# THE DIVERSITY PROBLEM IN ARBITRATION

**Authored by: John Evans (Partner), Nadia Osborne (Senior Associate) and Niah Sohal (Trainee Solicitor) - Fladgate**

The English Arbitration Act 1996 saw its 25th anniversary in January 2022.

***Arbitration as a dispute resolution method has grown rapidly in recent years (26% between 2016 and 2020) and is netting over £2.5 billion per annum for the UK economy.***

It is unsurprising against this backdrop that the Government asked the Law Commission to review whether the 1996 Act remains fit for purpose. The Consultation Paper outlining the eight proposed reforms was released on 22 September 2022. One key area of reform is discrimination in the arbitral profession.

## Interaction with the Equality Act 2010?

Under the current law, employment discrimination rules do not extend to arbitrators (as confirmed in Hashwani v Jivraj [2011]). This decision implies that the selection of arbitrators can be restricted by traits such as race, which are protected characteristics under the Equality Act 2010. The Law Commission described the selection of an arbitrator as "analogous" to the selection of a barrister, which is regulated by the Equality Act 2010.

However, this is yet to be confirmed by the courts. Additionally, the Law Commission points out that arbitration agreements with discriminatory clauses could be subject to s142 Equality Act 2010, which renders contractual terms unenforceable if they prescribe treatment of a person in a manner prohibited under the Equality Act 2010.

## Diversity deficiencies amongst arbitrators

The lack of ethnic diversity among arbitrators is manifest.

***The ICC's 2018 statistics show that 40.8% of all appointed arbitrators on ICC cases originated from Europe.***

The African Promise was launched in 2019 to boost representation of African arbitrators, particularly in disputes with an African connection. However, a consultee to the International Arbitration Survey 2021 recounted an arbitration conference on the subject of arbitration in Africa where none of the invited speakers were African. Organisations such as REAL (Racial Equality for Arbitration Lawyers) are working to promote diversity and prevent discrimination too, but again in 2021 only 31% of those surveyed felt that positive progress had been made for ethnic diversity in arbitrations (contrasted with the 61% who felt that positive progress had been made regarding gender diversity in arbitrations).

***The lack of progress on diversity in the arbitral field means that unique perspectives and understandings are being lost.***

Parties may also feel unrepresented when seeking resolution through arbitration. This could have an adverse effect on arbitral outcomes and result in dissatisfaction with this forum of dispute resolution.

## Proposed reforms

The Law Commission affirmed the decision that arbitrators are not employees for the purposes of the Equality Act 2010 as correct in law, but that equality legislation not extending to arbitrators is an issue of policy. Under the proposed reforms, (i) parties will not be able to challenge the appointment of an arbitrator on the basis of a protected characteristic (which includes race); and (ii) any agreement between the parties regarding the arbitrator's protected characteristics would be unenforceable unless an arbitration would require an arbitrator to have a protected characteristic as a proportionate means of achieving a legitimate aim (for example, the need for an arbitrator to be a particular race given the subject matter of the dispute underpinning the arbitration).

Additionally, discriminatory requirements would be ignored when courts consider the agreed qualifications required for appointment of an arbitrator, when removing an arbitrator for not possessing the required qualifications, or when an arbitral tribunal decides whether it is properly constituted.

## Light at the end of the tunnel…

The proposed reforms seem to cover both bases – if only one party is being discriminatory, that party does not have grounds to object, and if both parties are being discriminatory the agreement is not enforceable (unless the 'discrimination' constitutes a proportionate means of achieving a legitimate aim).

However, it remains to be seen whether the proposed reforms will boost ethnic diversity in arbitration. In the UK, the pool from which arbitrators are selected usually consists of experienced barristers and solicitors, judges, or commercial experts.

These are professions where ethnic minority candidates have been historically underrepresented.

***For example, in 2020 only 8% of court judges and 12% of tribunal judges were from ethnic minority backgrounds and as of October 2021 only 8% of UK-based partners at top tier law firms and less than 8.8% of King's Counsel were from this group.***

Additionally, arbitrators are often chosen through referrals and repeat appointments, hence we are unlikely to see change in the near future.

It seems, therefore, that legislative change is just one step in the journey to achieve a racially diverse arbitration profession. Rather, the proposed reforms are part of a wider issue, such that the reforms will only go so far unless and until the systemic roots of under representation and lack of access for ethnic minority candidates in the legal profession is addressed.

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