

INTERNATIONAL ARBITRATION SURVEY:
DIVERSITY ON ARBITRAL TRIBUNALS

ARE WE GETTING THERE?



HELPING YOU ACHIEVE YOUR OBJECTIVES IN INTERNATIONAL ARBITRATION

International arbitration remains the preferred method for resolving cross-border disputes across all industry sectors. The value and complexity of disputes arising out of international contracts and investments mean that clients require specialist legal advice that is focused on achieving their commercial objectives.

BLP's International Arbitration group comprises a team of specialist arbitration practitioners based in our offices in London, Moscow, Singapore, Hong Kong, Abu Dhabi and Dubai. We work with a broad range of clients, including multi-national corporations, governments and government agencies, financial institutions and private individuals.

We can help.



ARE WE GETTING THERE?

Over the last 6 years BLP's International Arbitration group has conducted a number of surveys on arbitration user perceptions on various issues affecting the arbitration process.

This year we would like to consider the issue of diversity among appointed arbitrators. There is a perceived lack of diversity among arbitrators and that perception appears to be confirmed by the available statistics. While it is true that the arbitration community has taken some steps to address diversity issues, many feel that there is still some way to go. Furthermore, hand in hand with diversity goes choice. Do practitioners have enough information about new or less well-known arbitrators to enable them to make an informed choice about the pool of available arbitrators?

We were interested in finding out whether practitioners think that increased gender and ethnic diversity on arbitral tribunals is desirable, what consideration is given to this issue when potential arbitrators are being short-listed, whether practitioners would welcome more information about new and less well-known arbitrators and who amongst the various players in international arbitration should take the lead in promoting increased diversity.

We have canvassed the opinions of arbitrators, corporate counsel, external lawyers, users of arbitration and those working at arbitral institutions. We would like to thank all those who participated in the survey.

HELLO

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Over the last 6 years BLP's International Arbitration group has conducted a number of surveys on arbitration user perceptions on various issues affecting the arbitration process: conflict of interest (2010), delay (2012), document production (2013), choice of seat (2014) and the use of tribunal secretaries (2015). The final report on each of those studies can be found on our website.

THE ISSUES

The historic perceived lack of diversity among arbitrators is forever captured in the description “pale, male and stale”.

Statistics confirm the extent of the current imbalance. SIAC’s Annual Report for 2015 reports that the number of women appointed as arbitrators accounted for just under a quarter of appointments. ICC statistics for 2015 indicate that women represented 10% of all appointments and confirmations, and that women were more frequently appointed as co-arbitrators (43%) rather than sole arbitrators (32%) or tribunal presidents (25%). ICC data on arbitral appointments for 2016 shows that, to November 2016, only 20% of arbitrators appointed were women. LCIA statistics are more encouraging. In 2015 (compared to 2014) there was an increase in the number of female candidates put forward by the parties (6.9% compared to 4.4% in 2014) and selected by the LCIA (28.2% compared to 19.8% in 2014). SCC statistics indicate that, in 2015, 14% of arbitrators appointed were women, although the percentage fell to 6.5% where the parties themselves made the appointment. Statistics from the Chartered Institute of Arbitrators indicate that, of the 222 arbitrators qualified to be on the panel from which presidential appointments are made, only 16 (7%) are women.

There are few statistics on minority ethnic and racial representation on tribunals but it is suggested that the majority of men appointed (the number of women being small in number) are Caucasian men of advancing years and that minority ethnicities and candidates of non-Western geographic origin are blatantly under-represented, as are younger practitioners. There is a dearth of statistics but one commentator has examined the issue by looking at the region from which appointed arbitrators are chosen in ICSID arbitrations. He found that in 289 closed cases from January 1972 to May 2015, in nearly half of cases (45%), the tribunals were composed of all Anglo-European arbitrators. In 84% of the cases, two or more of the tribunal members were Anglo-European, or the sole arbitrator was Anglo-European. Only 11 cases (4%) were arbitrated by entirely non Anglo-European tribunals.

We struggle to escape the past. The first “old men” of arbitration were predominantly white and from Europe or the United States. The elite club of arbitrators that later emerged had similar backgrounds. Established practice in international arbitration is acknowledged to block change and keep new entrants out - the same arbitrators are chosen again and again.



In 289 closed cases from January 1972 to May 2015, in nearly half of cases (45%), the tribunals were composed of all Anglo-European arbitrators.

Reported statistics on ICSID arbitrations



20%

ICC data on arbitral appointments for 2016 shows that, to November 2016, only 20% of arbitrators appointed were women.

There is only limited biographical and professional information available to provide clues about the existence, ability and past performance of potential arbitrators. Ad hoc enquiries may be made and informal opinions expressed amongst those in the ‘arbitration club’ but, in the absence of information on benchmarks such as party satisfaction, efficiency, and challenges to and time to publish an award, as well as increased visibility and acceptance of lesser known candidates, it seems inevitable that arbitrators will continue to be drawn from the same pool and in the same image.

Does a lack of diversity matter to the parties?

Is there a danger of putting too much emphasis on diversity?

International arbitration is a private process for resolving commercial disputes. The parties to the dispute will generally want the tribunal to be made up of experienced able arbitrators who will determine the dispute fairly and efficiently. As long as that objective is achieved do they really care that equally able candidates may have been excluded from consideration? If a party chooses to appoint an elderly white man because they regard him as an experienced and respected arbitrator whose decision they will accept and/or because they believe he will carry weight with other members of the tribunal, then why should party autonomy not prevail? For the most part, parties have one opportunity to have a dispute determined in their favour and, for wholly legitimate reasons, they will have a very short-term self-interested view of the appointment process.

Should diversity matter?

Commentators put forward various reasons as to why diversity does (or should) matter.

At the principled end of the spectrum is the idea, widely held, that the inclusion of individuals of varied racial, ethnic, gender and social backgrounds has a value in itself. There is also the notion that a system serving the needs of a particular constituency - in this case, participants in international commerce - should reflect the make-up of that community.

Concerns have been voiced that a lack of diversity may also affect the quality of arbitral awards. Empirical studies are cited as finding that “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”.

It has also been suggested that if arbitrators are regarded as operating in an under-regulated private “cartel” of elite arbitrators, there is an increased risk of regulation if we arrive at the day when work product comes under increased scrutiny because of the sheer volume of arbitrations directed to a very small pool of arbitrators.

A more positive argument is that widening the pool of arbitrators and increasing transparency around performance will give greater choice and fewer conflicts, remove the imbalance in information available to different parties and (in light of the greater competition for appointment) encourage greater efficiency, as well as facilitating new perspectives on the dynamics of a dispute. In a gender context commentators refer to studies demonstrating a correlation between gender balance and improved performance in a commercial environment. Overall, a diverse tribunal may be better prepared, more task-orientated, and more attentive to the parties’ arguments than a non-diverse tribunal.

7%

Out of the 222 arbitrators from which presidential appointments are made, only 16 (7%) are women. Statistics from the Chartered Institute of Arbitrators.

4%

Only 11 cases (4%) were arbitrated by entirely non Anglo-European tribunals. Reported statistics on ICSID arbitrations.



Assuming a consensus that improved diversity is a good thing, what role should those involved in the practice of international arbitration play in achieving this objective?



What is being done and who should do it?

Debate on gender balance in arbitration has gained momentum in the last few years. 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.

Assuming a consensus that improved diversity is a good thing, what role should those involved in the practice of international arbitration play in achieving this objective?

Some commentators suggest that the burden of promoting diversity should rest with arbitral institutions. This view clearly has some merit. Institutions play a major role in the appointment of arbitrators and there is a growing awareness among institutions that they should “step up” and engage with concerns around diversity.

Institutions are certainly engaging with the issue. The Director General of the LCIA has made public statements to the effect that institutions should take the lead on diversity. An increased number of institutions publish diversity-related statistics. There also appears to be a growing awareness of the need for and trend towards greater transparency around arbitrator availability, attributes and performance.

Clearly institutions have an important role to play. However, many might say that it is neither fair nor expedient to leave it to the institutions to lead the way in initiating change. In many of the cases they administer, institutions have no involvement in the selection of arbitrators. External law firms often act as gatekeepers to appointment - corporate counsel normally rely on external counsel to provide up to date information and arbitrator CVs. Should counsel for the parties think about diversity when drawing up a short list of possible arbitrators? Should arbitrators consider similar issues when they are invited to agree a Chair for the tribunal to which they have been appointed?

KEY FINDINGS FROM OUR SURVEY

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

Pale, male, stale?

Perceptions around the lack of diversity on international arbitral tribunals were confirmed with an overwhelming level of consensus. 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.

The majority of respondents favour improved diversity, both in respect of gender and ethnicity. 50% of respondents thought that it was desirable to have gender balance on arbitral tribunals although 41% thought that "It makes no difference". Responses on ethnicity and national background followed a similar pattern with 54% saying "Yes" to improved diversity.

Lost appointments?

Only 6% of respondents believed that they had lost appointments as a result of their ethnicity but 23% thought they had lost appointments as a result of their gender. 28% of respondents believed that they had lost appointments because they were considered too young.

More information?

A substantial majority of respondents (70%) thought that it was desirable for institutions to publish statistics about the gender, and ethnic or national identity of appointed arbitrators. Importantly, 28% said that the content of the statistics would influence their choice of institutional rules in the future.

Publically available feedback on arbitrator performance?

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 50% of respondents thought that feedback to institutions should not be made publically available.

Who should improve diversity?

We received a clear message that everyone has a part to play in improving diversity on arbitral tribunals. 78% of respondents thought that arbitral institutions should play a role in achieving greater diversity. Counsel for the parties were also considered to be important players - 65% of respondents thought that they had a role to play. Arbitrators came next at 60%, with the balance being made up of academics and teachers (24%). A small minority (12%) said that none of the above-named had a role to play and that they were happy with the status quo.



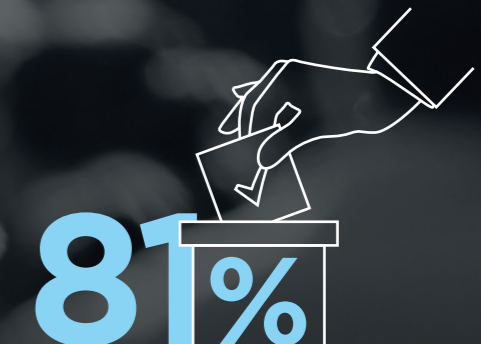
92% of respondents said that they would welcome more information about new and less well-known candidates



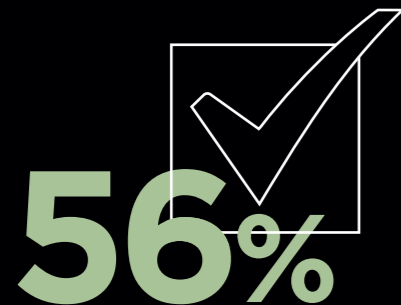
70% thought that it was desirable for institutions to publish statistics about gender and ethnic or national identity



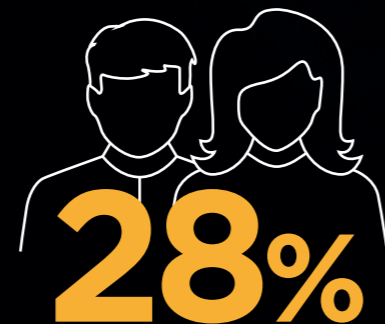
84% thought that there were too many men



81% of respondents would like to provide feedback about arbitrator performance at the end of a case



56% already consider diversity when drawing up a short list of potential candidates for appointment as arbitrator



28% of respondents believed that they had lost appointments because they were considered too young



64% felt that there were too many arbitrators from Western Europe or North America



80% of respondents thought that tribunals contained too many white arbitrators

THE RESULTS

How important is diversity when selecting an arbitrator?

The survey results confirm that diversity issues are on the agenda in international arbitration.

As a starting point, we wanted to find out what respondents thought were the most important attributes to consider when looking at potential arbitrators, and how important they thought issues of gender and ethnicity/national identity. We asked respondents to express an opinion about the importance of particular factors when drawing up a shortlist of potential arbitrators, ranking them on a scale of 1 to 5 ranging from “very important” to “not important at all”. The relative importance respondents attributed to each factor is set out in the table below.

Only 12% of respondents thought that gender was a “very important” or “important” factor to consider. The figure was a little higher for ethnicity/national identity with 26% of respondents marking these categories. 68% of respondents thought that gender was “not that important” or “not important at all”. The corresponding percentage for ethnicity/national identity was 44%. Interestingly, the importance that respondents place on available information on potential candidates was confirmed - 87% of respondents felt that informal feedback on potential candidates was either “very important” or “important”.

	Very Important	Important	Neither important nor unimportant	Not that important	Not important at all
Number of previous appointments	14%	39%	34%	11%	2%
Perceived gravitas/ability to influence other members of the tribunal	36%	39%	18%	3%	4%
Number of awards challenged	12.5%	27%	29%	24%	7.5%
Informal feedback from other practitioners who know this arbitrator	45%	42%	11%	2%	0%
Expertise	70%	23%	6%	1%	0%
Efficiency	62%	29%	8%	1%	0%
Gender	2%	10%	20%	16%	52%
Ethnicity/national identity	4%	22%	30%	14%	30%
Well-known in the arbitral community	12%	30%	36%	16%	6%

In order to test perceptions of the constitution of tribunals, we asked respondents whether, in their opinion, too many of the arbitrators appointed to international arbitration tribunals were (a) white (b) male and (c) from Western Europe or North America. The degree of consensus amongst respondents on these questions was significant. 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.

We then asked respondents whether, on the assumption that all of the potential candidates have the necessary level of expertise and experience, they thought it desirable that (a) the tribunal should have gender balance and (b) that members of the tribunal should come from a diverse range of ethnic and national backgrounds.

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”.

It may be that these last two percentages are simply an indication of the relative level of support among respondents for some form of positive discrimination, and a more non-interventionist view that the worth of a potential candidate should be assessed by reference to other considerations, with gender being ignored completely.

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”.

Amongst those respondents who work in Asia and the Middle East, a higher percentage said that it was desirable that appointed arbitrators should come from a wide range of ethnic and national backgrounds than said that it was desirable to have gender balance on a tribunal-55% and 57% respectively compared with 48% and 42%. For respondents working in other geographic regions the percentage of respondents in favour of gender diversity was higher.

We also asked respondents if they themselves considered diversity when considering potential candidates for appointment, and if they were likely to do so more frequently in the future than they had done in the past. Perhaps surprisingly given the available statistics on the relatively small numbers of women and other minority groups obtaining appointments, 56% of respondent said that they do consider diversity when considering potential candidates for appointment as arbitrators. 26% said that they did not consider it relevant and 17% said that they did not think about it. 47% of respondents said that they were likely to consider diversity more often in the future than they had in the past but 36% said that they would not do so.

“To drive change law firms need to adapt to ensure a more diverse partnership, hence broadening the pool of candidates. Equally we all have a responsibility as counsel to be a little braver in the recommendations we make to clients on arbitrator candidates.”

Ania Farren, BLP, Partner, London



93%

93% of respondents felt that a potential candidates expertise was either “very important” or “important”



54%

54% of respondents felt that, assuming expertise and experience, it was desirable that tribunal members came from a diverse range of ethnic and national backgrounds

Lastly, we asked respondents whether they believed that they had received fewer arbitral appointments than they might otherwise have done as a result of their gender, age, ethnicity, religion or national identity.

41% of respondents do not sit as arbitrator. Of the remainder, there were a number who believed that they had received fewer appointments than they would otherwise have done as a result of their ethnicity and gender. 6% of respondents believed that they had lost appointments as a result of their ethnicity and 23% thought that they had lost appointments as a result of their gender. Interestingly, almost half of those who responded yes on the basis of ethnicity only worked in Western Europe. 3% believed that they had lost potential appointments as a result of their religion and 14% felt that they had lost appointments as a result of their national identity, although it is possible that the latter may be linked, in part, to correlation with party nationality and the requirements of institutional rules. Interestingly 28% of respondents believed that they had lost appointments because they were considered too young.

Diversity Statistics and Institutional Rules

As yet, there is limited reference to diversity in institutional rules. It is an open question as to whether institutions should consider introducing changes to their rules in order to encourage diversity, and what sort of provision would have a positive effect.

A suggestion has been made by one commentator that institutional rules should incorporate a requirement that the presiding or sole arbitrator should be from a different region than either of the two parties – one possible division of regions (said to be “roughly by ethnicity”) being Anglo-Europe, Africa, Asia and Latin America. It is said that a regional diversity requirement would increase demand for ethnically diverse arbitrators in a way that would better reflect arbitration’s internationalism, respect the parties’ autonomy, and rebut criticism of “systemic bias”. We asked respondents whether, in their opinion, it would be a good idea for institutional rules to require arbitrators appointed to the same tribunal to come from different regions of the world. A very substantial majority (74%) said no to this question. The percentage of respondents who answered in this way was broadly consistent regardless of the region/s in which respondents worked.

As noted earlier, an increasing number of institutions do publish diversity-related statistics. This is a positive and essential first step since without statistics it is difficult to gauge how serious is the problem and whether steps taken to improve matters have made any difference.

We asked respondents if they thought it desirable for arbitral institutions to publish statistics about the gender, and ethnic or national identity of appointed arbitrators. We also asked respondents whether the content of such statistics would influence their choice of institutional rules. A substantial majority (70%) thought that it was desirable for such statistics to be published. Interestingly, 28% said that the content of the statistics would influence their choice of institutional rules in the future.



We asked respondents whether, in their opinion, it would be a good idea for institutional rules to require arbitrators appointed to the same tribunal to come from different regions of the world. A very substantial majority (74%) said no to this question. The percentage of respondents who answered in this way was broadly consistent regardless of the region/s in which respondents worked.



70%

A substantial majority (70%) thought that it was desirable for diversity statistics to be published.

28%

28% said that the content of the statistics would influence their choice of institutional rules in the future.



As a young arbitration practitioner, I think we all have a part to play in actively considering and suggesting more diverse candidates for arbitral appointments.

Sara Paradisi, BLP,
Senior Associate, Singapore



Greater Access to Information about Arbitrator Performance and New/Less Well-Known Arbitrators

A lack of information about new and less well-known arbitrators from all backgrounds, but particularly from amongst women and other minority groups, hinders the introduction of new entrants to the pool of arbitrators selected for appointment. A lack of accessible information about arbitrator performance frustrates a more inclusive approach when making a selection from amongst established arbitrators.

We asked respondents if they would welcome more information about new and less well-known arbitrators. An overwhelming 92% said that they would welcome this information. Only 5% of respondents said that they would not. The remainder responded “Don’t know”.

We also asked respondents if they would welcome the opportunity to provide feedback on an arbitrator at the end of a case, and whether they thought that feedback provided to an institution should be publically available. Again, a very significant majority (81%) said that they would welcome the opportunity to provide feedback, although a much smaller percentage (36%) thought that such information given to an institution at the end of a case should be made publically available. 50% of respondents thought that feedback should not be made publically available. When respondents were broken down according to geographic work area, the differences in the percentages who said yes, the feedback should be made publically available, and those who said no, it should not, were most marked in relation to respondents working in North America, Western Europe and Australasia. In these categories, the relevant percentages against public access were 51%, 50% and 52% respectively compared with 25%, 30% and 29% in favour.

If feedback is not publically available, it does, of course, leave it very much in the hands of the institutions to monitor performance criteria and adjust their appointments according to the feedback they receive. Those making party appointments are thrown back once more on what can be gleaned from the informal network of arbitration practitioners.

36%

36% of respondents thought that feedback on arbitrator performance should be made publically available

Who is Responsible for Initiating Change?

Another objective of the survey was to find out from respondents who they thought should play a role in achieving greater diversity on tribunals. The responses received indicate that change is the responsibility of everyone involved in the arbitration process. 78% of respondents thought that arbitral institutions should play a role in achieving greater diversity on arbitral tribunals. Counsel for the parties were also considered to be important players - 65% of respondents thought that they had a part to play. Arbitrators came next at 60%, with the balance being made up of academics and teachers (24%). A small minority (12%) said that none of the above-named had a role to play and that they were happy with the status quo.



Lastly, we asked respondents who of the many participants in the arbitral process should play a role in achieving greater diversity on arbitral tribunals. The responses received indicate that change is the responsibility of everyone involved in the arbitration process.



About BLP

Berwin Leighton Paisner is an award-winning, international law firm. Our clients include over 50 Global Fortune 500 or FTSE 100 companies. Our global footprint of 13 international offices has delivered more than 650 major cross-border projects in recent years, involving up to 48 separate jurisdictions in a single case.

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