The CIArb Canada Arbitrator

CIArb Canada's Newsletter
Summer 2018

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Events & Announcements

- *6th Annual Symposium* *Toronto, ON* *Sept 20, 2018*
- *Accelerated Route Course* *Toronto, ON* *Sept 21-23, 2018*

A Message from Dr. Paul Tichauer, FCIArb, Chair

Dear Fellow Canada Branch Members,

I am delighted to report that membership in the CIArb Canada Branch has increased by 10% since inception on July 1, 2017 and now totals 243.

Membership in the Branch is distributed geographically as follows:

- Ontario – 113
- British Columbia – 55
- Alberta – 44
- Quebec – 16
- Other Canada – 10
- Rest of the World – 5
- 17% are female
- 51% are Fellows; 28% are Members; 18% are Associates and 3% are retired

We would like to see the make-up of our membership evolve so that it more closely reflects the distribution of the Canadian population in general, especially with respect to gender and mother tongue.

Canada Branch AGM and Executive:

The Canada Branch held its first AGM on April 30, 2018. The following CIArb members were elected as Canada Branch Directors, effective May 1, 2018:

- Pierre Dalphond
- Jacques Darche
- Scott Fairley
- Arif Ghaffur
- Julie Hopkins
- Joe McArthur
- William Neville
- Joel Richler
- Sabri Shawa
- Paul Tichauer
- Daniel Urbas
- Janet Walker

Directors are elected for a period of three years and may hold office for up to three successive terms. For the purpose of continuity, the term of office for roughly one-third of the Directors ends each year. In order to establish a staggered incumbency, however, one third of these directors elected on April 30, 2018 will step down after one year, another third will step down after two years, and the remaining third after three years. In each instance, the directors who have stepped down may run for re-election for up to two additional 3-year terms.

At the Director's meeting that was held immediately following the AGM the following individuals were elected by the Directors as officers of the Canada Branch:

- Chair: Paul Tichauer (ON)
- Vice-Chair, Events: Sabri Shawa (AB)
- Vice-Chair, Membership: Joe McArthur (BC)
- Honorary Secretary: Julie Hopkins (AB)
- Honorary Treasurer: Daniel Urbas (QC)

Election of the Branch officers is held annually.

The CIArb Canada Arbitrator Co-Editors:
William L. Neville E: wln@nevilleadr.com
Ralph Cuervo-Lorens E: rcuervolorens@blaney.com

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Branch Activities

The Canada Branch now has Chapters in Montreal/Ottawa, Toronto, Calgary and Vancouver. The activities at these Local Chapters are reported elsewhere in the newsletter.

James Bridgeman, the 2018 President of the Chartered Institute of Arbitrators visited the Canada Branch on May 31 and June 1. A reception was held on May 31 and around 30 members had the opportunity to enjoy some wonderful refreshments and chat with Mr. Bridgeman. Thanks very much to Kim Stewart for making Arbitration Place available to us for this function.

The Canada Branch is organizing two events in September:

1. On Thursday, September 20 the Branch will host the 6th Annual Symposium at The Albany Club in Toronto. Put this date in your calendar, details will be forthcoming soon!
2. And on Sep 21 – 23 the Branch is offering an Accelerated Route to Fellowship program. This will be held at the offices of Blake, Cassels and Graydon LLP in Toronto. Full details and registration information for this course can be found on the Canada Branch Website: www.ciarbcanada.com

Keep checking the Canada Branch website for updates and new events: www.ciarbcanada.com . And be sure to keep your profile current on our website. This is available to all CIArb Canada members. If you have any questions or need help please reach out to Izak Rosenfeld, our member webmaster, at izakrosenfeld@yahoo.com .

The Canada Branch is an entirely volunteer organization. All CIArb members who reside in Canada are encouraged to participate actively and promote our growing organization. Please contact one of the following Directors for more information as to how you can become involved:

- Vancouver – Joe McArthur: joe.mcarthur@blakes.com
- Calgary – Sabri Shawa: shawas@jssbarristers.ca
- Toronto – Scott Fairley: sfairley@cambridgellp.com
- Ottawa – Bill Neville: wln@nevilleadr.com
- Montreal – Jacques Darche: jdarche@blg.com
- Rest of Canada – Paul Tichauer: ptichauer@ceoarbitration.com

I look forward to connecting with you again at our next event or earlier.

Paul A. Tichauer, FCIArb

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Vancouver Chapter Update

By Laura Cundari

On May 10, the Vancouver Chapter hosted a panel discussion and networking reception for current and prospective members at the Vancouver offices of Blake, Cassels & Graydon LLP. Henri Alvarez, Q.C., Tina Cicchetti and Gerald Ghikas, Q.C. shared insights from their careers as arbitrators in a panel discussion moderated by Joe McArthur. Following the panel, the inaugural AGM of the Vancouver Chapter was held, and the executive members were elected. Joe McArthur was elected Chair, Vanessa Hobden was elected Treasurer, David Gruber was elected Secretary, and Dina Al Ansary, Laura Cundari, Robert Holmes, Q.C. and Hein Poulus, Q.C. were elected Members at Large.

6th Annual Symposium on International and Domestic Arbitration in Canada and Award Dinner

The Albany Club
Toronto, ON

September 20, 2018

Accelerated Route to Fellowship

September 21-23, 2018
By Daniel Urbas

The Canada Branch will offer its second Accelerated Route to Fellowship program this Fall and registration is almost full. The September 21-23, 2018 program will be hosted at Blake, Cassels & Graydon's offices through the generous support of Brad Berg and his colleagues as well as having two of their partners from their National Commercial Arbitration Group attend. The course tutors are Osgoode Hall Professor Janet Walker, the CIArb North American Branch's Jim Reiman from Chicago, Julie Hopkins from BLG's Calgary office, Igor Ellyn from Toronto's Igor Elly ADR, Stephanie Cohen from the CIArb's New York Branch and Jacques S. Darche from BLG's Montreal office. "We're excited by the quality of the candidates who have signed up and that the interest has been so strong" said Canada Branch Chair Dr. Paul Tichauer. For those interested in securing one of the few remaining places, visit the Canada Branch's website here. Early Bird pricing ends June 29.

Accelerated Route Course

Toronto, ON
September 21-23, 2018

In addition, one-day Introduction to International Arbitration courses are planned for Vancouver, Calgary and Montreal - dates to be confirmed

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CIArb Alberta Update

by Sabri Shawa, QC, FCIArb

The Alberta Chapter of the Chartered Institute of Arbitrators will be holding its informal inaugural event on Thursday, June 14, 2018. Please join us at Rodney's Oyster House (355 10th Ave SW) for drinks and snacks (courtesy of JSS Barristers LLP) from 5:00 p.m. – 6:30 p.m. This is an informal event intended to give anyone interested in CIArb Alberta an opportunity to get together, and to meet the Alberta Chapter Committee. There will be no speaker or formal program. We hope you can join us.

Please also join us for cocktails and appetizers on Thursday, September 13, 2018 for our formal inaugural event. The Honourable Thomas Cromwell CC, formerly a justice of the Supreme Court of Canada, will be our guest speaker. The event is cosponsored by BLG and JSS Barristers, and will take place at the offices of JSS Barristers beginning at 5:00 p.m. The event is open to those already affiliated with CIArb as well as those interested in learning more about our organization.

CIArb Alberta is in the process of building a website. We hope to host a variety of events in order to provide an opportunity for those interested in arbitration, and other forms of ADR, to meet and talk about issues of interest and recent developments in our field. We will make more information available on the website once it is established.

Sabri Shawa, a CIArb Canada Director and Alberta Branch Chair, is currently CIArb Canada Events and Program Chair.

6th Annual CIArb Symposium and Awards Dinner

Thursday, September 20, 2018 3 – 9 pm

by Igor Ellyn, QC, FCIArb.

As you focus on the fine spring weather and on enjoying some summer R & R, we remind you that just three short months from now, on ***Thursday, September 20, 2018,*** CIArb. will present its **Annual Symposium on Arbitration in Canada** at the Albany Club, 91 King Street East, Toronto.

Now in its 6th year, the Symposium format has been increasingly popular with members old and new as a must-attend event on the Canadian Arbitration calendar. As in the past years, the Symposium will feature two panels: one on International Arbitration and on Domestic Arbitration with distinguished speakers from Canada and the United States.

Lisa Munro, lawyer, arbitrator and managing partner of Lerrners LLP, will moderate the International Arbitration panel. So far, we have confirmed three excellent speakers with different and interesting perspectives on international arbitration.

Christina Doria, last year's Symposium co-Chair, is one of the brightest lights of the arbitration bar. She practices at Baker McKenzie's Toronto office and has been involved in some of the leading and most interesting cases in international arbitration. ***Barbara Capes*** of Dentons LLP has developed expertise in many aspects of arbitration including the hot topic of class action arbitration. ***Stephanie Cohen*** is a Canadian lawyer, who resides in New York, where she practices as a highly regarded arbitrator of commercial disputes. She has already arbitrated several ICC disputes and is on the arbitration panels of ICC, ICDR, AAA and other rosters. Among other matters, she has expertise in cybersecurity in arbitration. A fourth speaker from Quebec with international arbitration expertise will be added shortly.

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Marvin J. Huberman, independent arbitrator mediator, barrister and the editor of *A Practitioner's Guide to Commercial Arbitration* will moderate the Domestic Arbitration Panel.

Three distinguished and experienced speakers have been confirmed. The ***Hon. Barry Leon*** is an arbitrator and mediator at Arbitration Place. He is a former Chair of the ICC Canada Arbitration Committee and recently completed a three-year term as Presiding Judge (Commercial Division), Eastern Caribbean Supreme Court in the Territory of the Virgin Islands. ***Stephen Morrison*** is also an arbitrator and mediator at Arbitration Place, following a distinguished career at the Rose Corporation and at Cassels Brock LLP. ***Joel Richler*** is a commercial arbitrator and mediator at Bay Street Arbitration Chambers, following a lengthy career as a partner at Blakes LLP. A fourth speaker, likely a retired judge, will be added shortly.

The educational sessions will be followed by networking reception and the presentation of the ***2018 CIArb.Award for Distinguished Service in Arbitration in Canada***. We are very pleased to announce that this year's honouree and keynote speaker is ***Professor Janet Walker.*** Janet is an arbitrator, mediator, professor, teacher of arbitration law and procedure and a recognized leader of the arbitration bar in Canada, England and Australia. She was a past chair of the Toronto Chapter of CIArb and an early promoter of the establishment of the Canada Branch. She is a very worthy recipient of this Award.

This year, Lisa Munro, Marvin Huberman and Igor Ellyn, CIArb Toronto Chapter Past Chair, are co-chairing the 2018 Symposium. CIArb Canada Branch Chair Paul Tichauer is providing input and advice. Izak Rosenfeld is providing technical support for registrations and our website.

As in past years, the evening will continue with a sumptuous dinner at the Albany Club at which Janet Walker will present a keynote address. Last year, we had more than 70 attendees, all of whom found the Symposium interesting, educational and thought-provoking and in tune with most pressing issues in domestic and international arbitration in Canada. This year, we hope to learn from past successes and be even better. We hope you will attend and encourage your colleagues to do so. "Save the Date" and watch your email for registration details shortly.

ARTICLE

Can "Inclusive" Canadians Help Change the Face of International Arbitration[1]

By Louise Barrington[2], J.D., L.L.M

On a recent flight from Paris, I spied an article in the in-flight magazine citing Deloitte's recent report "Outcomes over optics: Building inclusive organizations". The Deloitte conclusion was that courageously inclusive companies, which take calculated risks and invest in innovation, are those which grow and create jobs in Canada. Other studies over the last decade have repeatedly demonstrated that corporate boards with diverse memberships make better decisions and show better financial results. A range of diverging ideas fosters conversations, creativity and adaptability. Employees in a corporation that respects and encourages new ideas report better job satisfaction - and they stay longer.

But Canadians aren't trying hard enough. In our proudly multicultural, welcoming nation, most Canadian corporate entities continue to focus on our differences instead of welcoming and valuing individuals with something original to bring to the table. Deloitte cited our innate conservatism as the reason Canadian corporations are reluctant to change their corporate structures, even when faced with compelling evidence that it will help their bottom line. The Deloitte study encouraged Canadians to take advantage of our inclusive nature to gain market advantage, outlining a five-point approach to make that happen.[3]

[1] A version of this paper was presented at the ICC YAF North America Regional Conference in Montreal, June 8, 2018
[2] International Arbitrator, Hong Kong, Paris, London, Toronto. www.arbitrationplace.com
[3] www.canada175.ca/unitetoinclude

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Finding that message in an Air Canada flight publication was proof that the diversity conversation is no longer the women and minorities issue it was once thought to be; it has gone mainstream.

Now what has this to do with international arbitration as practiced in Canada? Lack of diversity isn't just unfair. It is now recognised as an organisational problem. Excluding outsiders and clinging to comfortable but outmoded habits is not a recipe for success in today's changing world.

That got me to thinking about Canada and diversity and arbitration. Although it hasn't yet been officially studied to any extent, what diversity does in a board room it should also be able to do in a law office. Or in an arbitration institution. Or in an arbitration tribunal. In fact, diversity and inclusiveness could very well be critical to the future of arbitration as it faces existential challenges from our rapidly changing business universe. And Canada, with our open, multi-cultural heritage, is well-placed to take a leading role.

If you have any doubt that arbitration as we know it must adapt, then consider the following four observations:

1 The way international business is conducted is changing, drastically and rapidly. The SMAC revolution (social media, mobility, analytics and cloud commerce) is challenging business operators to adapt -- not only how they do business, but how they will resolve the inevitable disputes spawned by digital international business. My generation doesn't really master the new skills and technologies; it is the millennials and Gen Y, who have grown up with these new technology-based elements, who are going to make the changes.

2 Geographically too, players are changing. Over one-third of the world's population is in China and India. Both economies are growing rapidly, with China vying with the U.S. for top spot in global trade. What makes us think that these new business operators will continue to use a dispute resolution system devised on another continent, in another century, and in vastly different conditions?

3 For a century, arbitration was touted as the commercial response to slow, non-neutral "foreign" courts. In this century, international business operators complain about the system that was sold as "faster, cheaper and more efficient" than state court arbitration. Those claims are now to a great extent false. Yet arbitration has not evolved to cure its own ills. We've been using bandaids where major surgery may be indicated. To meet the present demands of commercial operators and to anticipate their future needs, we need fresh cultural viewpoints, innovative ideas, and a willingness to risk change.

4 Arbitration's main advantages are its flexibility, its neutrality, and its finality. All of these are under attack -- from over-regulation, from the homogenously western face of the decision-makers, and from the resulting lack of credibility of "western arbitration" especially in the Eastern hemisphere. If the arbitration community cannot adapt to new business, we will be replaced.

But convincing ourselves of the advantages and even the necessity of diversity doesn't in itself translate into change. This is all too evident in the statistics about women in high positions in commerce, law firms, government and of course, in arbitration.

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Over my 25 years of studying the role of women and their progression in dispute resolution, and particularly in international arbitration, it has become clear that the dearth of women is part of the larger problem. Women aren't the only ones excluded from the "boys' club" or the "in crowd" of arbitration. Focussing on women is looking at one part of a much larger whole, which includes ethnicity, religion, culture, sexual preference, physical appearance, height, language or accent, physical ability and age.

But the practical reality is that women are easy to identify. And if you can count it you have a shot at changing it. ArbitralWomen focusses on the promotion of women but the behavioural changes we can achieve will benefit other "outsider" groups as well.

Women have made visible progress in the domain of international arbitration. In 1993, (although back then no one thought to ask) women were appointed in about 2% of cases. We could count the female arbitrators on our fingers. Now, as the arbitration institutions see the value in demonstrating their diversity, they rush to publish statistics that now show women getting between 15 and 25% of arbitral appointments.

Studies have shown however that this 15 to 20% mark is a danger point. It is critical at this point that both women and men not accept this level as "good enough". Women have broken through the glass ceiling, but now is not the time to sit back and wait for parity to arrive. Just think about it. Despite the fact that since the 1970's (that is TWO full generations) half of Canada's law school graduates are women, and we've finally got to 15%? At this rate parity might be expected in about 100 years.

But, in reality, if we stop now, not only will women fail to progress; women will lose ground

Without us calling them out, those in command (male and female) will return to past organisational habits. Habits that are perpetuated by deeply ingrained unconscious bias.

International arbitration carries over traditional corporate biases into the milieu of dispute resolution. Facing corporations reluctant to change their habits, in-house counsel and independent advisors know the mantra: "no one gets fired for buying IBM". It seems safer to go with the name brand than to try out a new one, even if that new one promises improved performance and efficiency.

Here's a question: who comes into your mind when you read the phrase: "an arbitrator with gravitas"? Did you think of a woman? I thought not! In a recent Toronto seminar of more than 50 people, only two raised their hands to say a woman had come to mind. And one of them confessed that the woman he thought of was his mother! Now gravitas may be an asset to an arbitrator, who is expected to command respect as a leader and an organiser as well as a judge. It is reassuring to have a steady dependable and respectable individual to judge your case. But is it really wise to demand gravitas of a candidate who has all the other knowledge, skills and judgment required for the job? Or is saying we need gravitas simply our unconscious bias code for "we'd feel more comfortable with an older white male who *looks like a judge*"?

Although no one likely gets fired for doing it "the way we've always done it", the risk is that the very existence of the company – or in our world, of international arbitration - is at stake. Just as new electronics can't be repaired with obsolete tools, new kinds of "smart" disputes are going to need innovative "smart" dispute resolution tools.

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Those currently at the top of their arbitration careers, but who don't know how to use email or edit in Word, much less deal with electronic discovery, will not be providing those solutions. And what of cyber security? How many of the "old guard" are confident that they are adequately protecting their information, and the information belonging to the parties? Most of us don't understand how software works any more than we can repair our modern computer-driven cars. We don't know what to look for, so how can we solve the problems? It will be the new kids on the block who bring with them the changes we need.

Still, we hesitate to welcome change. Having lived many years outside Canada, my perception is that Canadians – at least those of my generation and above - tend to be very conservative and risk averse. We are biased in favour of the known, the familiar, the safe and the comfortable. When we need to make decisions involving people, our unconscious uses mental shortcuts based on the attitudes and stereotypes that we've developed throughout our lifetime.

Unconscious bias is in every one of us. Do you think you are less biased than the average member of the society you live in? If you answered Yes, you should know that about 95% of people questioned answer Yes. Do the math; it just cannot be true. Unconscious bias bears no relation to intelligence, and your unconscious bias may be directly opposed to your conscious beliefs and opinions. If you don't believe you are biased, spend 15 minutes to take one of the Harvard bias tests[4] - and marvel at what you learn.

Nobel Prize winner Daniel Kahneman has a book called *Thinking, Fast and Slow*,[5]that gives us wonderful examples how our superfast processor and our slow methodical conscious brain work to complement each other, but also compete like jealous siblings.

There are names for some different kinds of bias and what triggers them:

- Affinity bias (looks like me, went to my school)
- Similarity basis (thinks the way I do; we're on the same page)
- Beauty bias (60% of male CEOs are over 6 feet tall; only 15% of the US population is over 6 feet)
- Halo bias (he's so good looking and confident, he must be a good manager) or the reverse: the horns / cloven hoof) bias (he dresses sloppily so he must be incompetent and unprofessional)
- Confirmation bias (I see only information that reinforces my first judgment and am literally blind to the rest)
- Conformity bias (go along with first speaker's views, or with the majority – even if it's wrong!)

These biases affect the way we perceive different people and reality in general. They dictate how we will react to some people, whether we are friendly and helpful to them or not, and even whether we pay attention to them. Do we listen to one person more than another? Do we believe some people rather than others? And how do we use micro-affirmation (like saying mmhmm, yes, and nodding in agreement) to support or encourage some people? At this point the litigation counsel might be thinking, hmm, will my unconscious biases affect whether I will believe a witness or not? Answer: Yes! And so do those of judges and arbitrators.

Quickly now, what is the sum of 2 + 2? How long did it take you to "know" this answer? A millisecond. Because it is simple, and probably the most familiar arithmetic problem in existence.

[4] www.implicit.harvard.edu
[5] Penguin, 2011

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Your unconscious brain knows it. Now, what is the product of 17 x 24? Kahneman explains that you know immediately two things: first, this is a multiplication problem, and second, you don't know the answer, so you'll have to work it out in your head. Now is the correct answer 40? Your unconscious brain knows that can't be correct. How about 40,000?

Same thing. So the unconscious brain passes the problem to the conscious brain, which can slowly work it out: 7 x 4 is 28, carry the 2. 7x2 is 14 +2 is 16, so 168. Drop down a line and add 1 x 24 to get 408.

Now your unconscious mind – even if you are a lawyer – can do simple math and is generally aware of the parameters of scale, so it quickly and automatically rules out 40 and 40,000. Then it passes the problem to the conscious, calculating brain. Now - assuming you could do this multiplication in your head - could you do it while driving on a busy highway? The slow brain is not good at multi-tasking.

Here's an old puzzle that Kahneman uses.

> A bat and ball cost $1.10.
>
> The bat costs one dollar more than the ball.
>
> How much does the ball cost?

A number came to your mind. That number is 10 cents. Easy? This easy puzzle, says Kahneman, invokes an answer that is intuitive, appealing, and wrong. If the ball costs 10 cents, the total cost of the bat and ball will be $1.20 – 10 for the ball and 1.10 for the bat. The intuitive answer came to your mind, but did you stop there, or did you resist your intuition and engage the plodding, conscious, calculating brain to get the right answer?

The neuropsychology of how blind spots betray our conscious logical decision making processes is a fascinating study. Read *Blindspot: The Hidden Biases of Good People*[6] for a fascinating introduction to how unconscious cognition controls human prejudices and behaviour. The decisions we make in our offices may not mean life or death, but they can have very far-reaching effects on the people we exclude out of habit. And they may make us blind to better choices, choices which could bring the competitive advantages of diversity in adapting and improving the way we do business and resolve our disputes.

Once convinced of the competitive advantage to be gained by embracing new actors, new ideas, and new methods, we need to confront our unconscious bias. We need to recognise how it holds us back, and substitute sane, fair and logically reasoned decisions - instead of relying on our reflexive "gut-reaction" and then finding ways to justify it.

Recognising our own blind spots is the first step in dealing with them so as to minimize their effect on decisions which although not life-threatening, may run counter to our expressed beliefs and values. But self-knowledge is just the first step on a difficult path, one that requires courage as well. Awareness of our biases alone will not change our behaviour.

In making decisions about arbitration – whether to initiate it, who to engage as counsel, who should make up the counsel team, and who should be the arbitrator, you are not dealing in life and death. In our busy stressful lives, it is all too tempting to rely on intuitive, easy, familiar precedents and fail to engage the services of the plodding hardworking conscious brain.

[6] Banaji and Greenwald, Delacorte Press 2013

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Let us not be too quick to demonise our biases. Unconscious bias is not an enemy to be vanquished or a disease to be cured. It is part of a system that is vital to our survival. It is the product of our upbringing, our education, our religion and ethics and social situation. It is part of an amazing function of our brain which allows us to process at an unconscious level 60 million bits of information per second, while our conscious brain is using slow logic to mull things over. Our brain's ability to process information in a split second is a survival skill without which our ancestors would have perished to predators and we would not even be here. But this fast-processing brain works on experience; it forms stereotypes and judgments based on that experience; it accepts the family and the familiar as safe and dependable. It rejects the unfamiliar

as unknown and therefore potentially dangerous. It causes us to have "blind spots" which influence our decisions, even when we think we are being logical. Simply put, when faced with a choice, your unconscious mind's superfast processor quickly arrives at a judgment, far ahead of the slow, methodical, logical conscious process of deciding. So by the time you get to your conscious decision, it has been influenced – stealthily, silently – by the superfast unconscious judgment. Then you try to explain rationally the reasons for choosing the same old, same old. Known, safe pair of hands, respected, - but possibly far too expensive for the case at hand and unavailable for meetings until 2021.

It is now that we need to do the real work to change our behaviour to reap benefits diversity can bring.

Any dieter will extol the virtues of her high protein, low carb, no-fat, high-fat, grapefruit, ketogenic diet or intermittent fast. Meanwhile, she bites into a Big Mac or Godiva biscuit and hops into the car to drive 300 metres to take the elevator to her second story apartment.

We all have experienced the disjunct between what we is know is good and what we actually do. The truth is, old habits die hard. And in times of stress or trouble, we still crave our comfort food.

Without focus on the goal and a large dose of will power, we'll be packing on those pounds again.

Without obliging ourselves to engage the conscious mind to monitor "decisions" made by our unconscious mind, we will soon fall back into the same old habits.

Diversity is the beginning. Inclusiveness though, is the only way that lasting change can happen. An organisation can have a diversity policy in hiring, but if it sidelines the diverse employee, that employee will feel underappreciated and will hesitate to contribute his or her original ideas.

Someone once said, "Diversity is being invited to the party. Inclusiveness is being asked to dance."

Kahneman and others have arrived at two conclusions, which are when read together, disturbing. The first is that we have difficulty in seeing our own blind spots, so we need others to notice and call us out. The second is that real change comes from the top, from those responsible for establishing the ethos of the organisation. This means that those at the top, those with clout, must encourage open conversations and allow others to call out bias when they see it. Think about it: how many junior associates are ready to knock on the senior partner's door and suggest that the firm needs a more inclusive hiring programme? And how many at the top are willing to listen?

Many firms are seeking wisdom in making changes which will ensure that those who haven't usually been invited to the party not only get invitations, but that their dance cards are full.

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Until now though, no one has applied the knowledge to the field of international arbitration.

ArbitralWomen has received a grant from the AAA-ICDR Foundation to develop The ArbitralWomen Diversity Toolkit ™ We are studying the problem and working on strategies to resolve it by raising consciousness, by identifying unconscious bias, and by finding or designing ways to change the way we choose the people who we work with to resolve our disputes. We will launch the Toolkit in New York in November, as a one-day seminar to be delivered by AW trainers to law firms, corporate entities, arbitration institutions, and any group that wants to learn more. As a preview though, we will be thinking of ways to:

- set specific objective fair expectations for making decisions regarding arbitration
- adopt personal and professional habits that challenge people's traditional ideas; encourage openness to new viewpoints and cultures
- slow down decision-making to engage the reflective, calculating, logical brain
- challenge ourselves an others on decisions that appear to unfairly exclude someone, and
- empower those who are included as well as those who are inclusive.

A twentieth century black revolutionary wrote, "There is no more neutrality in the world. You either have to be part of the solution, or you're going to be part of the problem." As Canadians with the most diverse population in the world, we are justifiably proud of our rich cultural heritage.

We can take advantage of our multicultural society to include in our personal and professional life practices and connections that bring us into contact with people whose ideas are different from ours. Canadians are in a unique position to turn that cultural richness to developing arbitration as an inclusive process with the creative resources to adapt to the needs of new commerce.

LOUISE BARRINGTON, JD, Maitrise en droit europeen

Louise Barrington is a dispute resolver with 30 years of experience. She practiced law in Ontario before moving into the field of commercial arbitration during graduate studies in Paris. A Canadian, she also holds a British passport. As well as private practice, her career includes sitting as arbitrator, mediating, teaching, and consulting.

Ms Barrington is legally qualified in **Ontario, New York** and **England and Wales**. She studied international business law in France and holds a Maitrise in European law from the **University of Paris II (Assas)**. In 2001 she became one of Asia's first chartered arbitrators and an accredited mediator and trainer

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With "home bases" in **Hong Kong, Paris and Toronto,** she has acted as sole arbitrator, co-arbitrator named by parties and institutions, and as tribunal president, in both ad hoc and institutional cases on four continents. In her **more than 100 arbitration cases** she has resolved disputes involving sales (CISG and shares), banking, franchises, insurance, construction, wrongful dismissal, intellectual property and licensing, agency, commission and shareholder disputes. She is a panel member for **HKIAC, CIArb, ICDR, VIAC, CIETAC. DIAC, BCCIA** and a number of other regional arbitration institutions and has sat as sole arbitrator and chaired numerous **ICC** and ad hoc arbitrations, in Asia, Europe and North America.

She has always combined arbitration practice with academic pursuits, teaching American Business Law in Paris and **arbitration, mediation, international and commercial law** (including in the French language) on law school faculties in Canada, England, Hong Kong and the USA. She directed the LLM Programme in Construction Law and Dispute Resolution at **King's College London** and is currently Director of the Dispute Resolution Module for the **SiLS on-line LLM in International Commercial Law**.

In 1997 Ms Barrington founded **ICC Asia in Hong Kong**, acting as arbitration/commercial law and practice resource for lawyers and businesses throughout the region. Ms Barrington turned to **full-time arbitration and mediation** practice as an independent arbitrator in **2009** and in 2011 was one of the original Member Arbitrators at . Now shuttling between Toronto and Hong Kong, in addition to sitting as arbitrator, she continues to teach arbitration law and practice, award writing and international sales law (**CISG**) as an adjunct professor at **Osgoode Law School** in Toronto and for a number of arbitration organisations.

She founded and directs the annual **Vis East Arbitration Moot** (www.cisgmoot.org) and is co-founder and honorary president of **ArbitralWomen** (www.arbitralwomen.org). She is a member of the **ICC Arbitration Commission (Paris)**, the **International Law Institute** and for many years held elected offices with the **Chartered Institute of Arbitrators**. She teaches arbitration practice courses around the world – recently in Brazil, Cambodia, Washington DC and Croatia. She is chief editor of **The Danubia Files: Lessons in Award Writing from the Vis Moot**. In her role as Director of the **Vis East Moot Foundation** she has established capacity building programmes in Cambodia and Myanmar.

Ms Barrington speaks **English** and **French** fluently, along with conversational **Spanish**, and a little **German.**

She received the **CPR Diversity Award** in 2011.

ARTICLE

Can the Application of Blockchain Technology Broaden the Horizons for Arbitration?

By Ralph Cuervo-Lorens and Dena Girvari

In recent years, consumers, governments and public interest groups have increasingly raised concerns over human rights abuses in the mining sector. Businesses are facing growing pressure from the public in this regard and various countries have as a result adopted legislation imposing a variety of due diligence and reporting obligations on corporations sourcing and using in their supply chains and products, minerals extracted from known conflict areas[1]. The possibility of being tainted by human right violations can harm the reputation of businesses as well as that of the host countries and weaken a corporation's social license to operate in those jurisdictions.

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While public scrutiny and the adoption of such legislation constitute commendable efforts to protect human rights globally, these measures can impose a significant burden on businesses that are part of the supply chain. Blockchain technology can reduce this burden by facilitating transparency in the supply chain. The application of this technology in the mining sector has the potential to have a significant effect on the arbitration of mining related disputes.

Blockchain – a brief primer

Blockchain technology made its debut as the medium on which the cryptocurrency Bitcoin is transferred. Blockchain is essentially an electronic ledger or database maintained by the members of a network. The only way this ledger can be amended or updated, is by a pre-determined protocol. In the case of Bitcoin, for example, the ledger is updated once the majority of the "nodes" or members of the network consent to the specific update.

Smart contracts are functions that can be enabled on a blockchain. They add a layer of sophistication to the technology because they can be used to impose pre-determined conditions before a change to the ledger can be implemented.

For example, smart contracts can be used to require that three specific members need to consent to an update before the nodes in the network can verify the update and implement it to the ledger.

The principal value feature of blockchain technology is that the information in the ledger can be trusted without the need of oversight by a centralized authority.

CSR legislation and the role of Blockchain

On August 22, 2012, the United States implemented a law which impacts thousands of companies globally: section 1502 of the U.S. Dodd-Frank Wall Street Reform Act ("DF 1502"). The statute for the first time required all companies listed on the U.S. Stock Exchange to declare the use of minerals determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo (DRC) or in adjoining countries.

This imposes a significant due diligence burden on industries which use such minerals when producing goods such as those in the electronics and automotive industries. The burden is exacerbated by the fact that mining supply chains consist of complex multi-tiers with multiple actors, all of which militates against a transparent and traceable record.

On January 1, 2021 the European Union's Regulation (EU) 2017/821 (the "EU Regulation") is set to come into effect. This legislation was motivated by the concept of "responsible sourcing" touted by the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights as the principle of encouraging businesses to verify, via due diligence procedures, that they are not purchasing minerals from sources which fund armed group activities in designated conflict areas.

The EU regulation is anticipated to directly affect between 600 and 1000 EU importers and indirectly affect about 500 smelters and refiners. It requires importers to identify smelters and refiners in their supply chains and to check whether they have the correct due diligence practices in place. Specifically, the regulation requires importers to follow a five-step framework set out by the OECD:

1. Establish strong company management systems;
2. Identify and assess risks in the supply chain;
3. Design and implement a strategy to respond to identified risks;
4. Carry out independent third-party audit of supply chain due diligence at identified points of the supply chain; and,
5. Report on supply chain due diligence

[1] UK Modern Slavery Act, French Due Diligence Law, USA Section 1502 of the Dodd Frank Act (although this is currently under threat by the Financial Choice Act which seeks to undo the regulations imposed on financial institutions post 2008 economic crash) and in 2021 the EU's Regulation 2017/821 of the European Parliament and of the Council will come into force across the EU.

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In the European Commission's Executive Summary of the Impact Assessment for this legislation, an "opaque supply chain" is cited as one of the main obstacles to European Union companies complying with these requirements.

Organizations such as the ITRI Tin Supply Chain Initiative (iTSCi) are attempting to address this issue. iTSCi is a joint initiative of governmental authorities, companies and civil society organizations working with mineral supply chains in Burundi, the DRC, Rwanda and Uganda to carry out due diligence on mineral supplies in accordance with the OECD due diligence frame-work. The process used is to audit mines for human rights violations and then apply a bag and tag system whereby each sack of minerals is given a bar code that identifies details such as the miner's name and weight of the sack. This information is then recorded in a paper logbook. The logbooks are stored in boxes secured by three padlocks which are controlled by each of the Service for Assistance and Supervision of Artisanal and Small-Scale Mining (SAEMAPE), mining cooperatives and the concession owner. The problem is that this process is not very efficient and is vulnerable to corruption.

Blockchain technology can help address this very issue of supply chain transparency and efficiency by providing a platform on which ownership information of tagged minerals is recorded on a digital ledger that can only be updated or modified upon pre-determined conditions such as when all members of the blockchain network agree to the modification.

This is exactly the kind of initiative that Cobalt Blockchain, a mineral resource company, is launching. As reported in the article, "Cobalt Blockchain tries new model in DRC"[2], the company's goal is to produce ethically sourced cobalt from artisanal mines in the Congo using a bagging and tagging system and adhering to the iTSCi requirements regarding supply chain information.

Cobalt Blockchain believes blockchain can close loopholes in the iTSCi system and protect it from tampering. The company plans to partner with DLT Labs, the creator of a supply chain and logistics management product called DL Asset Track, to develop a new blockchain-based platform for tracking base and precious metal supply chains.

How Might Arbitration Benefit?

Disputes arising from mining are often the subject of domestic, international and investor-state arbitrations. Such disputes invariably pit the often foreign mining company seeking to exploit a natural resource against local or national governments seeking to regulate it, with indigenous populations on whose land or territory the extractive activities take place in the middle and being the most affected.

Arbitrators should be prepared for the arrival of blockchain technology in the realm of mining sector disputes and should welcome it. This is because automating transparency in the supply chain will help manage the evidence and will make it easier to make findings relating to the origin of the particular mineral.

It will do this by removing the need to spend time and energy backtracking the chain of ownership and sifting through the evidence in order to establish whether the mineral was sourced from a mine in a conflict area and whether anyone benefitted from human rights violations when doing so.

Blockchain technology will also assist in the determinations that an arbitrator will be called upon to make relating to breaches of contract amongst members of the supply chain. The Working Group on International Arbitration of Business and Human Rights described the impact that can be expected from inserting human rights commitments and arbitration clauses into contracts between members of a supply chain in this way:

[2]R. Quarisa, "Cobalt BlockChain tries new model in DRC", The Northern Miner, April 16-29, 2018, VOL. 104 Issue 8.

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> These contracts could contain perpetual clauses that require each member of a supply chain, in turn, to insert such clauses in contracts with its own suppliers. An entire supply chain could be covered by an arbitration arrangement that allows the originating business to instigate arbitration against any supplier in the chain that breaches the commitment to observe human rights. This would not be expanding its own liability, only exposing any breaching supplier to relatively prompt enforcement.[3]

By adopting the smart contract functionality of a blockchain, members of the mining supply chain can ensure compliance with such clauses by creating a blockchain whose protocol will only allow the transfer of ownership of minerals if the transferor transfers ownership of the mineral through a smart contract which obligates the transferee to agree to be subject and to adhere to the human rights commitment and arbitration clause. In this way, a subsequent transferee will have certainty that all of the members of the supply chain have contractually committed to the human rights standard. This will reduce the risk of exposure to human rights related liability arising from the acts or omissions of another member of the supply chain.

The blockchain protocol can even be made to notify all the members in the supply chain when supply chain members have commenced arbitration over a human rights related matter.

Corporate social responsibility requirements on businesses together with smart contract enabled blockchain are creating opportunities for arbitration to become a more effective dispute resolution mechanism[4] in particular contexts. The increased concerns over transparency in the mining supply chain and the burden that related legislation impose on businesses together call for the application of novel technologies that can help facilitate compliance. As companies are drawn to the application of blockchain, arbitrators should be considering and preparing for how this development will impact the process of arbitrating disputes.

At a minimum, the smart contract capability of blockchains will assist arbitrators to play a more effective role in arbitrating issues as to the formation, verification and performance of agreements among the members of the mining supply chain.

[3] C. Cronstedt, J. Eijsbouts et. al, "International Arbitration of Business and Human Rights: A Step Forward", Kluwer Arbitration Blog, November 16, 2017, http://arbitrationblog.kluwerarbitration.com/2017/11/16/international-arbitration-business-human-rights-step-forward/?print=print, <June 3, 2018>.

[4] If it is stipulated that every member in the network is notified when a dispute is submitted to arbitration over a human rights matter members in the supply chain (i.e. members of the network) are incentivized to comply with due diligence requirements. A system that requires compliance with due diligence requirements and which exposes human rights violations to your business partners will incentivize members of a supply chain to comply thereby becoming a self-regulating system, and reducing the need to resort to the regulator or to the court system.