

Great Expectations: tips on securing your first arbitral appointment and starting out as an arbitrator

Sara Masters QC and Colleen Hanley

Combining counsel practice and sitting as an arbitrator is both an aspiration and a challenge. How do you secure your first arbitrator appointments and what are some best practices when you are sitting as an arbitrator?

In this third edition of *Arbitration Classics*, Colleen Hanley interviews Sara Masters QC on aspects of her experience as an arbitrator.

1. How did you get your first appointment? Was it as sole or on a panel?

I received a phone call in Chambers out of the blue from a senior maritime arbitrator asking me to chair a panel of three in a shipping arbitration. I spent the first 10 minutes of the conversation thinking it was a mistake and he had meant to phone somebody else entirely!

I think getting that first appointment is key. Whether it comes via other arbitrators (as mine did) or via an institution does not matter. Once you have that first appointment, you have something to build on and your practice will grow, albeit not overnight. Mine has now developed into a mix of ad hoc and institutional appointments both in the UK and increasingly abroad, particularly in Asia.

One other way of acquiring experience is to act as a Tribunal Secretary. This was not really available in the UK when I was starting out, although I think it has been used more prevalently elsewhere for quite some time. I think it can be very valuable. Not only do you see arbitration practitioners at the very top of their game at work, it also increases profile, is good for the CV and exposes you to practical issues that are often not dealt with in textbooks.

Finally, the question “how much experience do you need to have to be appointed?” is often raised. I waited until I had taken Silk before pursuing it with any vigor. However, I sense that is changing and people are now being appointed earlier in their careers, particularly by the institutions for lower value claims. This feeds into diversity which we touch on below.

2. What role do you think the institutions are playing in encouraging new, younger and more diverse Tribunals? Which institutions do you think in particular are making real strides in this area? I know from my own experience arbitrating how helpful and supportive the LCIA in particular have been - they gave me my first appointment as a sole.

I think the institutions are trying hard to encourage more diverse panels. I have been particularly impressed with the LCIA, and the SCC which I think has made real strides forward. I find that other institutions are still less transparent. The LCIA's statistics for 2018 (the most recent I could find) reveal that 43% of appointments by the LCIA Court were women, up from 9% in 2017. This is very encouraging.

3. Do you think parties still tend to be more conservative and are generally more reluctant to give someone new a “punt”? Have you encountered that reluctance personally? Do you think it is changing, albeit slowly?

I think this is a really difficult issue. On the one hand, there is undoubted enthusiasm in principle for “new blood”. This is not only from the lawyers. There is also a real push from the clients themselves where the increasingly pro-diversity corporate culture is being felt across the board.

On the other hand, there continues to be the concern that if it all goes wrong and the arbitrator does not perform as well as expected, the solicitor or other adviser who has encouraged the appointment of a less well-known arbitrator may lose his or her client. This leads to a tendency to stick with the “Known Knowns” even if a wider pool is considered during the appointment process.

The atmosphere is changing little by little. But looking at the LCIA statistics for 2018 (which reveal that only 6% of arbitrators appointed by the parties themselves were women with slightly better figures for appointments by co-

arbitrators at 23%) demonstrates there is a long way to go.

Being asked by party appointed arbitrators to act as “Chair” is another good way in and also has the advantage of having advice “on tap” from your co-arbitrators. That said, it is normal practice in many sectors for party appointed arbitrators to consult the parties before choosing the chair which then can lead to the same issues as regards “fear of the unknown” and “reluctance” to take a punt, as I have already touched on above.

I also think there is still an element of “window dressing” taking place. I am regularly asked to be included on lists of potential arbitrators where frankly either the nature of the dispute or the identity of the other candidates (much more experienced and almost invariably male) make it extremely unlikely that I will get appointed. I suppose that it could be said that it does get my name “out there” and that I shall be touched by the reflected glory of “reputation by association” in due course.

4. In this context, how much difference has the Equal Representation in Arbitration (ERA) Pledge made in reality? Is it even fair?

I think the Pledge has been important in getting people talking about gender diversity issues, promoting change and also developing networks particularly between more senior and junior practitioners.

The arbitration “in crowd” appears daunting at first (well it did to me). Initiatives like the Pledge makes it easier to get involved and offer inclusive and accessible networking opportunities. Arbitration practice groups in firms are well developed and tend to be highly visible. It does not

take a lot to work out who you need to target.

That said, whilst it is undoubtedly a good thing that the Pledge is “pro-women”, it is also important that it is not seen as “anti-men”. The mantra “pale, male and stale” has a ring of truth to it but should not be allowed to dominate. It should be possible to promote women without being seen to be “anti-men”. Obviously we need both new men and new women in arbitration!

There are other potential difficulties with The Pledge. Its focus on gender does not mean that other diversity issues do not exist which need to be tackled - Youth – would a young male arbitrator be justified in the current climate in saying he was being short-changed? What about ethnicity and LGBTQ issues?

In short, the Pledge is an important first step but the debate is now being widened to encompass other diversity issues and rightly so.

5. The first appointment most young arbitrators starting out get is as a sole arbitrator often dealing with parties who are not participating or engaging fully. This brings its own challenges, often with complex procedural issues arising. What are the classic issues first time arbitrators often face? What advice would you give to the new arbitrator starting out on their first appointment as a sole tribunal? Can and should you turn to older more experienced colleagues for advice and support?

It is ironic that the first appointments a newly fledged arbitrator receives are often sole appointments. One of the things I have found most valuable when acting as Chair (and chairing three person tribunals is also

a good way of securing those first appointments) is being able to talk things through with my co-arbitrators.

It can sometimes be lonely sitting on your own and stressful particularly if the parties (or their lawyers!) are on bad terms.

Colleagues are a good sounding board, although you must be careful about confidentiality. In these dark days of COVID-19, a quick chat with your colleague next door may not be available.

Where references are being administered, I have found the institutions very responsive and knowledgeable particularly regarding procedural steps. You can generally pick up the phone and get an answer in a few minutes.

Early appointments as sole arbitrators often involve default cases where one party does not take part at all. Ensuring that the party is properly served/notified of each stage of the proceedings and given a reasonable opportunity to respond can be tricky and pernicky (particularly when you are pretty certain they have no intention of ever taking part) but is essential.

Another “favourite” for the fledgling arbitrator, is parties who are obstructive or fail to engage properly (often because they have no substantive merits defence and are just trying to string out the proceedings for as long as possible).

6. When appointed as part of a panel for the first time how do you deal with other more senior members of the tribunal who may be too busy to engage properly, or worse still, not always take other members of the tribunal seriously? Have you encountered this? What advice would you give?

There is a difficulty with a small number of highly successful arbitrators sometimes taking on too many appointments and thus being, at times, able to devote enough attention as and when required. Diversification in appointments should help to mitigate this by spreading the pool of work wider hopefully to those keen to cut their teeth and eager to appear proactive.

I think communication between the members of the tribunal is key. People who ignore emails, or reply weeks later, are immensely frustrating. You don't want the parties to associate you with any delays. Equally, though, you don't want to jeopardize collegiality or your reputation as a team player by "telling tales".

I think people need to pick up the phone more than has been the case recently (although I have noticed people have been keener to hear a voice rather than send an email since we have all been at home self-isolating). Much more can often be achieved in a short telcon than in strings of email. It also prevents misunderstandings. We have all been involved in email exchanges when what was intended to be an innocuous remark, has been misconstrued or "lost in translation".

7. What has been your highlight as an arbitrator so far?

Being flown by private jet with my co-arbitrators to inspect a super yacht in the South of France.

8. And what was your lowlight?

No real lowlights so far. That said, having to conduct a jurisdiction hearing whilst on holiday from halfway up a tree (the landline failed 30 minutes before the hearing and mobile reception was extremely patchy) was challenging!



Sara Masters QC

Sara has a wide-ranging commercial practice as Leading Counsel with a particular interest in jurisdiction issues and conflicts of law. She also sits regularly as an arbitrator both in the UK and abroad.

She has considerable experience of both ad hoc and institutional arbitrations and has experience of arbitral references conducted under all of the main institutional rules including LCIA, ICC, LMAA, SIAC, SCMA, and CIETAC.

Sara is a member of the LCIA and a supporting member of the LMAA and is also a Centre for Effective Dispute Resolution (CEDR) accredited mediator.

[Read her online bio >](#)



Colleen Hanley

Colleen specialises in commercial law with a particular focus on dry shipping, commodities and international arbitration. She sits regularly as an arbitrator.

Colleen is a member of the LCIA, a supporting member of the LMAA and a member of Arbitration Ireland.

[Read her online bio >](#)

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