

Diversity in International Arbitration: Where Do We Stand? - An Overview of a Berwin Leighton Paisner Survey

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Diversity in arbitral tribunals has already received a considerable amount of attention at this blog, especially in regards to gender diversity (post are available [here](#), [here](#), and [here](#)). The discussion is, of course, still ongoing and far from reaching the desired goals. On 10 January 2017, Berwin Leighton Paisner released an annual arbitration survey titled Diversity in International Arbitration: Are We Getting There? ("Survey"). The results of the Survey confirm that further discussion on the topic of diversity in arbitration is necessary. This post highlights some of the more interesting (and also thought provoking) results of the Survey, whereas the full version of the Survey can be downloaded [here](#).

The Survey adopted a unique approach in tackling some very important issues by focusing on obtaining statistics in regards to the situation, as well as taking a proactive stance on how to move forward from this point. This was done, in particular, by addressing the issue of attribution of responsibility for promoting and achieving diversity in arbitral tribunals.

The Survey received responses from 122 respondents from all over the globe including: Asia, Australasia, the Middle East and North Africa, North America, Latin America and the Caribbean, Western and Eastern Europe, East and West Africa, the BVI/Cayman and Bermuda (page 5 of the Survey).

The results of the Survey, unfortunately but not surprisingly, revealed that the diversity in arbitral tribunals is far from being achieved and respondents flagged some diversity issues which deserve due consideration. For example:

1. 84% of respondents thought that there were too many male arbitrators (page 7 of the Survey);
2. 80% of respondents thought that tribunals contained too many white arbitrators (page 7 of the Survey);
3. 64% of respondents felt that there were too many arbitrators from Western Europe or North America (page 7 of the Survey);
4. 28% of respondents believed that they had lost appointments because they were considered too young (page 6 of the Survey).

The catchphrase "pale, male, and stale" has not lost its stand in the field of arbitration thus far. This

does not come as surprise as, according to the Survey,

“Established practice in international arbitration is acknowledged to block change and keep new entrants – the same arbitrators are chosen again and again.”

The Most Important Attributes of Arbitrators

The Survey investigated and reported on the attributes that are taken into account by parties when nominating an arbitrator and the importance given by parties to each of these factors.

On a positive note, the expertise of an arbitrator is placed the highest on the list of attributes ranked by importance. The Survey reports that “93% of respondents felt that a potential candidate’s expertise was either ‘very important’ or ‘important’” (page 9 of the Survey). The expertise of potential arbitrators is followed by efficiency, for which 91% of respondents opined as a “very important” or “important” consideration in the nomination process (page 9 of the Survey).

Gender and ethnicity, on the other hand, have received lower percentage on a stand-alone basis. Only 12% considered gender as “very important” or “important” factor, while 24% of the respondents found that ethnicity/national identity was worth consideration when nominating an arbitrator (page 8 of the Survey). However, when respondents were asked to view all the potential candidates as if they were all equal in regards to their level of expertise and experience, the results told a different story. In this context, the results were the following:

- “On gender, only 6% of respondents said “No”, it was not desirable to have gender balance. Other responses were fairly evenly divided. 50% of respondents thought that it was desirable to have gender balance on arbitral tribunals but 41% thought that “It makes no difference”.” (page 8 of the Survey),
- “Responses on ethnicity and national background followed a similar pattern with 54% saying “Yes”, 31% saying that “It makes no difference” and 10% saying “No”.” (page 9 of the Survey).

The Attribution of the Responsibility for the Initiation of Change

The Survey asked respondents who is responsible for initiating a change (page 12 of the Survey). It was perceived that all the main actors in arbitration share this responsibility, though in somewhat different portions.

Seventy-eight percent of respondents felt that arbitral institutions should play a role in achieving greater diversity on arbitral tribunals. Sixty-five percent of respondents thought that counsel for parties are also important players. Sixty percent of respondents included arbitrators and 24% of respondents considered that academics and teachers have a role in this as well. Only 12% said that none of the abovenamed had a role in initiating a change and that they were happy with the *status quo*.

It was also noted that the initiation of change has already been commenced, especially related to gender diversity. This is, however, done scarcely, and not all the diversity attributions have received their share of attention thus far. In particular, it was stated that:

“There is increased transparency about the number of women appointed as arbitrators and there are various initiatives underway to encourage the appointment of more women. There are fewer initiatives in relation to other under-represented groups.” (page 3 of the

Survey)

A factor that is gaining more and more attention to this point is the *age* of arbitrators. A lack of new entrants to the pool of arbitrators is linked to a lack of information about new and less well-known arbitrators from all backgrounds (page 12 of the Survey). Ninety-two percent of respondents stated that they would welcome more information about new and less well-known arbitrators and only 5% of respondents said that they would not (page 12 of the Survey).

Advocating for Diversity

The Survey also reported on the question: "Should diversity matter?" Several responses were collected and put forward to purport the opinion that diversity does matter:

- the inclusion of individuals of varied racial, ethnic, gender and social backgrounds has a value in itself;
- a system serving the needs of a particular constituency – in this case, participants in international commerce – should reflect the make-up of that community;
- a lack of diversity may also affect the quality of arbitral awards;
- the deliberative process before the arbitral tribunal is likely to be crucial and, therefore, the diversity of views may be fundamental for a fair process and outcome;
- widening the pool of arbitrators will give greater choice and fewer conflicts, remove the imbalance in information available to different parties and encourage greater efficiency, as well as facilitating new perspectives on the dynamics of a dispute; and
- a diverse tribunal may be better prepared, more task-orientated, and more attentive to the parties' arguments than a non-diverse tribunal (page 3 of the Survey).

Author's Remarks

This post introduces only a small portion of many interesting statistics presented in the Survey. This type of inquiry is welcomed at these times because it serves as a reminder that the road to reach our goals is a long one. It also offers a welcomed point that advocating for diversity should always be put in the context. We welcome your thoughts on these and other statistics as well as your opinion on how to approach these issues in practice.