

The Diversity Dilemma in Arbitrator Appointments

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Dipen Sabharwal and Mona Wright (White & Case LLP)

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The results of the 2018 Queen Mary/White & Case International Arbitration Survey were launched on 9 May 2018. The survey explores "The Evolution of International Arbitration": how international arbitration has evolved, the key areas for development in the future, and who and what will shape the future evolution of the field. This is the 4th survey conducted by the School of International Arbitration, Queen Mary University of London, in partnership with White & Case, and is the most comprehensive yet. Record participation from stakeholders around the world reflects the uniquely global nature of international arbitration.

Diversity is an inherent hallmark of international arbitration: commercial disputes resolved by international arbitration in virtually all jurisdictions, involving parties from all over the globe operating in a wide range of sectors. It should follow that the diversity across the global community of arbitration users is reflected in the make up of arbitral tribunals. The available statistics on arbitral appointments, however, tell a different story. The big questions that this raises for the arbitration community are what can be done to change this, and by whom?

Making decisions: does diversity make a difference?

Few, if any, would argue against the proposition that diversity is a good thing. But do users of arbitration think diversity across a tribunal can make a difference to the quality of its decision making? As our 2018 Survey reveals, around 40% of respondents feel that diversity across an arbitral tribunal may have a positive effect on the quality of its decision-making. A quarter of respondents (26%), however, took a more nuanced approach: they felt that the extent to which diversity across a tribunal might affect the quality of its decision-making would depend upon the particularities of the dispute in question. A completely different take on this question was shared by almost a fifth (19%) of respondents, who consider diversity to be so inherently valuable in and of itself that, in their view, it is redundant to ask whether there is any substantive, qualitative impact to be gained through greater diversity. Despite the different views articulated by the respondents, however, there can be little doubt that most, if not all, users of arbitration welcome diversity both across the community generally and across arbitral tribunals.

The diversity spectrum

The increasing emphasis that has been placed on diversity in recent years is perhaps reflected in the growing practice amongst arbitral institutions to publish statistics on arbitral appointments showing, amongst other things, the gender and nationality of appointees. It is to be hoped that statistics

relating to diversity of appointments continue to show an upward trend in favour of greater diversity and inclusion. We sought to explore whether the general perception of arbitration users is that progress has been made over recent years and, if so, to what extent and in relation to which aspects of diversity?

The results were clear: of the five different examples of aspects of diversity on which we focused, almost 60% of respondents agreed with the proposition that progress has been made in relation to gender diversity on arbitral tribunals. Much of the credit for this was given to the excellent work of global organisations and initiatives such as ArbitralWomen and The Pledge for Equal Representation.

A less positive story emerged in relation to the other aspects of diversity we profiled: a third or less of respondents agreed that progress has been made over the past five years in relation to age (35%), geographic (34%), cultural (31%) and especially ethnic (24%) diversity. Respondents expressed hope that inspiration can be derived from the efforts made to increase representation of women on arbitral tribunals to encourage greater representation of other aspects of diversity as well.

The drive for diversity: who is in pole position?

It is clear that the arbitration community as a whole recognises that more needs to be done towards achieving the goal of greater diversity across arbitral appointments. We asked respondents which participants in the international arbitration community they feel are best placed to act in this regard. Almost half of them (45%) voted for arbitral institutions. Apart from the obvious role played by arbitral institutions when called upon by parties to appoint tribunal members, interviewees stressed that arbitral institutions typically hold more information on potential arbitrators than other stakeholders in the arbitral community. Others added that even where parties select the arbitrators themselves, they are often aided by institutional lists of suggested or recommended arbitrators; moreover, even where co-arbitrators are chosen by the parties, arbitral institutions are frequently called upon to select the presiding arbitrator.

Only 27% of respondents thought the parties (including their in-house counsel) are best placed to ensure greater diversity across arbitral tribunals, and only 23% selected external counsel (with a mere 7% opting for co-arbitrators who are often asked to jointly select their presiding arbitrator).

Who is really in the driving seat?

Do these statistics, however, reflect the real story? Arbitral institutions hold a unique and multi-faceted role and, in addition to appointing arbitrators, are able to contribute to and influence change in many positive ways, both directly and indirectly – for example, the ICC recently announced it has achieved gender parity amongst the members of the ICC Court and is planning to launch a dedicated Africa Commission. Given the prevalence of party-nominated arbitrator appointments, however, do arbitral institutions really have significantly more power to influence the composition of tribunals than the parties and their counsel (both internal and external)? And, in any event, could parties and their counsel do more than they currently are to further diversity objectives?

The statistics collated by arbitral institutions certainly suggest much room for improvement in this regard. For example, the LCIA has reported that 34% of the arbitrators selected by the LCIA Court were female, as opposed to only 17% of the arbitrators chosen by the parties. Respondents to our 2018 Survey also noted that even where a diverse pool of potential arbitrators are available, for example on lists circulated by arbitral institutions or drawn up by counsel teams, parties and their counsel still exhibit a tendency towards repeat nominations. Ultimately, our 2018 Survey found that despite the prevailing view that greater diversity is a greater good, diversity meets its fiercest resistance from parties and, by extension, their in-house or external counsel, rather than arbitral

institutions.

Perhaps, then, the real question is not who has the most power to effect change, but are we all making the most of the power that we have to help this process. The only way in which the goal of greater diversity across arbitral tribunals will be properly realised is for all stakeholders in the arbitral community to fully commit to making this happen.