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Arbitral Institutions Are Doing Their Bit; What About The Other Players?

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White & Case's recent research should provide some comfort to the arbitral community by showing that arbitral institutions are becoming increasingly flexible and responsive to users' needs. Flexibility was in fact a characteristic which the 2015 survey conducted by White & Case with Queen Mary University of London established as being one of the most valuable ones in arbitration.

What proved to be positive in itself was the very data gathering process from the various institutions in that it revealed a growing willingness by the institutions to publish and share data, some of which up until now they had either been reticent to disclose or at least considered not relevant to disclose. Statistics regarding female arbitrator appointments, for instance, were only made available, if at all, from 2014. Given the apparent increased drive by institutions to please their users as well as the heightened competition amongst them all, it will be a safe bet to say that many more institutions will be publishing data on female appointments (as well as other issues) in the coming year and years.

The results of the research, put simply, show that (a) more parties are wishing to use expedited proceedings, a tool that is becoming more widely on offer by the institutions; (b) there is an increase in, even preference for in some cases, single member tribunals over three member tribunals, and (c) more female arbitrators are being appointed, at least by the institutions themselves.

These steps and attitudes displayed by the arbitral institutions no doubt have a positive impact on the arbitration process by recognising that parties are wishing to exercise more control in an effort to save time and costs. This however should not be considered in a vacuum; indeed, to gain the optimal benefit from this welcome move by institutions, the other players must co-operate and play their part as well.

Taking female arbitrator appointments, it is all very well that the institutions themselves are making impressive efforts to appoint females, but what about the appointments by parties and co-arbitrators which is lagging behind considerably? There is room for much improvement here. It is noteworthy that the Equal Representation in Arbitration Pledge has been signed by about 2,000 users, including

individuals, lawyers, law firms, corporates and arbitral institutions but parties and co-arbitrators are not yet, in practice, appointing nearly as many female arbitrators as the institutions. Why is this so? Is it perhaps due to a mindset along the lines of "in the ideal world, it makes sense for more females to act as arbitrators but in my particular case, especially given it's my money and my reputation at stake, I prefer to go with the known figures"? Maybe in part. What's the solution? A start could be law firms providing more opportunities to women internally which could have a snowball effect with good female counsel being appointed as arbitrators. There is also probably room for counsel to better enlighten and educate clients as to the benefits (or at least lack of harm) of appointing female arbitrators. Perhaps a conscious change of mentality is required amongst co-arbitrators as well where they tell themselves that old habits should be broken and that they can really make a difference.

The rise in the use of sole member tribunals is also to be welcome in light of the obvious benefits of speed and cost. This though cannot be looked at in isolation of the circumstances of each case. This is where counsel and parties must carefully analyse the possible risk of losing out on quality, especially in a particularly complex and large case, when a sole member tribunal is appointed.

Similar concerns apply to expedited proceedings. It is applaudable that parties are optimising an ever increasing array of tools on offer by institutions to allow for expedited proceedings but again, this will not be appropriate in all circumstances. There is an argument that something is inevitably lost in the name of efficiency. To illustrate that expedited proceedings are not necessarily appropriate for all cases lies in the fact that the institutions will not necessarily accept all applications. What is appreciated in any event is that the parties have the choice and that after careful consideration with counsel, can opt for this procedure.

Finally, it would be amiss not to make mention of time and cost. The results of the research indicate that there is room for improvement by the institutions. To stop there though would be to ignore the fundamental role of parties, counsel and arbitrators. Much is also in their hands to maximise efficiency and minimise cost such as avoiding unnecessary delay tactics by parties and counsel and stronger case management by arbitrators.