

Which diversity benefits parties in Arbitration?

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Around 40 years ago I attended a weekend course in Glasgow to qualify as a BSAC diving instructor. We were told it would be an intensive weekend and please arrive on time Saturday morning. Several minutes late, a guy appeared in the room. He had a rainbow-coloured Mohican haircut, bits of metal sticking out of his skin and quite a few tattoos. Along with everybody else, my first impression was negative. By the end of the weekend my second impression was of a bright university graduate who worked hard, was friendly, liked helping others and was good to dive with. The lesson I never forgot was not to judge people by how they look on the surface. We all looked similar wearing drysuits under the cold waters of the Clyde.

Diversity in arbitral tribunals is a hot topic. The assertions currently being made about how and why tribunals should become more diverse lacks analysis and provides no evidence that the outcome will be beneficial to arbitration users. One discussion I attended during LIDW suggested that someone might have a “diversity characteristic” that they did not want to reveal, such as being gay and that if they did reveal this, it might increase their chances of being appointed to a tribunal.

Historically the tent of arbitrators was small and homogenous. The gate-holders restricted entry to those who were white, male, lawyers. The drive now is to include those previously excluded and, in some cases, to exclude those previously included on the grounds of “positive discrimination”. Discrimination is discrimination and it is never positive. One lawyer stated that they now propose lists of potential arbitrators to parties which were all “diverse” and this **specifically excluded white males**. You cannot be inclusive by excluding people and you cannot improve diversity by reducing diversity. We are all part of the diversity landscape. Why should a white male looking for a first appointment be denied that chance because of historical favouritism towards other white males? He’s not to blame for that history.

Lawyers use careful analysis, reasoning and evidence in their work. Not following this approach for diversity has led to political correctness becoming the yardstick. Start with a defined problem and apply legal standards of reasoning to arrive at a rational conclusion. In this case, the conclusion has become the starting point. In all this debate, the interests of the parties to arbitration – those paying the bills – doesn’t get a mention. This should be the diversity question – **what best serves the interests of the parties using and paying for arbitration?**

Parties to a commercial dispute need to have disputes resolved fairly, quickly and cost effectively. If political correctness dictates arbitration panels, users will not be happy and will start to avoid arbitration. If low diversity is bad for arbitration, how should a diverse tribunal be selected to achieve better fairness, speed and low costs?

Fair result. Research shows that a problem-solving group with members who differ in how their brains encode problems and attempt to solve them will out-perform a homogenous

group of high performers who all think the same way¹. The first requirement is that the tribunal should have diverse brains, with different problem-solving methods. The bodies that host those brains are irrelevant, with one exception. Women and men naturally encode and process problems in different ways and so one immediate way to achieve better problem resolution is to have both male and female arbitrators on a panel. The arbitral selection tent should be very large and include all those with the capability of being good arbitrators. No capable potential arbitrator should be excluded or prioritised because of any irrelevant physical or “diversity” characteristic.

Fast result and cost effectiveness. These two issues are closely related. There is one particular root cause of several problems, that is arbitrators who have a huge number of concurrent appointments. Any practitioner knows of awards that take many years to appear. I was told recently by an in-house lawyer about one eminent arbitrator on their panel who had around 60 concurrent tribunal appointments. It is impossible for this person to give each arbitration the time it deserves. The award took around a year to appear after final hearings. The pool of arbitrators is kept lower because many new arbitrators can’t get a first appointment as the number of appointments potentially available to them is low. Parties can solve this by specifying in their arbitration clauses that tribunal members must agree to a limit on the number of their concurrent appointments, which should be in the mid single figures. This also encourages the arbitrators to finish their work in good time so that they may then accept other appointments.

Tailoring procedures to the needs of the arbitration and avoiding defaulting to courtroom procedures will contribute to reducing time and cost. Setting out a realistic timetable and committing to issue the award within a short timescale – weeks not years – is possible if the tribunal members have sufficient time to do their work and get together over that timescale because they have agreed to limit their concurrent appointments.

The ideally diverse tribunal. A tribunal with a diversity of both problem-solving skills and broad experience relevant to the dispute (industrial, legal, financial) will be able to identify matters for early disposition and focus on the remaining substantive matters. A commercial dispute tribunal would perhaps ideally include an industry expert for the technical issues, a lawyer familiar with the law of the contract for the legal issues and a quantum expert for the financial issues. Every commercial dispute has these three aspects. One or two members of a 3-person tribunal should have Y chromosomes. Arbitrators early in their arbitral careers will want to do an impressive job, will not have many concurrent appointments and will be highly focused on the case and should be considered. An effective chair who ensures that each arbitrator is listened to and their opinions considered is important. If the arbitration agreement sets out these conditions, then the claimant names their arbitrator who meets the concurrent case limit with the statement of claim and has the choice of which sex and expertise. The respondent has a choice of sex and one of the two remaining expertise’s. These two then appoint the chair with the last expertise and relevant sex. This type of diversity is what will benefit the progression of arbitration. Pressure to choose a politically correct tribunal does the exact opposite.

¹ <https://sites.lsa.umich.edu/scottepage/wp-content/uploads/sites/344/2015/11/pnas.pdf> and https://insight.kellogg.northwestern.edu/article/better_decisions_through_diversity

The 1996 Arbitration Act defines the object of arbitration to “*obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*”. The parties who use arbitration have the absolute right to choose their tribunal and are unlikely to prioritise political correctness when making that choice. Widen the tent by all means, absolutely. Propose appropriate panel members without discrimination or favouritism to obtain an independent tribunal with the combined skills needed to assess the matters in dispute.