.
- U.S. minorities having to be better than their majority counterparts.
- Education
- Unknown reasons.

Table 6. Have you ever participated with a U.S. Minority Group Person in an international commercial arbitration?

Had U.S. Minority Participant	U.S.	Other Nationals	Total
Yes	17*	14**	31
No	4*	29**	33
Total	21*	43**	64

* includes a person who answered both yes and no.
** excludes a person who said they had no recollection.

Source: International Commercial Arbitration Survey

U.S. National Comments

- "Minority was in-house counsel for party. Minority was co-arbitrator."
- "Most of the arbitrations I have been involved in concerned parties/legal teams/tribunals made up of persons based outside the United States. While I have had a number of counsel and arbitrators of African Middle Eastern Asian and Hispanic background they were not citizens of the U.S. and accordingly not members of American minority groups."
- "I have worked more frequently with non-U.S. Africans (Kenyans and Nigerians), Arabs, Asians and Hispanics."
- "I should note that in international arbitration I have participated with Africans, Arabs and Asians in various capacities."
- "I am a Middle-Eastern American (Turkey) and Hispanic American."
- "Includes primarily giving advice to former students, basically Hispanic-LLM students previously."
- "Sorry to answer both yes and no on this question, but (i) there have been many Latin American participants in my arbitrations, and I believe that a few have also been U.S. citizens, and (ii) there have been numerous E. Asian and S. Asian participants in my arbitrations, but I am uncertain that any has been a U.S. citizen. No African Americans to my recollection."

Other Nationals Comments:

- "Though I have acted as arbitrator in international arbitrations involving U.S. American companies, I have never met a member of an American minority group of the type described above – neither as a (co-) arbitrator

nor as a counsel. I assume that this deplorable fact is due (sic) the other fact that members of such minority groups have not yet, in sufficient numbers, arrived in the upper levels neither (sic) of law (sic) international law firms nor of companies engaged in international traffic. I hope that this will change very soon. In my view, it is a question of education."

- "I have had Asian American counsel appear before me once, Hispanic American counsel 3 or 4 times. Other than dealing with you, Ben, as an ICC Secretariat case manager, I have not encountered any African-Americans in actual cases."
- "Do not think so."
- "I had a case administered by the ICC where Ben Davis was the ICC counsel in charge in Paris."
- "I have acted as arbitrator with arbitrators, including former Chief Justices, from India, and from the Middle East (Jordan and Kuwait)."
- "No recollection"
- "I have no comments. My American colleague was professional and good."
- "During my employment for an arbitration institution, a colleague of mine was an African-American."
- "No, but I might be considered a "Middle-Eastern or Arab-Canadian"
- "Very few of my arbitrations are in U.S. or U.S. related."

VI. *Comments of those who had no experience with American minorities in international commercial arbitration*

As you have answered NO to question V, I would be grateful if you would provide a note below about the reasons you think members of American minority groups were not present in international commercial arbitration as experienced by you.

U.S. Nationals comments:

- "In my experience, there are very few lawyers belonging to American minority groups who practice in international law, and more particularly arbitration, outside the United States"
- "Not selected by counsel of the arbitral institutions"
- "The reasons are doubtless as broad as those for under-representation in the highest levels of the commercial world generally"
- "Very difficult to answer. I have found that African Americans do not gravitate toward the international arbitration practice within the law firm

world. Logically, Hispanic-Americans should gravitate to the practice, because of the utility of Spanish. Some have."

Other Nationals Comments:

- "Most of the arbitrators I have been involved with dealt with civil law. Cases where an American party was involved were few."
- "In spite of the fact that American firms or American Law Offices were involved in some of the cases experienced by my (sic), I never got the opportunity to meet members of American minority groups. Why? I don't know."
- "In my case, one reason is in all likelihood that in many of my arbitrations no American party has been involved."
- "I have the impression that members of American minority groups are hardly participating in transnational business transactions."
- "I see no reason(s). Please see general comments on Arab Middle East arbitrators and Answer to Question XIII"
- You may, if you wish, cite Annex No 1 which presents *some* similarities with the status of American minority groups."
- "Tunisia uses civil law and I am more fluent in civil law (Arabic – French-Swiss – Belgium and African systems)."
- "Practicing in France, no opportunity."
- "I do not know."
- "In none of the international commercial arbitrations in which I participated was an American… involved as counsel, judge, arbitrator, expert or other capacity."
- "I suppose that being "minorities," by definition there would be a minority of cases in which they would be involved and that I did not have the opportunity to serve in such cases except once as sole arbitrator in an ad hoc arbitration involving an American from African origin whose company (press, cosmetics…) catered to the black community. I was selected by joint agreement of the parties/counsel."
- "Because I work in a different geographic area."
- "Obviously, because they are not appointed by the parties, at least in the cases in which I have been involved. My answer may not be representative as I have had: - no domestic arbitration in the U.S.; - few cases involving U.S. corporations as I am mostly nominated by the European and African parties."
- "U.S. arbitrators come from a restricted pool, drawn mainly from partners in large eastern coast law firms. Few minorities there, and few women either."

- " U.K., C/Wealth and Europe Centred"
- "There are no special reasons for the non-participation of American minority groups in the international commercial arbitration cases in which I have participated."
- "I have only been involved in four or five arbitrations taking place in the U.S."
- "I do not know. I have participated in international arbitration sometimes without any American."
- "My experience as an arbitrator is largely focused on disputes between parties from Europe, Middle East and Africa. I have also been involved in proceedings with parties coming from India, Japan, Thailand and in a few cases from America (for instance companies incorporated in Bahamas). This proportion is most probably due to the network I have built up along the years."
- "I. C. arbitration is a closed club not easy to become a member of."
- "The parties choose counsel; parties must prefer other counsel than members of American minority groups. Or U.S. law firms do not promote American minority members to their clients. Arbitral institutions choose arbitrators; I think American minority groups are not sufficiently known to the institutions. A hen and egg problem, not related to ethnics."
- "I have to confess that I have no specific recollection of any non-WASP Americans participating in any of my arbitrations. However, I deal with so many races and nationalities that I get a little colour blind and never look out for any non-WASP Americans. Furthermore, I have relatively few cases where American law firms from the mainland (as opposed to offshore branches) have been involved. However, it is probably fair to say that non-WASP Americans do not have a high profile in Asian arbitrations."
- "In my activity, the focus has been on central and eastern Europe. Thus, only a limited number of U.S. citizens are acting as arbitrators or as counsel to parties."
- "Ben, I have no record of the American minority groups which participated in the arbitration cases we administered at the ICC (I suppose there were some at least!). I therefore suggest that you fill in questions VII to XI according to your recollection of facts, as we should both of us provide the same answers."
- "I have had very few international arbitrations involving the U.S. and/or U.S. persons. Only two arbitrations involved the U.S. in 1976 and 1978."
- "The focus of my arbitration practice is European."
- "As stated very few of my arbitrations have been in U.S. or have involved a US party."

- "I don't know"
- "I have no idea"
- "I don't really know but from my personal experience I think that members of a Minority group have to be "still better" than members of the majority to overcome the natural resistance!"
- "No American parties, no American arbitrators."
- "Very likely because the cases I was involved [in] as arbitrator were mostly relating to contracts to be performed in Europe or with parties of European nationalities."

VII. *Those who answered yes to experience with U.S. minorities in international commercial arbitration*

For those who answered yes to having had an experience with a U.S. minority in an international commercial arbitration, we then attempted to explore the types of roles those minorities played in those arbitrations. Questions VII through XI attempt to explore that U.S. minority participation.

a. Participation by U.S. minority group

Participation as arbitrators: As you have answered YES to question V, please indicate below how many persons from each American minority group(s) you remember participated as arbitrator during your experience in international commercial arbitration.

The *total interventions* by all U.S. minorities as arbitrators in international commercial arbitration in this survey is equivalent to about one-third of the average intervention by *one member* of the total group of 64 being surveyed (65 U.S. minority interventions/170 total group interventions).

The *total interventions* by all U.S. minorities as arbitrators in international commercial arbitration in this survey is equivalent to about the average intervention by *one American member* of the total group of 64 being surveyed (65 U.S. minority interventions/57.6 American sub-group interventions).

The *total interventions* by all U.S. minorities as arbitrators in international commercial arbitration in this survey is equivalent to about the average intervention by *one quarter of one Other National member* of the total group of 64 being surveyed (65 U.S. minority interventions/220.9 Other National sub-group interventions).

Even if we were to include the arbitral experience of the Middle-Eastern American/Hispanic American (30), the Native-American (132) and two other U.S. minorities discovered in this study (12) with the U.S. minority interventions as counsel (85) and expert (16) (a total of 275 more interventions bringing the total

to 340), the total interventions of U.S. Minorities rises to about 2 average members of the 64 members of the total group, 6 American sub-group members and 1.5 members of the Other National subgroup participation. Nearly 40 percent of that presence is the extraordinary experience of one Native-American (132/340 or 38.8 percent) In short, the data shows that American minorities are essentially non-existent in international commercial arbitration as arbitrators (or otherwise). Even assuming there is no double counting, the entire picture as a group (African-American, Middle-Eastern American, Hispanic-American, and Native-American together) is apocryphal. Further breakdown into which role was played (Chair, Co-arbitrator or Sole Arbitrator) appeared to be meaningless.

Table 7. U.S. Minority group interventions as arbitrators in international commercial arbitration

Minority Groups	**U.S.**	**Other Nationals**	**Total interventions by each minority group**
African-American	8	4	12
Middle-Eastern- or Arab-American	8	0	8
Asian-American (Including South Asia)	12	At least 19	At least 31
Hispanic-American	12	2	14
Native-Americans	0	0	0
Total U.S. minority Interventions as arbitrator	40	At least 25	At least 65

Source: International Commercial Arbitration Survey

U.S. National comments

- "I have participated in many cases with Africans, Arabs, Asians and Hispanics as arbitrators, but not very many with Americans of any stripe."
- "In one Spanish language arbitration, the party arbitrators were from Puerto Rico and Colombia and the Chair was from Spain. I suppose the Puerto Rican arbitrator is considered an Hispanic-American and the other two are Hispanic but not American."
- "Ben: I am uncertain of whether I ever encountered a Native American for the simple reason that there are not always identifying signs such as looks

or names. I myself am part Lenape (a tribe from New Jersey, part of whom were sent to Ohio and Oklahoma), but do not see any reason to advertise this – no desire to open a casino."

- "The African-American is a judge of the Iran-United States Claims Tribunal since 2001 (and female)"
- "I am not sure I should have answered yes to V by this stage of the questionnaire. I am not even certain whether I should answer the questionnaire at all because my involvement has been quite deliberately academic. I have, therefore, been at the fringe of the practice in the area and confined myself to academic writing. If you ask me whether I believe there is a presence of American minority groups in ICA, I believe there clearly is not because it is both commercial & international and a boutique practice. Should there be greater participation – of course, but I found it difficult to generate among students."
- "The participation of the groups noted above has been as counsel or as staff of an arbitral institution. With respect to Africans, I have sat with an African arbitrator and Asian arbitrator. On many occasions non-American members of the groups noted above have appeared before me as counsel."
- "1 partner of firm is of Haitian descent and has been involved in a number of arbitrations as chair or coarbitrator."

Other Nationals Comments

- "No one participated as arbitrator."
- "Sorry, I do not recall any number"
- "Can't remember their position."

VIII. *Manner of designation of American minority arbitrator*

As you have answered YES to question V, please indicate below how the American minority group(s) members was designated as an arbitrator in the international commercial arbitrations you have experienced.

The manner of appointment survey data (see Table 8) appear to show that in the extremely unlikely case of an appointment of a U.S. minority as an arbitrator, the principal means by which U.S. minorities become arbitrators in international commercial arbitration is through party appointments as a coarbitrator. Agreement on U.S. minorities as chair or sole arbitrator is even more remote than

the extreme few cases noted of U.S. minorities as coarbitrators. Appointment by arbitral institutions or other appointing authorities are only marginally better.

Table 8 – Manner of appointment of U.S. Minority as arbitrator

Manner of appointment	**U.S.**	**Other National**	**Total by type of intervention**
Party appointment	10	5	15
Joint nomination of parties or the coarbitrators of a Chair of the Arbitral Tribunal	1	0	1
Joint nominations as Sole Arbitrator	1	0	1
Arbitral Institution appointment	1	3	4
Other appointing authority appointment	0	4	4
Other	1	0	1
Total minority group interventions	14	12	26

Source: International Commercial Arbitration Survey

U.S. National Comments

"Do not know."

Other Nationals Comments

"Do not recall."

IX. *U.S. Minority participation as counsel of parties*

As you have answered YES to question V, please indicate below how many persons from each American minority group(s) you remember participated as counsel of a party during your experience in international commercial arbitration.

As has been noted above, Table 9 suggests that the total participation by U.S. minority group members as counsel appears to be a pitifully low number, at or equivalent to the intervention of less than one survey group member.

Table 9 - U.S. Minority participation as counsel of parties

	U.S.	**Other Nationals**	**Total interventions as counsel by each minority group**
African- American	17	7	24
Middle-Eastern or Arab-American	9	3	12
Asian-American including South Asian	16	11	27
Hispanic-American	17	5	22
Native-American	0	0	0
Total U.S. minority interventions	59	26	85

Source: International Commercial Arbitration Survey

U.S. Nationals

"Excluding me, I have worked with one Asian-American associate on a number of arbitrations and one African-American associate on one very lengthy arbitration. I don't remember any minority attorneys for any other party."

Other Nationals Comments:

"This is only what I remember. When I am seating (sic) in an arbitral tribunal I am rarely informed of the nationality of all the members of the legal teams representing the parties and even less of their belonging to an American minority group."

X. *Role of U.S. minority participating as counsel of parties*

As you have answered YES to question V, please indicate below the role played by the member(s) of the American minority group(s) you remember participated as counsel of a party during your experience in international commercial arbitration. (check all applicable categories)

Table 10 suggests that 2/3 to 3 /4 of the U.S. minorities that are acting as counsel are not acting as lead counsel but are rather part of the arbitration team.

Table 10 – Role of U.S. Minority Counsel

	U.S.	**Other Nationals**	**Total interventions by type of intervention**
Lead Counsel	9	8	17
Member of the Arbitration Team	27	14	41
Trainee	0	2	2
Other	0	0	0
Total interventions by nationality of response	36	24	60

Source: International Commercial Arbitration Survey

Other Nationals Comments:

"Member of the team handling the arbitration."

XI. *U.S. Minority participation as experts*

As you have answered YES to question V, please indicate below how many persons from each American minority group(s) you remember participated as expert during your experience in international commercial arbitration.

The data suggest that U.S. minorities are extremely rarely chosen as experts.

Table 10 – U.S. Minority Group Participation as Experts

	U.S.	**Other Nationals**	**Total interventions by each minority group**
African-American	2	0	2
Middle-Eastern or Arab American	3	0	3
Asian-American (including South Asia)	6	1	7
Hispanic-American	4	0	4
Native-American	0	0	0
Total interventions by minorities	15	1	16

Source: International Commercial Arbitration Survey

U.S. National Comments:

"I don't recall ever having been involved in a case with an American expert, except in one instance (two experts, both white males)."

"In one Spanish language arbitration, the expert was from Spain. But he was not American."

Other nationals:

"No one participated as expert."

"All these groups were involved in arbitration procedures but I can't give a number."

XII. *U.S. minority participation as experts*

As you have answered YES to question V, please specify below indicating how the person(s) from each American minority group(s) you remember participated as expert during your experience in international commercial arbitration were appointed

The lack of data makes the analysis of this question meaningless.

Comments:

"No one participated as expert."

XIII. *Reasons U.S. minorities present*

As you have answered YES to question V, I would be grateful if you would provide a note below about the reasons you think members of American minority groups are present in international commercial arbitration as experienced by you.

Below are the comments received from survey participants as to why U.S. minorities are present in international commercial arbitration as they experience. The survey data suggesting that the numbers are extremely low provide an opportunity for a few further comments.

- The presence of Middle-Eastern Americans, Asian-Americans, and Hispanic-Americans appears directly related to cases with parties from regions of the world of their ancestry
- The presence of African-Americans has less of a correlation with geography
- White Americans do not appear to be so geographically constrained.
- Native-Americans essentially do not exist in international commercial arbitration. Only one - one with extraordinary experience - has been noted
- The numbers are pitiful

U.S. Nationals Comments:

"All of the arbitrations related to China. Perhaps the appointing party (in the case of the arbitrator) or the client (in the case of counsel) felt that that individual had the necessary language, cultural and other China-specific understanding. I do not know that for certain as I was the arbitrator and not on the legal team, but this would be logical."

"Two reasons. First, the vast majority of the cases I get involved in take place in Europe and involve European or other foreign arbitrators, counsel and experts. Second, to the extent Americans are involved, there is simply a disproportionate (on the low side) number of minority lawyers in the firms that typically handle international arbitrations."

"The lead counsel was a prominent international lawyer with a large law firm in New York; hence it was not surprising that his practice would involve international arbitration. The other, younger lawyers were a reflection of a certain degree of diversity within the ranks of large law firm practices in the U.S."

"This small participation is the result of the fact that the large number of international arbitrations is a fairly recent condition and the fact that many, certainly most, of the arbitrators, counsel etc are a generation older than the many recent law graduates of the minority groups you note. Over time, I would anticipate a larger participation of such groups as they mature through their law practices and other careers."

"In a large firm such as mine, minority lawyers are assigned to international commercial arbitrations the same way they are assigned to any other litigation. I would think (though I don't have statistics on this) that minority lawyers are equally represented on international arbitration matters as on other types of litigation matters."

"Leading international lawyers, who served as Legal Adviser of the Department of State."

"Ben: Not sure how to answer. Why should minorities NOT be present? The reason they are underrepresented probably relates to our history. Some things change slowly. But on this matter you are certainly better qualified than I am to answer."

"While I answered yes, the figures are not impressive. In all cases the persons were Hispanic-Americans and the cases had a Latin American connection. Spanish fluency may have been a factor. Thus, I think there remains a perception that international commercial arbitration is a white middle-aged male world. But this may change. I certainly have a much more diverse body in the relevant courses than I used to."

"Hispanic-Americans on counsel teams largely because of increasing need for Spanish language facility in growing number of arbitrations involving Latin American parties. Same for Hispanic-American arbitrators. Otherwise, and more broadly, growing reflection of diversity in American body politic and professions"

"By operation of the majority culture in Latin American arbitrations and for reasons of haphazard personal professional development in the Asian case. There are few, if any, Black participants – I agree and few took my course in it. Maybe you might investigate course registration and ask why little to no enrollment. The absence or exclusion may begin before practice."

"Professional expertise; client choice; arbitral experience."

Other Nationals comments:

"In my opinion the member of American minority groups was present in the arbitration because the person in question (i) returned to his Middle Eastern home country and (ii) was experienced in arbitration matters."

"I believe the Hispanic-American and Asian American persons were involved, in part, because of the ethnic origin and identification with their client. *i.e.,* the Asian American counsel acted for a party from Taiwan. The Hispanic American

counsel and arbitrators were retained or appointed by Argentine, Mexican or Peruvian parties."

"Part of their investment portfolio, they have business interests in Asia"

"The American Arbitrators that I have seen in my international commercial arbitrations were all Caucasian males (many Jewish) and party-appointed. All American counsel that I have seen were Caucasian males, with one exception: I have seen a Chinese-American woman co-counsel. I believe that American law firms make an effort to hire competent lawyers from minority groups. For the nominations of arbitrators, I do not perceive much of an effort, except in arbitral institutions around the world, when they appoint. I have however not seen any institution-appointed American arbitrators."

"Asian Americans appear in Asian related disputes because they may have language skills or cultural sensitivity."

"I would think that the main reason is that they have the required level of expertise to act in an international high powered arbitration process."

"Because they are hired by law firm of some size and, so or otherwise, enjoy the trust of a party."

"I have no idea why American minorities are not more represented in international commercial arbitration. My guess is that it has nothing to do with international arbitration as such but with their representation within American law firms involved in international legal matters. However I am not an expert on this subject matter. Maybe their social environment does not facilitate their joining universities well-connected with such law firms."

"I do not know enough about the American educational system to be in a position to comment as to the reasons why American minority groups are so few to be participating in arbitration matters. I would also observe that unfortunately, to my knowledge, there are very few French lawyers of African or Caribbean origin with a prominent standing in arbitration, and I am unsure that there may be any who have been granted tenure as a law professor by a French university (aggregation de droit privé)."

V. ANALYSIS

A. *A Conclusion, a Surprise and an Epiphany*

The survey results lead to at least one inescapable conclusion, a second surprising finding, and a third troubling epiphany.

First, the inescapable conclusion is that the forces at work, whether accurately captured in the seven currents described in Section I (the U.S. current, the foreign-based minority current, the human capital current, the cooptation current, the cultural diversity current, the changing international commercial arbitration current, and the lifestyle current) together have led to a dismal situation where the

number of U.S. minorities in international commercial arbitration in all roles is a pittance. Fifty years after *Brown v. Board of Education*, international commercial arbitration practice is an extreme forward location on the color line. As contrasted with other arenas in the law and or in society as a whole in which minorities have made progress, the data suggest that U.S. minorities have made glacially slow progress in international commercial arbitration.

Second, the surprising finding is that among the pittance I have come across three exceptions. One is an American international commercial arbitration practitioner who is part-Native American. A second is an American international commercial arbitration practitioner who is Middle-Eastern-American and Hispanic-American. A third is an international commercial arbitration practitioner who is Asian-American. These three appear to have built careers with significant international commercial arbitration practice. As for African-Americans, a recent appointment to the Iran-U.S. Claims Tribunal is a most likely candidate to be the fourth representative.

Third, the troubling epiphany was that several of the non-American respondents referred to me as an African-American in international commercial arbitration. As I read the data and the responses I saw that my direct responsibility for 1000 international commercial arbitration cases and indirect work with another 4000 (as corroborated by one of these non-Americans) at the center of international commercial arbitration was an incredibly extensive international commercial arbitration experience with regard to geography, national laws, procedure, nationalities, types of disputes, and any other measure. As these persons referred to that identical experience as part of their international commercial arbitration experience and those number of cases were so far beyond the numbers presented by others, I started to wonder whether in fact, at least as of 2000, I was the one African-American at the front edge with what could be termed significant international commercial arbitration experience. And thinking of my experiences in that light made me wonder if my ability to suggest the currents at work and even see and do this study was to be my gift to international commercial arbitration and, in particular, to all the people of good will I had met in that rich experience. Further, if I was that one, then I felt an enormous burden fall on my shoulders as my experience at a forward point might be emblematic of the crosscurrents affecting other minorities – and particularly African-Americans – coming to the field now or in the future. Thus, I thought I was constrained to now bear the burden of plumbing my own soul in uncomfortable ways as well as probing those of my colleagues to help those reading this article reflect on the international commercial arbitration color line from an American perspective.

And these three points have led me to suggest the following analyses.

B. *The Currents Analysis*

1. *Nuancing the Seven Currents*

As noted above the seven currents that appear to me to be at work form a rich tableau. The sections below analyze those currents in light of the data provided and are informed by my personal experience.

At the same time, the emergence of U.S. law firms as significant players and a threat to more atomized firms in foreign countries and, in particular, international commercial arbitration, is a well-documented phenomenon.[25] So the overseas office is a strategic location.

a. U.S. – Foreign-based U.S. minority current intersection

For the Foreign-based U.S. minority current, even as of today, I am not aware of an American minority who is working in international commercial arbitration in a foreign office of an American law firm. I am aware of one who is working in the Paris office of a French law firm and who is beginning to have a certain amount of international commercial arbitration work. I am aware of an American minority working as a judge for the Iran-U.S. Claims Tribunal. But, otherwise, no one appears to have made it overseas in international commercial arbitration, if at all.[26]

What this suggests to me is that if I had followed the advice during the first three years I was overseas and gone to New York and worked for two or three years in one of the prestigious New York law firms with the hope of being sent to Paris after three years, the chances that I would in fact have been sent to Paris were essentially nil. No U.S. minority has been sent to the Paris office of a U.S. law firm who is working in international commercial arbitration or – to my knowledge – at all. The U.S. current, frequently described by other commentators,[27] is such that the selection of a U.S. minority to go abroad to Paris, France, was impossibly remote.

Even if I had been successful and made partner at one of those firms, I would most likely never have been able to get in a rotation to have me come to Paris except, possibly, for vacation. Moreover, assuming an eight-year track to partner, I would have been hitting the partnership-level decision in 1991, just when the French merging of the legal professions was occurring. Thus, if I had managed to successfully reach the partnership decision point, my chances of being able to practice in France as an *avocat* were reduced as I would not have had the requisite

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[25] *See* DEALING IN VIRTUE, *supra* note 18.

[26] Anecdotal evidence suggests one Asian-American in Hong Kong was in that office of a U.S. law firm for a while and has now moved on to open his own office in New York (T.K. Chang).

[27] See notes 6 and 7 *supra*.

years of internship and experience to seek admission in the post-1991 environment. I would not have been grandfathered as were those already in Paris. Moreover, this would have been just at the time when my responsibility for bringing in significant business for the firm would rise. My clients would have been used to me being in New York, my workload and teams would have been located there, etc. In short, the intuitive analysis I made three times in 1983, 1984, and 1986 that, if I were to have the international career dream, it was better to stay on in Paris than return to the United States, appears to be confirmed by the data. My 1L Contracts professor, Todd Rakoff, was right and I am forever indebted to him for encouraging all in his class to "go do what we think we want to do." Otherwise, I am certain my dream would have been lost.

Looking at this from another perspective, one of the respondents said that there was a generation lag due to significant numbers of minorities only entering the law since essentially the 1970s and early 1980s. To have sought to come to Paris to work meant that rather than rise with this new generation of minority lawyers and arrive at a point of being in Paris 20 years hence (that is, at the point I am at today as I sit in Toledo), I was stepping onto the other operative timeline – that of my non-minority American counterparts, some of whom were able to and continue to make flourishing careers in U.S. and non-U.S. law firms overseas in Paris and around the world. Put another way, there is a time lag between the minority road and the non-minority road to an overseas office – an invisible discontinuity – a color line in the American legal profession for me and possibly any minority seeking to work in international commercial arbitration overseas.

However, notwithstanding that time lag, I *did* work overseas at a significant level in international commercial arbitration and, though I did not work in a French law firm, I did work in a French-based not-for-profit organization that happens to be at the center of international commercial arbitration. In that sense, I confirm the rule that U.S. minorities seeking to work overseas should not expect that if they are in a U.S.-based American law firm they will have an opportunity to go to a foreign office. Thus, the worldwide networks of U.S. law firms are, for the present at least in international commercial arbitration, closed off to U.S. minorities. The U.S. minorities better or more consistent opportunities in international commercial arbitration overseas is to be in the non-American office overseas of a non-American law firm or (as in my case) a non-American local organization. This reality contrasts with the reality for their non-minority colleagues.

This path, however, while the best, is fraught with risks which will be discussed below. The major risk is that once a U.S. minority were to step away from the Wall Street law firm jobs that feed the international commercial arbitration groups in the U.S. offices and foreign offices of U.S. law firms, there would be no turning back. One would have a few years in New York and then take the risk of finding a job in a new country in a new law firm. Provided one

had worked in the international commercial arbitration group in the U.S. office of the U.S. law firm, the leap internationally would be a change of geography but not function. If, however, one had been tracked away from international commercial arbitration in the U.S. office of the U.S. law firm, one would be seeking to change both function and geography – a very high-risk career strategy as one is learning new skills in a new foreign environment.

An American minority in a U.S. office of a U.S. law firm seeking to participate in international commercial arbitration faces several dilemmas. Most law practice being territorial, domestic specialties such as employment or public finance law might be very difficult to market as being attractive specialties for a foreign law firm overseas. Other sectors of the U.S. law firm such as corporate finance, internet and computer law, biotechnology – sectors where the client base was internationalizing–might offer possibilities of having a geographically transposable specialty. Alternatively, a path could be taken where the U.S. minority went from the U.S. office of a U.S. law firm, to the U.S. office of a foreign law firm in the domestic arbitration context, and evolved their position to get to the international commercial arbitration sector in the foreign firm's U.S. domestic office. Overtime, this might translate into an overseas posting in international commercial arbitration.

Some of the risk can be countered it would seem by the U.S. minority getting a second law degree in the university system of the foreign country where they would like to build a career. Subject to local rules on foreigners practicing, this could mean going through pupilage etc to become a barrister or through article clerking to be a solicitor if England were the destination. An English degree might be more fungible in the Commonwealth than an American degree. More broadly, a civil-law degree in French law might expand the reach of the American minority. The second or even third degree permits entrance to the other culture, subject to limits on immigrant lawyers. The minority can overcome the immigrant restriction through adopting the local nationality.

Barring this human capital strategy, lack of access to the international commercial arbitration group in the U.S. office of a U.S. law firm poses a non-negligible hurdle. The evidence appears to say that minorities are not present in the U.S. offices of U.S. international commercial arbitration practices.

Another route that appears possible is through the Office of the Legal Advisor of the U.S. State Department, through appointment to panels of institutions such as NAFTA or the Iran-U.S. Claims Tribunal. It is difficult to see the direction of causality but it is clear that for Americans in U.S. law firms abroad in international commercial arbitration, some of them at the top of the profession have had this type of experience.

All of these structural issues affect U.S. minorities and non-minorities seeking to work in international commercial arbitration in overseas offices. Yet the fact that non-minorities have been seen making that transition in significant numbers,

but no minorities, suggests that the effect is complicated for non-minorities but terminal for minorities.

This discontinuity in 1983 through to today between minorities and non-minorities in international commercial arbitration suggests that I was not supposed to be there. The consistent advice to return to the United States (with what I now know is no real possibility of being sent back to Paris by the U.S. law firm) suggests that a minority dreaming of the overseas career in a U.S. law firm was and is really dreaming a non-minority American dream if one is in international commercial arbitration (and most likely in any area of the law). And that dream in 1983 was simply not realizable. That I nevertheless had this broad experience suggests that I forced the space open enough to give me some of the experiences I would have had in a U.S. law firm's foreign office in international commercial arbitration – working with the non-minority American lawyers from the U.S. and offices abroad in international commercial arbitration, collaborating with them on projects, speaking at conferences before them and others around the world, helping to draft laws of countries, etc, – even though that U.S. law firm foreign office door was shut. I feel that the opening at the ICC International Court of Arbitration was a small hole – a wormhole in space-time we might call it – through which I walked[28] that permitted me to have this experience in the 1986-2000 period that will be more available – if all things hold equal – to other American minorities at a lag of fifteen if not twenty years. The survey data shows that the few minorities that are noted as having some experience in international commercial arbitration are just beginning to come on stream and still in numbers that are a pittance. I am now out the other side of the wormhole thinking back on that experience.

After time overseas, one reason for the difficulties of U.S. minorities with reentry to a U.S. law firm in the U.S. was the problem of the associates in the U.S. office coming up the partnership track. As would be expected, one could feel palpable hostility to this person from the outside. So, from inside one could not go overseas and come back and from outside one could not first go to the overseas office and come back. One might be able to come back to the U.S. if one was on a non-partnership track. The effect is a perfect symmetry for keeping the minority interested in international commercial arbitration and being overseas frustrated and off of the partnership track.

Those part Native-American and Middle-Eastern Hispanic Americans passed in some existential sense (or being "but for minorities")[29] in order to proceed on the white (particularly white male) time track. Their minority status might go unnoticed due to their lack of any characteristic features and, as was noted in the

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[28] Like Tim Allen and his colleagues in the spoof of space exploration movies, *Galaxy Quest*, "Never give up! Never surrender!"

[29] *See* David B. Wilkins, *supra*, note 23 at 1581.

comments, there being little incentive for them to draw this to anyone's attention. Another means to get on to the white time track would be to so identify with the majority (drawing on common immigrant pasts, etc as contrasted with that of minorities and African-Americans in particular)[30] that the minority is perceived less as a "minority as other" and more like the "minority as assimilator"[31].

For the U.S. current, the peculiarities of being a minority in the U.S. located office of an American or non-American law firm is the subject of some literature, as is the literature about minorities or the lack thereof in the legal academy and the judiciary.[32] I have described above the difficulty of moving function and geography to get abroad that the U.S. minority faces. In fact the position of U.S. minorities in U.S. law firms shows the significance of this hurdle.[33]

I wish to add to that discussion an additional theme which appears to reflect back from the foreign experience I had to the U.S. experience. One subgroup of the people that I have contacted are persons who are non-Americans working in international commercial arbitration in American law firm offices in the U.S. or overseas. In the cross-border arena, these lawyers who are members of foreign bars in their respective countries of origin as well as the local bar in their place of work (which may or may not be the same) bring expertise concerning a foreign culture and contacts (or at least an ability to dialogue) with the dominant players of their foreign culture, and possibly third cultures, as assets to U.S. offices. Though some may count as minorities for statistical purposes,[34] they appear to be viewed in a middle world between minority and non-minority that is the special world of the foreigner/immigrant lawyer. By exploiting opportunities, they have managed to build credibility and careers as international commercial arbitration practitioners outside of their home countries. I have known persons in this

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[30] I have seen this done.

[31] David B. Wilkins, *supra* note 23 at 1586.

[32] *Id*. *See* notes 6 and 7.

[33] Minority attorneys composed 12.9 percent of all associates and 4.1 percent of all partners in the responding firms for the annual survey. Information on what portion of them were in international commercial arbitration is not available. *The Diversity Scorecard*, MINORITY L. J. (Summer 2003).

[34] David B. Wilkins, *supra* note 23 at 1581. As noted in that article, no direct census exists of the number of U.S.-born (or at least U.S. citizen minorities as some of us were born abroad too or adopted abroad by U.S. parents) minorities working in foreign offices of U.S. firms. Nor am I aware of a census of U.S.-born minorities in foreign offices of non-U.S. law firms (whether of the local nationality or a third nationality). The evidence from my survey is suggesting that, at least in international commercial arbitration, U.S. minorities (certainly African-American and Native-American and very likely for Hispanic-American, Asian-American and Middle-Eastern American) have no presence in the foreign offices of U.S. firms but do have a presence in the foreign office of non-U.S. firms.

position who act as special counsel or counsel in U.S. law firms, becoming partner it appears when they have built a sufficient practice to be eligible to participate in the partner draw. In overseas offices of non-U.S. firms, sometimes after having come from another overseas office of a U.S. firm, I have seen some of these persons become partners or create firms with locals – even acquiring a second nationality along the way to better integrate into the local law culture. This group of international commercial arbitration nomads is a special subcategory that merits further analysis as they appear to have a rich experience of being both of a local country and not – and still making their way. The essence of this is having the geographically transposable expertise in international commercial arbitration.

In the U.S. current, in the Darwinian struggle that occurs for who will be the international commercial arbitration practitioners, as regards a minority American lawyer, these foreign lawyers distinctive skills give them one type of competitive advantage in getting to the foreign office and possibly being assigned to the international arbitration group. This advantage is subject to their ability to quickly adapt to the Anglo-Saxon arbitration and litigation environment. One way to do this is through the LL.M and it has been noted that some of the participants in this study had procured U.S. LL.M's early in their careers (this will be discussed more in the human capital current).

Moving away from the U.S. current, the foreign-based American minority appears to have been less the subject of scholarly scrutiny. The reader will remember that my primary conclusion from the data is that the chances for such a minority to get to the overseas office through the traditional track – "the golden road"— would appear to be closed. Such a minority would thus have an alternative option, which is to work for a bit in the United States, and then independently make her way to the foreign country to find a position with a non-U.S. local law firm. At least from my experience in Paris, several minority American lawyers have been able to do this – though only one with the possibility of significantly staying on in Paris and still at a relatively early stage in an international commercial arbitration career.[35]

A second possibility is to have some experience with an international arbitration institution for a period of time and then to make one's way to a non-U.S. law firm overseas. After that, the one Asian-American I know who did this made a leap to the U.S. location of a U.S. law firm outside of the eastern market. The point about this path is it is a further departure from proceeding through the American law firm.

On the non-partnership track, I know of one minority who started in legal services after law school, went on to the U.S. office of an international arbitral

[35] This process reminds me of the black American flyer who joined the French Air Corps in World War I because he wanted to fly and blacks were not allowed to fly planes in the U.S. Air Corps.

institution, then to the litigation support group of a top accounting consulting firm, then to a second international arbitration institution, and most recently to become Litigation Practice Group Manager of a New York law firm.

In each case, the foreign office of a U.S. law firm was not a route available. Why that option appears closed for minorities may relate to the wormhole affect mentioned above – U.S. minorities cannot be overseas in the foreign office of a U.S. law firm because they are on a different time track or a "minority time track." This time track is derived from the time when significant numbers of U.S. minorities began to enter law school as a result of *Brown v. Board of Education*.

The problem for the advancement of the U.S. minority in the foreign office of a non-U.S. law firm is multileveled. In addition to the credentialing issue that is present for any foreign lawyer attempting to participate in the legal career in a country, the U.S. minority lawyer has to confront the reactions of the local culture to a U.S. minority professional. My experience in Europe was that there was very little experience in the commercial world with minorities of any stripe.

In France, being a U.S. minority of African-American origin in a French, private, not-for-profit international institution gave me some protection and some complicating issues. By being in an international institution that was not completely French, I was in an international environment where the hard edges of a monocultural environment were muted somewhat. Thus, while French treatment of African-Americans was generally favorable, French experience with African-Americans appeared to be primarily in the arts (jazz) and culture as opposed to the commercial world. Thus, the risk of being considered a black jazzman more than a commercial lawyer was present.[36] Similar stereotypes played out for others. However, in a situation where the three principal members of my hierarchy were Swedish, U.S. and French (changing to Mexican, U.S. and French, then to French, U.S. and French and finally to French, Argentinean and Swiss), one set of stereotypes was not able to dominate.

What I am trying to say is that as a U.S. minority based in France one is able to function as a lawyer, but there are limitations. One is the lack of familiarity with U.S. minorities as lawyers. On the one hand I am like the African and perceived as an "other"; on the other hand I am westernized and perceived as "western." Will the reaction of the French client and staff be to my skin or my nationality or not at all? This issue is not only for the French, as I remember being interviewed for a job in Paris to become the Chief Executive Officer for a French trademark search and identification company. The formal requirements fit me down to the requirement of a business and a law degree, international experience, etc. When I came to the interview, I could see that the present Swiss

[36] This issue for the French was once noted for me by a white American lawyer in his Paris office. Whether this view is accurate or just a rationalization by him is, of course, one of those interesting issues along the color line.

head of the company was uncomfortable with me. Through the back channels of the supplier who had heard of the position, I learned that the dominant concern of the President was my skin color and whether I would get enough respect from the clients and the staff.

A further manifestation of this was when my American boss was leaving to take a job with a U.S. firm in Paris. As a General Counsel at an earlier stage had come from the legal counsels and since I thought I was doing a great job, I applied for the Secretary General's job. At the time, the General Counsel was a French lawyer. My American boss said he had been supporting my candidacy with the French president of the Court and I did hear back that even efforts were made to put my name forward with the President of the ICC by an American lawyer working with him. However, in the interview with the French Secretary General of the ICC he expressed concern about my being promoted to be over the French General Counsel ("What would he think?") (who was unable to be a candidate as having both a French Chairman of the Court and French Secretary General would have been a disequilibrium in the careful balancing of nationalities that occurred in the institution). An American non-minority partner with a non-U.S. law firm in Paris was ultimately selected by the Chairman of the Court. On paper this can be interpreted in many ways, but in the context it was clear that race was one part of this – (was it possible to have an African-American as the Secretary General of the ICC Court over a French General Counsel?).[37]

One issue that is present for the U.S. minority in the foreign office of a foreign law firm is that the U.S. minority's acceptance in the firm can be a complicated affair. Where the entity is essentially monocultural, the acceptance of a foreigner in that culture who is a minority may be subject to issues about both race and being an immigrant. Harassment for grounds other than race or sex – such as *harcelement moral* or psychological harassment – form part of the scene in both U.S. and foreign institutions. As an immigrant and a person of color, it is possible to become a subject of harassment where the machinery available may not adequately address issues of race or other forms of psychological harassment.[38]

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[37] I find this topic extremely complicated to discuss because of the large number of non-American (and overseas American) friends and colleagues I have had who have been supportive, caring and humane. I especially want to highlight the extraordinary warmth so many of the French have shown me over the years. While the occasions described here are few, I believe they are significant and thus merit to be discussed as they address a U.S. minority seeking to make his way in a foreign hierarchy. But, I hope that the reader of this discussion will understand that I am addressing only a part of a rich international experience where race appeared to come to the fore. Race appeared to come to the fore as I came close to or reached for power – an interesting thought in itself.

[38] Treatment of psychological harassment in U.S. employment law and labor law is beyond the scope of this study. I would note that psychological harassment exists that is not based on race, sex or some other classification under Title VII and the law appears to

b. *Human capital current*

One has difficulty succeeding in the U.S. and overseas competitions in the international commercial arbitration arena without certain Human Capital. The question is what is the appropriate human capital. On the theory that those who are in international commercial arbitration best reflect the type of human capital that is needed to be successful in the field, a verification was made of the educational backgrounds of a number of the U.S. lawyers who are active in international commercial arbitration in U.S. or non-U.S. based offices. With some variation for individual cases, the study does suggest types of common characteristics. The U.S. lawyers noted have had U.S. degrees from top U.S. colleges and law schools. Many have multiple languages. Some have dual nationalities and multiple Bar memberships.[39] These characteristics were

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say that, absent that predicate, there is really nothing that can be done about it in the U.S. at-will system. In systems such as in Europe the requirement for just cause is a significant worker protection but mechanisms to deal with discrimination or the psychological harassment vary. *See* MARIE-HELENE HIRIGOYEN, HARCELEMENT MORAL, LA VIOLENCE PERVERSE AU QUOTIDIAN (1998); Emmanuel Diet, *Le Thanatophore. Travail de la mort et destructivité dans les institutions, in* SOUFFRANCE ET PSYCHOPATHOLOGIE DES LIENS INSTITUTIONNELS (René Kaës et al. eds., 1996). An example of actions of colleagues that might appear to be a form of this psychological harassment is as follows:

When, after four years of strenuous work leading the team to create the Case Management System of the ICC Court, I was invited to present it to the Court at a special session of the Court, the presentation did not immediately work. The problem turned out to be that someone had disconnected the wire that had been run down from the computer room just outside the door to the meeting room. The computer technician came in and found the disconnection, reconnected everything, rebooted the system and I was able to do the presentation again. It was an enormously painful moment for me and the President. Five years later, the same computer technician advised me that an internal investigation had been done and the conclusion had been reached that the disconnection had not been innocent but had been done by one of my colleagues. I did ask why it had taken five years to tell me this piece of information. Of course, I was happy that said colleague had moved on. All I could do that much after the fact was tell my hierarchy of this difficulty. All of the colleagues referred to were non-American.

[39] For example, Eric Schwartz of Freshfields-Paris, Dartmouth College and Yale Law School, California and Paris Bar, French and English, French and U.S. nationality http://www.freshfields.com/lawyers/pf_lawyers.asp?personnelID=2580&languageID=11 Last visited on March 31, 2004); Lucy Reed of Freshfields-New York, Brown University and University of Chicago Law School, http://www.freshfields.com/ lawyers/pf_lawyers.asp?personnelID=1510&languageID=11 (Last visited on March 31, 2004); Jan Paulsson of Freshfields-Paris, Harvard, Yale and University of Paris degrees, English, French and Swedish http://www.freshfields.com/lawyers/pf_lawyers.asp? personnelID=2654&languageID=11 (Last visited on March 31, 2004); Michael R. Moser of Freshfields-Hong Kong, fluent Mandarin and English, http://www.freshfields.com/

lawyers/pf_lawyers.asp?personnelID=4175&languageID=11, (Last visited on March 31, 2004); Stephen R. Bond of White and Case-Paris, Brown University and Columbia Law School, New York and Paris Bar, French and English, http://www.whitecase.com/bond_stephen.html (Last visited on March 31, 2004); Charles N. Brower of White and Case-Washington D.C., Harvard College, Rheinische Friedrich-Wilhelms-Universität, Bonn and Hochschule für Politik, Berlin (Fulbright Scholarship), Harvard Law School, and Certificate, Columbia University, Parker School of Comparative and International Law, English, German, French, Dutch, and Russian http://www.whitecase.com/brower_charles.html (Last visited on March 31, 2004); Richard H. Kreindler of Shearman and Sterling Frankfurt, Harvard College, Columbia Law School, Ludwig-Maximilians-University, Munich, Magister, New York Bar, Paris Bar, and Rechtskundiger, Frankfurt, English, German, French, and Russian http://www.shearman.com/lawyers/partners/kreindler.html (Last visited on March 31, 2004); Paul Friedland of White and Case – New York, Yale College and Columbia Law School, English and French http://www.whitecase.com/friedland_paul.html (Last visited on March 31, 2004); Robert F. Pietrowski of Covington and Burling - Paris, Stanford University and University of Virginia, http://www.cov.com/lawyers/rpietrowski/ biography.html (Last visited on October 19, 2004); W. Laurence Craig (now retired) of Coudert – Paris, Williams College, Harvard Law School and Université de Droit de Paris, New York and Paris Bars, English and French, http://www.coudert.com/lawyers/ default.asp?action=partnerdetails&id=1128 (Last visited on March 31, 2004); David W. Rivkin of Debevoise and Plimpton – New York and London, Yale College and Yale Law School, New York Bar, (Last visited on March 31, 2004); Richard Chernick Vice-President and Managing Partner JAMS (formerly of Gibson, Dunn and Crutcher – Los Angeles), University of California at Los Angeles and University of Southern California, http://www.jamsadr.com/images/PDF/Mgmt-Chernick.pdf (Last visited on March 31, 2004); Arif Hyder Ali, Fulbright and Jaworksi – Houston, Columbia University and New York University Law School, English, French, Spanish, Urdu, Hindi and Bengali, http://www.fulbright.com/index.cfm?fuseaction=attorneys.detail&site_id=357&emp_id=10933 (Last visited on March 31, 2004); Donald F. Donovan of Debevoise and Plimpton – New York, University of Virginia and Stanford Law School, http://www.debevoise.com/lawyers/nbio.asp?id=D552907979 (Last visited on March 31, 2004); Robert H. Smit of Simpson Thacher – New York, Cornell University and Columbia Law School, University of Paris – Sorbonne, http://www.simpsonthacher. com/bios/RSmit_detail.htm (Last visited on March 31, 2004); Dennis A. Foster (formerly of Wolf Arnold and Cardoso – Washington D.C.) University of North Carolina, Stanford Law School, University of London, School of African Studies, English, French, Italian and Spanish, Reading comprehension of Arabic, German and Russian, limited oral Arabic, German and Russian, http://arbiter.wipo.int/domains/panel/profiles/foster.pdf (Last visited on March 31, 2004); Stefan Naumann, Denton Wilde Sapte – Paris Office, Harvard College, Boalt Hall School of Law, University of California at Los Angeles, University of Paris Law School, Center for International Industrial Property Studies, Strasbourg, English, French, German, Italian and Spanish, http://www.martindale.com/xp/Martindale/Lawyer_Locator/Search_Lawyer_Locator/search_result.xml?PG=0&STYPE=N&LNAME=Naumann&FNAME=Stefan&FN=&CN=&CTY=&STS=&CRY=&LSCH= (Last visited on April 1, 2004).

consistent with what I had seen over the years I was at the ICC. The level of language ability of participants in international commercial arbitration appears to be rising. Where in the past one could be successful as a monolingual - particularly overseas - being bilingual, tri-lingual or multilingual appears to be the direction in which human capital skills are moving. In addition, law degrees from schools in different countries appear to be present to a more significant degree.

In addition to educational human capital, participants – particularly the younger ones – appear to have mentors assisting them to enter and rise in the field from their university,[40] family,[41] or otherwise (ties that bind/link individuals are very difficult to know).[42] This kind of capital in kind, contacts and even wealth are obvious non-trivial elements assisting the rise of persons in the field.

For example, try as one may to have these internships be neutrally selected on "merit alone" it is possible that access to internships at international commercial arbitration institutions may be facilitated by the introduction of someone with whom the institution is already comfortable. Thus, a young law student or newly minted lawyer might be "marked" for the international commercial arbitration track by having had such an internship. In addition, participation in the annual Willem C. Vis International Commercial Arbitration Moot Court[43] as a student is a way of "marking" oneself to the seasoned members of international commercial arbitration as destined for greatness in the field. A further possibility is to take summer courses where the student visits the international commercial arbitration institution and becomes acquainted with persons there – possibly having this evolve into an internship.[44]

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[40] Arif Hyder Ali mentions having been a research assistant of Professor Andreas F. Lowenfeld of New York University School of Law who is a distinguished participant in international commercial arbitration. http://www.fulbright.com/index.cfm?fuseaction=attorneys.detail&site_id=357&emp_id=10933 (Last visited on April 1, 2004).

[41] Robert H. Smit, the American representative of the ICC International Court of Arbitration is a partner at Simpson Thacher and is the son of Professor Hans Smit of Columbia Law School, a distinguished participant in international commercial arbitration. I can think of six similar examples in the United States and in Europe of distinguished children following in the footsteps of distinguished parents in international commercial arbitration. No doubt there are more in this field, as there are in many fields.

[42] For example, Maitre Christophe Imhoos of Switzerland returned home to practice with his father and ultimately take over the office. I am not aware of a U.S. equivalent but there is no reason that this might not occur or be occurring in the U.S.

[43] http://www.cisg.law.pace.edu/vis.html (Last visited on April 1, 2004)

[44] I was astounded by the number of distinguished international commercial arbitration specialists who had had internships at the ICC in the 1960s or 1970s in their student years. In addition, a distinguished French Professor of Law, the late Professor Philippe Fouchard, was graciously permitted to teach a class at the ICC for a few days each year for his law students. Further, I teach an international commercial arbitration

This combination of top-ranked schools, contacts and interaction appears to be a non-trivial set of relations enhancing international commercial arbitration specialist human capital. For the U.S. minority, this conclusion leads to a particular concern: affirmative action at the color line. Let us imagine that there was no affirmative action in the United States. The expectation would be that some minorities would not be accepted at the top ranked schools and would cascade down to the next tier. The reduced presence of minorities at the top-ranked schools – based on the backgrounds of these U.S. participants in international commercial arbitration would lead to the few minorities being present likely disappearing completely from the international commercial arbitration arena. This reality at this most advanced aspect of the color line brings into relief a little noted battleground. Without affirmative action, the ceiling would likely be lowered. With affirmative action consistent with *Grutter*, the ceiling is left in place in a manner that allows the still pittance of minorities to participate – though apparently still not in the non-U.S. offices of U.S. law firms. In short, the cascading effect from these top-ranked schools on the future of U.S. minorities in international commercial arbitration would have been devastating. It appears essentially impossible to become a participant in international commercial arbitration at these top levels represented by these individuals without these types of credentials.[45]

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course under the auspices of Hamline University School of Law and Benjamin N. Cardozo Law School in Paris each summer in which part of the course is a half-day visit to the ICC. The ICC graciously has provided opportunities for students to speak with members of the ICC International Court of Arbitration Secretariat and learn from them. Students are extremely enthusiastic about these experiences. I am also hopeful that the International Competitions for Online Dispute Resolution (ICODR) will serve as a means for students to learn online international commercial arbitration and be evaluated by international practitioners at significantly reduced cost, permitting the expansion of the potential circle of contacts at the student level and thus the enhancement of the human capital of a broader group of students. The main point is that enhancement of human capital of students is occurring through these methods also. For ICODR see http://www.odr.info/icodr.php (Last visited on April 1, 2004).

[45] One exception is Ms. Deborah Enix-Ross – a black woman who has chosen to work as a Litigation Practice Group Manager for Debevoise and Plimpton in New York. She went to the University of Miami School of Law and, at a further point in her career, received a Diploma from the Parker School of Foreign and Comparative Law of Columbia University. She has followed a path through the U.S. Council for International Business of the International Chamber of Commerce, to Director of International Litigation for the Dispute Analysis and Corporate Recovery Services Group (DA&CR) of Price Waterhouse LLP, to the Arbitration and Mediation Center of the World Intellectual Property Organization and now to Debevoise and Plimpton – New York Office http://arbiter.wipo.int/events/conferences/2000/speakers/enix.html, (Last visited on March

c. *Cooptation current*

In order to achieve success in this field, there is the need for marketing in all forms. One form of marketing is for one to be present frequently at international commercial arbitration seminars around the world so that key people begin to see one as a familiar face as an audience participant and/or speaker. A second aspect of marketing is participating in the activities of international commercial arbitration institutions (training courses, conferences such as Tilney organized by the London Court of International Arbitration, but also pro bono activities like work on the ICC Commission on International Commercial Arbitration or other business related activities) and bar associations (American Bar Association Dispute Resolution Section or the American Bar Association Section on International Law and Practice; the appropriate committees of the International Bar Association). Participation as a representative of the United States at public or quasi-public international organization activities such as the Hague Conference on Private International Law or the United Nations Commission on International Trade Law are further examples of activities of marketing. Taking the next step after student years and being selected as a judge/arbitrator at the Willem C. Vis International Commercial Arbitration Moot Court in Vienna is another avenue for becoming known in the field. Being listed on the lists of arbitrators of arbitral institutions (both new and more established) is part of the effort to market oneself as an international commercial arbitration specialist so as to have cases as counsel, arbitrator, and/or expert.

Even if one is successful in becoming a participant, there is the constant pressure of continuing to participate in conferences around the world so as to maintain one's status within the field. Membership in key institutions (such as the Institute of World Business Law of the ICC) may be considered essential as these are arenas where people become comfortable with each other. Even after membership, striving to be a member of the Board or governing body is the next step to help maintain one's position. A further effort is spent writing articles on international commercial arbitration published in the appropriate journals as a means of demonstrating one's competence in the field.

Law professors are paid to do these types of activities though their travel budgets may not be as ample as those in private practice. For those in the bar, the burden of time and expense for the law firm is evaluated as an investment or (sometimes) as pure consumption. In any event, it is widely recognized that these activities are a cost of doing business in the international commercial arbitration arena.

U.S. minorities and U.S. lawyers are aware of these obligations of cooptation. Their resumes demonstrate that the writing, volunteering, and bar association

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31, 2004) http://www.abanet.org/careercounsel/profile/international/rossd.html (Last visited on October 19, 2004).

activities of the top persons in the field are extensive. The conference going habits are also quite impressive – reflecting the importance of this means of marketing.

One relatively new arbitrator has on his resume the participation he has made at seminars, to wit:

> CLE (Continuous Legal Education): Implications for the Future of International Commercial Arbitration, Global Center for Dispute Resolution Research, PCA, UNCITRAL (The Hague, 2004); International Commercial Arbitration and Energy Disputes, ICC/Canadian Bar Association (Alberta, 2003); Int. Symposium in Advanced Case Management Issues (New York, 2003); Advocacy Skills in Int. Arbitration (Vienna, 2003); NYSE Arbitrator Training (Washington, D.C. 2002); From Arbitration to ADR, ICC Dispute Resolution, ICC (New Orleans, 2001); Int. Commercial Arbitration in the New Millennium, LCIA/Canadian Bar Assn. (Toronto, 2001); Int. Commercial Arbitration, ICC Rules of Arbitration, ICC (Paris, 2001); WIPO Workshop for Arbitrators, WIPO (Geneva, 2000); Construction Law, Univ. of Maryland (Baltimore, 2000); NASD Chairperson Training for Arbitrators, NASD (Washington. D.C., 1999); Int. Arbitration, LCIA/AAA (Miami, 1998); Arbitration and Mediation Workshops, AAA Neutrals Retreat (Orlando 1998); NASD Securities Arbitrator Training, AAA (Washington, D.C. 1996); Construction Industry Arbitrator Training, AAA (Washington, D.C., 1996); Advanced Mediation Skills Training, AAA (Washington, D.C., 1996)[46]

As one progresses in these volunteer activities, the resume may need to become less extensive as certain titles (Advisory Board Member for an Arbitral Institution, for example) are proof of one's status within this community. In addition, as one moves to higher levels in these volunteer activities one begins to have an impact on determining who will be selected to speak at conferences (as I did as a Director, Conference Programmes and Manager, ICC Institute of World Business Law). These speaking engagements are excellent opportunities to demonstrate one's expertise so as to be considered as a potential arbitrator. Similarly, to the extent one becomes a volunteer helping in the selection and appointment of arbitrators, one now has another form of power to exercise over the appointment of neutrals. As the number of potential arbitrators far outstrips the number of arbitration appointments, this power makes one a desirable person to in turn be selected for speaking engagements and to serve as arbitrator by others.

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[46] Douglas Earl McClaren, Esq., MARTINDALE-HUBBELL INTERNATIONAL DISPUTE RESOLUTION DIRECTORY 406 (2004) (on file with the author).

d. *Changing international commercial arbitration current*

Borrowing from Competitive Strategy Theory,[47] it may be useful to view the International Commercial Arbitration Market as divided into Clients of International Commercial Arbitration, Substitutes for International Commercial Arbitration, New Entrants for International Commercial Arbitration, Suppliers for International Commercial Arbitration, and Competitors in International Commercial Arbitration.

i. *Clients of international commercial arbitration*

Clients of international commercial arbitration are the entities (individuals, corporations, partnerships, state-owned enterprises, and governments) placing arbitration clauses in their international commercial contracts. When disputes arise the lawyers for these clients may be the clients' traditional lawyer or may be supplemented by lawyers who have a specialty in international commercial arbitration. These lawyers with a specialty in international commercial arbitration may be specialists at a national, regional or international level. Clients refer disputes to their lawyers; those lawyers either conduct the arbitration or work in tandem with these specialists. Lawyers who are successful in international commercial arbitration become known through the cooptation process described above.

ii. *Substitutes for international commercial arbitration*

International commercial arbitration has typically been selected by the parties in their arbitration clause in the contract. As such, the alternative of court litigation may not be available nor may it be of interest. Negotiation between the parties remains a possibility at any time. Mediation is also possible either through the mechanisms foreseen in the rules selected by the parties or through voluntary selection once the dispute has arisen. Over time, alternatives to international commercial arbitration may be selected in some contracts (for example an Alternative Dispute Resolution clause) but as a practical matter there is no substitute for the arbitration clause.

iii. *New entrants for international commercial arbitration*

New international commercial arbitration providers develop all the time. They come from international organizations (World Intellectual Property Organization), national organization projecting themselves internationally (the American Arbitration Association and its International Centre for Dispute Resolution), or as part of a country's structure to deal with international trade (Chinese International Economic and Trade Arbitration Commission and the liberalizing of the authority for Chinese domestic arbitration entities to conduct

[47] MICHAEL E. PORTER, COMPETITIVE STRATEGY (1980).

international commercial arbitration). Domestic commercial arbitration institutions may increasingly take on regional and international commercial arbitrations. Barriers to entry are low in terms of setting up a center, having a set of rules and maintaining a roster of individuals to serve as arbitrators. The difficulty is in getting parties to accept making reference to the new center in their arbitration clauses. Reputation and experience work hand in hand to hinder the success of new entrants. In their standard forms (a key arena of competition between dispute resolution providers), international financial institutions such as the World Bank or organizations such as architects or engineers may be reluctant to provide for new dispute resolution providers as opposed to providers with more extensive experience and reputation.

As a consequence, new entrants seek to develop new markets where they are not in direct competition with the more established international commercial arbitration institutions. For example, WIPO's development of domain name dispute resolution and dispute resolution related to intellectual property disputes and the internet is a logical strategy to build work for its Arbitration and Mediation Center. The National Arbitration Forum's use of domain name dispute resolution as a means to develop its international experience is a similar example. Another example is the provision of emerging dispute resolution for online commerce where entities such as Squaretrade.com are present in both consumer and small international commercial disputes from around the world. Some dispute resolution may arise from public international law disputes such as the Iran-U.S. Claims Tribunal or other similar tribunals that have specific series of problems to address. These niches have variable growth potential.

iv. *Suppliers for international commercial arbitration*

The principal suppliers for international commercial arbitration are the arbitrators designated by the parties and the arbitral institutions. These suppliers provide the arbitral procedure and awards conducted under the rules of the institutions or ad hoc international rules. Suppliers for the more complex, more highly remunerated cases are typically supplier/arbitrators with the greater experience in the field. Greater experience comes from experience as a counsel or arbitrator and also as an expert in international commercial arbitration.

v. *Competitors in international commercial arbitration*

The typical entities with significant numbers of cases in regional or international commercial arbitration are the ICC International Court of Arbitration, the London Court of International Arbitration, the Stockholm Arbitration Institute, the Chinese International Economic and Trade Arbitration Commission, the Hong Kong International Arbitration Centre, and the International Centre for Dispute Resolution of the American Arbitration Association. Sectoral specialties may be present in, for example, maritime or

grains. but these entities would typically be considered the major entities in international commercial arbitration.

Looking at these five aspects of the international commercial arbitration arena, one particular feature to be noted is that the same person can play all five roles. Thus, a person as a lawyer may be representing a client of arbitration in one setting. As an arbitrator she may be conducting an arbitration in another setting. The person may be participating in the development of a new arbitral institution on a national, regional or international level to help create a new entrant that could be a source of further arbitrations as counsel or arbitrator. The person may also be developing new types of products to substitute for arbitration for which their expertise will be sought. Finally, the person may be serving in a capacity of some kind on an advisory board of one or more arbitral institutions that are the principal competitors in this marketplace.

Those who are the premier international commercial arbitration specialists operating in all five competitive domains (clients, suppliers, substitutes, new entrants, and competitors) form an elite corps. They cannot control client selection of lawyers as advocates or client selection of coarbitrators, but what they can do is demonstrate superior relative knowledge through the cooptation process so that risk averse clients would be more likely to select from this group. In addition, through their dominance of the voluntary levers of powers in the international commercial arbitration institutions, they can at least play a role of managing the cooptation of potential new participants in the field. They form the cadre of gatekeepers in a shifting field of new lawyers who they may wish to develop into arbitration specialists and arbitrators as these lawyers are from their firm or form part of the network of individuals who are able to provide access to opportunities for cooptation. The data suggest that only one of these elite corps members is from a U.S. minority.

e. *The lifestyle current*

The personal current is the most complex to address. Providing the reasons why a person self-selects for international commercial arbitration and expresses the series of qualities that make them successful in the field is beyond the scope of this analysis. Whatever the reasons, to be successful in the international commercial arbitration arena today, as in the top levels of many arenas of law, appears to require significant self-sacrifice for the enormous rewards.

The best I can do is to give a personal example with regard to opening the Hong Kong Office of the ICC. During early 1996, my then boss approached me about heading the soon-to-be-created ICC Asia Office in Hong Kong. While at the time I knew this was a significant opportunity, from the review of the various currents done in this article I have come to understand that the possibility of a U.S. minority being sent by a French institution to open an office in Hong Kong –

no matter how small – was a significant if not enormous stride for myself and for U.S. minorities in international commercial arbitration.

Part of the decision was to take my family out there to visit. This trip was done during the children's spring break. There were concerns about the air pollution for my daughter's lungs. In any event, we wavered back and forth on whether we wished to go out there. At one point I declined the position and at another I reconfirmed. Costs of sending an American family (income equalization with worldwide tax liability for U.S. taxes, etc.) were part of the issues – new issues for a French organization to address. In any event, the end result was that a single Canadian was ultimately selected for the position. The point is that this is an example of the lifestyle current issues trumping all of the other currents that had brought me to the point of being considered for this major step forward.

C. *Cultural Diversity Current: Race, Culture, Nationality*

I received a letter as part of my survey. The letter states the following:

> Dear Mr. Davis,
>
> Thank you for your communication by e-mail of February 28. I was glad to hear from you. Indeed I was not aware that you had adopted law lecturing and I congratulate you for this choice.
>
> I return my answer to your questionnaire. Unfortunately, I have no personal experience in the particular field of your enquiry, which is of course politically very correct.
>
> By contrast, having had the opportunity of sitting with arbitrators from all five continents, I gathered some experience in cultural diversity. If I may, I suspect that the members of the minority groups mentioned in your inquiry are most likely to have the same legal and cultural background than their purely American counterparts. By the way, what is a purely American lawyer when one thinks of the major role played in the New York Bar by lawyers of Jewish persuasion?[48]
>
> By contrast, cultural differences in the legal world are, in my view, largely derived from the legal origin of their national law. In this sense, the influence of the common law of England and of French law, just to quote these two, goes very

[48] I do not subscribe to the views expressed in this letter which are offensive. I include them here for what they assist us in understanding about the "primacist" vision described below. My approach is similar to the publication of offensive remarks in another recent law review article. *See* Jerry Kang, *Cyber-Race*, 113 HARVARD L. REV. 1130 (2000).

> much beyond the frontiers of their country of origin. But it is certainly an experience you have made during your time at ICC.
>
> With best wishes.

This letter is intriguing for it brings together issues of Race, Nationality and Culture in an interesting manner. With regard to Nationality, the distinction made between U.S. minorities and "purely American" or Jews and "purely American" does give one the sense that this person's vision of who is purely American is based in part on Race (i.e. not Native-Americans but non-Jewish whites). While all those listed are by definition U.S. nationals, the author of that letter goes beyond nationality suggesting the purity of one's American Nationality is tied to a characteristic lacking or not pure enough in the minorities.[49] At the same time, the transnational nature (the flow from the English Common Law; the flow from the French Civil Code are the examples given) of legal culture is contrasted with the questions of race and nationality.

It seemed that this letter could be read in two ways. One way to read it was to view it as racist and anti-Semitic and disregard it completely. Yet, this letter comes from a sophisticated international commercial arbitration practitioner clearly sending me a message. Another way to view this letter therefore was to see the equating of race and nationality as being a certain vision of nationality. In this second sense, the letter is focusing on which race most purely reflects a given nationality. The letter does give primacy to one race or group (non-Jewish whites) as opposed to others (minorities and Jews). In that sense the letter might be said to be expressing a "primacist" vision in discussing experiences in international commercial arbitration.

Thinking in terms of this primacist vision, this letter made me think back to some comments I had heard during my years in international commercial arbitration, to wit:

- "Chinese are sneaky."
- "Arabs scratch their feet because they have sand in their shoes."
- "Africans are dreamers."
- "What do you expect from Africans?"
- "It is good to be outside the United States so you can say what you think."
- "Two Jews were walking down the street and saw two young black guys approaching. One Jew looked at the black guys and turned to the other Jew and said, "Here's the dollar I owe you.""

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[49] This harkens back to the discussion on "hyphenated-Americans" back in the 19th century.

- "Blacks have to start thinking differently. That's their problem."
- "Indians hate blacks."
- "Chinese hate blacks."
- "Like a nigger in a woodpile."
- "Arabs hate blacks."
- "Eastern Europeans hate blacks."
- "It is the Jews who have brought the anti-Semitism on themselves through their raising all this nonsense about the Holocaust."
- "It must be difficult carrying around all those white elephants." (With regard to my tie covered with white elephants – a symbol of good luck) [50]

All of these comments were made by non-Americans principally from Europe but some from the Middle East and Asia all of whom were extremely highly educated and worldly. Over the thirteen years at the top of the field, I feel comfortable in saying that it was very rare to hear these types of comments being made. Some were said as an effort to help me "understand the world," others seemed to have real venom in them, but, again they were rare.

Some of these comments could be construed as anti-Semitic and/or racist – a reaction that I would tend to have as an American. But my view and that view is not the only way to react to these comments. The lens of race qua nationality or primacist vision understood in the above letter applied to these comments could also lead one to see these comments as being about the nationalities within the regions identified (Africa, Eastern Europe) as well as a statement about the primary race present in each of those regions (black, white, etc). Both of these can be congruent, but not necessarily. Thus, through the primacist lens, a black Bulgarian or a white South African would only be indirectly the object of the comment as they are not part of the primary racial group in their respective countries.

That a non-American has this primacist view about the United States nationals has made me wonder from where does this view of race and nationality derive its existence.[51] It seems that the primacist view could be the reflection of what this person has seen in their experience with American lawyers in international commercial arbitration. This primacist vision would have digested the notion that pure American lawyers in international commercial arbitration are white and possibly Jewish but not U.S. minorities. Alternatively, this primacist vision may be the reflection of the way race and nationality are understood in the environment from which this person has come (e.g. "My country is a white country." "My country is a black country." "My country is a yellow country."). For example,

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[50] For all of these comments, see my disclaimer at note 48 *supra*.

[51] Hannah Arendt's *The Origins of Totalitarianism* (1968) has greatly informed my appreciation of this Race/Nationality phenomenon.

notwithstanding the presence of numbers of non-whites in European countries, the process of accepting these persons as Europeans has been one of the most interesting developments of the post-colonial period. The tensions of assimilation and integration are also reflected in some of the comments that were made by the survey participants.

Whether the primacist vision of Americans is the result of the Americans who have been acting in international commercial arbitration or the result of the non-Americans' application to Americans of their local lens, as regards U.S. minorities, the effect is significant. The primacist vision forms the context in which the U.S. minority acting in the international commercial arbitration plane operates – not seen as a pure American because of the attitudes of his compatriots or because of the racial categorizations of his foreign counterpart. Add to this the question of the legal traditions and who is the representative of the legal tradition of a given nationality, the implication of the primacist vision is that the U.S. minority is a less effective merger of race, nationality and legal culture and less effective representative of America than his/her non-white counterpart.

That being said, the primacist vision can be contrasted with two other visions - one that did not so equate race and nationality and saw all actors within a nationality as being equal representatives of that legal culture. This vision might be referred to as a multidomestic vision. Thus, one's ethnicity would not be an expression of one's representivity, but rather the extent of one's grounding in the legal culture would be the most persuasive expression of how one would apply one's nation's legal culture to a dispute in international commercial arbitration.

Moving beyond this multidomestic vision, to the extent one voiced legal maxims – possibly couched in different terms (due process – principles of natural justice – droit de la defense) consistent with those of others of other nationalities one would be presenting a vision of the legal concepts that would go beyond the multidomestic vision and be assertive of universalist principles – principles that go beyond race, nationality or any given legal culture.

Even in the primacist vision, among the members of the primary group in one country, it is possible to have common beliefs. There may be even some rivalry and selection to have common beliefs within the country through the types of human capital investment required to get access to this type of international commercial arbitration work. As between countries, the primacist groups in each country may have views that are similar. This set of principles would lead to a notion of primacist norms that may be regional or, if held all over the world, universalist. Those norms may be the result of uniform racial visions (i.e. primacists of only one race but of different nationalities having a common view) or may be non-uniform (i.e. primacists of different races and different nationalities having a common view). These uniform primacist visions until recently would be expressed more easily in regional or universal fora. However, with the advent of the internet, it is possible for the communication to be more exploded and

atomized so that the connections can be transnational without being regional or universal. The end result, in each case however, is that the primacist regional, transnational, or universal view does not include in the consensus the non-primary racial group in each country.

The primacist regional, transnational or universal approach may be a stable equilibrium because the common views and regional, transnational or universal pretentions are supported by the reciprocity each primary group can show to its counterpart (of the same (homogeneous reciprocity) or different race (heterogeneous reciprocity)) in the other nationalities of a region or universally.[52] The common understanding encourages further interaction in an agreed primacist space.

Those outside of this primacist network, irrespective of their nationality or minority or non-minority status, would be perceived as being non-parties to the consensus and, in the worst case, exotic.[53] Race, minority status or both would operate to make one appear different.

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[52] Further hierarchies may be at work inside this primacist universalist consensus space so that, if one were to look closely, one would in fact find distinctions or layers. But, for the purposes of this analysis, that is not fatal as it only demonstrates that reciprocity does not lead to stasis but may be a dynamic reciprocity based on rivalries by nationality.

[53] An example of this exotic issue has been highlighted in the following footnote from Samir Saleh, *Commercial Arbitration in the Arab Middle East: Shari'a, Lebanon, Syria and Egypt* (2nd ed. 2004):

> Fn. 29 . . . In mixed international arbitration involving Western parties and Asian, African, or Middle-Eastern parties, the main criticism made by the "exotic" parties relates to the process being conducive to pre-constituted majority, inasmuch as one co-arbitrator is generally appointed by the "exotic" party and two members of the tribunal, including the chairman, are appointed by the western party. The latter is often appointed by an arbitral institution based in the West. According to critics, despite judicious selections of arbitrators by the ICC Court of Arbitration from neutral European countries, the result in practice is one of a Western majority closely connected by cultural, economic and industrial solidarity. Hence, according to these same critics, political neutrality has no impact on the economic and legal mechanism of commercial arbitration. It is submitted that criticism of this inherently recurring majority finds as a counterpart, on the other side of the barrier, a regional solidarity arising from poverty, inferiority complexes and residual anti-colonial sentiments. Frequently, the minority arbitrator is treated as some kind of poor relation. His input remains furtive. If the minority opinion is one expressed with a certain degree of forcefulness, e.g. in ICC practice, the Court will not always act on this in accordance with Article 27 of the Rules (*"The Court may also draw the attention of the arbitrator to points of substance.")*, but rather will often make use of the lever of the minority opinion to remedy the weaknesses in the draft majority

As a U.S. minority wanting to work in this environment one could support the primacist (regional, transnational or universalist) vision, whether or not one actually believed in it. Nevertheless, that support or even belief would not necessarily lead to your admission or acceptance as a member of the primacist group. By pledging fealty to the values articulated by the primacists or being assimilationist to the primary purely American group one could try to become white or be a "but for minority," but that would not necessarily gain one admission to the homogeneous or heterogeneous reciprocity unless the foreign primacists were willing to accept the U.S. minority as having been validated by the white U.S. primacists as being "one of the club." To the extent that foreign primacist group members would respond to these U.S. minorities as members of the primacist purely American group, there would be acceptance and an ability to prosper.

The rub comes with the foreign offices of U.S. law firms in this model. From foreign eyes, the U.S. minority supporting the primacist views who is only intermittently abroad as opposed to being a fixture on the circuit is only a part-time presence. And that part-time presence person is required to be the whitest Negro – a darker shade of the white counterparts. That status of a part-time presence would be eliminated if that U.S. minority were sent overseas to the foreign office of the U.S. law firm. The U.S. minority would go from being a part-time presence to being a full time presence with an opportunity – not a

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opinion. The dissident opinion is then considered as supportive padding and not as a springboard for new considerations and potential substantive improvement. The problem ultimately lies in the balance of composition of a tribunal, with the aim being to eliminate the stumbling block of the pre-constituted majority, whether real or imaginary. The second issue is one also connected to the real or supposed majority and has to do with the independence of arbitrators. Independence is generally considered, *rationae personae*, as required for the relationship of an arbitrator to the parties and not *inter* arbitrators: the non-Western arbitrator sits with Western arbitrators whose fellowship is often woven around a complex web of cases, either as counsel or arbitrators. This contributes to promoting closer understanding between the Western arbitrators. It would be going too far to see in this situation one of vulgar trading under the table, yet, it is naturally conducive to a mutual consideration which excludes from its own circle the "exotic" arbitrator. As it is not possible to read into hearts and minds, an objective criterion would be the disclosure of the existence of parallel arbitral procedures within which the two Western arbitrators have sit together as arbitrators or as counsel. This interdependence is certainly not the *causa causans* of the majority issue. Whatever are the components of the interdependence, it is submitted that a wider and less cosmetic declaration of independence would be a useful safeguard in helping to prevent any abuse.

The discussion of primacist thinking appears consistent with this feeling of unease noted by the "exotic" arbitrator.

certainty – of being able to integrate both the primacist vision of the United States and the primacist vision in the local country. That process of dual primacist experience or multiple primacist experience in several cultures would lead to a development of the U.S. minority into an actor within all of the primacist regional, transnational and universal space. Without that overseas experience, the U.S. minority in international commercial arbitration would be only a part-time presence and, relative to the white counterparts that are perceived as pure Americans, at risk to be relegated by foreigners to a role of the rare bird that confirms the rule of the primacy of American whites as pure Americans in the international commercial arbitration arena.

In the non-U.S. office of a foreign law firm the situation is different as the dominant primacist vision is still a non-U.S. vision. The success of the U.S. minority may be derived from credit given for being a U.S. primacist as well as the willingness to subordinate oneself to the non-U.S. but still primacist vision that would permeate the non-U.S. law firm's office. The same forces would be at work for primacists of foreign countries in the U.S. offices of U.S. law firms.

So one could imagine the international commercial arbitration space as being a space of primacist regional, transnational or universal views, with outsiders who are not members of the primacist groups, and minorities of different colors in each country who are outside of the consensus.

If this were an accurate depiction of this arena, one troubling issue is the extent the primacist vision would trump nationality. Nationality is frequently used as a proxy for neutrality for the selection of the Chair of the Arbitral Tribunal or the selection of a Sole Arbitrator. If the Chair shares the primacist vision with one party appointed coarbitrator of another nationality, it is likely the other coarbitrator outside the primacist circle will be perceived as an exotic – thus affecting the equilibrium of the arbitral tribunal or of the arbitration. Parties seeking to take advantage of this primacist situation would seek to propose primacists as Chairs, or create panels made up of primacists who would be sure to have the "proper" orientation. This situation could call into question the notion of neutrality through nationality, a topic beyond the scope of this article.

In contrast to the primacist view, another view would be to imagine oneself as a universalist, striving to hold views that are common to all peoples whether of primary groups or not in each country. In this vision, while not denying one's origins, one would seek to find the universalist principles tying one with the minorities and primacists within one's country as well as to those of all peoples in the other nationalities. Currents that are derived from legal cultures of each type of law would be dissected and thought of to bring forth principles on which all actors would find common ground. Neither hierarchy of visions or pure relativity would be the product. Instead, an attitude of universal openness would be inculcated in and expressed by the actions of such persons in their interactions with individuals coming from around the world. From this praxis there would

appear the idea that binds all but not at a pure level of abstraction – at a level of practice of providing peaceful means of dispute resolution.

Those with this vision call out to the commonalities in all the actors and reject the notion of pure American (or pure French or German or Chinese or whatever). None is excluded, all form part of the cloth.

Primacist visions as described here and universalist visions as described here are not mutually exclusive. Individuals may be mixes of these visions. Some may be more primacist than others. Some may be more universalist than others. The effort here is to try to articulate these two visions that may be tugging in the soul of each participant in international commercial arbitration.

And if one is a U.S. minority like me, a further tension may arise. The lens I am commonly viewed through determines that I am viewed as an African-American. My color invokes Barbary – my 200-year-old ancestor brought to America as a slave. Yes, I am an African-American. Yet, my color also invokes one of my paternal great grandfathers – an Irish judge in Georgia. My color also invokes one of my paternal great grandmothers, a Cherokee. My paternal grandmother was the thirteenth illegitimate child of their relationship. She was only black because there was no place to school such a half-Irish and half-Cherokee child. So, yes I am white or European-American. And, yes I am Native American. My color also invokes my maternal grandmother who was from Cuba – light-skinned progeny of a dark-skinned father and a light-skinned mother. My grandmother spoke Spanish with her mother in my childhood so in that sense I can invoke my Hispanic background. Part of my family is in Mexico now somewhere I do not know. So, yes I am also Hispanic-American. I can also invoke French-speaking ancestors who settled in Haiti. I can invoke an Irish sea captain who had a love affair with a black Baltimorean in my maternal grandmother's lineage.

Though not through the matrilineal line, I can invoke the Jewish men who came from Brazil to Grand Cayman Island to escape the Inquisition and who form part of my ancestors. So, yes I am a Jew. I can also invoke Chinese ancestors as I have been told that at some point in my family history there were Chinese. So, yes I am Asian. And, if not through blood - through my formative experience first being born in Africa I can confirm the African in me whether from Liberia, Nigeria or, to a lesser extent, Togo and Ivory Coast. I can also invoke my times growing up in Tunisia to assert a Middle-East connection where, as a child, I spoke Arabic. So, yes I am an Arab or Middle-Eastern American. Finally, I can invoke the lineage of two American Presidents that intertwined with that of Barbary who I mentioned first.

And when I invoke all of those currents of blood in me, of experience I have had, and compare those currents with my experiences in international commercial arbitration, I feel strong links of a universalist nature to all peoples around the world. To be true to that history, I feel constrained to reject the pure American primacist vision as exported from America or as reinterpreted through the foreign

view looking at America.[54] I feel my role is to push back the primacist regional, transnational or universalist vision and search for those who articulate a more purely universalist vision of international commercial arbitration. Under the universalist vision, I am not required to deny or minimize or give primacy to only one part of that experience I have and history that courses through me. I am allowed to give credit to all of it and draw strength from all of it. Because there are links to each of the persons who responded to the survey, I am able to be with them and of them – even having points in common with the primacists but also seeing the limits of their visions.

And since ancestors are in me and I can share with others and others can share with me, I think it is possible in international commercial arbitration to absorb the primacists in a universalist vision. This absorption cannot be without struggle as the reciprocities of primacists are no doubt significant, but I think that the universalist approach can also engender reciprocities from primacists and non-primacists creating new forms of reciprocities. Yet, how can one fight for this nirvana?

VI. WHAT IS TO BE DONE?

The survey suggests that only a pittance of U.S. minorities is in international commercial arbitration. Recommendations I have seen to increase minority presence have called for normative social justice approaches to convincing the profession and contrasted this with tensions in the market-based approach now emerging as evidenced in amicus briefs in *Grutter*.[55] My concern with either of these bases for argument for progress is that 50 years have passed since *Brown* and, in international commercial arbitration, U.S. minority presence is pitifully low. I would think that in that period market-based or normative reasons would have become evident enough. Put another way, 200 years after Barbary was a slave the stratification in the legal profession does not lead me to think change will occur out of the goodness of anyone's heart or due to a new-found basis of profitability. The primacist has ruled a further 50 years.

That there has been primacist resistance – whether massive or not – to change seems to be a reasonable conclusion to be made after 50 years. Swaying the resisters with appeals to right or profitability, has apparently been to little avail. Violence is not possible. However, the history is that civil disobedience has an effect.

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[54] Thus, I consider the universalist vision ultimately is subverted by the primacist vision. The civil rights movement was not about assuring "a largely white managerial elite () has received the benefit of a diverse education." *Supra* note 23 at 1592.

[55] *Id.*

It seems that the situation is pathological and some inspiration or suggested direction to look for ways to overcome resistance is to look to the study of psychology, if one thinks of the absence of U.S. minorities as a psychopathic situation that blocks the path to a universalist vision.[56] If thought of in that light, then those who permit this situation are themselves acting rationally in their own world but pathologically as to this parameter. Those with the power to hire and promote who do not hire and promote should be seen as what they are – destroyers of the possibility of advancement for minorities seeking to make their way in international commercial arbitration. In this sense, they are introducers of death to the careers of those minorities. The introducers of death bring into their organization the hostility in society toward minority progress and through this approach suppress minority aspirations. This suppression may be by direct means (not hiring) or indirect means (sabotage). It is immaterial which way it is done; the end result is that death is brought into the path of the U.S. minority.

Such an entity willing to bring death will squeeze off links between the minority and the others in the organization, to isolate them and finally destroy them. This type of activity or person can be viewed as a construct – taken from psychology – that might be of assistance in thinking about these death bringers. The term used for them is "thanatophores" who create and fan psychopathic behavior in institutional linkages bringing death to those within the institution.[57] Rather than think of those who resist minority advancement as persons capable of responding to appeals to what is right or economic arguments, unmasking the malignancy of the thanatophores among the primacists may be more productive.

The task of unmasking of a thanatophore requires the ability to bring light – to interpret the acts and links of the thanatophore to the other members of the institution. By revealing the modus operandi of the thanatophore, the thanatophore's power to continue to introduce death into the organization is challenged. In this true death struggle, the thanatophore may strike back and be forced to seek to kill directly to reassert its power. However, each link of the thanatophore that is revealed weakens its powers on the members of the organization. Thus, alliances of the forces that bring light in and outside the organization help to narrow the options of the thanatophore. Once one eliminates

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[56] I am not sure if this suggests a theory that is applicable domestically and internationally, but it seemed to be a useful construct. For the problem of domestic and international conflict resolution definition tensions, see Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2 J. DISP. RESOL. 319-352 (2003).

[57] Emmanuel Diet, *Le Thanatophore. Travail de la mort et destructivité dans les institutions, in* SOUFFRANCE ET PSYCHOPATHOLOGIE DES LIENS INSTITUTIONNELS, *supra* note 38.

the essential branches of its network, one kills the thanatophore's role in creating psychopathic institutional links.

This approach does not count on any cooperation from the resister. Rather it counts on unmasking the resistance – bringing it into the light – so it can be inspected by all. That bringing into the light causes the resistance to be seen for what it is. That knowledge alters the perception of the thanatophore causing it to lose power unless it spends time fighting to regain power. In the meantime, minority progress may occur as the thanatophore's focus is shifting to survival rather than domination.

The examples of this approach in the civil rights movement are legion: the marchers in Birmingham that led to the fire hoses used on children, the freedom riders leading to the burning of a bus in Anniston, Alabama, the sitting at lunch counters in Woolworth's. Each of these are acts of courage and civil disobedience that showed light on the mechanisms of oppression – on the psychopathology in the institutional links of society – on the thanatophores among us. The revealing of these links led to a recoiling in horror at the true nature of the institutions, weakened resistance and – as a minority – caused mutation with some opportunity opening.

Looking in the law firm setting, the suggestion that would come to mind would be that minority lawyers who enter law firms should insist on being moved immediately to the international arena. Any time the argument of "Do this now and we'll see about that later" is made the minority lawyer should understand that as being a classic thanatophore's maneuver which really means that the path sought is not going to be allowed to open easily, if at all. Those who do this may lose but they will push forward as far as their organization will allow them in the central aspects of international work. And the experience of the limits of progress, due to blocking by the thanatophores would come earlier so that new paths can be found in the field. The process requires a ruthless willingness to push the thanatophore and reveal its actions. Rather than appease, confront without aggression but by bringing light.

To bring light, the minority associate would build ties to centers of power. The risk here is the law firm hierarchy being seen as a collection of thanatophores (large and small) and a difficult place in which to navigate, survive and prosper. Rather than take a road where one appeases one thanatophore in attempting to counter another, the idea is to bring light to both or all.

Light is defined in this context as bringing progress for minorities. Progress is defined as becoming a full-time autonomous actor in international commercial arbitration. A means of getting there would be for a minority partner to build a subspecialty in the international commercial arbitration area as a space in which minority associates could learn that specialty. A high risk approach would be for a minority partner to leave behind their domestic focused practice and seek to be brought into the international commercial arbitration group of the firm. On the

macro level, the best minorities would shift from defending/interpreting domestic focused corporate acts (public finance and employment law for African-Americans, other specialties for other minorities). Even the internal counseling role to corporate clients on meritorious claims would be shifted to non-minorities who would – if special skills are present to the minority partners – do their work badly – to the benefit of progress of minority plaintiffs against the corporations.[58]

Switching to the international field also entails reaching the highest levels of the profession – causing U.S. minorities to act in a significant manner on the international plane. That access to foreign visions that differ from the echo chamber of U.S. race relations provides a further source of riches to spur the U.S. minority.

This vision foresees dynamic reaction of the thanatophore and focuses on combating evil in persons that have shown a distinct inability to do enough good for 50 years. Whatever the thanatophore's maneuvers, the minority associate should show light, show light, show light. Participate in the relevant pro bono activities, ruthlessly work without working stupidly, keep faith in their ability to rise above and keep pushing to get that international experience – experience no one can deny.

For purposes of fighting the color line, identification of the thanatophore behavior may be difficult. However, one simple first step is to see if any U.S. minorities are working or have ever worked in the international commercial arbitration group. If not, it would seem prudent to proceed on the assumption that one is in the presence of a primacist who is a thanatophore or several primacists who are thanatophores. To all, one must show light and force out their contradictions.

Put another way, by doing this, I would suggest that the U.S. minority should reclaim a certain international legal personhood – an identity that inures to his/her simply by being human independent of any rights that are granted or respected by one's government or the government in any country that one lives. This sense of the self as having international legal personality draws its strength from human rights law and, more distantly, natural law. One sees oneself as royal, whether or not one receives the jelly.[59]

This may be the way to push forward that color line: with faith, hope and light over the next period. So that in 100 years we can look back and say "Barbary, we have overcome." On the other hand, there is a concern that the seduction of accepting the primacist vision and being incorporated transnationally may lead to the U.S. minority turning into a primacist thanatophore like his colleagues. As part of pushing back – those willing to push back the perverse primacist and

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[58] *Cf.* David B. Wilkins, *supra* note 23, at 1603.

[59] David B. Wilkins & G. Mitu Gulati, *Why are There so Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996).

thanatophore personalities, those seeking a more universalist approach – these actors should not hesitate also to confront these types of psychopathic personalities.

Beyond the fight in the law firm, the fight in the law schools must be to increase the number of U.S. minorities who see the merits of having significant international careers and, particularly, international commercial arbitration careers. The task for law professors of good will is to teach in the international arena and to reach out to the minorities at their law schools to encourage them to take international courses as well as the more domestic focused courses. By stepping outside of the domestic echo chamber, the U.S. minority can understand the diversity of law and the world, use the overseas to leverage the domestic experience, and have better tools to struggle to the top of the profession in a globalizing century.

VII. THE COLOR LINE: REFLECTIONS FROM THE HORIZON OF EQUAL OPPORTUNITY

The 1954 *Brown* decision began another significant phase of the American journey towards non-discrimination and integration of minorities. The goal might be described as creating an America in which – at any time – minorities are on the same track as their majority counterparts, rather than on a separate track. Fifty years later, in the world of international commercial arbitration, the evidence presented above suggests that U.S. minorities are on a separate lagged track. U.S. minorities are barely represented in the field in the United States. U.S. minorities appear not to be seen in overseas offices of U.S. law firms practicing international commercial arbitration with parties from around the world. In contrast, their non-minority colleagues are significantly represented in the field in the United States and abroad. Their non-minority colleagues are seen overseas in U.S. law firms practicing international commercial arbitration with parties from around the world. In short, while the horizon of equal opportunity has moved forward, there is a color line.

This color line is not, however, immutable. As described above, seven currents (U.S. current, foreign based U.S. minority current, the human capital current, the cooptation current, the changing international commercial arbitration current, the culture current and the lifestyle current) interact to make this reality. The effect of these currents can be influenced to change this reality. People of good will who are in the position to change this reality should change this situation. In an arena in which the universal nature of international commercial arbitration is a cardinal principle strongly proclaimed, the absence of U.S. minorities fifty years after *Brown* reflects poorly on the American participation in that universal project.

On the day I presented this paper, I went to a meeting of international commercial arbitration practitioners at the Association of the Bar of the City of New York. At the table were about twenty people, 17 middle-aged white men from prestigious law firms and law schools, two white women (one American and one French I believe) and me – a middle-aged African-American. I told them to look around this table and look at the lousy job of integration in international commercial arbitration they were doing. Fifty years after *Brown*, I was the only minority at the table. I found it an irony that, while at the table, I was the only one who no longer wanted to be an arbitrator, a counsel, or an expert in international commercial arbitration. I said we all had to find a way to get more U.S. minorities into international commercial arbitration, an area that I love.

A comment was made that there were significant numbers of women in positions at the ICC International Court of Arbitration. I agreed, saying that when I first arrived at the ICC Court, the arbitration community was concerned about whether a female legal counsel would be respected in cases with parties from the Middle East. Today, half of the legal counsels are women and the Secretary-General and the American legal counsel are white female U.S. nationals. The Middle East concern no longer plays a role that blocks women's progress.[60]

A young African-American woman as well as a Hispanic-American man who were sitting by the wall were pointed out to me. She had just started five days earlier as a deputy to the white female head of the arbitration section of the United States national committee of the International Chamber of Commerce. I understood that he was working with the International Centre for Dispute Resolution of the American Arbitration Association. Neither were arbitrators, counsel or experts in the prestigious New York law firms. I pointed out that neither of them were at the table; they were by the wall. Later, after my comments, a place came open at the table with the departure of the non-U.S. white woman and the young African-American woman sat in the vacated seat and began to intervene in the discussion. Time will tell if she will have a significant seat or even be at the head of the table some day.

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[60] What I did not say was that the decision to promote the first woman was probably made by the then Secretary General of the ICC Court while in India in the fall of 1994. He mulled it over with me at breakfast before a major seminar in New Delhi organized to support international commercial arbitration in India. My relationship with the then Secretary General went way back to 1982 when, in law school, he interviewed me for the summer job in Paris during which I met my wife. My advice to the then Secretary General was to encourage him and to encourage him to use his authority to make the appointment quickly. Shortly after he returned to Paris, the first female legal counsel (a Frenchwoman) was appointed and the world has never looked back. This little footnote salutes that Secretary General's courage on at least these two occasions.

Later that day, at the session at which this paper was presented, I met with more experienced African-Americans who expressed their frustration to me as they had been told that the only way that they could get appointed to be an international commercial arbitrator was by working in one of the prestigious law firms doing international commercial arbitration in New York. The symmetry with what I had heard 20 years earlier was stunning for me and I wondered if I was watching history repeating itself.

One thing I can do to help end this lockout of U.S. minorities is to start counting heads: make a survey every year of the progress of appointments of U.S. minorities in international commercial arbitration. Access to that information might be one change that might help the seven currents shift and generate more U.S. minorities as international commercial arbitration practitioners.[61] While this is a rarefied space, it is the forward place from which we can look back to *Brown* and measure America's true progress in fulfilling the promise of *Brown* and the promise of international commercial arbitration: elimination of the color line.

[61] Professor Vernellia Randall is taking a similar approach for law schools. *See* "The 2004 Whitest Law Schools" http://academic.udayton.edu/race/03justice/LegalEd/Whitest/ (Last visited on April 25, 2004).

ANNEX 1

International Commercial Arbitration Survey

Authored by Benjamin Davis, Associate Professor of Law, University of Toledo, College of Law

Background and Instructions

I invite you to take a few moments to complete this survey concerning one aspect of cultural diversity in international commercial arbitration. The data you will provide will assist my presentation at an upcoming American Bar Association Dispute Resolution Section meeting and a future publication. I am sending this survey to you as you are one of the top international commercial arbitration specialists and your responses are vital and your time is greatly appreciated. I anticipate this should take 20 minutes to fill out. The results will be kept confidential. Any data will be presented in an aggregate form and any report will not make reference to survey participant names.

While by returning this survey to me you will be considered to consent to participate in the survey, for good order's sake at the end of the survey I would be grateful if you would formally enter your consent to participate/choice not to participate with your signature. Please note that if you choose not to participate in this survey, this will not prejudice in any manner your relationship with the University of Toledo.

If you decide to participate, please return this by March 12, 2004 by email to ben.davis@utoledo.edu or by telefax to 1 419 530 2439.

Thank you for your attention to this matter.

Sincerely,

Benjamin G. Davis
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University of Toledo, College of Law
2801 W. Bancroft Street
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Tel.:1 419 530 5117
Fax:1 419 530 2439
E-mail:ben.davis@law.txwes.edu

I. Please indicate below your nationality.

II. Check those features that best describe your employment (check all applicable categories)
___ private practice in a law firm
___ in house counsel in a company
___ employee of an arbitral institution
___ professor in a university
___judge
___ other (please describe)

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

III. How many years have you been involved in international commercial arbitration?
___1-5 years
___6-10 years
___11-15 years
___16-20 years
___ greater than 20 years

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

IV. In how many international commercial arbitrations have you participated in that period and in what capacity?
___ how many as arbitrator
___ how many as counsel for a party
___ how many as an expert
___ how many as a judge
___ how many in any other capacity (please explain)

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

V. In your time participating in international commercial arbitration, have you ever participated with a member of an American minority group (i.e. African-American, Middle-Eastern or Arab American, Asian American (including South Asia), Hispanic American or Native American) serving in any capacity in any of the international commercial arbitrations?
____Yes

____No

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

If you answered NO to Question V, please go on to Question VI. If you answered YES to Question V, please skip Question VI and go on to Question VII.

VI. As you have answered NO to question V, I would be grateful if you would provide a note below about the reasons you think members of American minority groups were not present in international commercial arbitration as experienced by you.

If you answered Question VI, please go directly on to Question XV.

VII. Participation as arbitrators: As you have answered YES to question V, please indicate below how many persons from each American minority group(s) you remember participated as arbitrator during your experience in international commercial arbitration.

____Number of African-Americans
____Number of Middle-Eastern or Arab Americans
____Number of Asian Americans (including South Asia),
____Number of Hispanic Americans
____Number of Native Americans

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

VIII. Role of participation as arbitrators: As you have answered YES to question V, please indicate below whether the American minority group member(s) served as a Chair of an Arbitral Tribunal, as a coarbitrator, or as a Sole Arbitrator in the international commercial arbitration(s).

Chair of an Arbitral Tribunal

____Number of African-Americans
____Number of Middle-Eastern or Arab Americans
____Number of Asian Americans (including South Asia),
____Number of Hispanic Americans
____Number of Native Americans

Coarbitrator in an Arbitral Tribunal
____Number of African-Americans
____Number of Middle-Eastern or Arab Americans
____Number of Asian Americans (including South Asia),
____Number of Hispanic Americans
____Number of Native Americans

Sole Arbitrator
____Number of African-Americans
____Number of Middle-Eastern or Arab Americans
____Number of Asian Americans (including South Asia),
____Number of Hispanic Americans
____Number of Native Americans

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

IX. Participation as arbitrators: As you have answered YES to question V, please indicate below how the American minority group(s) members was designated as an arbitrator in the international commercial arbitrations you have experienced.
___Number of Party appointments
___Number of joint nominations of the parties or the coarbitrators as Chair of the Arbitral Tribunal
___Number of joint nominations of the parties as Sole Arbitrator
___Number of appointments by an arbitral institution
___Number of appointments by other appointing authority
___Other (Please specify)

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

X. Participation as counsel of parties: As you have answered YES to question V, please indicate below how many persons from each American minority group(s) you remember participated as counsel of a party during your experience in international commercial arbitration.
____Number of African-Americans
____Number of Middle-Eastern or Arab Americans
____Number of Asian Americans (including South Asia),
____Number of Hispanic Americans
____Number of Native Americans

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

XI. Participation as counsel of parties: As you have answered YES to question V, please indicate below the role played by the member(s) of the American minority group(s) you remember participated as counsel of a party during your experience in international commercial arbitration. (check all applicable categories)
____Lead Counsel
____Member of the arbitration team
____Trainee
____Other (Please specify)

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

XII. Participation as experts: As you have answered YES to question V, please indicate below how many persons from each American minority group(s) you remember participated as expert during your experience in international commercial arbitration.
____Number of African-Americans
____Number of Middle-Eastern or Arab Americans
____Number of Asian Americans (including South Asia),
____Number of Hispanic Americans
____Number of Native Americans

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

XIII. Participation as experts: As you have answered YES to question V, please specify below indicating how the person(s) from each American minority group(s) you remember participated as expert during your experience in international commercial arbitration were appointed
____Number of party appointed experts
____Number of Arbitral Tribunal/Sole Arbitrator appointed experts
____Number of Institution appointed expert
____Other (please specify)

Comments (if you have any comments to assist in understanding your response, I would be grateful if you would place them here.):

XIV. As you have answered YES to question V, I would be grateful if you would provide a note below about the reasons you think members of American minority groups are present in international commercial arbitration as experienced by you.

XV. Do you consent to me using your responses as part of my survey of this topic.
____Yes
____No

XVI. If you answered YES to question XV, may I contact you for a brief interview?
____Yes
____No

XVII. (Optional) Please indicate your name, address, e-mail and telephone number.

Signature_____

Please return this by March 12, 2004 by email to ben.davis@utoledo.edu or by telefax to 1 419 530 2439.

Thank you for your time and attention to this request.