

“Working Twice as Hard to Get Half as Far”

Presentation to the International Arbitration Club of New York, August 13, 2020

By Benjamin G. Davis, Professor of Law, University of Toledo College of Law¹

I. Introduction

It is a pleasure to speak with you today after 38 odd years in this arena. Having handed in my final class grades on Tuesday as a law professor (retiring on January 31, 2021) I am a has been or fast on my way to being one. I think of this as my farewell speech to international commercial arbitration and, upon the suggestion of my wife, have dressed accordingly in the tuxedo I wore yesterday to celebrate our fourth wedding anniversary.

I speak to you out of my deep and abiding respect for international commercial arbitration. I have known this field’s promise and limitations, the good and the bad in it, and the best and the worst in it.

So I appreciate your time today to discuss this topic.

I will attempt to shed some heat but I also hope to bring some light on this arena. You will be the judge of whether I succeed.

The presentation will be on the way forward for the New List - Arbitrators of African Descent with a US Connection (<https://www.simpsonadr.net/files/NewList2020.07.30Edited.pdf>).

The bottom line will be you should hire, promote, and appoint these people in international arbitration practice. It is in the best interest of your clients, your firms, and yourselves – and for international commercial arbitration. The durability of international arbitration as the world’s dispute resolution mechanism may depend on it.

¹ I thank the members of the New List Arbitrators of African Descent with a US Connection for their insightful comments on an earlier version of this speech. I thank Katherine Simpson for her research assistance on this speech. Any errors are my own.

1. Having been born in Africa of two black American parents when they were stationed in Liberia for the US Foreign Service I am both an African-American and an American-African. Having Cuban ancestors who emigrated to the US in 1914 and Caribbean and Mexican ancestors I am also a Caribbean-American or West Indian Black and an African-American. So I share both the rise from slavery black experience in this country, the immigrant black experience in this country, and the African experience and they are all bonded in me in what I say.

2. I also share the Irish experience through at least one great-grandfather who was a Lieutenant in the Confederate Army and a Judge in Faunsdale, Alabama. The Cherokee and other Native-American experience through my Cherokee great-grandmother who had 13 children with that white judge. He had 5 children with his white wife. I share the Jewish history through my mother's family who were Portuguese Jews who emigrated from Portugal to Brazil and then further to the Caribbean (Grand Cayman Island, and Jamaica. Jamaica had the largest synagogue in the Caribbean until it burned down in the 19th century) out of fear of the Spanish Inquisition. They later dispersed to Cuba, Haiti and Mexico. If I still had my great-grandmother's name I would be Benjamin Qualo, in proper Portugal Portuguese Benjamin Coelho, which translated into English makes me Benjamin Cohen. I share the experience of North Africans through my four years growing up in Tunisia during the Algerian War. I share Chinese blood I am also told in my family. I have the world flowing in me. And after 17 years there, I share the only civilized European culture which is – the French!

3. This is my third presentation in my 38 years in international commercial arbitration to some form of this group. I started in 1982 – it was my 2L Summer job with Eric Schwartz and Chris Seppala at SG Archibald in Paris.

April 7, 1994 - Fast-track arbitration seminar at Baker and McKenzie, New York as the brouhaha continued over the ICC International Fast Track Commercial Arbitration I created in 80 days in a case for hundreds of millions of dollars in late 1991- early 1992.²

² As the original fast-tracker, here is a quick 30 year history of fast-tracking international commercial arbitration.

These were my fast-track articles and a book in reverse chronological order.

Improving International Arbitration, The Need for Speed and Trust, *Liber Amicorum* Michel Gaudet (Benjamin G. Davis ed., 1998)

Roland Amoussou-Guenou, Bachir Georges Affaki, Ram T. Madaan, Maasaki Sawano, Fernando Mantilla Serrano, Odette Lagace Glain, David Brown, Robert H. Smit, and Benjamin Davis., International Fast-Track Commercial Arbitration, *Compar. L. Y.B. Int'l Bus.* 357 (1995)

Benjamin G. Davis, Odette Lagace Glain and Michael Volkovitsch, When Doctrines Meet: Fast-Track Arbitration and the ICC Experience, 10 *J. Int'l Arb.* 69 (Dec. 1993) (With Odette as a co-author with Michael Volkovitsch)

Benjamin G. Davis, Laying Down a Gauntlet: The 36 hour Chairman, in *Festschrift for Professor Hans Smit*, 3 *Am. Rev. Int'l Arb.* 170 (1992)

Benjamin G. Davis, Fast-Track Arbitration and Fast-Tracking Your Arbitration, 9 *J. Int'l Arb.* 43 (Dec. 1992)

Benjamin G. Davis, An ICC Counsel's Perspective, in *Special Section: Fast-Track Arbitration*, 2 *Am. Rev. Int'l Arb.* 159 (1991)

Benjamin G. Davis, The Case Viewed by a Counsel at the ICC Court's Secretariat, in *Fast-Track Arbitration: Different Perspectives*, *Special Section*, 3 *ICC Int'l Ct. Arb. Bull.* 4 (Nov. 1992)

Benjamin G. Davis & Irene Ezratty, Recent Fast-Track Arbitrations Resolve Cases in Shorter Time, 3 *World Arb. and Med. Rep.* 141 (1992)

These were the conferences in reverse chronological order

Launching of the new 1998 ICC Rules of Arbitration, Paris, New York, Washington DC, San Francisco, and Palo Alto

The Need for Speed: the Acceleration of International Arbitration (in honor of Michel Gaudet, former Chairman of the ICC International Court of Arbitration), Paris, France, May 7, 1998 (published as *Improving International Arbitration : The Need for Speed and Trust*, *Liber Amicorum Michel Gaudet* (Benjamin G. Davis ed., 1998))

Symposia of Arbitrators with Queen Mary's College, University of London (Dispute resolution and electronic commerce, Acceleration of international commercial arbitration, Interim relief, New trends in arbitration management), Paris and London (1997)

The Drive Towards Speedier Arbitral Justice, The 1993 Geneva Global Arbitration Forum, October 21, 1993

AAA/ICC/ICSID - 9th Joint Colloquium (Rights of the parties and powers of the arbitrators and arbitral institutions in the conduct of arbitral proceedings), November 6, 1992, Paris

As then Secretary General Horacio Grigera Naon told me, this is the fast-track rule in the 1998 ICC Rules of Arbitration

Article 32 - Modified Time Limits

2004 – Association of the Bar of the City of New York - International Arbitration Committee meeting led by Professor Hans Smit on my first article on this topic entitled The Color Line in International Commercial Arbitration: An American Perspective where I was somewhat of a lightning rod at that meeting 50 years after Brown v/ Board of Education

Today 2020 August 13, 2020 - Working Twice as Hard to Get Half as Far.

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.

This is a commentary on the ICC 2012 rules which were the first revision it appears since the 1998 rules done by Michael Buhler who you know (<https://www.jonesday.com/en/insights/2012/01/2012-icc-rules-of-arbitration-come-into-force>). The 2012 Rules integrated the Emergency Arbitrator (previously a separate pre-arbitral referee rules created in the 1990's). The ICC decided to integrate that in the basic rules with the 2012 version and a commitment by arbitrators and parties to conduct the arbitration quickly, but no expedited procedure. From this other commentary (http://arbitrationblog.kluwerarbitration.com/2019/01/13/expedited-procedure-under-the-2017-icc-rules-does-the-iccs-priority-for-efficiency-and-cost-effectiveness-come-at-the-expense-of-the-parties-rights/?doing_wp_cron=1596706149.3172938823699951171875) on the 2017 rules, it appears clear that this was the first time the expedited procedures were included. The modified time limit rule from 1998 is now Article 39 of the 2017 rules which includes the expedited procedure provisions (<https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/>).

As to the ICC Expedited Procedure Provisions – note the choice to have those rules apply for disputes under a certain dollar amount of \$2 million. The first case in 1990-1991 was for hundreds of millions of dollars. It is again the tension between the speed people (we can do it if you want it) and the rough justice folks (slow is due process, fast is rough justice). In the background is the financial consequences for all in the business of speed increasing. We talked about these kinds of segmentation issues in the When Doctrines Meet article.

I still have a copy of the draft Supplemental Fast-Track Arbitration Rules I prepared in December 1993 or January 1994. A bit of not lost memory (not history).

II. Why this title?

4. The title “working twice as hard to get half as far” is what is told to me growing up and was confirmed to me a couple of weeks ago was told to the members of the New List - Arbitrators of African Descent with a US connection. Actually, this phenomenon has been so often recognized it is beyond cliché – even the ABA recognized it in their recent publication “Left Out and Left Behind”(<https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf>), regarding the struggles faced by women of color in the legal field. This quote brings it all together:

*“Some of the barriers you can’t do [anything] about— like the (mis)perceptions people have in their own minds about your race or your sex or your background. So you start by having to overcome those negative assumptions, stereotypes, and presumptions. And then there’s 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.**”*—late 40s black woman. Page 4, Left Out and Left Behind.

5. I want to take a moment to thank Katherine Simpson and Nancy Thevenin for their yeowoman work in conceiving this list and executing it, despite the COVID-19 pandemic. Their work began in February 2020 and could have been derailed by the COVID-19 pandemic. It is a remarkable achievement of which we all should be proud. They reached out broadly to gather the list and worked with people on the list to prepare their bios. Each person has specifically consented to being a part of this List, and a community of expertise is developing through it. When I first wrote on this topic back in 2004, I approached the question through a survey of all the people I had known in international commercial arbitration about whether they had seen American minorities in international commercial arbitration. In 2014 I expanded on that question in line with the ABA Goal III of increasing diversity in the legal field and asked about whether those surveyed had seen American women, minorities, lawyers who were LGBTQ, and/or lawyers with disabilities in international commercial arbitration. Nancy and Katherine have gone so much farther in doing an empirical study of the presence (or absence) of blacks in American international arbitration practice and creating this list.

6. Other organizations have attempted to develop this List in the past, and those efforts were stopped by some of the same nonsense that those in this room have hurled at them personally, and at the List. Katherine worked with the NBA, BASIL, the ABA Minorities Committee, and each person on this List to get recommendations for further people to be reached, join, and be seen. Many on this call also recommended arbitrators. Several arbitral institutions have appreciated the thoroughness of the List and have begun actively recruiting from it. Rather than cast aspersions or start the old blacklisting game that I have heard rumors of for Katherine Simpson – a white woman who worked for years with Prof. Karl-Heinz Bockstiegel and Rusty Park – I would hope that nonsense would stop immediately if it is getting started and that Nancy and she be rewarded richly for the pro bono gifts they have provided pro bono to international commercial arbitration through this and all their other remarkable work. These are great people and represent the best in us.

7. I understand that there has been a small earthquake brought on by a study showing that only around 57 people out of a global 3,434 attorneys in the top 37 US international arbitration practices are of African Descent. (This was originally published as 54, but firms requested changes). That is not “57 people in NY” or even “57 people in the U.S.” – that is 57 people in the global international arbitration practices of the top 37 American international arbitration practices, which employed as of June 2020 3434 attorneys doing all the usual roles in international arbitration. I have also learned that some of the 57 persons have since that report was published indicated they are in joint litigation and arbitration practice groups, but and that they do not in fact do international commercial arbitration. So the 57 – as hard as it is to believe – probably overstates the number of blacks doing arbitration in the top American international arbitration practices. The anger that has been heard about this publication (“it letting the cat out of the bag) is unfortunate. That energy should have been focused on the point that this abysmal rate of hiring and employment exists and that the response should be hiring and appointing.

8. Based on what I saw at the IAC Club meeting I sat in on this past month, I expect that this will be an all white affair with a few women and as women of color Nancy Thevenin and Melida Hodgson. So here we go.

9. The heart of what I am going to say today is to hire and promote persons on this list who want to work in these firms and appoint those who want to serve as arbitrator, as arbitrator. You have the tools to make these hires and appointments

on the same basis as you do for whites. As Captain Picard says in Star Trek, “Make it so.”

10. From what I see, the entry-level slot is the way in for those who want to be in this field. I would say that the summer intern programs you have should of course have blacks in them. For those blacks who may have no clue as to this arena (I certainly did not before I had my 2L summer at SG Archibald in Paris) making sure they rotate through the international arbitration group in that summer should be important so that they get exposure to this area. Since you were aware of this list, if you had any blacks in that program, did you rotate them through the international arbitration practice at your firm for your pandemic challenged summer internship program?

11. Organizing speaking engagements at law schools with the International Law Society or the International Arbitration Society is fine but these should be done in collaboration with the black law students and Hispanic law student associations to have students of color be encouraged to see this area. In your plans for speaking engagements this recruiting year, are you coordinating with the black and Hispanic law students associations at the schools at which you are speaking even virtually?

12. In the hiring process, the same kind of identifying of un-mentored whites to go to the international arbitration group should be done for blacks. Even if that is not done, the international arbitration groups should reach out to black associates to do some of the work quickly so that their utilization rates in that work rises. And they should not be set up to fail.

13. The twice as hard for half as far thing we as blacks learn means that black associates are under enormous stress that is unfair. The cruelty and brutality inside the firm are understood but the thinking that if they make one mistake they are done for is the kind of oppression that is not acceptable and should not be done to black associates as it is not done to white associates. Making black associates be the voice of all blackness and placing upon them the sole responsibility for promoting equality within a firm is simply unfair and degrading. It is not required of white associates. It should not be the black person’s job to remind co-workers that racism is bad, or to explain on a daily basis what it looks like.

Further still, women of color are more likely to report having a mentor than attorneys of other groups. There is no shortage of formal mentoring. What they have reported, however, is that the mentoring that they are receiving is far different from that received by men. They report that their mentors are less well connected

and less able to exert any influence or guidance for them, in the same ways that are done for men. Left out and Left Behind, page 22.

III. It is not hard to do cross-cultural, cross-racial, cross-national, and cross-gender mentoring

14. Having benefitted from cross-cultural, cross-racial, and cross-national mentors all my life, the incapacity of some of you to mentor black associates is a problem with you and not the associates. And blaming those black associates for one's own failure of spirit may be a nice rationalization but it is unacceptable. You need to look within.



15. In this first picture, I am standing next to an older Frenchman named Michel Gaudet, former President of the ICC International Court of Arbitration who we were honoring that day (Gaudet Day - 1998). According to the current adage one can note that he was “stale, pale and male”. He had been one of the founders of the European Community being the first Legal Advisor back in 1958 and had a

long and distinguished career before he became President of the ICC International Court of Arbitration. Down in front to the left is Fali Nariman, Vice-Chair of the ICC International Court of Arbitration and a very distinguished Indian lawyer who can rightly be called the father of the Indian Conciliation and Arbitration Act of 1996. Thanks to him leading many courageous Indian jurists in the early 1990's, with the adoption of that UNCITRAL Model Law of Arbitration based act, India took a great leap forward of easily 50 years in its international commercial arbitration law. In the center, below me is Paul-A. Gelinas, a Canadian lawyer who was the Legal Counsel to the Canadian Embassy in Paris, and who at that time was the Chair of the ICC Commission on International Arbitration and had been a member of the ICC International Court of Arbitration for many years. He had had a distinguished career as an international commercial arbitrator for many years at that time. To the right with a hand on his chin is then Chief Justice S. Ba of the Common Court of Justice and Arbitration under the auspices of the OHADA treaty in West Africa. Mr. Gelinas had asked if Chief Justice Ba could be invited to this luncheon and, as the organizer, I said of course.

16. As you can see, while they may be stale and they are male³ they certainly are not all pale. It is important to highlight that President Gaudet took the decision to hire me – a black American – as the American Legal Counsel at the ICC in 1986. And over the years I had the honor to work with him, he always demonstrated belief in me while still expecting high standards in my work with him in the Secretariat. Similar experiences occurred with Fali Nariman and Paul Gelinas. So, as I look back as someone who is stale and male but not so pale, I show you pictures of 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.

17. I want in particular to reflect on Michel Gaudet, a white Frenchman, who was the President of the ICC International Court of Arbitration when I started work there in 1986. It should be noted that I was in fact taking the seat of another black American lawyer – Roberto Powers – who was leaving the ICC after 8 years to make a mid-career change to the United States Department of State. So for a

³ I should note here the efforts of ArbitralWomen since their inception in 1993 or so to move forward women in the profession so that a picture like this would not be without women today. I hope more black women are moved forward in that effort. I remember Eric Schwartz appointing the first woman legal counsel at the ICC – breaking a glass ceiling again. Cross-gender is not hard. I do it everyday for the past 20 years as a law professor.

period of roughly 18 years or so 1978-1996, the American Legal Counsel at the ICC International Court of Arbitration was a black American. We are talking going back 40 years from now. Moreover, that same President Gaudet appointed in the mid-1970's a woman named Tila Maria de Handcock to be the Director of the Secretariat of the ICC International Court of Arbitration. Again, 40 years or so ago, this white Frenchman was putting forward women and black Americans to the international plane. For those of you who are white today, looking at him should be an opportunity to reflect on what you did or did not do to advance women and minorities over your career. And also, what you are doing today to help the path forward be open in international commercial arbitration. And for those who are American women and/or minorities, knowing these memories (not history), helps to not see oneself as a new entrant even if those around you in their ignorance of the history perceive one that way.

18. For laterals - the requirement that black laterals be “magic negroes” is appalling. Yes someone has to be either a rainmaker or have a specific expertise that is salable but the level of perfection required of such a black lateral is not required of a white lateral and so it is unacceptable to so limit the access to those positions. The same conditions need to apply to all people – we are equals.

19. Firms that are looking to start up an international practice should look to the risk takers willing to take that on who are black.⁴ Look at Debevoise – top of the Legal500, and with women of African Descent in leadership roles. It is no accident that that firm is doing well.

20. Your systems should make sure you 1) recognize the work of black talent, 2) make sure others in the shark tank do not take credit for the work of that black talent (senior associates for black junior associates, etc.) and 3) that you make sure that those blacks are not sabotaged in their path.

21. Extra burdens are placed on blacks to help develop the diversity efforts of the firm and that is part of the legacy we carry in our generation. I am the first generation since legal segregation and have understood that is my lot to play that role of integrating the profession wherever I lay my bucket down. But, if that

⁴ Overseas now should include cyberspace and the developments in Online Dispute Resolution that are aggregated and moved forward at the National Center for Technology and Dispute Resolution of the University of Massachusetts of which I am a Fellow. The pandemic has pushed us to zoom meetings, but there are people who have been working for over 30 years on developing the technology that is not tricknology to move dispute resolution forward.

burden is not put on whites to an equal level who are also in the first generation or so after legal segregation, then the firm should give those blacks partnership track credit for that extra work as marketing for the firm.

22. When people are being looked at to do a project overseas, blacks should be thought of in that pool not just the fair-haired white man or woman. When an opening in an office anywhere in the world comes up needing that expertise, blacks should be both groomed and looked at to take on those positions.

23. As for the pitiful arbitral appointment numbers for blacks, the old myth that there are none qualified is put to rest by the list. This List has retired judges, construction arbitrators, mediators, professors, established arbitrators, attorneys. The someone who you are looking for is likely here – and if your research for that special someone has not revealed them, it might be a problem with the research.

24. Let me mention the Ray Corollary Initiative that Professor Homer LaRue of Howard Law School and former Chair of the ABA Section of Dispute Resolution is spearheading. I attach a copy of his upcoming article in the Howard Law Journal about this important initiative supported by the National Academy of Arbitrators. While the article focuses on the labor and employment arbitration space, we should remember that great international arbitrators such as Judge Howard Holtzman came from that space to the international arbitration plane with great success.

25. 16 years ago I castigated people like you for the dearth of blacks in the international arbitration practice in their firms then 50 years after *Brown v the Board of Education* (<http://aria.law.columbia.edu/racial-diversity-in-international-arbitration/>. I encourage everyone to review these articles and reflect on them.). Six years ago I did the same in my second article on the subject in the *American Review of International Arbitration* (<http://aria.law.columbia.edu/racial-diversity-in-international-arbitration/>. I encourage everyone to review these articles and reflect on them.). And this year in my third article I introduced a new arbitration story that is 565 years old of blacks in international trade (http://fordhamlawreview.org/wp-content/uploads/2020/06/Davis_May_S_3.pdf I encourage everyone to review these articles and reflect on them.)

26. White women who call themselves the sisterhood in these firms should also be ashamed that so few black women are in the American international arbitration practice and that they do not get a pass because they are women. I have seen white

women move ahead thanks to white men being more open to their daughters moving ahead, but for me this is just one more white thing that is also abominable. But I am not alone in seeing it: The ABA, in *Left Out and Left Behind*, reports on it too. It is a problem generally in law firms and specifically in international arbitration.

27. I salute those foreign lawyers who have had success in these American international arbitration groups. But, I know that in the classic processes of assimilation of a foreigner into the US system one of the classic ways has been for the foreigner to “play the immigrant card” and pledge fealty to white supremacy by saying some version of « I don’t know why these blacks are so upset. America has given everything to me. ». Thus, waving that patriotic / endemic racism imbued theme as a means to get ahead. I have seen it. If you do that, stop that. And if you go back to your country of origin or go to other offices in the world, hire American blacks.

IV. The Arc of History

28. The George Floyd murder is nothing new. I can start with the lynching of Emmitt Till the year I was born or better yet you should go to Montgomery, Alabama and see the Peace and Justice Museum (commonly called the Lynching Museum) to see how far back all this goes. What is different today is that we are alive today – the burden is on all of us. That is it.

29. And if going to Montgomery is too far to go due to COVID-19, as you are in the New York area and subject to social distancing and all that, you should go to the Memorial for the Transatlantic Slave Trade at the entrance to the UN and stand in the beautiful white marble A frame with the jet black reclining statue of a black man in tight quarters with his hand raised. Ask yourself whether you can take his hand and truly say « brother » or are you just part of the same exploitative path of history that goes back 565 years at least that enslaved, sold and bought, raped and worked to death people like him. (<https://www.bbc.com/news/world-africa-53527405> And if you have two minutes see the transatlantic slave trade here <https://youtu.be/SKo-XxfywK>).

30. I was able to hold his hand and say brother. With all the power and privilege that you have, are you able to look him in the eye and say brother?



31. The color line is a 565 year old wound that was reified by the 1452 and 1455 Papal Bulls calling for the perpetual enslavement of Africans. All those Africans in that trade and slavery were the unrecognized actors in international trade (<https://www.bbc.com/news/world-africa-53444752>).

32. The color line is a seamless color line that runs from the heights of international commercial arbitration practice down to the depths of the most desperate black inner city tenement child or rural Mississippi Delta black poverty.

33. Africans are not new to international trade for they have been doing it since antiquity. They are merely unrecognized.

34. For those of you who say, "I was not around when all this happened," please note.

Of course, I was not around when the Magna Carta was written but I do take the benefits of it.

Also, I was not around when the Church of England was created, but I take the benefits of it.

I should mention that I was not around in 1455 when Pope Nicholas the V published his Papal Bull that said

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

—Pope Nicholas V

I was not around in 1619 when the first enslaved blacks were brought to Jamestown.

I was not around in 1776 when the US Declaration of Independence was pronounced.

I was not around in 1787 when the US Constitution was signed.

I was not around when Andrew Jackson created the trail of tears.

I was not around in the Civil War or when the 13th, 14th and 15th amendments were adopted.

I was not around when the US fought in WWI, I was not around when the US fought in WWII.

I was not around when the Japanese were interned.

I was barely not around during segregation.

I was around from 1961 when I came to the States after my first two years in Liberia and four years in Tunisia when I personally experienced discrimination in the United States.

And on and on.

So this “It’s not my problem” argument leaves me a bit cold. It is a private person’s ridiculous vision as if that is all that mattered.

35. The point is that the states (if we go all Westphalian) have been around and the kingdoms even farther back. And these slavery, segregation and oppression policies were and are acts of the states that private parties in this capitalist system have exploited to enrich themselves down to today.

36. As to evidence, in the Transatlantic Slave Trade in two minutes, each of those ships carried the flag of a state at the time and so were under the protection of those states doing their dirty business. The data on the ships will lead to the data on the states. And this leaves to the side the actual destination states indicated on the routes.

37. For those of you who think, “you need to get over slavery” as the late Justice Scalia once said (at a very large dinner in his honor at the Inverness Club in Toledo) to me to resounding applause in response to an objection I have to originalism which is that my ancestor was owned by a Founder and Framers (the Benjamin Harrison family), let me point this out. On the way out, a white couple said to me, “He didn’t really answer your question.” And the wife of the late Judge McQuade for which the auditorium is named at the University of Toledo Law School (who was sitting at the table with me) came up to me and said with visible emotion that she was deeply proud of the fact her great-grandfather had fought for the Union during the Civil War. He had survived because a Confederate bullet hit his belt buckle. I was so moved by her that on a road trip I stopped at Gettysburg and bought a souvenir Union belt buckle (made in China) and sent it to her in recognition of her kind words to this then untenured second year newly minted law professor who had the temerity to tangle with a Supreme Court Justice. The next day – at a lunch with faculty – Justice Scalia again in response to me confirmed that he would have voted in favor of *Brown v/ Board of Education* if he had been on the court, contrary to rumors that I had heard about what he had said in the past. And, of course, now, if I had had the quick wit so needed I would have said to him that I will get over slavery when you get over the Founders and Framers in your originalist vision of Constitutional interpretation. As they say about 9/11, never forget.

V. Conclusion

38. I had my wife, Odette Lagace, who many of you may know from her years working at the ICC International Court of Arbitration as an Assistant, then Deputy

Legal Counsel, and then Legal Counsel succeeding me. I like to say she has forgotten more about international commercial arbitration than many of us think we know.

39. She took time out of our anniversary day yesterday (photo below) to read over this paper. She pointed out that there seemed to be much anger in this paper and that the result might be that you would take away only the anger and not the light.



40. We have been married for four years when a friendship that stretches back 27 years starting from when we worked together blossomed into love. She is a white (with some Huron) French-speaking Catholic Canadian about as different from me as one could imagine. Yet, she understands the experience of racism and oppression from the experiences she has had in Canada growing up.

41. You see she and I have seen and experienced – as have women of color and other white women – the misogyny that too often held women back in international commercial arbitration. I can remember when I started in 1986 the five male legal

counsels having discussions about whether a woman could be a legal counsel. Eric Schwartz made that “bold” move to push back the glass ceiling when he appointed Anne Cambournac the first woman counsel and shortly thereafter in 1996 promoted Odette to Legal Counsel. And since then women have risen in various roles in the Secretariat including Secretary General and make up half or more of the legal counsels. And, of course, the ICC is doing just fine. So the mindset of 1986 that somehow women would not be “respected” as a Legal Counsel was shown for what it was – nonsense.

42. So I would say the same for those who today have these kinds of conversations reminiscent of those about women in 1986 but about blacks. I am amazed that these conversations and attitudes persist. It is an American sickness that permeates our culture. And it is nonsense also. In fact, one of the saddest things I learned when I wrote my most recent Fordham Law Review article was just how that racism held back the United States from participating fully in the New York Conference for the 1958 New York Convention and delayed our acceding to that fundamental treaty until 1970. A host of changes had to be made in state laws to move away from the common law resistance to arbitration in our federalism. That took time and the fear of exacerbating state-federal tensions in 1958 at the height of the civil rights movement in the time of massive resistance slowed that process of modernization. And it cost American business dearly over the next 12 years as they moved heaven and earth to catch up with our trading partners in the modernization of the international commercial arbitration regime.

43. Women of color, white people, and myself have seen and experienced that racism working in international commercial arbitration and beyond. It disrespects international commercial arbitration and is something that in this farewell address I make a point of highlighting to you in my effort to bring light and to let you know that I know.

44. At the same time, looking at the “differences” that should somehow have kept Odette and I from falling in love with each other while we shared an abiding respect for the promise of international commercial arbitration, I am brought back to the flood of memories of people I had the honor to work with from all five continents. So many people of goodwill, humor, brilliance, and so many of them excellent lawyers.

45. And in those vivid memories, I see the spirit of international commercial arbitration and its promise and possibilities, And, so the emotion that you may think you hear from me is anger, but it is not anger.

45. Rather it is dismay at how little has progressed in the 38 years I have been in the field in terms of blacks being hired, promoted and appointed as arbitrators. It is sadness at the limits of those with the power to decide. Those limits are not my limits nor the limits of the blacks who are prepared for the wonderful challenges that international commercial arbitration provides in that magical space that I call the international plane.

46. So, in this farewell to international commercial arbitration, I pass along my dismay but also my hope. No amount of narrowness can dim the brightness of the spirit of international commercial arbitration that I had the great fortune to be exposed to and learn from and that I attempt to pass on to my students and in my writing. And so I again attempt to pass that on to you today, not in anger but with boundless optimism that those blacks who follow me will not let the limits of others be limits on their souls. The world is bigger than that.

47. So in terms of hiring, promoting and appointing blacks, you need to get your act together which you should have done 16 years ago when I first raised this issue to this group. The progress since then has been appallingly slow.

48. I want nothing from you but equity for those in this path. It is insane that a black has to work twice as hard to get half as far (or 4 times as hard to get the same). Your acceptance of this state of affairs in the manner in which you treat blacks is a burden on your souls, not on our souls.

49. In closing, if some of your egos have felt a little singed by my manner of expressing myself then just remember you are New Yorkers having a hard time listening to a Jersey boy. You need to get over yourselves and get on with making America great. Make it so.

40. For, in the sweep of the 565 years of oppression back to those 1452 and 1455 Papal Bulls there are those who have worked to lift and raise and those who in their complacency or envied position have merely gone along to get along. Who are the ones that international arbitration practice will remember after each of us is long gone? Who of you wants to be remembered as a gatekeeper keeping what others think are barbarians out? Or do you want to be remembered as being the gate opener to people who are of African descent who bring new ideas and new approaches to enrich you and your firms future?

31. Lead, follow or get out of the way. Thank you.