THE DIVERSITY DIVIDEND

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I. INTRODUCTION

A book about Professor Benjamin Davis and his arbitration career would be incomplete without discussions of both speed and diversity. In the context of arbitration, speed and diversity are pitted as competing values or goals, with one coming at the expense of the other.[1] With the first fast-track international commercial arbitration case, however, Professor Davis transformed a theoretical possibility into a reality. He preserved fast-track commercial arbitration's future and saved it from its certain fate as a one-time event, by institutionalizing the lessons learned and the required elements for fast-track arbitration's replication. Through his work regarding fast-track international commercial arbitration Professor Davis demonstrated that diversity supports speed: the two are complementary.

The creation and replicability of fast-track international commercial arbitration is an example of a dividend that was made possible by a moment of diversity, inclusion, and equality at the International Chamber of Commerce ("ICC"). It is also a story that invites one to consider what international dispute resolution might be like if, in 1991, the ICC had had policies that excluded people on the basis of race or, alternatively, if racial inclusion efforts had begun for more institutions, more intensely, years prior. The fast-track international arbitration story serves as a reminder that diversity has paid dividends in international commercial arbitration and can likely do so in the future.

II. ARBITRATION & DIVERSITY: A COMPLEX HISTORY

International arbitration derives much of its relevance from the variety among legal systems and legal cultures that influence diverse parties' contracts and procedural expectation.[2] Using arbitration, commercial parties from varied legal

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1. E-mail from Colin Brown, Deputy Head of Unit, Directorate Gen. for Trade, Dispute Settlement and Legal Aspects of Trade Policy (Unit F2) to Katherine Simpson (Jan. 9, 2020) (on file with author) (explaining that gender balance in international trade will be addressed "in the future", as the European Commission was presently, gradually building its practice of state-to-state bilateral dispute settlement. Implicitly, gender diversity would be added after the European Commission would build its practice).

2. BENJAMIN G. DAVIS, IMPROVING INTERNATIONAL ARBITRATION: THE NEED FOR SPEED, LIBER AMICORUM TO MICHEL GAUDET 28 (Nov. 1, 1998).

traditions can resolve disputes in a judicially neutral procedure that privileges neither side.[3] International arbitration's attractive pull is based on its ability to deliver (nearly) globally recognizable and enforceable awards that resolve disputes between diverse parties, with final effect. Without diversity among legal systems and cultures, the relevance of international arbitration diminishes.

But, arbitration and diversity have a complex relationship – one which enveloped Professor Davis's educational and professional experiences, even if not immediately felt. His entire period of studies at Harvard, from 1973 to 1983 ran concurrently with major judicial reform and a subsequent boom in the arbitration industry in the United States (U.S.).

Professor Davis had just begun earning his J.D./M.B.A.[4] when, in 1977, President Jimmy Carter began to address both long-standing court backlog and attacks on the legitimacy of the U.S. judiciary in what is now remembered as "the largest-ever expansion of America's court system."[5] Prior to this expansion, federal judicial appointments were based on relationships rather than merit. Attorney General Griffin B. Bell would explain how this did not consistently ensure the quality of judges:

> A person could not expect to be considered for one of these positions unless he or she knew a senator personally, knew someone who did, or was owed some political favor by that senator. Exceptions from this mold were few. Notwithstanding, many excellent judges and U.S. attorneys emerged through the years from just such a process. Its deficiencies have been largely that the pool of potential candidates has been very limited and that there has been a general unevenness in the quality of candidates.[6]

President Carter pledged that all federal judges would be "appointed strictly on the basis of merit…"[7] During his term, he expanded the federal judiciary by one third,

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3. *Id.* at 29-30.

4. Benjamin G. Davis, Presentation to the International Arbitration Club of New York, *Working Twice as Hard to Get Half as Far* (Aug. 13, 2020), https://www.utoledo.edu/law/faculty/fulltime/docs/200813-davis-presentation.pdf; Destiny Peery, Paulette Brown & Eileen Letts, *Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color*, A.B.A. 4 (2020), https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf ("… [Y]ou start by having to overcome those negative assumptions, stereotypes, and presumptions [related to race and sex]. And then there is the 'black tax' of having to demonstrate outsized achievements just to get the same opportunities as everyone else. It's not by accident that at the firms at which I worked, every single black associate had at least two Ivy League degrees. Majority associates? Not so much.").

5. Christopher Kang & Brian Fallon, *What Joe Biden Can Learn from Jimmy Carter*, THE AMERICAN PROSPECT (June 28, 2020), https://prospect.org/justice/what-joe-biden-can-learn-from-jimmy-carter/; Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the US Justice System Possible?*, 105 NW. U. L. REV. 587, 588 (2011) ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." (citing Grutter v. Bollinger, 539 U.S. 306, 332 (2003))).

6. Griffin B. Bell, *'Merit Selection' and Political Reality*, WASH. POST, Feb. 25, 1978 at A15.

7. *Id.*; *see also* Mary Clark, *Carter's Groundbreaking Appointment of Women to the Federal Branch: His Other Human Rights Record,* 11 J. OF GENDER, SOC. POL'Y & L. 1131, 1132 (2002).

and in a merit-based appointment procedure, "appointed more women (41) and people of color (57) than had … all past presidents combined."[8] This moment brought Judge Gabrielle Kirk McDonald, now of International Criminal Tribunal for the Former Yugoslavia and Iran-U.S. Claims Tribunal-fame, to the federal bench, and inspired recently departed Justice Ruth Bader Ginsberg to consider a judgeship.[9]

President Carter's judiciary revolution was followed by an increase in the use of mandatory arbitration provisions by employers[10] and the establishment of "rent-a-judge" centers.[11] For a fee, these centers promised to help parties avoid delay and uncertainty by having their dispute resolved by a retired judge.[12] Owing to the fact that they were created at the dawn of inclusion of African Americans and women in the federal judiciary (not to mention on the heels of segregation), these arbitration centers were staffed almost exclusively by Caucasian men: they were the retired judges of the day.[13] Hence, when opting for arbitration, parties could rest assured that, even in a list procedure where they would have little control over the pool of arbitrators from which to choose, their dispute would likely be resolved by a Caucasian male arbitrator.[14] In effect, these centers enabled parties to avoid ongoing diversity efforts in state and federal courts. Arbitration may have served as a refuge for those wishing to avoid having their dispute decided by an African American or a woman.

Prof. Davis studied law and business during a period that featured pushes for equality and inclusion, followed by fierce counter-measures against both. On the

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8. Kang & Fallon, *supra* note 5.

9. *Id.* ("Ruth Bader Ginsberg recalls that the first time she thought of becoming a judge was 'when Jimmy Carter announced to the world that he wanted to change the complexion of the U.S. judiciary.'"); *Biographical Directory of Article III Federal Judges*, FEDERAL JUDICIAL CENTER (Dec. 30, 2020), https://www.fjc.gov/history/judges/mcdonald-gabrielle-anne-kirk ("Nominated by Jimmy Carter on February 27, 1979, to a new seat authorized by 92 Stat. 1629. Confirmed by the Senate on May 10, 1979, and received commission on May 11, 1979.").

10. Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J. L. REFORM 783, 784 (2008).

11. Anne S. Kim, *Rent-A-Judges and the Cost of Selling Justice,* 44 DUKE L.J 166, 173 (1994); *The JAMS Story*, JAMS, https://www.jamsadr.com/history.

12. *Id.*; Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson Jr., Christopher M. Kwok, Janice Tudy-Jackson, Roberto Velez, *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing the ADR Field*, 35 FORDHAM URB. L.J. 119, 129 (2008) [hereinafter *Volpe et al*].

13. Kim, *supra* note 11, at 175; *The JAMS Story*, JAMS, https://www.jamsadr.com/history.

14. For an example of how this might be reflected in rosters today, see Dan Nielsen, *Statement by the NAA President on Institutional Racism*, NAT'L ACAD. OF ARBITRATORS (June 3, 2020), https://law.missouri.edu/arbitrationinfo/2020/06/03/statement-by-the-naa-president-on-institutional-racism/. ("… the majority of our membership is male (80% plus) and white (90% plus). We do not reflect the workplaces we serve. We have initiatives underway to address that – outreach and mentoring, more realistic membership standards, the (Ray Corollary Initiative) RCI project. But we have always had initiatives. Success is measured by succeeding, and so far we have not."); Sopan Deb, *Jay-Z Criticizes Lack of Black Arbitrators in a Battle Over a Logo*, N.Y. TIMES (Nov. 28, 2018), https://www.nytimes.com/2018/11/28/arts/music/jay-z-roc-nation-arbitrators.html (alleging that Jay-Z had only found three African American arbitrators out of the 200 recommended by the American Arbitration Association, in a list procedure).

one hand, this period featured government action in response to economic analysis showing that racism and sexism were economically inefficient, morally wrong, and unsustainable.[15] At the same time, this period also bore the emergence of the "paradox of diversity,"[16] which emboldened actors to openly question minorities' intellectual abilities and to stigmatize their credentials.[17]

The diversity paradox continues to cast a shadow over the legitimacy of minority professionals in the U.S. and abroad. Minority professionals report that – regardless of seniority, experience, or prior educational qualification – they must prove their competence to some colleagues in addition to completing a task or case.[18]

> Women, people of color, anyone who's not of the majority in their workplace or industry – we don't have the luxury of others assuming that we are competent. In fact, we're asked to prove our competence over and over again, like a professional "Groundhog's Day"….The credential [however] is supposed to be proof of competence.[19]

Many minority professionals experience the paradox throughout their careers and credit it as undermining diversity efforts, as well as the efficiency and innovation that diversity should enable and ultimately produce.

III. FAST-TRACK INTERNATIONAL COMMERCIAL ARBITRATION

In the early 1990s, parties opting for international arbitration were often dismayed to learn that, even without procedural warfare, their case would require at least eighteen months for completion.[20] While speed was a recognized marketing point, it was arguably not the priority in international commercial arbitration. From an institutional perspective, generous schedules were beneficial and viewed as necessary to preserve the parties' due process rights.[21] The parties' need for a

15. Scherer, *supra* note 5, at 588-591.

16. *Id.* at 591 (explaining the diversity paradox as the phenomenon that, where a policy of actively promoting the appointment of minorities can be seen as legitimizing the process in minorities' eyes only, and that a "color-blind" approach, on the other hand, maintains the status quo for minorities and Caucasian men).

17. *Id.* at 615 (citing Adarand Constructor, Inc. v. Peña, 515 U.S. 200, 241 (1995)) ("It is said that affirmative action brands minorities and women with a 'badge of inferiority.'").

18. Peery, *supra* note 4, at 9 ("Having to deal with assumptions of inferiority, intellectual or otherwise, and constantly having to prove myself no matter how senior or qualified or experienced I am is something my white male peers do not have to do. It is psychologically exhausting.").

19. *The Doctor is In: Backlash Ensues Over WSJ OpEd About Dr. Jill Biden*, MSNBC (Dec. 30, 2020), https://www.msn.com/en-us/news/politics/the-doctor-is-in-backlash-ensues-over-wsj-op-ed-about-dr-jill-biden/vi-BB1bXhoi [hereinafter *Professional Groundhog Day*].

20. Davis, *supra* note 2, at 26 (partially quoted); David C. Downie, Jr., *"Fast-Track" International Commercial Arbitration: Proposed Institutional Rules*, 2 AM. REV. INT'L ARB. 473 (1991) ("As a result of its procedural informality, arbitration is theoretically a more expeditious means of resolving disputes than litigation in a judicial form. In the international context, however, arbitration is often plagued by procedural delays and protracted in nature.").

21. Davis, *supra* note 4, at 44.

neutral forum that would produce a judicially enforceable award took precedence.[22]

One could, therefore, imagine Professor Davis's surprise when, on November 28, 1991,[23] he received four files for four related cases. There were two multimillion-dollar-cases that would require resolution by a three-member tribunal within sixty days of the new year of the contract, pursuant to a novel sub-clause in the pre-dispute arbitration agreement. The other two related cases were intended to proceed between the same parties pursuant to the same arbitration agreement, under the normal time frame.[24] The cases had been filed on October 21, 1991 and the award was due by December 30, 1991.[25] Professor Davis received the files with only thirty-two days remaining on a sixty-day timeline.

These cases arose under an arbitration agreement that violated two sacred commandments of arbitration agreement drafting. In their pre-dispute arbitration agreement, the parties (1) selected a subset of disputes from the universe of potential disputes ("sequestered claims") and agreed that, if a dispute were to arise in relation to those sequestered claims, those claims would be (2) resolved within a non-extendable time limit.[26] All other matters, including those related to the validity of the contract, would proceed under the shortened timeline, and matters that would proceed in the normal fashion.

At that moment, Professor Davis had several choices. He could have said "this is not possible," and no one would have criticized it. Prior to that point, he may have been correct: fast-track arbitration was, as he would later reflect, a point where doctrines meet.[27] While theoretically able to improve the efficacy of a procedure, the sequestered claims and the strict time limits that would make up a fast-track procedure were unadvisable in all practical terms. Even if there was no debate about which claims belonged on the fast-track and the tribunal were established without objection, the deadline imposed could have been viewed as pathological. Fast-track arbitration was not an easy matter of shifting deadlines. The parties and the institution would need to fit each step of the mandatory arbitration rules into the shortened timeframe. There was a high risk that the deadlines would be invalidated or violated by an arbitral tribunal or, alternatively, that the award would be rendered unenforceable by a court. Professor Davis would later remark that an award rendered late would further risk becoming "'Dead on

22. *Id.* at 44 – 45; Benjamin Davis, Odette Lagacé Glain & Michael Volkovitsch, *When Doctrines Meet Fast-Track Arbitration and the ICC Experience*, 10 J. INT'L ARB. 69, 85 (1993) [hereinafter Davis, Lagacé Glain & Volkovitsch] ("Any arbitral process is only as good as the awards it produces, and an accelerated process that results in unenforceable awards will ultimately fail to serve the parties' desires for celerity or certainty.").

23. This was Professor Davis's 38th birthday and Thanksgiving Day.

24. Downie, *supra* note 20; Hans Smit, *Fast-Track Arbitration*, 2 AM. REV. INT'L ARB. 138 (1991); Benjamin Davis, *Fast-Track Arbitration: An ICC Counsel's Perspective*, 2 AM. REV. INT'L ARB. 159 (1991) [hereinafter Davis, *ICC Counsel's Perspective*].

25. Smit, *supra* note 24.

26. Davis, Lagacé Glain & Volkovitsch, *supra* note 22, at 70, 73.

27. *Id.* at 71.

Arrival' at the door of the courthouse when the winning party sought enforcement."[28]

If fast-track was going to work, there was not a moment to waste. Armed with five years of professional experience at the ICC, his intelligence, the ICC Library, a land-line phone, a fax machine, a computer (no Internet), and a professional title (Counsel to the Secretariat of the ICC International Court of Arbitration), Professor Davis drove the process through his research, memo writing, and daily contact with the ICC Court, the National Committees in the ICC System, the parties, and later with the tribunal.

These were high-value, complex cases and the "fast-track" experiment could have derailed at any moment. For example, the parties raised jurisdictional objections. The procedure could have been further delayed by the parties' motions for consolidation or suspension of the two fast-track and the two non-fast-track cases.[29] Internal elements were also a threat: there was disharmony in the proposed procedural schedules, with the Answer in the second fast-track case due twelve days before the expiration of the time limit for the award. Further, it was not until December 20, 1991 that the tribunals had been constituted, the advances on costs had been paid and the parties had agreed to extend their deadline for the final award, to January 8, 1992.[30] The parties' final submissions on December 30, 1991 were extensive and included, in addition to the briefs, approximately 1500 pages of materials (ten affidavits and eighty-eight exhibits).[31] The hearing and the draft of the award were completed within nine days of the signing of the Terms of Reference.[32] Finally, Professor Hans Smit, chairman of the tribunal, submitted the draft award to the ICC Court for scrutiny within thirty-six hours of the hearing.[33] The final award was rendered on time, following scrutiny by the ICC Court[34] in a procedure that only lasted a total of seventy-eight days (approximately forty-two of which were in Professor Davis's care).[35]

This case demonstrated, objectively, that high value complex international commercial arbitration cases could be resolved quickly and that fast-track arbitration was possible: an ICC arbitration could be as fast or as slow as the parties wanted it to be.

A. "Making" Fast-Track International Commercial Arbitration

The enduring success of fast-track arbitration would depend on whether it could be replicated by people who were not involved in this first case.

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28. *Id.*

29. Davis, *ICC Counsel's Perspective*, *supra* note 24.

30. *Id.*

31. Knox Bemis, *Fast-Track Arbitration as an Alternative Institutional Procedure*, 2 AM. REV. INT'L ARB. 148 (1991).

32. *Id.*

33. Benjamin Davis, *Laying Down a Gauntlet: The Thirty-Six Hour Chairman*, 3 AM. REV. INT'L ARB. 170 (1992) [hereinafter *The Thirty-Six Hour Chairman*].

34. Davis, *ICC Counsel's Perspective*, *supra* note 24.

35. Downie, *supra* note 20.

Over the next decade, Professor Davis perfected international fast-track commercial arbitration and reported on what his research and experience showed to be the required elements of a viable fast-track international commercial arbitration procedure: (1) a well-written arbitration agreement with reasonable time limits that left no doubt as to the (2) subset of claims that would be decided on the fast-track, (3) a limited financial impact, (4) party cooperation, (5) highly skilled arbitrators, and (6) institutional availability.

First, the key to a successful fast-track arbitration is that no time is wasted. This meant having an **arbitration agreement** that was so precise and clear that no time would be wasted on defining the scope of the fast-track clause or establishing its reasonableness in light of the institutional rules.[36] This exactness was more than simply having clearly defined start and end dates. The time limits would need to account for each mandatory procedural step in the arbitration rules.[37] All such steps would be necessary for the arbitration to produce an award that would be enforceable at the seat as well as in the potential places of enforcement.

Second, Professor Davis proposed that fast-track procedures would apply to a **subset of claims**, sequestered from the entire dispute. The first fast-track cases involved hundreds of millions of dollars, divided over four cases. [38] Professor Davis observed that, the time limits set for the subset of claims "stimulate(d) top-management attention and commitment of resources, which (had) a salutary effect on expeditious resolution of even more complicated disputes out of the fast-track procedure. …."[39] Professor Davis credits the two fast-track procedures with accelerating the other two related cases. [40]

Third, Professor Davis reasoned that fast-track cases would need to have a **limited financial impact**, as this might help enforceability of an award and party cooperation. Although the first fast-track cases were high value, they were part of a unique long-term contract that stipulated that the financial consequences of the arbitration would only affect one year of the relationship.[41] Taken in its context, its financial impact was limited.

Fourth, the **parties' cooperation** was essential. In the first fast-track arbitration, cooperation was ensured through the sequestering of claims in four parallel proceedings. Professor Davis recalled that "Claimant's invocation of the fast-track procedures required it to seek to ensure that the fast-track was successful. For the Defendant, not frustrating the fast-track procedure from occurring helped … to protect its broader interests related to the contract-frustration claims (that were the subject of the 2 (parallel) arbitrations) ..."[42] On the fast-track, "any party who makes even the slightest effort to derail the arbitration finds itself under a

36. Davis, Lagacé Glain & Volkovitsch, *supra* note 22, at 83.

37. *Id*. at 78-83.

38. Benjamin Davis, *Fast-Track Arbitration and Fast-Tracking Your Arbitration*, 9 J. INT'L ARB. 43, 48 (1992) [hereinafter Davis*, Fast-Tracking Your Arbitration*].

39. *Id*. at 50.

40. *Id*. at 48.

41. *Id*. at 46.

42. *Id*. at 47.

heavy burden. This reaction is related to the time-pressure on everyone. Even the slightest procedural dispute is frowned upon…"[43]

Fifth, a fast-track arbitration needs **excellent arbitrators**. When asked what kind of arbitrator would be needed for a "fast-track" case, it would have been easy enough for Professor Davis to say, as was as typical in the early 1990s as it is today, "just be an arbitrator like [insert name]" – here, Professor Hans Smit, who served as chair in the first fast-track proceeding. Instead, Professor Davis assessed which professional characteristics made the tribunal and the entire proceeding work, thereby making that talent imitable, replicable, measurable, and trainable. A chairperson would need to:

1. be "authoritarian without being rigid,"
2. have an optimal case timeline in mind,
3. be self-driven to move the case from start to award as expeditiously as reasonable,[44] and
4. For fast-track cases, the Chairperson must have the capacity for rapid decision-making, and be skilled in the myriad of procedural due process issues that, left unaddressed, could render an award unenforceable. [45]

These are the same skills that are required today. Importantly, they focus on the arbitrator, personally and professionally, without giving any privilege or attention to assumptions about how co-arbitrators might respond to that arbitrator. Arbitrators are expected to cooperate with one another, and the due process to the parties requires it.[46] Further internal tribunal dynamics (including that arbitrators depend on one another for new appointments and time pressures) strongly mitigate against racist or sexist behavior on a tribunal. Arbitrators on a tribunal are, for the duration of the case, in a live job interview for their next arbitral appointment, should it come from a co-arbitrator. In other contexts, racism and sexism are correlated with a lack of skill, rather than a demonstration of it.[47] Within an arbitral

43. Davis, Lagacé Glain & Volkovitsch, *supra* note 22, at 86.

44. *The Thirty-Six Hour Chairman*, *supra* note 33, at §§ I and II (Successful Chairpersons contact the co-arbitrators and the parties "within days if not hours" of receiving the file, to advise them (proactively) on the next steps to move the matter forward).

45. Davis, *Fast-Tracking Your Arbitration*, *supra* note 38, at 47-48.

46. Global Arbitration Review, *Tribunal Dynamics: Making the Best of an Arranged Marriage* (Oct. 19, 2017), https://globalarbitrationreview.com/tribunal-dynamics-making-the-best-of-arranged-marriage.

47. Benjamin G. Davis, *American Diversity in International Arbitration: A New Arbitration Story or Evidence of Things Not Seen*, 88 FORDHAM L. REV. 2143, 2152 (2020) ("… discussions of women's limits by men are only discussions of the limits in men's minds and not realities as to the women's capabilities."); Michael M. Kasumovic & Jeffrey H. Kuznekoff, *Insights into Sexism: Male Status and Performance Moderates Female-Directed Hostile and Amicable Behaviour*, PLOS ONE 10(9) (2015), https://doi.org/10.1371/journal.pone.0131613 [hereinafter *Kasumovic & Kuznekoff*] ("Gender inequality and sexist behavior is prevalent in almost all workplaces…female-initiated disruption of a male hierarchy incites hostile behaviour from poor performing males who stand to lose the most status.…Lower-skilled players were more hostile towards a female-voiced teammate, especially when performing poorly. In contrast, lower-skilled players behaved submissively towards

tribunal, an individual's physical attributes are of little relevance. Leading arbitrators recognize that sexism and racism are inefficient – what matters on a tribunal is what the arbitrator can contribute.

Sixth, the **arbitral institution** would need to be willing and able to commit resources to ensure that the matter would receive priority treatment. [48] This first case tested the ICC Rules (1988). Following the case, the ICC reported that the Chairman of the Court had, with the assistance and support of Professor Davis, used his Article 1.3 powers with respect to the:

i. determination of the *prima facie* existence of an arbitration clause between the respective parties in each case (Article 8.3);
ii. constitution of the Arbitral Tribunals, which were identical in each case (Article 2);
iii. confirmation of the places of arbitration, which were also the same (Article 12);
iv. fixing of the advances on costs (Article 9);
v. communication of the Terms of Reference (Article 13), in which the parties agreed to consolidate the two cases;
vi. approval of the draft award for the consolidated proceedings (Article 21);
vii. fixing of the administrative expenses and the arbitrators' fees (Article 20).[49]

These were solutions that were tailored to the specific case that could not be easily transferred. In the first case, Professor Davis was "on call." Obviously, this would be unsustainable, if not a gross violation of French labor law! Professor Davis encouraged institutions to create separate rules or to engage with its own existing rules to determine whether and where modifications may be made or clarity added, to support the fast-track.[50]

B. The measurable impact on international arbitration

The first successful fast-track international commercial arbitration proved that arbitration could live up to its promise of speed, without sacrificing quality. Thereafter, with his Fast-Trackers Club and other initiatives and publications, Professor Davis created the knowledge base that let fast-track arbitration flourish. Today, it is difficult to imagine international arbitration without fast-track procedures.

Reflecting on the impressive work and research that had been completed in the first fast-track case, the ICC in 1998 amended its rules to give the tribunal the

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a male-voiced player in the identical scenario.…Higher-skilled players, in contrast, were more positive towards a female relative to a male teammate.…").

48. Davis, *Fast-Tracking Your Arbitration*, *supra* note 38, at 47-48 (1992); Smit, *supra* note 24, at 141.

49. Davis, *ICC Counsel's Perspective*, *supra* note 24, at 162.

50. Davis, Lagacé Glain & Volkovitsch, *supra* note 22, at 75-86.

power to approve time limits set by the Parties and the Court, on its own initiative, to extend a time limit:

> **Article 32 – Modified Time Limits**
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> 1. The parties may agree to shorten the various time limits set out in these Rules. Any such agreement entered into subsequent to the constitution of an Arbitral Tribunal shall become effective only upon the approval of the Arbitral Tribunal.
> 2. The Court, on its own initiative, may extend any time limit which has been modified pursuant to Article 32(1) if it decides that it is necessary to do so in order that the Arbitral Tribunal or the Court may fulfil their responsibilities in accordance with these Rules.[51]

This change would enable future tribunals to perform well in a fast-track arbitration, without being hog-tied by pathological deadlines that parties– unaware of the many mandatory steps that must occur in an enforceable award – might set. Instead, it would allow for modifications at the Court's initiative and would facilitate the fast-track by letting the tribunal focus on the substantive issues, rather than on the potential impact a necessary extension of a deadline might have on the award.

IV. SPEED & DIVERSITY: AN ARBITRATION STORY

The success of fast-track ICC arbitration is also the story of a "diversity dividend" – that illusive, measurable indicator that, indeed, diversity is worthwhile. The need for speed existed before 1991 – enough so that parties would insert a novel clause into their arbitration agreement that would make it possible. It was Professor Davis's initial insight that set the case onto the fast-track, and his dedication and research that helped keep it there. Importantly, Professor Davis[52] worked in an environment where, at that key moment, his research and judgment were trusted.

In the seventy-eight days that this case was ongoing (approximately forty-two of which were in Prof. Davis's care), Professor Davis was not tasked with wasting time proving that he was qualified for his position or for the tasks required.[53] In truth, no one was. One arbitrator did not have the chance to even evaluate for himself whether he was qualified: he was appointed without being informed that the arbitration agreement contained an untested fast-track provision, and that Professor Davis at the ICC had already committed themselves to doing

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51. International Chamber of Commerce (ICC), *ICC Rules of Arbitration, in force as from 1 January 1998*, Article 32, *available at* https://library.iccwbo.org/content/dr/RULES/RULE_ARB_All_EN.htm?l1=Rules&l2=Arbitration+Rules.

52. Davis, *supra* note 4 (explaining that Professor Davis was born in Africa to two Black American parents. He has Cuban, Caribbean, and Mexican, Irish, Cherokee, Jewish, and Chinese ancestry).

53. *Compare with Professional Groundhog Day*, *supra* note 19.

everything possible to make fast-track a reality![54] Everyone involved was afforded the luxurious presumption that his position defined his competence and his ability to fulfill the demands of the role.[55] Professor Davis would later recall that:

> From the first moment I spoke with the Parties, they trusted that I knew what I was doing. What mattered was that I was Counsel at the ICC and, owing to my prior training and work in the field, I understood what was important: enforceability.[56]

Time is finite and irreplaceable, and in a space where there was no time to waste, every moment that Professor Davis or the arbitrators might have spent separately proving his own abilities, would have come at the expense of case performance. The entire fast-track arbitration project could have been derailed if any person on the case had had to divert time away, to engage in a wasteful "professional Groundhog Day" exercise.[57]

Fast-track arbitration was made possible by Professor Davis's research and advice to the ICC, an institution which at that key moment featured some of the equality and inclusion that many institutions and firms strive for, for their attorneys, today.[58]

Looking back, Professor Davis would reflect on his work with ICC President Gaudet and others arbitration leaders, in the 1980s and 1990s:

> [Gaudet] had always demonstrated belief in me while still expecting high standards in my work with him in the Secretariat. … [the] leaders in the field of international commercial arbitration who helped me get on my way and did not seem to be troubled by the fact that we were cross-racial, cross-cultural, cross-national, or cross-whatever.[59]

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54. John Bishop Ballem, Q.C., *Fast-track Arbitration on the International Scene*, 2 AM. REV. INT'L ARB. 152 (1991).

55. *Compare with Professional Groundhog Day*, *supra* note 19.

56. Telephone Interview with Prof. Benjamin Davis (Dec. 30, 2020); *see also* Peter J. Nickles, *Fast-Track Arbitration: A Claimant's Perspective*, 2 AM. REV. INT'L ARB. 143, 145 (1991).

57. *Volpe et al, supra* note 12, ("Continuing racial and ethnic bias results in regular and humiliating incidents. Gatekeepers and even clients mistake highly qualified ADR professionals from under-represented racial and ethnic groups for support staff, suspect them of incompetence, distrust or openly challenge their qualifications, or otherwise treat them in a degrading fashion.").

58. Maja Hazell, *The Path from Diversity to Equity,* WHITE&CASE (Dec. 2020), https://inside .whitecase.com/articles/path-diversity-equity ("Diversity is the first step, simply increasing the numbers of underrepresented people within a workforce. Inclusion follows, creating an environment that is supportive for everyone, then promoting and living our common values.…Yet we also need to consider equity, to look at outcomes for people and improve systems and processes to account for the challenges they face. It's about asking the question: Despite all our diversity and inclusion efforts, who is being left out and why is that happening? It's only a meritocracy if everyone actually gets an equal opportunity to sit at the table. Ultimately, parity is the goal.").

59. Davis, *supra* note 4. Professor Davis's experience would appear consistent with peer reviewed research suggesting that, by analogy, sexism is a trait demonstrated by underperformers. *See also, Kasumovic & Kuznekoff*, *supra* note 47 ("Gender inequality and sexist behavior is prevalent in almost all workplaces…female-initiated disruption of a male hierarchy incites hostile behaviour from poor performing males who stand to lose the most status.…Lower-skilled players were more hostile towards a female-voiced teammate, especially when performing poorly. In contrast, lower-

Innovation happens when different people come together to solve a problem or work toward a common goal. Arbitral institutions,[60] professional associations, industries,[61] the Federal Reserve,[62] and even the European Commission[63] agree that diversity is key to innovation, cost reduction, and higher profitability.[64] This is more than economic theory; for the ICC in 1991/1992, diversity generated measurable dividends: the first fast-track arbitration, followed by publications,[65] the networking and knowledge-sharing platform of the Fast-Trackers Club, and finally in the 1998 amendment to the ICC Rules.

V. CONCLUSION – LOOKING FORWARD

For his entire career at the ICC, Professor Davis was the only African American in the office. He even replaced a prior employee who was of African descent.[66]

The fast-track story makes one wonder whether fast-track arbitration could have developed sooner had the ICC or other arbitral institutions and firms had more diverse staff. How long would fast-track arbitration have languished in the world

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skilled players behaved submissively towards a male-voiced player in the identical scenario.…Higher-skilled players, in contrast, were more positive towards a female relative to a male teammate.…").

60. *See e.g.*, American Arbitration Association ("AAA"), *Diversity and Inclusion Initiatives*, https://www.adr.org/diversityinitiatives (last visited Dec. 31, 2020); International Chamber of Commerce, *Diversity in Arbitration*, https://iccwbo.org/global-issues-trends/diversity/diversity-in-arbitration/ (last visited May 10, 2021); *Diversity, Equity, and Inclusion at JAMS*, JAMS, https://www.jamsadr.com/diversity/; Meg Kinnear, *Advancing Diversity in International Dispute Settlement*, WORLD BANK BLOG (Mar. 8, 2019), https://blogs.worldbank.org/voices/advancing-diversity-international-dispute-settlement; *see also* International Council for Commercial Arbitration (ICCA), *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings*, The ICCA Reports No. 8; *available at* https://www.arbitration-icca.org/icca-reports-no-8-report-cross-institutional-task-force-gender-diversity-arbitral-appointments-and.

61. *See e.g.*, *Where Do You Keep the Ketchup? The Importance of Diversity in Solving Problems*, 7PACE, (Nov. 2, 2017), https://www.7pace.com/blog/importance-diversity-problem-solving.

62. Doina Chiacu, *Systemic Racism Slows Economic Growth: Dallas Fed Chief Kaplan*, REUTERS (Jun. 14, 2020), https://www.reuters.com/article/us-usa-fed/systemic-racism-slows-economic-growth-dallas-fed-chief-kaplan-idUSKBN23L0LB.

63. European Commission, *A Union of Equality: EU Anti-Racism Action Plan 2020–2025*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, COM(2020) 565 final (Sept. 18, 2020), https://ec.europa.eu/info/sites/info/files/a_union_of_equality_eu_action_plan_against_racism_2020_-2025_en.pdf (quoting European Commission President von der Leyen: "We need to talk about racism. And we need to act. It is always possible to change direction if there is a will to do so. I am glad to live in a society that condemns racism. But we should not stop there. The motto of our European Union is: 'United in diversity.' Our task it (sic) to live up to these words, and to fulfil their meaning."); European Commission, *Gender Equality*, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality_en.

64. Sylvia Ann Hewlett, Melinda Marshall, & Laura Sherbin, *How Diversity Can Drive Innovation*, Harv. Bus. Rev. (Dec. 2013); *Volpe et al*, *supra* note 12, ("…diversity has become one of the cornerstones of good business practice.").

65. Davis, *supra* note 4 (listing articles and conference on fast-track arbitration at the ICC).

66. *Id*. at 9-10.

of theoretical arbitral possibilities, if the ICC had excluded employees on the basis of race?

While no one knows how many innovations are left to be discovered, we do know fast-track international commercial arbitration was created in a forty-two-day moment of diversity, inclusion, and equality at the ICC. It is exciting to think about how international arbitration could improve, if such moments were more frequent and more permanent, across more institutions and firms. Diverse teams produce better results.[67]

What if diversity, inclusion, and equality could generate the solutions to the many problems facing international arbitration today?

67. David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, Harv. Bus. Rev. (Nov. 4, 2016); Sian Beilock, *How Diverse Teams Produce Better Outcomes*, FORBES (Apr. 4, 2019), https://www.forbes.com/sites/sianbeilock/2019/04/04/how-diversity-leads-to-better-outcomes/?sh=76d775d665ce; Erik Larson, *New Research: Diversity + Inclusion = Better Decision Making At Work*, FORBES (Sept. 21, 2017), https://www.forbes.com/sites/eriklarson/2017/09/21/new-research-diversity-inclusion-better-decision-making-at-work/?sh=376866744cbf.