

# **BCLP International Arbitration Surveys: Party Appointed Arbitrators and the Drive for Diversity**

## **Kluwer Arbitration Blog**

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### **Party Appointed Arbitrators and the Drive for Diversity**

Over the last 8 years, BCLP's International Arbitration Group has conducted a number of surveys on issues affecting the arbitration process. In 2017 the survey focused on the issue of diversity [[Diversity on Arbitral Tribunals: Are we getting there?](#)] and in 2018 on the issue of party appointed arbitrators [[Party Appointed Arbitrators: Does Fortune Favour the Brave?](#)].

These topics are related. In recent years the system of party appointments has been the subject of some criticism based on concerns over potential arbitrator bias in favour of the appointing party. It has been suggested that party appointments be replaced with arrangements by which an institution or other independent body appoints all members of the tribunal, which could have the further advantage of improving diversity on arbitral tribunals, increasing the opportunities for younger arbitrators and improving gender and ethnic/national diversity.

The results of our 2017 survey confirmed that there is a desire within the arbitration community to improve diversity. However the results of our 2018 survey show that parties are reluctant to abandon a system of party appointments, in spite of the potential benefits for increased diversity on tribunals.

### **Party Appointments**

Arbitrations routinely begin with each side naming an arbitrator. Arbitration agreements often provide for this and the appointment procedures of many institutional and ad hoc rules permit party appointment or nomination. Large numbers of users of arbitration favour party appointments and it is said that the ability to select one of the arbitrators gives a party a sense of control and proximity to the arbitration proceedings that engenders confidence in its outcome. However, there are also criticisms of the system of party appointments, many of which are based on concerns that it can result in the appointment of partisan arbitrators. The practice of party appointments has been described as a "moral hazard" and a practice based on "comfort in the status quo". Another concern is that the system does not encourage diversity on arbitral tribunals as parties tend to select the same well-known names.

For the purposes of our 2018 survey, we asked arbitrators, corporate counsel, external lawyers, users

of arbitration and those working at arbitral institutions for their views on the arguments for keeping, or for discarding, the system of party appointments.

The results of the survey confirmed that there is a strong body of opinion in favour of retaining party appointments with 66% of respondents considering the retention of party appointments to be desirable.

One of the key reasons for wanting to retain the system of party appointment was party control. 82% of respondents felt that the system gives a party some degree of control over the background and expertise of the tribunal and 79% felt that party appointments give a party greater confidence in the arbitration process.

However, respondents recognised the risk of partisan arbitrators as well as the potential benefits for increased diversity on tribunals if there were fewer party appointments.

52% of respondents saw an increased risk of partisan arbitrators as a legitimate reason for ending party appointments. When respondents to the survey were asked about individual experiences of the conduct of party appointed arbitrators, 55% of respondents who sat as arbitrators said that they had experience of a party appointed arbitrator who tried to favour the appointing party by some means. 70% of respondents who had acted as counsel had been in a situation where they believed a party appointed arbitrator tried to favour the party that had appointed them.

A significant number of respondents agreed that an increase in institutional appointments would bring about greater diversity on arbitral tribunals and would create greater opportunities for younger practitioners to sit as arbitrators. 41% felt that more institutional appointments would help gender diversity and 31% that it would also help ethnic/national diversity. 45% of respondents felt that it would provide increased opportunities for younger arbitrators.

## **The Drive for Diversity**

The results of our 2017 survey confirmed that there is a clear ambition within the arbitration community to improve diversity, in respect of age, gender and nationality/ethnicity. The survey also demonstrated a recognition that everyone involved in the arbitration process has a part to play. There is some way to go.

80% of respondents thought that tribunals contained too many white arbitrators, 84% thought that there were too many men, and 64% felt that there were too many arbitrators from Western Europe or North America. On the assumption that all potential candidates have the necessary level of expertise and experience, 50% of respondents thought it was desirable to have a gender balance on arbitral tribunals and 54% thought it was desirable that the tribunal should come from a diverse range of ethnic and national backgrounds.

56% of respondents said that they already consider diversity when drawing up a short list of potential candidates for appointment as arbitrators. 47% said that they were likely to consider diversity more often in the future than they had in the past.

An overwhelming 92% of respondents said that they would welcome more information about new and less well-known candidates. 81% of respondents said that they would welcome the opportunity to provide feedback about arbitrator performance at the end of a case, although only 36% thought that such information should be made publicly available.

As regards responsibility for change, the clear message from respondents was that everyone involved in the arbitration process has a role to play in improving diversity on tribunals. 78% of respondents thought that arbitral institutions have a role to play, 65% thought that counsel for the parties also had an important role and 60% thought that arbitrators had a part to play.

The clear message from respondents to our 2018 survey is that parties wish to have a role in the appointment process. Our 2017 survey demonstrated that, when considering who to appoint/nominate, some parties and counsel do consider the issue of diversity and would welcome more information about new and less well-known candidates. Initiatives like [Arbitrator Intelligence](#) play an important part in this process by making information about arbitrators available for all.

## **The 2019 Survey**

BCLP's 2019 survey considers the issue of cybersecurity in arbitration.

Electronic documents and other information are introduced into international arbitration proceedings in vast quantities. Are participants in the arbitration process sufficiently aware of the need to protect that data against unauthorised access by third parties, and should more be done to promote risk assessment and the taking of active steps to enhance data security?

There has been a dramatic increase in cyber-attacks on corporations, governments and international organisations. Law firms and arbitration proceedings are not immune from these threats. Disputes referred to international arbitration have characteristics that can lead to an increased level of risk and adverse commercial consequences in the event of a data security breach. These developments have led to debate about the need for reasonable cybersecurity measures in individual arbitration proceedings, and how best to go about initiating and organising those measures.

We would like to obtain the views of our professional colleagues on this topic by requesting their responses to our survey questions. All responses will be treated as confidential and a report and editorial on the results of the survey will be circulated to all participants.

To participate in the survey please follow this [link](#).