

DIVERSITY IN ARBITRATION

Market survey on diversity in arbitrator appointments

Introduction

The call for greater diversity in arbitrator appointments has been in focus in the international arbitration community for some years, in particular when it comes to gender diversity. This focus has led to a certain progress, as several arbitral institutions have reported an increase in the proportion of female arbitrator appointments over the past few years.

Although much work has been put into improving gender equality in Norway, our thesis was that the Norwegian arbitration community probably was not as diverse as one might hope. On this background, we wanted to investigate the state of diversity in arbitral appointments in cases involving legal practitioners in Norway.

The survey

The survey was conducted by Wikborg Rein and BAHR in 2021. The purpose was to investigate diversity in arbitral appointments by practitioners based in Norway, with a particular focus on gender and age.

Diversity in this context essentially means representation of people with differences such as social affiliation, gender and gender identity, age, sexual orientation, political or religious belief, ethnicity, cultural background, experience, physical disability etc.

The survey was addressed to a large group of respondents in the arbitration community. Specific questions were asked on the following topics:

- i. the respondents themselves, including gender, age and their arbitration experience,
- ii. the gender and age composition of tribunals in arbitrations over the last two years,
- iii. whether gender and age had been topics of consideration in connection with arbitral appointments, and if yes, who brought these topics up, and
- iv. various topics of consideration when appointing arbitrators.

The survey's focus on gender and age did not intend to ignore or exclude other forms of diversity, and aspired only to be a first step towards achieving more diversity in the arbitration community and more broadly in the legal profession in Norway.

Diversity matters

Arbitration should reflect its users. Companies and organisations are increasingly focused on promoting representation of women in leadership and board positions, and are also experiencing increased pressure to do so.

Choosing an arbitrator is about finding the best person for the job. An obvious benefit of diversifying the arbitrator pool, is the influx of fresh blood into the community, ensuring that the very best talent and minds are represented at all times. This is a basic and essential driver of inclusion and diversity.

Furthermore, diversity is said to improve an arbitral process and its outcome. Several studies support that diverse groups/teams perform tasks better than overly specialised groups. Diverse groups bring a broader variety of perspectives and experiences to a task and may therefore take more informed decisions. There is no reason why diversity should be less important in law and arbitration.

When a relatively small and homogeneous pool of individuals decide on high-stake disputes concerning diverse and complex legal questions, business practices, and expectations, the legitimacy of the system may in turn be called into question. Diversity can be an antidote to the adverse effects of homogeneity, and at the same time enhance legitimacy of the arbitral community and tradition.

Finally, both by virtue of our profession and as citizens of society, we are obliged to promote equality and eliminate discrimination.

The practice of law should reflect norms and standards adhered to by our stakeholders and reflected internationally more generally. Homogeneity is not necessarily a consequence of conscious choices. Unconscious bias and stereotyping, or lack of awareness also counteract diversity. Awareness related to the importance and effects of diversity is therefore crucial.

Why age distribution and gender diversity?

The aim as counsel is to select the right arbitrator. Counsel and parties may tend to be somewhat conservative when appointing arbitrators. Arbitrators with established track records and experience are very often preferred. It may appear difficult to reconcile the lack of diversity in arbitral tribunals with the assertion that counsel and clients are consistently choosing the presumed most qualified individual for the job.

However, there is no question that there are obviously numerous highly qualified, relatively young and/or female candidates. Recruiting new talent to the arbitration community is crucial to its survival.

The respondents

The survey was addressed to practitioners based in Norway. However, the survey is not limited to arbitrations seated in Norway.

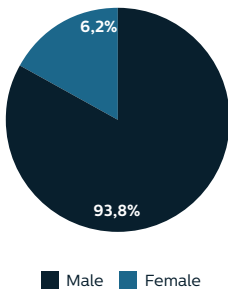
The survey shows that the respondents had relatively extensive experience with arbitration:

- The respondents had been involved in an average of 4.56 arbitrations the last two years.
- 50% of the respondents had been involved in 1-3 arbitrations and 47% had been involved in 4-10 arbitrations.
- The respondents had been involved in an average of 1.95 institutional arbitrations over the past two years, however only 5.4% had been involved in more than four institutional arbitrations.

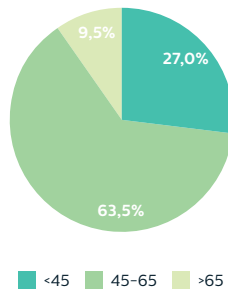
The survey confirms that ad hoc arbitration continues to be the prevalent form of arbitration in Norway, and that the share of institutional arbitrations continues to be relatively low. The average of 1.95 institutional arbitrations among the respondents may, on the other hand, indicate that the use of institutional arbitration is slowly increasing.

The respondent data demonstrates that there is lack of diversity among practitioners in Norway. The respondents were predominantly male and middle-aged.

Respondents by gender



Respondents by age



Gender diversity in arbitrator appointments

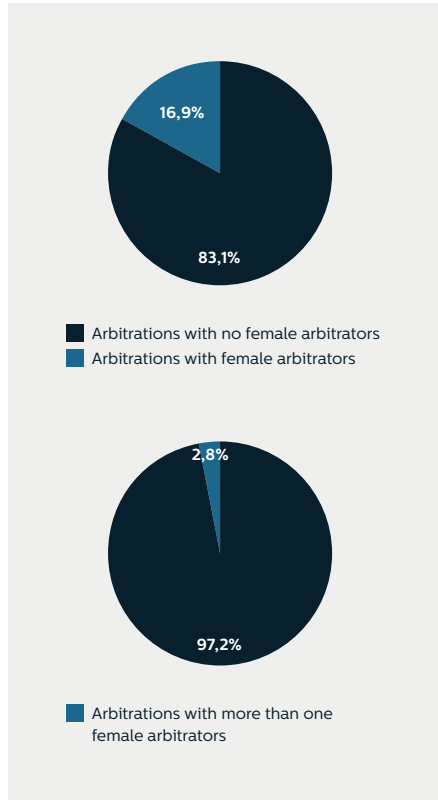
Our thesis was that there is lack of diversity in arbitral appointments in Norway. The survey confirms this thesis and shows a clear lack of gender diversity in arbitrator appointments in cases involving practitioners based in Norway.

The respondents reported that female arbitrators had been appointed in only 16.9% of the arbitrations they had been involved in the two last years. In only 2.8% of the arbitrations, more than one female arbitrator had been appointed.

At the same time, 44.29% of the respondents reported that they had been involved in one or more arbitrations with a female arbitrator.

The results must, however, be treated with some caution as some respondents may have been involved in the same arbitrations. If so, the results overstate female representation.

Our findings can be compared with the findings of the Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings (the ICCA Report), where it is reported that the proportion of female arbitrators across the most prominent international arbitral institutions was 21.3% in 2019. According to the Dispute



Resolution 2020 Statistics of the International Chamber of Commerce (ICC), the number of confirmations and appointments of female arbitrators increased from 21.1% in 2019 to 23.4% in 2020 across all confirmations and appointments.

Compared with reports from the international arbitration community, it may appear as though Norway is somewhat behind on gender diversity in arbitral appointments. One potential reason for this difference may be that ad hoc arbitration is still the prevalent form of arbitration in Norway, and that diversity has been much more in focus amongst arbitral institutions. Reports from the international community show that arbitral institutions generally appoint a larger proportion of female arbitrators than parties and co-arbitrators. According to the ICCA Report, approximately one third of all appointments by arbitral institutions in the period between 2015 and 2019 have been female, while female party appointments have been half that proportion over the same period.

Gender diversity as a topic/ consideration when appointing arbitrators

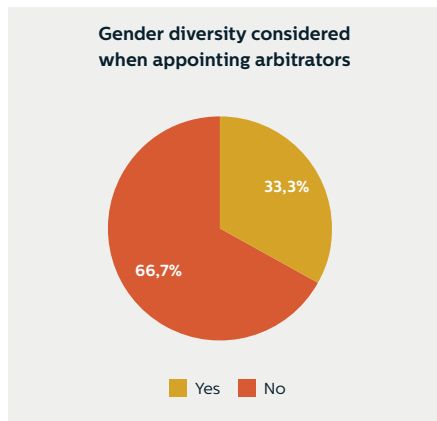
Even if a small proportion of female arbitrators were appointed, 33.3% of the respondents reported that gender diversity had been discussed in the context of arbitrator appointments in one or more of the arbitrations.

Based on the survey, the focus on gender diversity may appear to be driven primarily by external lawyers working in law firms and to a much less extent by in-house lawyers or the parties.

The survey shows that if gender diversity was a topic, it was predominantly introduced by an external lawyer.

A possible reason for this could be that arbitrator appointments are first and foremost handled by the external counsel, who often will shortlist arbitrator candidates to their clients (i.e. parties and in-house lawyers) who will then choose suitable candidates based on external counsel's proposals.

None of the respondents reported that gender diversity was brought up by an arbitral institution. This is interesting in light of the trend seen in the international arbitration community, where most major arbitral institutions generally appoint more female arbitrators than the parties and co-arbitrators. As mentioned, the proportion of female arbitrator appointments by institutions significantly exceeds the number of individual female arbitrators appointed by parties or co-arbitrators.



Age of arbitrators

Our second main thesis was that there was a lack of diversity with regard to the age of arbitrators. Therefore, we asked the respondents to provide information on the age composition of the arbitrators in cases they had been involved in the past two years. We divided the answer options into the following three age groups: i) under 45, ii) 45 to 65, and iii) above 65 years.

The survey found that in a clear predominance of cases, the tribunals were composed of arbitrators in the age groups 45 to 65 years and above 65 years. Arbitrators under 45 years had been appointed only in a few cases. Furthermore, there were clearly more arbitrations with tribunals composed of arbitrators in the last two age groups (45 to 65 and above 65) than the first two (under 45 and 45 to 65)).

Among the few respondents who stated that they had been involved in a case with an arbitrator under 45 years, only three respondents stated that an arbitrator under 45 years had been appointed in more than one case.

When compared with reports from the international arbitration community, Norway seems to be somewhat behind on age diversity in arbitral appointments in cases involving practitioners based in Norway.

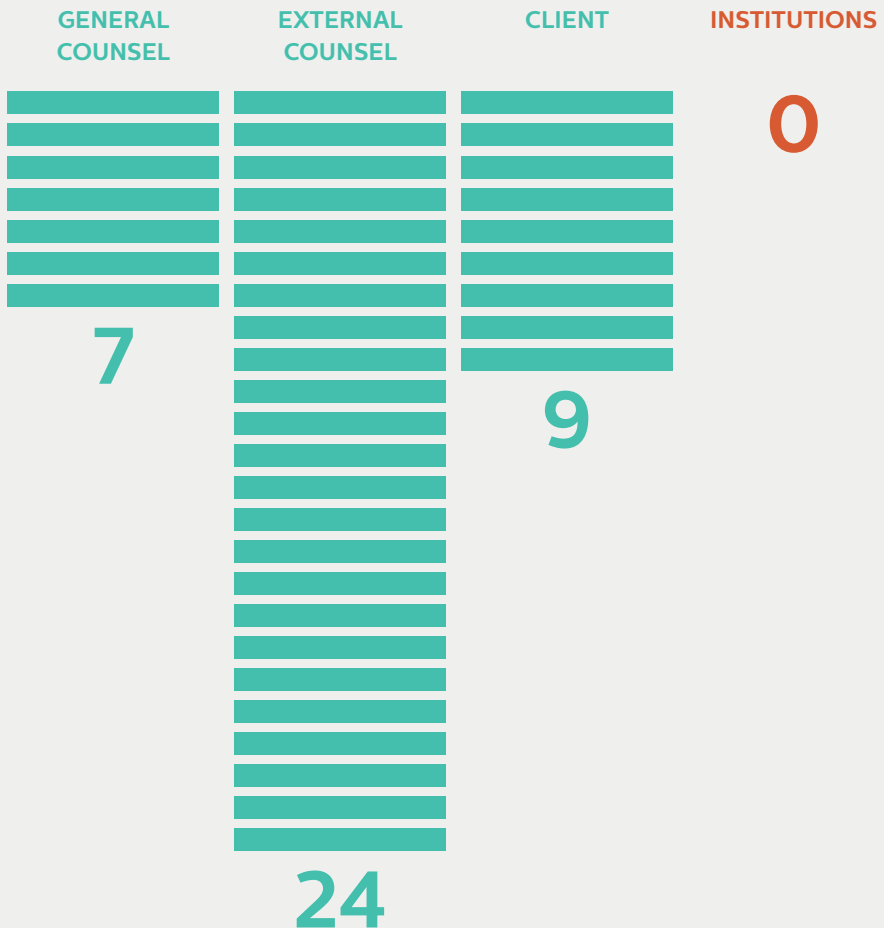
Age diversity as a topic/ consideration when appointing arbitrators

42.4% of the respondents answered that age had been a topic when discussing appointments. Also, when it comes to age diversity, the focus appears to be driven primarily by external lawyers working in law firms and to a less extent by in-house lawyers or the parties. The survey shows that if age diversity was a topic, it was predominantly introduced by an external lawyer. In the same way as for gender diversity, none of the respondents reported that age diversity was brought up by an arbitral institution.

Here, too, there are some interesting differences compared to the ICC Dispute Resolution Statistics, where arbitrators appointed by the ICC Court (directly or following a proposal by an ICC National Committee) were, as in previous years, approximately six years younger than the global average (50.5 years).



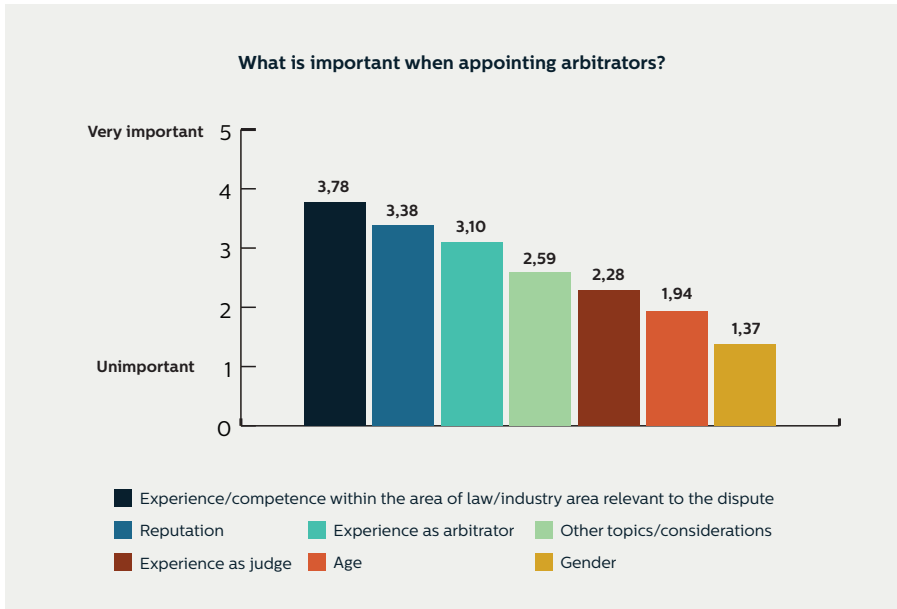
WHO RAISED THE TOPIC OF AGE OF ARBITRATORS?



What are the key considerations when appointing arbitrators?

The respondents were also asked to rate the importance of various topics/considerations when appointing arbitrators on a scale ranging from very important to unimportant. The results are shown in the figure below.

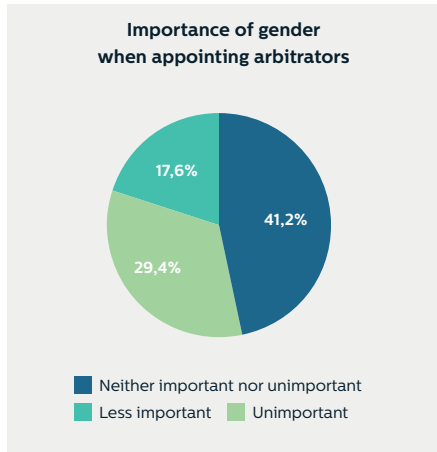
The responses demonstrate that expertise and competence in the area of law or industry area relevant to the dispute are by far the most important considerations, with reputation and experience as arbitrator as the two main runner ups.



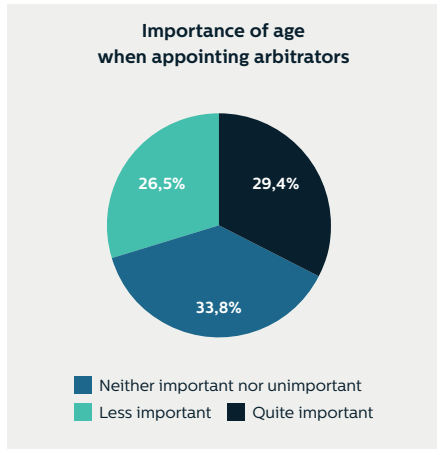
It is interesting to note that the respondents did not consider gender as an important factor (41.2% considered this factor as "neither important nor unimportant" and 29.4% as "unimportant"). This may at least tell us that the arbitration community in Norway does not request a certain gender in arbitral appointments.

However, when coupled with the fact that the traditional arbitrator is male and rather mature, and the fact that reputation and experience as arbitrator still are seen as very important considerations when choosing arbitrators, there is a certain market failure since there is no other way to secure arbitrator experience than actually sitting as an arbitrator. Additionally, unconscious bias may affect the appointments, which may not be reflected in the respondents' replies to the survey.

The above finding can be compared to research suggesting that most users of international arbitration are unsure of the importance of reflecting on gender diversity in appointments to arbitral tribunals. A survey by White & Case and the School of International Arbitration, Queen Mary University of London in 2018 found that users of international arbitration are "unsure" whether the causal connection between gender diversity on arbitral tribunals and the quality of the panel's decision-making "is a relevant enquiry to make".



Age is seen as somewhat more important than gender, but in general not a very important consideration compared to the other alternatives.





Responder comment

Gender and age are not important as such when choosing the individual [arbitrator]. But diversity in the [...] panel is very important. This applies to both competence / experience, gender and age. For example, you can choose an academic, a lawyer and one with background as a judge. At least one of these should be a woman.]

Several of the respondents emphasised the importance of personal characteristics or "soft skills", including empathy, sociability, ability to ease the parties, communication skills, analytical skills and ability to process information. Case management skills were also underlined by several respondents. The respondents also emphasised chemistry with and reputation among the other arbitrators of the arbitral tribunal. The responses, and the comments described here, reflect that the modern regime with joint appointments allow for the parties to take a more holistic approach to the composition of the tribunal.

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