

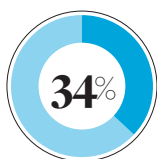
Diversity on arbitral tribunals: What's the prognosis?

The many faces of diversity: How much progress has been made?

Few, if any, would disagree that promoting diversity at all levels, including in the practice of international arbitration, is a positive thing. Calls for greater diversity, especially in relation to the appointment of arbitrators, have been prevalent for some time in the international arbitration community. The extent of progress towards this goal is a matter of debate. Respondents were therefore asked whether, and to what extent, they agreed or disagreed with the proposition that progress has been made in the past five years with regard to various aspects of diversity (i.e., gender, geography, age, culture and ethnicity) in terms of arbitral appointments.

Very few respondents expressed either strong agreement or disagreement with the central proposition in relation to any of the five listed aspects of diversity. While it is encouraging that the majority of respondents (61%) agreed that some progress has been made in relation to gender diversity, this contrasts sharply with the position for the other featured aspects of diversity. In relation to geographic, age, cultural and ethnic diversity, less than a third of respondents positively agreed in each case that progress has been made in recent years. Finally, for all aspects of diversity, a significant percentage of respondents (ranging from 21% to 35%) took a neutral stance, i.e., they neither agreed nor disagreed that progress has or has not been made.

Perhaps most revealing of all, these findings almost mirror the results for the same question posed in our 2018 survey.²⁸ Despite the increased amount of focus

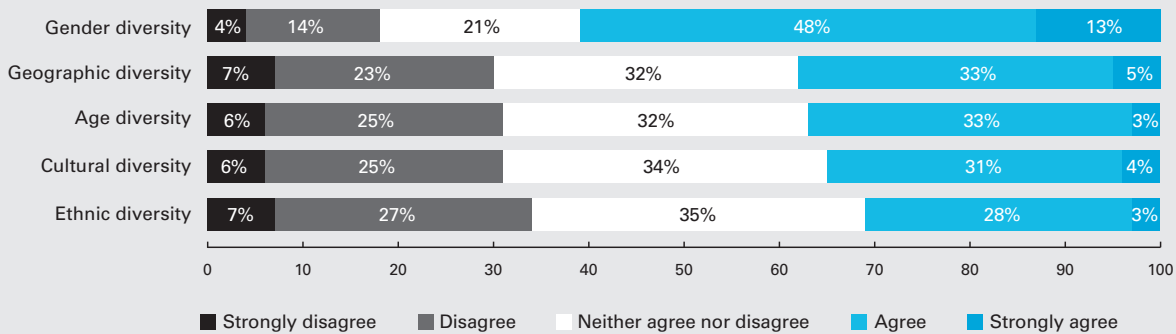


of respondents disagree that progress has been made in recent years in relation to ethnic diversity

Summary

- More than half of respondents agree that progress has been made in terms of gender diversity on arbitral tribunals over the past three years. However, less than a third of respondents believe there has been progress in respect of geographic, age, cultural and, particularly, ethnic diversity.
- Respondents are divided as to whether there is any connection between diversity on a tribunal and their perception of the arbitrators' independence and impartiality. Just over half of the respondents (56%) stated that diversity across an arbitral tribunal has a positive effect on their perception of the arbitrators' independence and impartiality, but more than one third (37%) took a neutral view. Others consider the enquiry redundant, on the basis that the call for more diversity does not require further justification.
- 59% of respondents continue to emphasise the role of appointing authorities and arbitral institutions in promoting diversity, including through the adoption of express policies of suggesting and appointing diverse candidates as arbitrators. However, the significance of the role of counsel is highlighted by about half of respondents, who included 'commitment by counsel to suggesting diverse lists of arbitrators to clients' amongst their answers. In-house counsel also bear the onus of encouraging diversity through their choice of arbitrators.
- Many respondents feel that opportunities to increase the visibility of diverse candidates should be encouraged through initiatives such as 'education and promotion of arbitration in jurisdictions with less developed international arbitration networks' (38%), 'more mentorship programmes for less experienced arbitration practitioners' (36%) and 'speaking opportunities at conferences for less experienced and more diverse members of the arbitration community' (25%). Building visibility is particularly important in light of the perception that users prefer arbitrator candidates about whom they have some knowledge or with whom they have previous experience.
- The general consensus amongst respondents is that caution should be exercised when exploring whether adaptations in arbitral practice experienced during the COVID-19 pandemic may have an impact on promotion of diversity objectives, as it can go both ways. Virtual events, meetings and hearings may facilitate participation by more diverse contributors, but this may be hindered by unequal access to technology and the challenges of building relationships remotely.

Chart 10: Do you agree with the statement that progress has been made in the following aspects of diversity on arbitral tribunals over the past three years?



on, and awareness of, diversity issues and initiatives since then, respondents clearly feel that this has not as yet translated into actual or sufficient positive change.

One difficulty identified by interviewees who were generally neutral on whether advances have been made is that it is hard to measure progress in this context. Although the publication by institutions and appointing authorities of diversity-related statistics for arbitral appointments is to be welcomed in terms of providing some degree of verified information, it was noted that these statistics represent limited data sets. On a similar note, respondents mentioned the difficulty in defining different aspects of diversity. For example, interviewees questioned how age diversity can be statistically measured in the absence of agreement as to how to define it in the first place.

Ethnic diversity, in particular, continues to be an area where respondents feel there is a distinct need for improvement. As in our 2018 survey, the statement that recent progress has been made in relation to ethnic diversity had the least agreement among the five listed aspects of diversity, with only 31% of respondents agreeing.²⁹ Some interviewees expressed their frustration and dismay at the lack of progress in this area. One perception was that, unless there is a level playing field in terms of opportunities



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for engagement and visibility within the arbitration community, it is difficult to see how greater diversity can be achieved in arbitral appointments. One interviewee, for example, tellingly recounted attending an arbitration conference focusing on arbitration in Africa where none of the invited speakers were from Africa themselves. Similar ‘pipeline’ issues were also raised in relation to other aspects of diversity.³⁰

While the question posed to respondents lists only a small selection of aspects of diversity, interviewees raised other aspects of diversity which they felt should also be given greater consideration. In particular, some interviewees focusing on arbitration in specific industries felt that the demands of certain types of disputes would be better served by less ‘legalistic’ arbitration procedures. They noted

in this context that there is room for more diversity in terms of arbitrator ‘background’, i.e., welcoming more arbitrators who come from relevant industries and who are not necessarily qualified lawyers, but who have training in international arbitration procedure.

Diversity, independence and impartiality: Is there a connection?

We then explored whether there is any correlation between diversity on a panel of arbitrators and users’ perception of the arbitrators’ independence and impartiality.

Responses were divided and no single viewpoint attracted a significant majority of support. Just over half of the respondents (57%) stated that diversity has either ‘the most positive effect’ (36%) or ‘positive effect’ (21%) on their perception of the arbitrators’ independence and impartiality. Only 6% said that it has a ‘negative’ (5%) or ‘the most negative effect’ (1%). More than a third of respondents (37%), however, said that diversity across a panel of arbitrators has no effect at all on their perception of the arbitrators’ independence and impartiality.

This outcome was replicated across those interviewed on this issue, who insisted that a nuanced approach is necessary on diversity. Many felt that the answer essentially depends on two factors: the type and particularities of a given dispute and the type of diversity in question. Put differently, the majority of interviewees felt it is not possible to

provide a 'one-size-fits-all' answer to this question—rather, one must take into account what is meant by 'diversity' in each given case. So, a respondent's choice of a positive or neutral answer to this question should not simply be taken at face value. As the interviews revealed, it is neither the case that those who replied in the positive unreservedly felt that an arbitral panel that lacks diversity would be partial as a result, nor that those who gave a neutral response felt that diversity is always irrelevant.

Additional nuances were also offered when specific aspects of diversity were considered by interviewees.

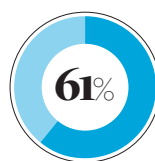
One view articulated in a number of interviews was that, when it comes to gender diversity, lack thereof has no impact on those respondents' perception of the tribunal's independence and impartiality. As one interviewee explained, gender diversity on tribunals is a laudable goal, but they would not automatically question the impartiality or independence of a panel just because its members were all female or all male. Similarly, age diversity was largely considered to be irrelevant in terms of perceptions of independence and impartiality.

Ethnic, geographic and cultural diversity were often considered to be interconnected. Some interviewees, both counsel and arbitrators, stressed that the



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impact of ethnic, geographic and cultural diversity on perceptions of impartiality and independence of arbitrators can depend, in part, on the nature of a given dispute. This is particularly the case in investor-state arbitration, where they felt diversity or the lack thereof could be viewed as having an impact on both party and public perceptions of the legitimacy of the process. Another example from interviewees is where an arbitral panel is composed entirely of arbitrators who have no relationship with or understanding of a specific country or culture central to a dispute. This could lead parties to feel that the arbitrators might fail fully to appreciate cultural differences and (perhaps subconsciously) favour parties from areas or cultures with which the arbitrators are more familiar. This concern arose particularly in relation to arbitrators from North America



61% of respondents agree that progress has been made in recent years in relation to gender diversity

and Western Europe when dealing with disputes involving legal or cultural mores from other parts of the world.

Finally, a significant number of interviewees rejected the entire premise of the question, expressing that it is simply unnecessary, in this day and age, to seek to draw any correlation between diversity and arbitrators' independence and impartiality in order to justify calls for increased diversity. It should suffice that having more diverse pools of arbitrators is the right thing. The real question for them is how to encourage more diversity in practice.

Encouraging greater diversity: Yes, but how?

Respondents were asked which initiatives they considered to be most effective in encouraging greater diversity in terms of arbitral appointments. Respondents were asked to choose up to three options from a list of suggestions, to which they could also elect to add suggestions of their own.

'Appointing authorities and institutions adopting an express policy of suggesting and appointing diverse candidates as arbitrators' was the most chosen option (59%). This reflects a preference for the institutions to be proactive in this regard. It also confirms the prevailing perception of arbitration users as to which participants in the international arbitration community wield the most influence on the promotion of diversity.³¹

This perspective was confirmed by an overwhelming majority of interviewees. As some explained, arbitral institutions (and, by extension, other appointing authorities) can exercise this influence when they are called upon

Chart 11: What effect does diversity across a panel of arbitrators have on your perception of their independence and impartiality?

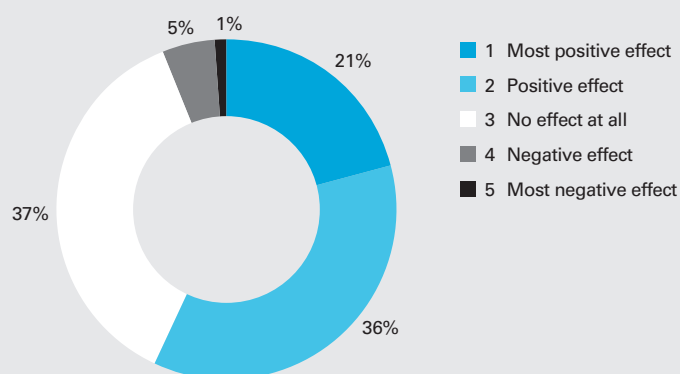
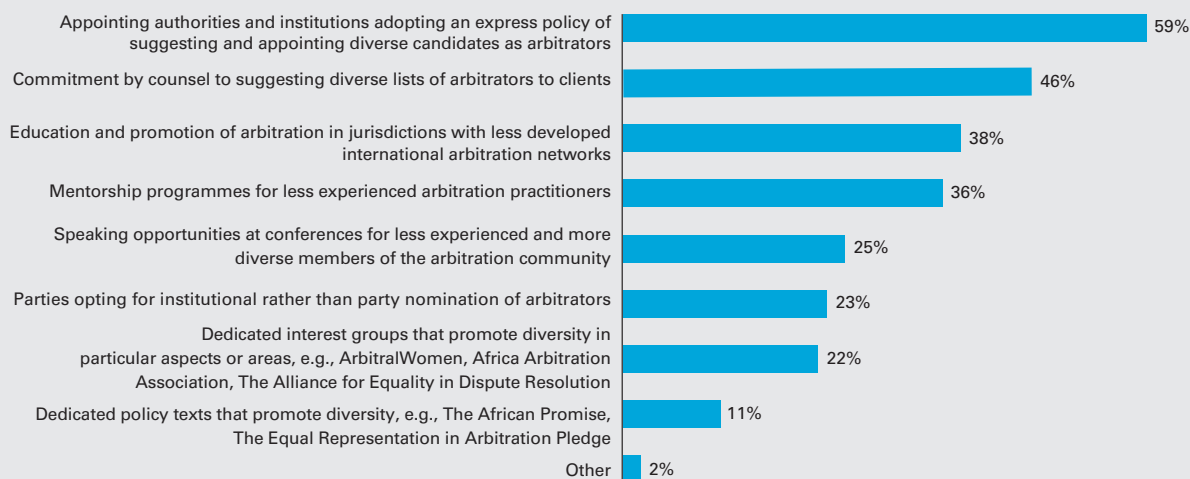


Chart 12: Which of the following initiatives do you consider to be most effective in encouraging greater diversity in terms of arbitral appointments?



Respondents were able to select up to three options

by parties to select tribunal members or presiding arbitrators, either from the outset or when the parties or co-arbitrators have been unable to reach an agreement on appointments. Several interviewees opined that institutions and appointing authorities were also likely to maintain or have access to databases reflecting a larger pool of candidates for tribunals than parties or their counsel might otherwise consider. Representatives of various arbitral institutions confirmed that increasing diversity across tribunals is high on their agenda when appointing arbitrators. As discussed at pp.11 – 12 above, interviewees also saw an opportunity presented by the growing presence of regional and less widely known arbitral institutions and the role they could play in promoting diversity objectives, including by suggesting and appointing diverse arbitrator candidates.

However, while appointing authorities and institutions undoubtedly play a major role in arbitral appointments, it was generally agreed that the larger proportion of candidates are nominated by parties and their counsel.³² The significance of the role of counsel was highlighted by 46% of respondents, who included ‘commitment by counsel to suggesting diverse lists of arbitrators to clients’ amongst their answers.



Ultimately, it is always the demands of the case that determine choice of arbitrators

The prevailing sentiment amongst interviewees, however, was that this is often easier said than done. Some private practitioners admitted that they do not necessarily suggest as diverse a spread of candidates as they could when proposing lists of potential arbitrators to clients. Several interviewees reported that they encounter resistance from their clients when they do suggest candidates with whom the clients are relatively unfamiliar; similarly, clients are often not willing to trust suggested names who have less experience as arbitrators. The vast majority of interviewees emphatically pointed out that, ultimately, it is always the demands of the case that determine their choice of arbitrators. One interviewee noted it is not always easy for counsel to persuade

clients to consider a wider range of arbitrators. However, this does not absolve them of the responsibility to carry out the necessary due diligence and propose and promote diverse choices to their clients. Interviewees also emphasised that in-house counsel have the ultimate power to choose between potential arbitrator candidates and so the onus is on them to encourage diversity by their choices.

This theme of responsibility of both external and in-house counsel and, in particular, of more senior members of the arbitration community in promoting diversity was emphasised by several interviewees. Notably, this included both arbitrators and in-house counsel. One point that was repeatedly made is that, even

though it is undoubtedly important to promote diversity across arbitral panels, the reality is that a lot of work remains to be done in promoting diversity across counsel teams. Drawing attention to this ‘pipeline’ issue, one interviewee noted that ‘today’s counsel may be tomorrow’s arbitrators’.

The third most cited suggestion (38%) was ‘education and promotion of arbitration in jurisdictions with less developed international arbitration networks’. ‘More mentorship programmes for less experienced arbitration practitioners’ ranked fourth (36%). In addition, a quarter of respondents (25%) included ‘speaking opportunities at conferences for less experienced and more diverse members of the arbitration community’ as a way to encourage greater diversity. As explained in the interviews, these events help increase the visibility of newer entrants to the arbitration field. Organisers of such events are urged to make sure that their lists of speakers and moderators reflect diversity of all kinds. Building visibility is particularly important, because users tend to prefer arbitrator candidates about whom they have some knowledge or with whom they have previous experience.

A number of respondents also opted for ‘dedicated interest



46%

of respondents encourage **commitment by counsel** to suggesting diverse lists of arbitrators to clients

groups that promote diversity in particular aspects or areas, e.g., ArbitralWomen, Africa Arbitration Association, The Alliance for Equality in Dispute Resolution’ (22%) and ‘dedicated policy texts that promote diversity, e.g., The African Promise, The Equal Representation in Arbitration Pledge’ (11%). However, a number of interviewees expressed scepticism with regard to the proliferation of groups promoting particular aspects of diversity relative to their tangible contribution.

Diversity and the pandemic: A blessing, a curse or irrelevant?

The arbitration community has had to adapt in many ways in response to the COVID-19 pandemic. We sought interviewees’ views on any potential correlation between the pandemic, the necessary adaptations in the practice of arbitration and the promotion of diversity objectives. The general consensus was that it can go both ways.

On the positive side was that there might be new opportunities to increase the visibility of practitioners from groups that are underrepresented or who are based in jurisdictions which are not amongst the best-known hubs for international arbitration. For instance, the shift from in-person

to online conferences and events has opened up participation to wider audiences worldwide. This also offers the opportunity for speakers at those events to introduce themselves to members of the arbitration community with whom they may not otherwise have been able to connect. Remote working could facilitate access to the arbitration community for people who may have been unable to travel.³³ Several interviewees also thought increased use of IT could encourage inclusion of younger arbitrators who are more familiar with new technologies.

Cautious notes were also sounded on how much impact there may be on diversity objectives. Some interviewees, including arbitrators, speculated if the lack of in-person meetings between members of a tribunal would push those selecting arbitrators to prefer a more well-known candidate with existing relationships with other tribunal members. They attributed this to a fear that it may be more difficult for newer candidates to establish those relationships of trust and confidence remotely.³⁴ Unequal access to reliable and affordable technology required for remote participation in hearings, meetings and community events was also flagged by many as a challenge.



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