

What I talk about when I talk about arbitrator diversity... Why and how to make arbitral tribunals us, rather than them

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Shantanu Majumdar is a recently appointed QC, who is sought after as an advocate and adviser in commercial, civil fraud, banking and professional negligence disputes. He regularly appears in international arbitrations, as well as complex litigation and appeals.

While the range of parties before tribunals has globalised, the typical composition of those tribunals has not. The international arbitrator community has long been said to comprise a club of "elderly white men". If that was ever quite true, it is certainly less true now, but the international arbitrator community still lags well behind its users when it comes to diversity. Does this matter?

Two of the perceived advantages of arbitration, namely privacy and the absence (or restriction) of review by the court, are also potential problems. This is because the inevitable lack of transparency and even accountability which these features bring mean that parties need to feel the greatest possible confidence in the integrity of the tribunal whose decision will largely be final.

This is not merely a question of the experience and expertise of the arbitrators – inescapably important though these are – but also of the perception that they are diverse enough to be properly representative of the parties whose disputes they arbitrate. This now matters much more than it did, given the wider modern expectation that those who lead and decide should reflect their constituencies.

Much of the recent focus on diversity in international arbitration has understandably focused on the under-representation of women, but there is a growing sense that ethnic, geographic and cultural diversity is important too, both for optical reasons but also the cultural and other knowledge that diversity of origin – to say nothing of age – can bring to the resolution of international disputes.

This latter point alludes to a wider (but perhaps less widely accepted) possibility and this is that heterogeneous groups make better decisions than homogeneous ones or, as Benjamin Franklin more succinctly put it: "If everyone is thinking alike, then nobody is thinking."

On one view, greater diversity is just a question of time, as Lord

Sumption, (retired UK Supreme Court justice) once said of diversity in the English judiciary. Arbitrators are typically drawn from a pool of senior practitioners who are inevitably historically less diverse than newer entrants to the field. In time, so the argument goes, this will change. However, the problem may be more urgent than that if, as there is some reason to suppose, lack of diversity in tribunals is or may be deterring potential arbitrators from, say, emerging market countries, from arbitrating at all. Moreover, there may be other solutions apart from waiting, not least if the problem is in appointment procedures and practices, rather than the lack of more diverse but nonetheless high-quality candidates.

In the very nature of arbitration, appointment procedures and practices are opaque. Statistics published by arbitral institutions suggest that the repeat appointment of a relatively small number of arbitrators remains a significant phenomenon. It is an understandable tendency; who is appointed to the tribunal is of the utmost importance and the appointment of arbitrators who are known quantities is therefore tempting (especially amongst risk-averse legal advisers). However, this is obviously something of a vicious circle: experience is valuable, but repeat appointments limit the number of people who can acquire that experience.

There is also the undoubted lack of objective and widely available information about arbitrators. The lists of arbitrators maintained by arbitral institutions obviously have a limiting and somewhat self-fulfilling quality and, beyond that, researches will often have to rely on the internet and soundings taken from colleagues.

Habit, anecdote and safety are therefore natural aspects of the appointment process, but if you only appoint people whom you know (or know of) then one can hardly complain if the pool of obvious arbitrators remains small.

Arbitral institutions can obviously play an important role in promoting tribunal diversity – as some of them already recognise – although the precise extent to which they can formally do so will depend on the particular rules of the institution and of course the precise terms of the arbitration clause. More broadly, the institutions could demystify the appointment process by providing more information about who has been appointed. Public commitment to diversity (see for example the LCIA and its signature of the gender equality initiative Equal Representation in Arbitration Pledge) can also encourage change.

It is debatable quite how much more the institutions alone can do in a process which is based on party autonomy. In any event, the fact is that most arbitrators are appointed by the parties or – as is often the case with the chair of the tribunal – by the party-nominated arbitrators.

It could therefore be said that the solution to the problem of lack of diversity in international arbitrator appointments lies most obviously with users. They agree (or could agree) arbitration clauses which give the parties complete freedom to select arbitrators (including the chair of the tribunal) and can then appoint accordingly. They would doubtless be assisted in appointing more diversely by simply being bolder (which may be easier said than done when very large sums of money are involved) but also by ready access to better sources of information on potential arbitrators.

Equal Representation in Arbitration (which seeks to promote the involvement of women) maintains a Search Committee which can

assist in identifying suitable female arbitrators and Arbitral Women maintains a database of female practitioners and arbitrators.

There are some nascent sources of information about arbitrators generally, but they need to be more diverse (and perhaps better known). Arbitrator Intelligence, for example, seeks to

“promote transparency, fairness, and accountability in the selection of international arbitrators, and to facilitate increased diversity in arbitrator appointments”

and, to this end, collates information from users about arbitrators whom they have appointed or seen. Global Arbitration Review, on the other hand, has devised an Arbitrator Research Tool which relies on information from arbitrators about their experience and expertise.

Inevitably, both tend currently to reflect the status quo and, if that is the problem, then they are not currently the solution. They are however a start, but need actively to cast their nets wider and, given their sources of information, will need help in doing so.

Arbitration is a uniquely adaptable process; it would be a shame and an irony if its forward march were to be impeded by a failure to adapt to the changing world in which it operates.

Let’s talk about arbitrator diversity and then do something about it.

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