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DISABILITY AND TRANSNATIONAL ARBITRATION: HUMAN RIGHTS LINKAGES AND REASONABLE ACCOMMODATIONS

ILIAS BANTEKAS*

ABSTRACT

Disability intersects with arbitration as regards the mental capacity of a party to enter into an arbitration agreement, the appointment of arbitrators with disability and grounds for removal thereof, accommodations during arbitral proceedings for arbitrators and counsel with disabilities, as well as the costs for all appropriate accommodations. This Article demonstrates that the right to a fair trial, which is universally recognized in arbitration, dictates that parties and arbitral institutions be free to select arbitrators of their choice, and no impediments may be imposed against arbitrators with disabilities other than that they are able to fulfill the functions of their mandate. Accommodations, however, are not enough. Arbitral institutions, the legal profession, and professional associations, in conjunction with the government, must undertake a sustained campaign to eliminate bias and stereotypes of disability and actively promote arbitrators and counsel with disabilities in arbitral proceedings. Finally, this Article shows that the cost to accommodate arbitrators and counsel with disabilities is less significant than multilingual arbitrations and, in any event, may be offset through synergies between arbitral institutions and governmental entities.

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INTRODUCTION

While arbitration of disputes involving some element of disability, such as employment disputes under the Americans with Disability Act (ADA), is now commonplace in many jurisdictions,¹ there is little, if any, discussion on the effect of disability in the arbitral process itself. The issue gained some notoriety when the current president of the International Chamber of Commerce (ICC) announced the creation of a Disability and Inclusion Taskforce upon taking office.² The motivation behind this initiative was an arbitral hearing taking place in New York where a junior counsel with a diabetes condition abruptly removed himself from the chamber to take his insulin jab.³ The tribunal failed to ask or make any accommodation for this counsel, and it seemed to the ICC President that at no time during her professional career in arbitration had anyone, whether an institution, tribunal, parties or even counsel, disclosed a disability or wondered if anyone present in the room would like any accommodation.⁴ This state of affairs is surprising given that more than one billion people in the world are estimated to have a disability, which represents around fifteen to twenty percent of the global population.⁵

The number of persons with disabilities in any given country cannot be precisely estimated by reference to the proportion of people who officially self-report their disability.⁶ Many people,

¹ See generally Wendy S. Tien, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443, 1460–61 (1993) (discussing the arbitration of ADA claims under the U.S. Federal Arbitration Act (FAA)).

² See *ICC Names New Disability and Inclusion Task Force Leadership*, INT'L CHAMBER COM. (Mar. 12, 2021) [hereinafter *ICC Statement*], <https://iccwbo.org/media-wall/news-speeches/icc-names-new-disability-and-inclusion-task-force-leadership/> [<https://perma.cc/V9F7-XCPW>].

³ See Claudia Salomon, President of the ICC Int'l Ct. of Arb., Welcome Address to the 6th Edition of the International Conference for Promoting Arbitration (May 26, 2022) (unpublished address) (address notes on file with author).

⁴ See *id.*

⁵ *World Report on Disability*, WORLD HEALTH ORGANIZATION [WHO] (Dec. 14, 2011), <https://www.who.int/publications/i/item/9789241564182> [<https://perma.cc/B63U-DHGB>].

⁶ See *id.* (“[While statistical] methods have demonstrated the existence of ‘biases’ in self-reported functioning, they have so far not been found to adequately correct for these biases.”).

for whatever reason, but chiefly out of fear for personal or professional bias, prefer to conceal their disability.⁷ Thus, if appropriate accommodation is not provided in a sensitive manner to the stakeholders of arbitral proceedings (i.e., arbitrators and counsel), the right to a fair trial is seriously compromised.

Arbitral proceedings enjoy the same types of guarantees and protections as litigation before the courts,⁸ including the right to a public hearing in exceptional cases.⁹ The introduction of human rights might seem alien to business lawyers, as the kind of accommodation desired in this context requires concrete action, chiefly from non-state actors: arbitral institutions, arbitral tribunals, and the legal profession.¹⁰

⁷ See, e.g., Laurie Henneborn, *Make It Safe for Employees to Disclose Their Disabilities*, HARV. BUS. REV. (June 28, 2021), <https://hbr.org/2021/06/make-it-safe-for-employees-to-disclose-their-disabilities> [<https://perma.cc/TK4W-VHBW>] (“[E]mployees with disabilities fear that disclosing will lead to outcomes such as retaliation, slower progression, and less meaningful roles.”).

⁸ See MATTI S. KURKELA & SANTTU TURUNEN, *DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION* 1–2 (2d ed. 2010); For the purposes of arbitration, it is noteworthy that the European Court of Human Rights (ECtHR) has developed a line of precedent according to which long-established domestic judicial practice may deviate within particular boundaries from Article 6(1) of the European Convention of Human Rights (ECHR). See *Gorou v. Greece* (no. 2), 2009 Eur. Ct. H.R. 488, ¶ 32; *Kerojärvi v. Finland*, App. No. 17506/90, 32 Eur. H.R. Rep. 8, ¶¶ 40, 42 (1995); cf. Adam Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights*, 21 J. INT’L ARB. 413, 437 (2004) (concluding that the ECHR was “never intended to apply to conventional private arbitration” though it may apply “occasionally.”).

⁹ *Mutu v. Switzerland*, App. Nos. 40575/10 & 67474/10, ¶ 179 (Oct. 8, 2018), <https://hudoc.echr.coe.int/eng/?i=002-12113> [<https://perma.cc/A9HM-2CTW>]. The ECtHR held that although the Court of Arbitration for Sport (CAS) was a privately owned institution and not a state court, its proceedings are covered by ECHR Article 6(1), establishing the right to a fair and public hearing. *Id.* ¶¶ 172–75. The tribunal explained that when parties submit a dispute to compulsory arbitration, all the guarantees of a fair trial under the ECHR must be provided. *Id.* ¶ 182. In this case, proceedings before CAS became the only way for Ms. Pechstein to pursue her career. *Id.* ¶ 183. Following this logic, the ECHR found that the absence of a public hearing in Ms. Pechstein’s compulsory arbitration proceedings amounted to a violation of Article 6(1) of the ECHR, especially considering her explicit request for a public hearing. *Id.* ¶¶ 179–83.

¹⁰ Ilias Bantekas, *The Linkages Between Business and Human Rights and Their Underlying Root Causes*, 43 HUM. RTS. Q. 117, 122 (2021) [hereinafter Bantekas, *Linkages*].

Traditionally, private persons were not considered as subjects of international law; that is, they were deprived of international legal personality and as such did not enjoy rights or bear obligations under international law. Rights and duties were only available under domestic law, while the interests of the person in the international sphere were assumed by the state as a matter of diplomatic protection. Current practice clearly suggests that this traditional view no longer holds sway. Even so, while the available case law and treaties aptly confirm that private persons enjoy rights in their personal capacity, in addition to bearing liability for particular international crimes, such as war crimes, it is not clear that private persons possess human rights obligations in the same manner as states, or in any other form for that matter.¹¹

Non-state actors (NSAs) and their operations affect the lives of many people, “including their employees, customers, and the local communities wherein they operate.”¹²

Moreover, states use corporations to provide essential services to their people, such as water supply, healthcare, pensions, correctional facility operations and many others. Although in all these cases, the state continues to remain the primary duty bearer, it is fair to argue that the private party should possess a complementary duty to fulfill these entitlements; otherwise, it will be free to treat relevant socioeconomic rights through a strict business perspective that is predicated solely on financial considerations.¹³

As arbitration experts may not be familiar with the socio-legal contours of disability, a brief exposition is warranted. Article 1(2) of the U.N. Convention on the Rights of Persons with Disabilities (CRPD) defines persons with disabilities as including “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may

¹¹ *Id.* at 122–23. *See, e.g.*, *Nevsun Resources Ltd. v. Araya*, [2020] 1 S.C.R. 166, paras. 114, 122 (Can.) (the Canadian Supreme Court holding that Canadian corporations may be liable for the breach of customary *jus cogens* obligations). Significantly, such liability is not limited to tort, particularly “given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.” *Id.* at para. 129.

¹² Bantekas, *Linkages*, *supra* note 10, at 124.

¹³ *Id.*

hinder their full and effective participation in society on an equal basis with others.”¹⁴ This definition is predicated on what is known as the social model of disability, which is wholly antithetical to its medical counterpart that was prevalent prior to the adoption of the CRPD in 2006.¹⁵ Unlike the medical model, the social construction of disability posits that one’s particular impairment (loss or diminution of an anatomical structure or physiological function or function of the mental-nervous system) is distinct from the overall engagement and interaction of disabled persons with the built and social environment.¹⁶ This represents a more general view than social constructionism.¹⁷ The medical model, on the other hand, objectifies impairment and largely serves paternalistic purposes that devalue the individual and do not allow others to see past the particular impairment.¹⁸ It further leads to unnecessary medicalization, despite the fact that the effects of

¹⁴ G.A. Res. A/RES/61/106, Convention on the Rights of Persons with Disabilities, art. 1 (Dec. 13, 2006) [hereinafter CRPD]; Ilias Bantekas, *The Right of Access to Sport and Recreation for Disabled Persons Under International Law: What Does It Really Entail?*, 45 LOY. L.A. INT’L & COMP. L. REV. 157, 160 (2022) [hereinafter Bantekas, *Access to Sport and Recreation*].

¹⁵ See generally Jan Grue, *Discourse Analysis and Disability: Some Topics and Issues*, 22 DISCOURSE & SOC’Y 532, 538–43 (2011).

¹⁶ See *Medical and Social Models of Disability*, U.C. SAN FRANCISCO, <https://odpc.ucsf.edu/clinical/patient-centered-care/medical-and-social-models-of-disability> [https://perma.cc/V35P-2LMU].

¹⁷ Social constructionism rests on the idea that notions and knowledge is given expression only because of human intellectual intervention, absent which it would never really exist. A typical example is the notion of states and statehood. See PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 26–27 (1991). Berger and Luckmann emphasized the role of typification and other constitutional processes like meaning and knowledge in order to demonstrate that social construction is achieved neither by meaning nor consciousness but through social processes, actions, and institutions. *Id.* at 72.

¹⁸ Janet E Lord, *Persons with Disabilities in International Humanitarian Law—Paternalism, Protectionism or Rights?*, in *DISABILITY, HUMAN RIGHTS AND THE LIMITS OF HUMANITARIANISM* 155, 158–60 (Michael Gill & Cathy J. Schlund-Vials eds., 2014); John Wyatt, *Medical Paternalism and the Fetus*, 27 J. MED. ETHICS 15, 19 (2001); see John-Stewart Gordon, *Is Inclusive Education a Human Right?*, J.L. MED. & ETHICS 754, 755 (2013) (who notes that: “it seems highly paternalistic to make inclusive education mandatory if parents and their impaired children agree that a homogenous educational setting would be more beneficial”).

the disability can just as well be removed or alleviated through the adjustment of the physical and social environment.

[I]t should be emphasized that the CRPD rests on several pillars, some of which are unique to human rights treaty-making. The first is the universal introduction of a social or human rights model of disability, in which the focus is on the creation of enabling environments. Secondly, disability rights in the CRPD are not new rights, but existing rights as adapted and adjusted to creating enabling environments. Thirdly, and in order to realize the first and second pillars, it is imperative that disabled persons enjoy unlimited accessibility. Accessibility, both physical and virtual in public and private spaces is enshrined in [A]rticle 9 CRPD and is integral to de facto equality and the pursuit of independent living, among others. In fact, with a view to streamlining accessibility into all walks of life, [A]rticle 4(1)(f) CRPD obliges States to construct, design and adapt all objects, services, materials and buildings on the basis of a universal design. . . . Fourthly, it is not only imperative that disabled persons are not discriminated against non-disabled persons, but that they enjoy de facto equality against non-disabled persons, as well as equality of opportunity.¹⁹

This Article seeks to undertake a mapping expedition of the key issues underpinning the linkages between arbitration and disability in the hope that this will lead to more interest in and identification of other areas of concern and best practices. Part I discusses the intersection of disability and contracts to ascertain how mental health laws restrict the freedom to enter into an agreement to arbitrate. Part II examines the difficulties concerned with the appointment of arbitrators with disabilities and the need to eliminate negative stereotypes of persons with disabilities within the global arbitration community and substitute these with fresh campaigns demonstrating the intellectual capabilities of persons with disabilities who are, or who aspire,

¹⁹ Bantekas, *Access to Sport and Recreation*, *supra* note 14, at 162–63 (“Article 2 CRPD defines universal design as ‘the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.’” “‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.” Fourthly, it is not only imperative that disabled persons are not discriminated against non-disabled persons, but that they enjoy de facto equality against non-disabled persons, as well as equality of opportunity.”) (quoting CRPD, art. 2).

to become arbitrators. Part III examines the array of accommodations that can be put in place during arbitral proceedings for the benefit of arbitrators with disabilities. Part IV discusses the particular problems associated with counselors with disabilities and the need to formulate rules that allow them to practice without discrimination. Part V deals with the expenses and their apportionment among the parties as these relate to the accommodations discussed in this Article. Finally, Part VI briefly explores whether disability can constitute a valid ground for setting the award aside.

I. MENTAL DISABILITY AND THE AGREEMENT TO ARBITRATE

A universal prerequisite to any arbitration agreement is that the parties have the legal capacity to contract.²⁰ “Capacity” or “competency” is generally distinguished from “competence,” with the latter usually referring to the authority of a person to have legal standing in court proceedings.²¹ One’s contractual capacity, at least under the law, is not compromised by reference to mental health or intellectual disability alone.²² Incapacity

²⁰ See Autumn Smith, *You Can’t Judge Me: Mental Capacity Challenges to Arbitration Provisions*, 56 BAYLOR L. REV. 1051, 1055 (2004) (“[C]ourts are willing to limit the power of individuals with mental infirmities to undertake binding contractual obligations.”); see also Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 615 (2017) (“Legal capacity has long been the greatest preliminary barrier faced by many disabled people . . .”).

²¹ *Compare Capacity*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[T]he satisfaction of a legal qualification, such as legal age or soundness of mind, that determines one’s ability to sue or be sued, to enter into a binding contract, and the like . . .”) and *Competency*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The mental ability to understand problems and make decisions. . . .”), with *Competence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A basic or minimal ability to do something . . .”) and *Competence to Stand Trial*, BLACK’S LAW DICTIONARY (11th ed. 2019). For example, litigation capacity in the United Kingdom is governed by the rule set out in *Masterman-Lister v. Jewell*, which Lord Kennedy summarized as “whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings.” *Masterman-Lister v. Jewell*, [2002] EWCA (Civ) 1889 [75], [2003] 1 WLR 1511 (Eng.).

²² See Piers Gooding, *Navigating the ‘Flashing Amber Lights’ of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns*, 15 HUM. RTS. L. REV. 45, 66 (2015).

may be associated with a person's age, level of maturity, sex,²³ or the authority granted to an officer of a legal person or an agent of the principal.²⁴ Most private law codifications, even those of liberal industrialized states, assume that a person "in a state of pathological mental disturbance" is incapable of contracting because such a state "prevents the free exercise of will," unless such a state is temporary.²⁵ As used in this Article, having legal capacity means one possesses sufficient authority under the law to enter into a contract with another person.²⁶ Such capacity exists equally in respect of other actions associated with personal autonomy, such as the right to marry and found a family.²⁷ Incapacity is one of the few exceptions to contractual freedom and constitutes a mechanism through which the law intervenes in the formation of contracts.²⁸ Similar exceptional mechanisms include the insertion of terms implied by law or fact,²⁹ public policy,³⁰ or force majeure,³¹ among others.³²

In a legal opinion on CRPD Article 12, the EU's Fundamental Rights Agency defined legal capacity as "the capacity to hold a right and the capacity to act and exercise the right, including

²³ Women lack full contractual capacity in some legal systems. See Arlene S. Kanter & Carla Villarreal López, *A Call for an End to Violence Against Women and Girls with Disabilities Under International and Regional Human Rights Law*, 10 NE. U.L. REV. 583, 599 (2018); see also, e.g., Mahdi Zahraa, *The Legal Capacity of Women in Islamic Law*, 11 ARAB L.Q. 245, 257, 262 (1996).

²⁴ Gooding, *supra* note 22, at 57. See RICHARD A. LORD, WILLISTON ON CONTRACTS: EFFECT OF CAPACITY, COMPETENCE, OR MENTAL CONDITION § 67:27 (4th ed.), Westlaw (database updated May 2022).

²⁵ See Bürgerliches Gesetzbuch [BGB] [Civil Code], § 104(2), https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0312 [<https://perma.cc/X8RN-MZT6>] (Ger.); LORD, *supra* note 24, § 67:27.

²⁶ See Bernadette McSherry, *Legal Capacity Under the Convention on the Rights of Persons with Disabilities*, 20 J.L. & MED. 22, 23 (2012).

²⁷ See *id.* at 23; Lucy Series, *Legal Capacity and Participation in Litigation: Recent Developments in the European Court of Human Rights*, 5 EUR. Y.B. DISABILITY L. 103, 112 (2015).

²⁸ David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 53 (2013).

²⁹ See RICHARD A. LORD, WILLISTON ON CONTRACTS: EXPRESS CONTRACTS INCLUDING CONTRACTS INFERRED OR IMPLIED IN FACT § 1:5 (4th ed.), Westlaw (database updated October 2022).

³⁰ See LORD, *supra* note 29, § 57:34.

³¹ See LORD, *supra* note 29, § 77:31.

³² See LORD, *supra* note 29, § 57:14.

the legal capacity to sue, based on such rights.”³³ In 2014, the United Nations Committee on the Rights of Persons with Disabilities defined legal capacity as including the capacity to be a “holder of rights,” entitling “a person to full protection of his or her rights by the legal system,” and the capacity to be “an actor under law,”³⁴ recognized “as an agent with the power to engage in transactions and create, modify or end legal relationships.” In *Fehily v. Atkinson*, the England and Wales High Court of Justice made it clear that capacity exists if the person understands the “key features” of a transaction, as opposed to its ancillary counterparts.³⁵ In order to possess the requisite mental capacity to contract, a person must be capable of understanding the “nature of the transaction,” or the “nature and effect of that particular transaction,” or the “nature of the contract.”³⁶ This means that the person must be able to “absorb, retain, understand, process, and weigh information about the key features and effects of the proposed transaction, and the alternatives to it, if they are explained to the person in broad terms and simple language.”³⁷ The only question is “whether the person had the ability to understand the transaction, not whether they actually understood it”³⁸ “The fact that a person needs help in understanding the transaction does not prevent them from having the capacity to understand it.”³⁹ Such understanding need not exist at all times but may just as well be time-specific, as people’s capacity varies.⁴⁰

³³ Santos Cifuentes et al., *Legal Opinion on Article 12 of the CRPD*, U. LEEDS DISABILITY STUD. GROUP ARCHIVES (June 21, 2008), <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/legal-opinion-LegalOpinion-Art12-FINAL.pdf> [<https://perma.cc/BHK6-PR6C>].

³⁴ Comm. on the Rts. of Pers. with Disabilities, General Comment No. 1, Equal recognition before the law, U.N. Doc. CRPD/C/GC/1, ¶ 12 (May 19, 2014) [hereinafter U.N. Doc. CRPD/C/GC/1]; see Anna Nilsson & Lucy Series, *Art.12 CRPD: Equal Recognition Before the Law*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY* 339, 351 (Ilias Bantekas et al. eds., 2018) (ebook).

³⁵ *Fehily v. Atkinson* [2016] EWHC (Ch) 3069 [101] (Eng.).

³⁶ *Id.* ¶ 99.

³⁷ *Id.*

³⁸ *Id.* ¶ 81; see *In re Estate of Smith* [2014] EWHC (Ch) 3926 [27], [2015] 4 All ER 329 (Eng.) (“[T]he overall test [for mental capacity] is one of ability to understand, rather than actual understanding.”).

³⁹ *Fehily*, EWHC 3069, at ¶ 82.

⁴⁰ *Id.* ¶ 80; see also *Haworth v. Cartmel* [2011] EWHC (Ch) 36 [55] (Eng.) (“[C]apacity is issue and situation specific”).

Even though this line of case law is progressive in contrast to the past, it hardly moves away from substitute decision-making.⁴¹ Disability scholars have viewed these tests as holding “persons with disabilities to a higher standard in decision-making than the rest of the population.”⁴² There is also a strong belief among disability scholars that determinations of capacity are largely discriminatory.⁴³

This discussion is particularly enlightening in the context of an agreement to arbitrate, which represents the very first phase of arbitration.⁴⁴ A party to a dispute may well argue that its counterpart lacked capacity under their particular personal law, and hence the agreement to arbitrate is null as if it never existed.⁴⁵ There are several problems with such claims. Firstly, CRPD Article 12 does not allow arbitrary denials of capacity.⁴⁶ Persons with a mental disability may receive assistive, but not substitute, decision-making in exercising their contractual freedom.⁴⁷ In those legal systems that restrict the free exercise of contractual capacity, whether by reference to mental impairments or forms of prodigality or “imbecility,” the tribunal would have to assess whether such personal law is consistent with the mandatory laws and public policy of the arbitral seat, as well as the seat’s obligations under the CRPD.⁴⁸ The prevalence of CRPD Article

⁴¹ See Clíona de Bhailís & Eilionóir Flynn, *Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD*, 13 INT’L J.L. CONTEXT 1, 10 (2017).

⁴² *Id.*

⁴³ See Piers Gooding & Eilionóir Flynn, *Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?*, 4 LS. 245, 250 (2015).

⁴⁴ See Ilias Bantekas, *Transnational Arbitration Agreements as Contracts: In Search of the Parties’ Common Intention*, 38 ARB. INT’L 169, 184–85 (2022) (arguing that despite the procedural nature of the agreement to arbitrate, it is usually a contract and must be construed as such by courts and arbitral tribunals).

⁴⁵ See Edwin N. Kimani & Peter M. Muriithi, *A Critique of the Law Governing Capacity of Parties to Enter into an Arbitration Agreement*, 9 ALT. DISP. RESOL. J., no. 1, 2021, at 137, 139, 140 (Kenya), <https://ciarbkkenya.org/wp-content/uploads/2021/02/volume9-issue1-1.pdf> [<https://perma.cc/BM25-N43E>].

⁴⁶ See U.N. Doc. CRPD/C/GC/1, *supra* note 34, ¶ 40.

⁴⁷ See Gooding, *supra* note 22, at 57.

⁴⁸ See, e.g., LAW NO. (22) OF 2004 REGARDING PROMULGATING THE CIVIL CODE 22 / 2004 [CIVIL CODE], art. 50(1)–(2) (Qatar) (“No person who lacks discretion by reason of youth or imbecility or insanity shall be competent to exercise his civil rights.”).

12 over and above the parties' personal laws is of paramount consideration, particularly where many states use the issue of capacity as a weapon against marginalized and vulnerable persons, including women,⁴⁹ persons with disabilities, and those whose families or other elites seek to strip their civil and property rights.⁵⁰ As a result, when tribunals encounter claims of incapacity—other than claims of agency—they should first distinguish the arbitration clause from the main contract and assess whether the impugned person's personal law is in tune with CRPD Article 12.⁵¹ Such an assessment by the tribunal is consistent with elementary considerations of justice and the international obligations of the *lex arbitri*.⁵² No application of the law frees independent justice-dispensing entities, such as the courts or tribunals, from enforcing just, including commercially just, outcomes.⁵³ Justice is an overriding consideration of the parties' chosen governing law,

⁴⁹ See Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 21, U.N. Doc. A/49/38(SUPP), at viii (1994).

⁵⁰ For example, Qatari law, clarifies that lack of discretion (i.e., capacity) may also arise because of "imbecility or insanity," in which case the person is considered incompetent to exercise its civil rights, including the absolute freedom to contract. QATAR CIV. CODE art. 50(1). This is not the same as mental incapacity. Qatari law, as in all Gulf Cooperation Council member states, further limits capacity to contract by stating that persons attaining discretion but not majority, as well as persons that have achieved majority but who are "prodigal or negligent" lack capacity. QATAR CIV. CODE art. 51; see Eleni Polymenopoulou, *Human Rights in the Six Arab States of the Gulf Cooperation Council (GCC): From Vision to Reality*, 3 INT'L COMP. POL'Y & ETHICS L. REV. 929, 951–52 (2020). On the capacity of the discerning minor, see ILIAS BANTEKAS ET AL., ISLAMIC CONTRACT LAW (forthcoming August 2023).

⁵¹ See Comm. on the Rts. of Pers. with Disabilities, Concluding Observations on the Initial Report of Sweden, U.N. Doc. CRPD/C/SWE/CO/1, ¶ 33 (2014); Comm. on the Rts. of Pers. with Disabilities, Concluding Observations on the Initial Report of Kenya, U.N. Doc. CRPD/C/KEN/CO/1, ¶¶ 23–24 (2015); Comm. on the Rts. of Pers. with Disabilities, Concluding Observations on the Initial Report of Uganda, U.N. Doc. CRPD/C/UGA/CO/1, ¶¶ 22–23 (2016) (concerning customary practices of de facto guardianships); Susan Hayes & Fiona Martin, *Consumers with an Intellectual Disability and Carers*, 11 J. INTELL. DISABILITIES 9, 10 (2007).

⁵² Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 INT'L & COMPAR. L.Q. 991, 999 (2020) [hereinafter Bantekas, *Equal Treatment*].

⁵³ Cf. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) ("[C]ourts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms . . .").

but only as regards fundamental justice concerns, as opposed to trivial or non-overrideing justice concerns.⁵⁴

Even so, much of the thinking that permeates international arbitration tends to take a narrow view of justice, conflating it with commercial justice.⁵⁵ Firstly, it is now firmly recognized that human rights exist in the private sphere⁵⁶ and that private commercial actors are not free from human rights duties.⁵⁷ Secondly, even the narrow conception of commercial justice owes its existence to the broader notion of justice; hence, it is absurd to argue that the narrow conception excludes its broader creator,

⁵⁴ Among the many possible conceptions of justice, it is worthwhile considering Rawls' first principle of justice as follows: "[e]ach person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all," JOHN RAWLS, *JUSTICE AS FAIRNESS* 42 (Erin Kelly ed., 2001).

⁵⁵ There are notable exceptions, no doubt. The German Constitutional Court in the Pechstein case, which concerned the applicant's request for a public arbitral hearing at CAS, which did not, however, allow for public hearings, held that:

In order for the state to recognize arbitration decisions, and enforce them in the exercise of its public authority, it must ensure that the arbitration procedure guarantees effective legal protection and meets the minimum standards of the rule of law. When interpreting and applying the statutory provisions on the recognition and enforcement of arbitration procedures and the validity of arbitration agreements, the specific guarantees of the general right of access to justice under Art. 2(1) in conjunction with Art. 20(3) GG must be taken into account. . . . [C]onflicting fundamental rights interests must be considered in terms of how they interact and must be balanced in accordance with the principle of achieving maximum equilibrium between conflicting fundamental rights of equal weight (*Grundsatz der praktischen Konkordanz*), which requires that the fundamental rights of all persons concerned be given effect to the broadest possible extent

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2103/16, June 3, 2022, http://www.bverfg.de/e/rk20220603_1bvr210316en.html [<https://perma.cc/WX2V-X6CX>] (Ger.) (quoting the court's non-authoritative English translation).

⁵⁶ For an excellent contemporary overview, see Eli Bukspan & Asa Kasher, *Human Rights in the Private Sphere: Corporations First*, 40 U. PA. J. INT'L L. 419, 461 (2019).

⁵⁷ See Ilias Bantekas, *The Globalization of English Contract Law: Three Salient Illustrations*, 137 L.Q. REV. 330, 336 (2021) (explaining states' use of private law to bypass transaction formalities otherwise subject to public law).

without which it has no existence.⁵⁸ Thirdly, there is no plausible basis to suggest that arbitral proceedings are not amenable to just outcomes of a fundamental nature, even though all other state mechanisms are so obliged.⁵⁹ This argument is confirmed in practice in most jurisdictions⁶⁰ and is exemplified by the European Court of Human Rights case law on arbitral proceedings.⁶¹

II. APPOINTMENT OF ARBITRATORS WITH DISABILITIES

The title of this Part seems straightforward, but it is not so. In the fast pace of the transnational commercial world, it may seem obvious to a junior, mid-level, aspiring, or existing arbitrator that the last thing the parties' counsel want to do is reveal a disability.⁶² The desire for a fast award or the vision of an arbitrator working long shifts and flying to several destinations is inconsistent with stigmatized perceptions of disability.⁶³ There is a significant likelihood that if a choice has to be made between an arbitrator with or without a disability, the latter will receive priority.⁶⁴ Speed and stamina are not the only impediments that factor into discrimination against arbitrators with disabilities.⁶⁵

⁵⁸ *Id.* at 339–40.

⁵⁹ “[I]t should be stressed that from a fair trial perspective fairness aims to secure the interests of the parties and the proper administration of justice.” Bantekas, *Equal Treatment*, *supra* note 52, at 993. Specifically, the foundational principle of the right to a fair trial is guaranteed, among others, in ECHR Art. 6. *See id.* at 1000.

⁶⁰ Simon Sloane & Emily Wyse Jackson, FIELDFISHER, *Due Process and Procedural Irregularities: Challenges*, GLOB. ARB. REV. (June 8, 2021), <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/due-process-and-procedural-irregularities-challenges> [<https://perma.cc/QW72-MKTF>].

⁶¹ *See* TOMS KRŪMIŅŠ, ARBITRATION AND HUMAN RIGHTS 42 (2020).

⁶² *See* Stacy A. Hickox & Keenan Case, *Risking Stigmatization to Gain Accommodation*, 22 U. PA. J. BUS. L. 533, 539 (2020) (noting that employees fear revealing hidden disabilities because of the associated stigma).

⁶³ *See id.*

⁶⁴ *See* Brandon Lowery, *How the Legal Industry Lets Down Lawyers with Disabilities*, LAW 360 (Aug. 13, 2018), <https://www.law360.com/articles/1071971/how-the-legal-industry-lets-down-lawyers-with-disabilities> [<https://perma.cc/E8HQ-V6Y4>].

⁶⁵ *See Reasonable Accommodations for Attorneys with Disabilities*, EEOC (May 23, 2006), <https://www.eeoc.gov/laws/guidance/reasonable-accommodations-attorneys-disabilities#> [<https://perma.cc/3ZD5-ZR6K>].

Cost is an equally significant factor.⁶⁶ A visually impaired appointee may require special accommodation to assess the evidence that is otherwise available to their other colleagues sitting in the tribunal.⁶⁷ Conversion into Braille or other accommodations may have to be provided, which adds to the cost of the proceedings.⁶⁸ An additional issue relates to the discussion in the previous section.⁶⁹ In the same way that contractual freedom is limited by lack of capacity, some legal systems may restrict one's eligibility to be appointed as an arbitrator based on their capacity. Let us examine these in turn.

The appointment of arbitrators may be viewed from a variety of lenses. While it encompasses an employment relationship, it is equally a contract for the provision of a specialized service.⁷⁰ In both instances, the role entails a judicial function that is given special weight in the law.⁷¹ The principle of party autonomy has long dictated that employment law is peripheral to the selection of arbitrators in the sense of hiring or recruitment.⁷² Even if viewed from an employment dimension, the particular service is so specialized that only a relatively small number of persons can perform it; in any event, individual traits are indispensable to the parties to arbitral proceedings.⁷³ By way of illustration, a

⁶⁶ *See id.*

⁶⁷ *See* Kevin M. Rivera, *A Law Firm's Legal Duty to Provide Reasonable Accommodation to Attorneys with Disabilities*, 23 THE PRACTITIONER 23, 27 (2017).

⁶⁸ *See id.*

⁶⁹ *See supra* Part I.

⁷⁰ *See, e.g.*, Eugen Salpius, *What if the Arbitral Institution Refuses to Administer a Case?*, 3 Y.B. INT'L ARB., 2013, at 105, 115 (noting the distinction in Austrian law between the appointment of an arbitrator and "the contractual relationship between the arbitrator and the parties.")

⁷¹ Although there is no single treatment of the relationship between the tribunal and the parties, there is general agreement that it is predicated on contract law. *See* ILIAS BANTEKAS, AN INTRODUCTION TO INTERNATIONAL ARBITRATION, 118–19 (2015).

⁷² *See* Deborah Wilkie, *Jivraj v Hashwani [2011] UKSC 40: Herbert Smith comment*, PRACTICAL LAW UK LEGAL (Aug. 4, 2011), [https://uk.practicallaw.thomsonreuters.com/5-507-1339?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-507-1339?transitionType=Default&contextData=(sc.Default)&firstPage=true) [<https://perma.cc/WM5K-6VM3>].

⁷³ *See* S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 J. DISP. RESOL. 119, 125 (2012) ("[I]nternational commercial arbitration typically involves . . . [h]ighly qualified arbitrators with years of experience in international law and practice . . .").

universally acclaimed judge with a large workload and a tendency to delay the delivery of awards may be seen as unsuitable compared to a junior and inexperienced lawyer perceived as enthusiastic, effective, and fast. In *Jivraj v. Hashwani*, it was initially held by the English Court of Appeals that the practice of appointing Ismaili arbitrators in commercial disputes between members of this religious community was contrary to English employment legislation.⁷⁴ The English Supreme Court overturned this decision, holding that because arbitrators are not subordinate to their appointees, they were not under contract to provide a service and, thus, not subject to equality or employment laws.⁷⁵ While rejecting an arbitrator because of their disability does not constitute employment discrimination, disability-inclusive law firm policies and comparable arbitral regulations may mitigate its effects.⁷⁶ This is very much in line with gender-based selections at the heart of the profession.⁷⁷

The removal of stereotypes associated with disability in the selection of arbitrators is dictated by CRPD Article 8, which obliges member states to institute awareness-raising measures to combat stereotypes.⁷⁸ Paragraph 2 of article 8 specifically dictates that such measures include:

- (a) Initiating and maintaining effective public awareness campaigns designed:
 - (i) To nurture receptiveness to the rights of persons with disabilities;
 - (ii) To promote positive perceptions and greater social awareness towards persons with disabilities;
 - (iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;
- (b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

⁷⁴ *Jivraj v. Hashwani* [2011] UKSC 40, [16] (Eng.).

⁷⁵ *Id.* ¶ 27.

⁷⁶ *See id.* ¶ 59.

⁷⁷ *Cf.* RUTH O'BRIEN, BODIES IN REVOLT 4, 30, 32 (2005) (detailing commonalities between gender and disability discrimination in the workplace).

⁷⁸ *See* CRPD, *supra* note 14, art. 8; *see also* Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75, 86 (discussing “socially engineered environment” that shapes perceptions and social attitudes toward disability).

(c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;⁷⁹

Various campaigns have been instituted at the national level to raise awareness, such as the “See the True Me” campaign in Singapore, set up in 2017 to encourage the public to engage with persons with disabilities to enhance social inclusion.⁸⁰ The EU Disability Strategy 2010–2020 was meant to raise awareness as a means of underpinning all actions within the EU regulatory framework.⁸¹ The CRPD Committee has highlighted that resistance to accessibility is very much the result of insufficient awareness and that the only way to introduce policies allowing for better accessibility is to change popular attitudes through awareness campaigns.⁸² Arbitrators with disabilities will have more opportunities to be appointed if the relevant stakeholders reflect on their achievements, education, potential, efficiency, and professionalism and demonstrate that they perform their tasks just as well as their counterparts without disabilities.⁸³ This awareness-raising role can be achieved with much success and few resources by bar associations, arbitral institutions, listservs, legal publishers, conference organizers, and others.⁸⁴

⁷⁹ See CRPD, *supra* note 14, art. 8.

⁸⁰ Press Release, Nat’l Council of Soc. Serv., Enabling a “Mixed Ability” Mindset: See the True Me Campaign Gets People Past Superficial Acceptance of Persons with Disabilities (Sept. 7, 2017), <https://www.ncss.gov.sg/docs/default-source/ncss-press-release-doc/enabling-a-mixed-ability-mindset-see-the-true-me-campaign-gets-people-past-superficial-acceptance-of-persons-with-disabilities-pdf.pdf> [<https://perma.cc/KWD8-6ZDS>].

⁸¹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe*, at 9, COM (2010) 636 final (Nov. 15, 2010).

⁸² Comm. on the Rts. of Pers. with Disabilities, General Comment No. 2, U.N. Doc. CRPD/C/GC/2, ¶ 35 (2014).

⁸³ *Cf.* Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 485 (2015) (discussing impropriety of viewing an employee with disabilities as the opposite of an “ideal” worker).

⁸⁴ *Cf.* Comm. on the Rts. of Pers. with Disabilities, General Comment No. 2, U.N. Doc. CRPD/C/GC/2, ¶¶ 35, 47 (2014) (“International cooperation should be used not merely to invest in accessible goods, products and services, but also to foster the exchange of know-how and information on good

A. Disclosure of Disability and Disqualification on Disability Grounds

International instruments relating to arbitration generally demand that arbitrators disclose any circumstances giving rise to justifiable doubts about their independence and impartiality.⁸⁵ By implication, any disclosure concerning experience or qualifications must be truthful, lest the arbitrator in question may be challenged and dismissed.⁸⁶ Article 14(1) of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) further notes that an arbitrator may be removed where he or she “becomes de jure or de facto unable to perform [its] functions.”⁸⁷ This is clearly not tantamount to a disability because an arbitrator with a disability may still be able to perform the required functions, with or without appropriate accommodation. It is important that the word “disability” was not inserted in the text of Article 14(1),⁸⁸ although it was originally drafted in 1985 and debated at least a decade before that.⁸⁹ De jure inability to perform refers to a legal impediment, such as a criminal conviction.⁹⁰ Even so, as noted in Part I, some states may well regard mental or intellectual disabilities as impediments to capacity and contractual freedom and hence establish de jure limitations.⁹¹ Such limitations are contrary to fundamental human rights and the CRPD and should not be recognized in arbitral proceedings

practice in achieving accessibility in ways that will make tangible changes that can improve the lives of millions of persons with disabilities worldwide.”)

⁸⁵ G.A. Res. A/40/17, annex I, and A/61/17, annex I, art. 7, UNCITRAL Model Law on International Commercial Arbitration (July 7, 2006) [hereinafter UNCITRAL Model Law].

⁸⁶ *Id.*

⁸⁷ *Id.* at art. 14(1).

⁸⁸ *Id.*

⁸⁹ See ILIAS BANTEKAS, ET AL., *Article 14*, in COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 255, 255–56 (2020).

⁹⁰ See *id.* As was the case in *Noble Resources Pte Ltd v. China Sea Grains and Oils Industry Co. Ltd* [2006] HKCFI 334 (H.K) (finding an arbitrator unable to perform his functions at a hearing in Hong Kong due to his arrest in China).

⁹¹ See Bürgerliches Gesetzbuch [BGB] [Civil Code], § 104(2), https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0312 [<https://perma.cc/X8RN-MZT6>] (Ger.).

in the jurisdiction of signatories to the International Covenant on Civil and Political Rights (ICCPR) and the CRPD.⁹²

The vast majority of institutional rules follow this paradigm by not requiring disclosure of arbitrators' medical condition and, more significantly, by omitting any reference to disability as a ground for challenge and disqualification. For example, Article 10.1 of the London Court of International Arbitration Rules stipulates that the appointment of an arbitrator may be revoked, among other reasons, if he or she "falls seriously ill, refuses or becomes unable or unfit to act."⁹³ Additionally, Article 15.2 of the ICC Arbitration Rules iterates the language found in Article 14(1) of the Model Arbitration Law.⁹⁴

The pertinent instruments do not only reflect the universal trend, but they are consistent with the CRPD and domestic anti-discrimination laws.⁹⁵ More significantly, an arbitrator with a disability is free to disclose a disability following an appointment (and not before) to seek appropriate accommodation.⁹⁶ Such concealment of disability does not count as failure to disclose; hence, there is no ground to remove.⁹⁷ In equal measure, no disability as such may count as a ground for removal unless there is a clear physical or mental inability to perform one's functions.⁹⁸

III. ACCOMMODATIONS FOR ARBITRATORS WITH DISABILITIES

Another problematic issue associated with the selection of arbitrators with disabilities is the cost of accommodations upon

⁹² See CRPD, *supra* note 14; *Status of Ratification*, U.N. HUM. RTS., <https://indicators.ohchr.org/> [<https://perma.cc/2D25-KF95>].

⁹³ See *icc st Arbitration Rules (2014)*, LCIA ARB. AND ADR WORLDWIDE [hereinafter LCIA], https://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx#Article%2010 [<https://perma.cc/R4EF-JY5S>].

⁹⁴ See *2021 Arbitration Rules*, INT'L CHAMBER COM., https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_15 [<https://perma.cc/9JLR-PSAD>].

⁹⁵ See CRPD, *supra* note 14, at art. 2; 42 U.S.C § 12112(a).

⁹⁶ See UNCITRAL Model Law, *supra* note 85, at art. 12.

⁹⁷ See *id.* at art. 14.

⁹⁸ Oberlandesgericht Köln, 11 April 2003, 9 SchH 27/02 (Ger.). The German court refused to remove an arbitrator with anxiety and depression, and an alcohol abuse issue undergoing treatment on the basis that his mental and intellectual faculties allowed him to perform his functions. *Id.*

appointment.⁹⁹ For example, written evidence may not be available in a format accessible to visually impaired arbitrators, and it might well be argued that despite the cost of such accommodation, the speed of the proceedings will be seriously compromised. These are hardly frivolous claims, but economists have long discredited the increased cost associated with the hiring of persons with disabilities.¹⁰⁰ Many proceedings may and usually do run into thousands of pages of documents for which the conversion into Braille may raise prohibitive costs and delays the parties cannot afford.¹⁰¹ Even so, visually impaired arbitrators may not be excluded from selection for two reasons: party autonomy¹⁰² and the fact that the language of proceedings is generally dictated by the language of the arbitrators and that of the majority of the evidence unless the parties dictated otherwise¹⁰³.

Given that language concerns share many common features with accommodations pertinent to visually impaired arbitrators,¹⁰⁴ an examination of the former is instructive. Article 22 of the UNCITRAL Model Law makes it clear that the parties' agreement as to the language of proceedings binds the tribunal and national courts—the latter as regards arbitral proceedings.¹⁰⁵ In fact, the parties may designate more than one language, even if this is ultimately confusing for the tribunal.¹⁰⁶

⁹⁹ See Michael Ashley Stein, *The Law and Economics of ADA Accommodations*, 53 DUKE L.J. 79, 144–78 (2003).

¹⁰⁰ See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 39–45 (2d ed. 1971); Ted Kennedy Jr., *Hiring People with Disabilities is Good Business*, N.Y. TIMES (Dec. 27, 2018), <https://www.nytimes.com/2018/12/27/opinion/disability-rights-employment.html> [<https://perma.cc/76KU-6BLC>].

¹⁰¹ See, e.g., Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 920 (2008) (noting that, under U.S. law, “benefits need not outweigh costs for an accommodation to be reasonable and not an undue hardship”).

¹⁰² See UNCITRAL Model Law, *supra* note 85, at 6–7.

¹⁰³ In transnational arbitration, translation and interpretation are common demands, so one should not presume that a common language is dominant across parties. See Susan Šarčević, *Translation in International Arbitration*, in *LEGAL DISCOURSE ACROSS CULTURES AND SYSTEMS*, 291, 291–93 (Vijay K. Bhatia et al. eds., 2008).

¹⁰⁴ See EEOC, *supra* note 65.

¹⁰⁵ See UNCITRAL Model Law, *supra* note 85, at 15.

¹⁰⁶ See Sally A. Harpole, *Language in Arbitration Procedure: A Practical Approach for International Commercial Arbitration*, 9 CONTEMP. ASIA ARB. J. 273, 287, 289–90.

From a practical perspective, using multiple languages may be cost-effective where the available evidence (witnesses and written material) is *spread* across several languages, and hence translation costs are avoided—assuming, of course, that the arbitrators are fluent in those languages.¹⁰⁷ Sensible combinations have been accepted in practice. The tribunal in *Chevron Corporation v. Republic of Ecuador* held that English and Spanish would both be the official languages of the proceedings, with English being the authoritative language.¹⁰⁸ A choice to employ multiple languages implies equality among them, which means that all decisions, awards, and other actions should be issued in all such languages simultaneously.¹⁰⁹

This may be difficult to reconcile with the tribunal’s mandate under Article 17(1) UNCITRAL Rules, whereby it must “avoid unnecessary delay and expense.”¹¹⁰ The parties’ power to choose a language of their choice indirectly implicates their choice of arbitrators, as they may be limited by the arbitrators’ linguistic skills.¹¹¹ If the choice of language were, thus, not within the realm of party autonomy, the freedom to choose arbitrators would be obfuscated, negating the very freedom to resort to arbitration.¹¹² This linguistic freedom means that the parties’ choice binds the tribunal even if the chosen language is not native—or known—to any of them or if it is wholly or partially unconnected

¹⁰⁷ See *id.* at 297. For multilingual proceedings, any costs relating to translation and interpretation between the parties would form part of the overall costs of the arbitration and, as such, be borne in principle by the losing party. See Mika Savola, *Awarding Costs in International Commercial Arbitration*, 63 SCANDINAVIAN STUD. L. 275, 279 (2017); UNITED NATIONS, UNCITRAL ARBITRATION RULES 28 (2021) [hereinafter UNCITRAL ARBITRATION RULES], https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf [<https://perma.cc/X9XR-PMKV>].

¹⁰⁸ *Chevron Corp. v. Ecuador*, PCA Case Repository No. 2009-23 ¶ 1.5 (Second Partial Award on Track II Aug. 30, 2018), <https://pcacases.com/web/sendAttach/2453> [<https://perma.cc/D2XL-U444>] (noting that the parties consulted Article 17(1) of the UNCITRAL Arbitration Rules to determine the language of the hearing).

¹⁰⁹ See DAVID D. CARON & LEE M. CAPLAN, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (2d. ed. 2013) 380 (noting tribunals working in two languages should generally issue decisions in both languages simultaneously).

¹¹⁰ *Id.* at 379.

¹¹¹ See UNCITRAL Model Law, *supra* note 85, at 6–7.

¹¹² See *id.*

to the case itself.¹¹³ The general rule is that parties' freedom to choose the language of their arbitral proceedings overrides any other rule of the *lex arbitri*,¹¹⁴ even if the chosen language would not ordinarily be appropriate, cost-effective, or would produce delay.¹¹⁵ "While the choice of language, whether through express agreement or by incorporation is not under contention, the 'use' or 'application' of a chosen language by a tribunal in the course of arbitral proceedings must not lead to a violation of either party's right to fair trial."¹¹⁶

Several sensible solutions may be put forward to accommodate visually impaired arbitrators. The most obvious is by the tribunal applying its discretion in order that particular documentary evidence be translated into Braille, which does not, however, mean that it may not rely on evidence submitted but not translated on the grounds of cost, delay, or other factors.¹¹⁷ The Paris Appeals Court has held that a tribunal would not exceed its powers if it were to accept documentary evidence that was not in the official language of the proceedings if the material in question had already been used in the parties' prior correspondence in that non-official language.¹¹⁸ "The same court has taken the view that where the tribunal accepts translations of excerpts, as opposed to the entirety of a document, on the ground that only the excerpts are relevant, this selectivity may be viewed as depriving the other party of its right to address such evidence."¹¹⁹

A practical way of overcoming party inequality concerns is either by providing more oral evidence or using software whereby the written evidence is scanned and uploaded and then reproduced in verbal form for the benefit of visually impaired users.¹²⁰

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *See Ilias Bantekas, Language Selection in International Arbitration*, 36 OHIO ST. J. ON DISP. RESOL. 125, 145 n.65 (2020) (noting that the Hague Appeals Court has rejected this argument).

¹¹⁶ *Id.*

¹¹⁷ *See UNCITRAL Model Law, supra* note 85, at 15.

¹¹⁸ *See Ilias Bantekas, Language Selection in International Arbitration*, 36 OHIO ST. J. ON DISP. RESOL. 125, 148–49 (2020).

¹¹⁹ *Id.* at 149 (citing *Blow Pack v. Windmöller et Hölscher*, 2 REV. ARB. 538 (2013)).

¹²⁰ This assistive technology is known as a "screen reader." *See Screen Readers*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/blindness-and-low-vision>

An abundance of technology exists, such as electronic notetakers in Braille.¹²¹ Moreover, the tribunal may limit the amount of documentary evidence submitted by the parties, which is common practice in international arbitration.¹²² In this manner, the parties would be obliged to present a specific volume of evidence (for example, a maximum of 500 pages of written evidence), which would allow for faster translation into Braille and reach an award much faster than if the parties were allowed to produce an indefinite amount of evidence.¹²³ In the ordinary course of proceedings, the majority of evidence produced by the parties is largely inconsequential to the determination of their claims.¹²⁴

So far, this Article has only discussed accommodations to visually impaired arbitrators, chiefly because their disability is perceived as most costly, although not more than a tribunal divided in language whereby translation is necessary.¹²⁵ Indeed, the American Foundation for the Blind offers free software for

/using-technology/assistive-technology-products/screen-readers [https://perma.cc/4V4C-8CG3].

¹²¹ See *Electronic Notetakers (Braille)*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/assistive-technology-products/braille-notetakers> [https://perma.cc/FE9S-MK2F].

¹²² Documents-only proceedings are not uncommon. U.N. COMM'N ON INT'L TRADE L., UNICTRAL ARBITRATION RULES, Art. 17 (2021), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf [https://perma.cc/KXV4-6CC2]. Equally, in the exercise of their general authority, arbitral tribunals might limit the submission of evidence.

The Swiss Federal Supreme Court in *Re TA G v. H Company*, (1997) ASA Bull 316, held that the right of the parties to be heard does not include a right to be heard orally, so long as this rule is consistently applied and is not fundamentally opposed to the wishes of the parties.

BANTEKAS, *supra* note 71, at 180. “The same Court has held, however, that the right to be heard includes a minimum duty to examine all issues material to the outcome of the case, as counter-balanced with the freedom of the tribunal to afford the weight it chooses to the available evidence.” *See id.* (citing Case 4A_669/2012 Swiss Federal Supreme Court judgment (17 April 2012)).

¹²³ *See* AM. FOUND. FOR THE BLIND, *supra* note 120.

¹²⁴ Commonly in arbitral proceedings, particularly where the arbitrators are inexperienced, counsel floods the tribunal with documentary evidence, the bulk of which is irrelevant. Counsel for the party with the weakest case may feel that this technique may intimidate the tribunal or, at the very least, win some points. *See generally* BANTEKAS, *supra* note 71, at 170–78.

¹²⁵ *See* AM. FOUND. FOR THE BLIND, *supra* note 120.

automatic translation into Braille.¹²⁶ There is no evidence suggesting that Braille translations are more expensive than foreign language translations; hence this accommodation is not a serious impediment to the appointment of blind arbitrators, nor is the cost prohibitive.¹²⁷ Arbitral institutions can promote the appointment of arbitrators with disabilities through the use of appropriate technology.¹²⁸ Other forms of disability are less likely to present cost or delay-related challenges. Physical impairments may easily be accommodated through the use of accessible buildings and software, and arbitrators with hearing impairments may make use of sign language in oral proceedings.¹²⁹ Evidence suggests that the direct cost of employment-related accommodations may be offset indirectly through other incentives available to employers through appropriate synergies with states (via tax incentives and reimbursement schemes).¹³⁰

IV. ACCOMMODATIONS FOR COUNSEL WITH DISABILITIES

While the legal profession has gone a long way towards recognizing the potential and talent of lawyers with disabilities,¹³¹ there is still reason to suggest that many law graduates

¹²⁶ See *Braille Translators*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/blindness-and-low-vision/using-technology/assistive-technology-products/braille-translators> [<https://perma.cc/Y963-4U6U>].

¹²⁷ See *id.*

¹²⁸ See generally Jonathan Lazar & Michael Ashley Stein, *Introduction*, in *ACCESSIBLE TECHNOLOGY AND THE DEVELOPING WORLD* 1, 1 (Jonathan Lazar & Michael Ashley Stein, eds. 2021) (discussing use of accessibility technology).

¹²⁹ See Comm. on the Rts. of Pers. with Disabilities, General Comment No. 2, U.N. Doc. CRPD/C/GC/2, ¶ 48 (2014); Jonathan Lazar & Paul Jaeger, *Reducing Barriers to Online Access for People with Disabilities*, *ISSUES IN SCI. & TECH.* 69, 69 (2011); Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 *ADMIN. L. REV.* 1, 8 (2009); Catherine Easton, *Revisiting the Law on Website Accessibility in the Light of the UK's Equality Act 2010 and the United Nations Convention on the Rights of Persons with Disabilities*, 20 *INT'L J.L. & INFO. TECH.* 19, 20–21, 46 (2012).

¹³⁰ For an analysis of how such considerations impact individual employers, see Stein, *supra* note 99, at 103; DEBRA RUH, *TAPPING INTO HIDDEN HUMAN CAPITAL: HOW LEADING GLOBAL COMPANIES IMPROVE THEIR BOTTOM LINE BY EMPLOYING PERSONS WITH DISABILITIES* 47–54 (2016).

¹³¹ See *Lawyers with Disabilities Division*, L. SOC'Y, <https://www.lawsociety.org.uk/topics/lawyers-with-disabilities/about-the-lawyers-with-disabilities-division> [<https://perma.cc/AU6V-JQJL>]; see also *What We Do*, ASS'N OF DISABLED LAWS., <https://www.disabledlawyers.co.uk> [<https://perma.cc/S4CS-BXRP>].

with disabilities will hide a non-obvious disability from prospective employers, such as diabetes, depression, schizophrenia, HIV/AIDs, and others.¹³² Lawyers concealing such disabilities from their employers may work around their personal needs (for example, insulin intake) during their working day at the office.¹³³ However, this is not necessarily so during a lengthy arbitration hearing where the tribunal wants to hear as much oral evidence as possible, especially where scheduled hearings are few and apart.¹³⁴ During such long hearings, it is impossible to conceal one's disability, and counsel's demeanor may seem unprofessional to their senior team members, the tribunal, and opposing counsel.¹³⁵ Disruptions to the hearing process might lead to disciplinary action by the arbitral institution¹³⁶ and the counsel's own law firm, tarnishing one's reputation.¹³⁷

Therefore, all relevant stakeholders must make reasonable accommodations for counsel with disabilities attending arbitral proceedings.¹³⁸ Such accommodations should be embedded in specific arbitral regulations or guidelines, in the absence of which the tribunal may use its discretion and the obligations of the seat under the CRPD to make appropriate accommodations.¹³⁹ Given the concerns of counsel described above,¹⁴⁰ there is little doubt that tribunals must provide any accommodation with the privilege of confidentiality. It is prudent for the tribunal to request all those present in the hearing chamber or associated with the hearing (for example, clerks, researchers, junior counsel)

¹³² See Henneborn, *supra* note 7.

¹³³ *Id.*

¹³⁴ See *supra* notes 3–5 and accompanying text.

¹³⁵ See *supra* notes 3–5 and accompanying text.

¹³⁶ Although, in practice, tribunals are reluctant to remove counsel for improper behavior, they possess an inherent right to both rebuke and remove in situations where they threaten the integrity and operation of proceedings. See LCIA, *supra* note 93, at art. 18.6.

¹³⁷ See *Public Discipline is More Public Than Ever: The Impact of Web-Based Lawyer Rating Services on Discipline*, A.B.A. (Mar. 1, 2016), [https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/public_discipline_more_public_ever_impact_webbased_lawyer_rating_services_discipline/?q=&fq=\(\(id%3A%5C%2Fcontent%2Faba-cms-otorg%2Fen%2Fgroups%2Fprofessional_responsibility%2F*\)\)&wt=json&start=0](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/public_discipline_more_public_ever_impact_webbased_lawyer_rating_services_discipline/?q=&fq=((id%3A%5C%2Fcontent%2Faba-cms-otorg%2Fen%2Fgroups%2Fprofessional_responsibility%2F*))&wt=json&start=0) [https://perma.cc/NXK5-QGUJ].

¹³⁸ See *supra* notes 131–37 and accompanying text.

¹³⁹ See LCIA, *supra* note 93, at art. 14.

¹⁴⁰ See *supra* notes 132–37 and accompanying text.

to notify the tribunal by email, text message, or other private means if they have a disability that may require accommodation.

Of course, a similar course of action should be taken with respect to disabilities disclosed to the tribunal by counsel. In such circumstances, the tribunal possesses inherent authority to accommodate counsel with disabilities, whether by adapting the chamber or access thereto or by taking breaks at appropriate intervals.¹⁴¹ Any claims by opposing counsel that a disability is used as a dilatory tactic or that it culminates in the unequal treatment of the parties should be flatly rejected. Civil and political rights, in particular the right to a fair trial, require that a person has the freedom to appoint the counsel of their choice.¹⁴² In no way is formal or de jure equality a substitute for de facto equality.¹⁴³ De facto equality, through appropriate accommodation,¹⁴⁴ is warranted in arbitral proceedings involving counsel with disabilities, who might otherwise be unable to physically keep up with the pace of proceedings.

It is clear that apart from arbitral institutions, major arbitration organizations such as UNCITRAL, IBA, or CIArb should take the lead in formulating rules and guidelines for the introduction of disability-friendly accommodations in arbitral proceedings for all those directly and indirectly associated with such proceedings.¹⁴⁵

¹⁴¹ See, e.g., *International Dispute Resolution Procedures*, arts. 19, 22, INT'L CTR. DISP. RESOL. (Mar. 2, 2021), https://icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf [<https://perma.cc/3BSB-U6TP>]; *2021 Arbitration Rules*, arts. 18–19, 22, ICC, <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> [<https://perma.cc/63EN-P7NS>] (reflecting the broad discretion arbitral institutions hold in organizing and orchestrating arbitration proceedings).

¹⁴² See *Luis v. United States*, 578 U.S. 5, 6 (2016) (holding that “the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment”); see also Karen A. Covy, Note, *The Right to Counsel of One’s Choice: Joint Representation of Criminal Defendants*, 58 NOTRE DAME L. REV. 793, 814–15 (1983).

¹⁴³ See Bantekas, *Equal Treatment*, *supra* note 52, at 995, 999.

¹⁴⁴ See generally Jody Heymann et al., *Disability, Employment, and Inclusion Worldwide*, in *DISABILITY AND EQUITY AT WORK* 1, 1–15 (Heymann et al. eds. 2014) (describing the diverse global approaches to integrating and accommodating people with disabilities in the workplace); see also Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 636–37, 671–72 (2004).

¹⁴⁵ See Bantekas, *Equal Treatment*, *supra* note 52, at 1010–11.

V. APPORTIONMENT OF ACCOMMODATION EXPENSES

Apportioning expenses related to accommodations is a vexing issue, requiring clear and rational thinking. The formula for calculating costs and expenses is set out in institutional rules.¹⁴⁶ In order to avoid suing the parties for non-payment, the rules typically oblige the parties to deposit in advance, part or all of, the anticipated fees and expenses,¹⁴⁷ or, exceptionally, some laws stipulate that the arbitrators may withhold the final award until the parties make full payment.¹⁴⁸ Although the latter outcome may be consistent with the parties' (including the arbitrators) contractual arrangements, it does raise concerns over the right to access justice. In practice, the winning party is often awarded all reasonable costs, and if only partially successful, it is entitled to a partial award of its costs,¹⁴⁹ but national arbitration statutes and arbitral institution rules may vary somewhat

¹⁴⁶ See Joseph R. Profaizer et al., *Costs*, GLOB. ARB. REV. (Dec. 19, 2022), <https://globalarbitrationreview.com/guide/the-guide-damages-in-international-arbitration/5th-edition/article/costs> [<https://perma.cc/2ELE-JPBD>]; see also *2021 Arbitration Rules*, *supra* note 141.

¹⁴⁷ See *2021 Arbitration Rules*, *supra* note 141, at art. 37; see, e.g., Oberster Gerichtshof [OGH] [Supreme Court] Oct. 30, 1985, 3 Ob 89/85, https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_1985_1030_OGH0002_0030OB00089_8500000_000&Suchworte=RS0045141 [<https://perma.cc/SM77-YCPE>] (affirming that tribunals may issue enforceable awards against a party for the non-payment of a due deposit on costs and fees); see also Franz T. Schwartz & Christian W. Conrad, *The Revised Vienna Rules: An Overview of Some Significant Changes (and a Preview of the New Austrian Arbitration Law 2014)*, 31 ASA BULL. 797, 810–11 n.71 (2013) (citing Oberster Gerichtshof [OGH] [Supreme Court] Mar. 8, 2006, 7 Ob 252/05t, https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2006_0308_OGH0002_0070OB00252_05T0000_000&Suchworte=RS0045065 [<https://perma.cc/2PM4-X28G>] (Austria)).

¹⁴⁸ See Arbitration Act 1996, c. 23, § 7(1), sch. 2 (UK), <https://www.legislation.gov.uk/ukpga/1996/23/schedule/2> [<https://perma.cc/9286-4XXV>]; *id.* § 56.

¹⁴⁹ See, e.g., 41 § The Swedish Arbitration Act (SFS 1999:116) (Swed.) (stipulating “[u]nless otherwise agreed by the parties, the arbitrators may, upon the request of a party, order the opposing party to pay compensation for the party’s costs and determine the manner in which the compensation to the arbitrators shall be finally allocated between the parties”); see also, e.g., Art. 595, C. Proc. Civ. (Rom.), <https://legislatie.just.ro/Public/FormaPrintabila/00000G3GEPUL6D88TFO3UHW6N6481YWA> [<https://perma.cc/G66T-656L>].

in how costs are allocated and awarded.¹⁵⁰ Some statutes, such as Section 60 of the English Arbitration Act, place a mandatory ban on pre-dispute agreements concerning liability for arbitration expenses,¹⁵¹ whereas others do not.¹⁵²

It is inconsistent with the right of access to a remedy and the right to a fair trial in general for the party appointing an arbitrator with a disability to pay exclusively for the arbitrator's accommodation costs. The right to select an arbitrator of one's choice necessarily entails that no additional burden rests on the appointing party.¹⁵³ Consequently, all costs associated with the arbitrator's reasonable accommodation should equally burden the parties, irrespective of the outcome of the award.¹⁵⁴

VI. DISABILITY AS A GROUND FOR SETTING ASIDE AN AWARD

As evident from the aforementioned discussion, because disability itself does not constitute a ground for the appointment or removal of arbitrators or the accommodations to counsel and arbitrators alike, it cannot possibly constitute a ground for setting an award aside.¹⁵⁵ Yet, one should not expect that challenges centered directly or indirectly on disability will not occur. Article 34(2)(a)(i) of the UNCITRAL Model Law stipulates that an award may be set aside if a party to the arbitration agreement was "under some incapacity" or the agreement is not valid under the law to which the parties had subjected it.¹⁵⁶ While the merits of this provision are obvious, it is unfortunate, in hindsight, that

¹⁵⁰ See Profaizer et al., *supra* note 146.

¹⁵¹ See Arbitration Act 1996, c. 23, § 60 (Eng.), <https://www.legislation.gov.uk/ukpga/1996/23/section/60> [<https://perma.cc/7AA2-D8RJ>].

¹⁵² See Profaizer et al., *supra* note 146.

¹⁵³ See Chiara Giorgetti, *The Arbitral Tribunal: Selection and Replacement of Arbitrators*, in LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE 145, 146–49, 152–54 (Chiara Giorgetti ed., 2014).

¹⁵⁴ Cf. Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 822–23 (2008) (demonstrating that parties share expenses and costs equally in other aspects of arbitral proceedings). This policy recommendation follows existing cost considerations and expense divisions between parties.

¹⁵⁵ See *supra* Parts II & III.

¹⁵⁶ UNCITRAL Model Law, *supra* note 85, at ch. VII, art. 34.

some more refined qualifications were not made.¹⁵⁷ The type of “prodigality” and “imbecility” encountered in Part I, which is arbitrarily imposed in some states to strip persons of legal capacity¹⁵⁸ or restricts the legal capacity of vulnerable persons, such as women (although the list could well be longer),¹⁵⁹ may well be used as a pretext by the losing party to argue that its counterpart’s *disability* was a barrier to its capacity to enter into the arbitration agreement.¹⁶⁰ Competent courts in liberal states should reject such restrictions upon personal freedom culminating in the arbitrary loss of legal capacity on the grounds enunciated in Part I.¹⁶¹

Another argument that a losing party may pose is that the award should be set aside because the accommodations offered to an arbitrator with a disability (chosen by the other party or the arbitral institution) did not allow them to fully present their case.¹⁶² One needs significant imagination to make such a claim, but it may be argued, for example, that the breaks required by an arbitrator or the fact that he or she joined the hearing through videoconferencing were most beneficial for the other party because it had prepared for such exigency.¹⁶³ The key test here is whether the actions of the tribunal as a whole seriously

¹⁵⁷ Julinda Beqiraj et al., *Access to Justice for Person with Disabilities: From International Principles to Practice*, INT’L BAR ASS’N 16–17 (Oct. 2017), https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf [<https://perma.cc/NZP2-HGBE>].

¹⁵⁸ See *supra* notes 46–50 and accompanying text.

¹⁵⁹ See *supra* notes 48–50 and accompanying text.

¹⁶⁰ Todd Rosenbaum, *Does the Physical or Mental Impairment of a Party Make an Arbitration Voidable?*, MINTZ (Mar. 5, 2019), <https://www.mintz.com/insights-center/viewpoints/2196/2019-02-does-physical-or-mental-impairment-party-make-arbitration> [<https://perma.cc/YB74-PRJR>].

¹⁶¹ See *supra* Part I; see also U.N. SPECIAL RAPPORTEUR ON THE RIGHTS OF PERSONS WITH DISABILITIES, INTERNATIONAL PRINCIPLES AND GUIDELINES ON ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES 12 (2019), <https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities> [<https://perma.cc/76AM-32UB>].

¹⁶² UNCITRAL Model Law, *supra* note 85, at ch. VII art. 34(2)(a)(ii).

¹⁶³ See Simon Sloane & Emily Wyse Jackson, *Due Process and Procedural Irregularities*, GLOB. ARB. REV. (June 8, 2021), <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/due-process-and-procedural-irregularities-challenges> [<https://perma.cc/TDK6-NFCG>].

impaired the parties' equal treatment.¹⁶⁴ Such arguments are unsustainable, chiefly, but not exclusively, because an accommodation under domestic law and the CRPD constitutes a right that cannot be denied or rejected on other grounds.¹⁶⁵ Hence, no accommodation as such, absent proof of intent to harm, can constitute unequal treatment despite the relative discomfort, if any, experienced by the parties.¹⁶⁶

CONCLUSION

Many disabilities are invisible, and employers and the public may perceive those with disabilities as problematic. The general perception, which has been rejected by the economics scholarship, is that persons with disabilities are counterproductive.¹⁶⁷ Therefore, it is no wonder that disability is invisible, and many persons with disabilities are afraid to disclose their disability to their employers unless it is too obvious to conceal.¹⁶⁸ Even though the number of lawyers with disabilities lawyers is increasing,¹⁶⁹ the linkages between disability and arbitration have never attracted serious study, let alone regulation at either hard or soft law level.¹⁷⁰ While arbitral organizations have produced a plethora of rules, regulations, and guidelines on all sorts of issues that appear in the course of arbitral proceedings, there is no reference to disability.¹⁷¹ This is also the case with other

¹⁶⁴ See Bantekas, *Equal Treatment*, *supra* note 52, at 995, 998, 1007.

¹⁶⁵ See G.A. Res. A/RES/61/106, art 27 (Dec. 13, 2006).

¹⁶⁶ See *id.*; see also *supra* notes 133–39 and accompanying text.

¹⁶⁷ See Sally Lindsay et al., *A Systematic Review of the Benefits of Hiring People with Disabilities*, 28 J. OCCUPATIONAL REHAB. 634, 634, 651–52 (2018).

¹⁶⁸ Abby Young-Powell, 'The Victimization Was Horrible': Why Are so Many Disabled Lawyers Treated Badly?, THE GUARDIAN (Feb. 11, 2020, 7:03 AM), <https://www.theguardian.com/law/2020/feb/11/the-victimisation-was-horrible-why-are-so-many-disabled-lawyers-treated-badly> [https://perma.cc/V95L-KZFS].

¹⁶⁹ See Nat'l Ass'n L. Placement, *2021 Report on Diversity in U.S. Law Firms*, 1, 5, 10 (Jan. 2022), <https://www.nalp.org/uploads/2021NALPReportonDiversity.pdf> [https://perma.cc/J5PV-WT3M].

¹⁷⁰ Kabir Duggal & Amanda Lee, *A 360-Degree Kaleidoscope View of Diversity and Inclusion (or Lack Thereof) in International Arbitration*, 33 AM. REV. INT'L ARB. 1, 10 (2022).

¹⁷¹ See *id.*; see also Simon Maynard, *Don't Leave Us Out of the Conversation: A Personal Perspective on Disability Inclusion*, GLOB. ARB. REV. (Aug. 20, 2021), <https://globalarbitrationreview.com/article/dont-leave-us-out-of-the-conversation-personal-perspective-disability-inclusion> [https://perma.cc/6VW4-RZX8].

spheres of regulation involving persons with disabilities, including its linkages to the business and human rights debate.¹⁷²

While this issue might seem trivial, this is not the case. Persons with disabilities constitute fifteen to twenty percent of the global population.¹⁷³ Consequently, their absence from arbitral proceedings is a matter of concern as clearly, their rights under the CRPD are not taken seriously. Moreover, since the right to submit a dispute to arbitration is encompassed in the right to a fair trial and access to justice,¹⁷⁴ the inability of parties to choose arbitrators with disabilities seriously jeopardizes this fundamental civil right.¹⁷⁵ This should be of some concern because it is no different from the exclusion of lawyers from applying to become judges if their income is below a certain threshold or their descent is not from a particular class, race, or religion.¹⁷⁶ The de facto exclusion of excellent arbitrators on the grounds that they are inefficient or will delay proceedings and increase expenses is problematic for the functioning of our legal systems.

It is imperative that all relevant stakeholders acknowledge the problem and design a set of appropriate accommodations that address the pertinent shortcomings.¹⁷⁷ Although these stakeholders are largely non-state actors in the form of arbitral institutions and professional legal associations, they can and should work with the public sector to increase visibility, remove stigma and bias against lawyers and arbitrators with disabilities, and agree on ways to offset the cost of such accommodations. Any rules, institutional or otherwise, should make the best possible use of modern technologies that allow arbitrators with disabilities to function efficiently and without hindrance.¹⁷⁸ Hence,

¹⁷² See Michael A. Stein & Ilias Bantekas, *Including Disability in Business and Human Rights Discourse and Corporate Practice*, 6 BUS. & HUM. RTS. J. 490, 491–93 (2021).

¹⁷³ See *id.*

¹⁷⁴ See Bantekas, *Equal Treatment*, *supra* note 52, at 992–94.

¹⁷⁵ See *supra* Part II.

¹⁷⁶ See *Guide to Disability Rights Laws*, ADA.GOV (Feb. 28, 2020), <https://www.ada.gov/resources/disability-rights-guide/> [<https://perma.cc/2JP7-T22F>].

¹⁷⁷ See *ICC Statement*, *supra* note 2; see also Maynard, *supra* note 171.

¹⁷⁸ See Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 336–38 (2021) (illustrating how various technologies can be leveraged to shape physical spaces in ways that accommodate people with disabilities and ensure their inclusion in the process of administering justice).

the inclusion of persons with disabilities in the larger arbitration framework is not simply about one set of institutional rules or lip service to the CRPD.¹⁷⁹ Rather, it requires a sustained and conscious effort to first change public opinion and stereotypes. This should be followed by a concerted effort to produce institutional or other guidelines that are realistic and which are coupled with sensible accommodations. Lastly, relevant stakeholders must make a concerted effort to promote arbitrators with disabilities effectively, and tribunals must equally be empowered to make accommodations for counsel with disabilities. Despite the outcome of the ICC Taskforce, whose first mandate is only to produce a short report,¹⁸⁰ there is a long way to go for any meaningful changes to be made.

¹⁷⁹ See U.N. SPECIAL RAPPORTEUR ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 161, at 6–8, 11.

¹⁸⁰ See *supra* note 2 and accompanying text.