

## THE COLOR LINE: WORK IN PROGRESS OR WORKING ON PROGRESS?

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We are two in-house counsel who are different in seniority and background, but for whom Professor Ben Davis has been an important influence in our work in international arbitration, far beyond his Ohio classroom. In our contribution below, we reflect not only his relevance to our work but also, as Ben would expect, our recognition that current arbitration practice still falls seriously short of the objectives that Ben sought to achieve.

Thus, we cannot flatter Ben with comments about how he helped create an enlightened and more fully representative world of international arbitration; one in which leading arbitrators and practitioners are as diverse as those involved in disputes. To do so would not only be untrue, but it would also undermine the very approach Ben has always adopted, which is a frank and even brutal confrontation with reality.

Rather, where Ben has been influential – and for this we are grateful – has been to start the discussion about diversity in international arbitration, and then to continue to frame it through use of facts and data and, above all, by insisting that change should only be measured in actions. As Ben recently commented on an international list of leading arbitrators, “pretty words are not enough.”

With that, we both salute Professor Davis, and believe the only genuine compliment that we can pay him (and that he would accept) will be through our own concrete actions as we continue to practice in international arbitration.

*[Part 1: Mike Mcilwrath]*

As will likely be reflected in other contributions in this volume, Ben’s writings and influence extend to a broad field of law, and include international diplomacy, criminal justice, online dispute resolution (ODR), and international arbitration. In my own experiences as in-house counsel over the past 20 years, I have encountered Ben’s work in e-commerce (as internet buying and selling was called in its early years), ODR, and international arbitration. For this short testimonial, I will focus on the third category, in fact a subset of his contributions to the field, which is Ben’s work in developing a framework for thinking about diversity in international arbitration practice.

Although it was published in 2004, Ben’s data-driven article, *The Color Line in International Commercial Arbitration: An American Perspective*, remains the seminal work on the subject of diversity in international arbitration practice. Relying on available data, the article presented and explained dispiriting lacunae in both gender and racial diversity in international arbitration as practiced from

North America and, importantly, also proposed methods for achieving more even levels of representation.

When I first read Ben's article, the American Perspective had analogues around the world. Arbitrators and lawyers most commonly appointed in proceedings were rarely representative of the countries and national origins of most parties in disputes, and one could be forgiven for thinking that international arbitration was a form of colonialism. In the sixteen years since *Color Line* was published, however, significant progress has been made with regard to achieving greater gender diversity in international practice around the world, and the practice has become more inclusive of those outside of the traditional centers of arbitration such as London and New York.

Today, international arbitration practice, and those who engage in it, is far more "representative" of the participants who, like my company, are the ones who pay for the process. There are lawyers, law firms, arbitrators, and arbitral institutions, in Asia, the Middle East, Africa, and South America. Just as the gender line has broken down, with women today being far more represented in the practice, so too has participation and positions of leadership moved outside of the previous centers.

At the same time, the "color line" in North America that Ben documented seems hardly to have moved. In terms of being represented in the echelons of power, the significance is difficult to overstate. As Ben pointed out in his article, the persons participating in international arbitration are "situated at the highest levels of the legal profession in their respective countries, helping to peacefully resolve some of the world's most complex commercial disputes." The lack of representativeness may even undermine the appearance of legitimacy of a system in which high-stakes disputes are settled by parties without subjecting them to public scrutiny.

When arbitration is increasingly demonstrating an ability to accommodate diverse seats, genders, and nationalities, why then does the color line persist with respect to the "American perspective," i.e., an under-representation of lawyers and arbitrators of color in international commercial arbitration practice? For example, a 2020 study of the international arbitration practices of US law firms by Prof. Katherine Simpson found that only 1% of law firm lawyers were persons of color.

I do not purport to be able to explain why the color line has not inched forward in all these years, but suspect that the systemic issues identified in Ben's 2004 article simply remain unchanged; beginning with law school educations and the steps that lead to practicing internationally and developing a reputation beyond one's own country.

Thus, the color line in international arbitration remains a work in progress. And it is a work whose objectives may not be satisfactorily achieved within the careers of those who currently occupy senior positions in organizations. There is simply no quick fix, and no short cut to the decades of effort necessary to build an international reputation. Instead, real progress is more likely to come at the hands of the generation that succeeds us, through their ability to influence change, inspire others, and carry on the discussion within the framework that Ben presented. And that is my segue to the next section of this contribution...

[Part 2: Chris Campbell]

“The life you want, starts the day you graduated from law school...take the job with Mcilwrath!” Those words, accompanied by a reassuring pat on the shoulder came mere moments after he had received a standing ovation for his call for greater gender diversity in ADR at the Atlanta International Arbitration Society’s Annual Conference. In a matter of moments Professor Benjamin Davis had impacted my professional life in a way that only he could—with his wit, patience, and from the perspective of someone who had been there and done that.

Leading up to this conversation, I’d read one of his premier texts, *The Color Line in International Commercial Arbitration: An American Perspective*. I’d heard about this pioneering work at the ICC, in the realm of online dispute resolution and as a champion for greater representation for women and ethnic/cultural minorities in international arbitration; but there are plenty of accomplished heroes and veterans of international dispute resolution. Ben, however, was one of the few that looked like me, and spoke from an appreciation of the challenges of someone with an unapologetic authority for those of us without an inside path into the field.

Since that day, Ben has been a guiding force, friend and even guest on my podcast, *Tales of the Tribunal*. During the largest period of civil unrest since the 1960s, he has provided perspective, insight, and been a sacrificial lightning rod for calling out injustice, malaise, and apathy in the realm of international law, in a way that only he can; because he’s not seeking any arbitrator appointments and doesn’t need to be on any list.

More than that, it appears that heading into retirement, Ben has taken on yet another audacious mantle. Not content to merely show what can be done, he is helping (like the guru he is) aspiring and rising international ADR professionals to navigate the opaque paths into academic positions, coveted counsel positions and/or neutral-relevancy.

In writing this and thinking of how I’ve gotten to know Ben these past several years, my only regret is that I didn’t know him sooner.

What is a legacy? It has been said that it is “Planting seeds in a garden that you may never get to see.” I believe, with how far and wide these seeds of greatness have been planted, that though he may have retired, there will one day be a great culling and harvest representing the genuine generosity undoubtedly reflecting Ben’s legacy. I’m proud to say my story will be part of that history.