



Issue : Vol. 1 - issue 3
Published : July 2004

Transnational Dispute Management

transnational-dispute-management.com

Madame La Presidente - A woman who sits as president of a major arbitral tribunal is a rare creature. Why?
by M. Goldhaber

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Madame La Presidente

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A woman who sits as president of a major arbitral tribunal is a rare creature. Why?

Gabrielle Kaufmann-Kohler confuses the lawyers who appear before her. Literally an Olympian figure in the world of international disputes, Kaufmann-Kohler served as chief arbitrator for the Olympic games at Atlanta, Nagano, and Sydney, issuing rulings that affected the fate of amateur athletes from snowboarders to gymnasts. The president of the Swiss Arbitration Association, she routinely adjudicates cases worth hundreds of millions of dollars. But statistically, Kaufmann-Kohler is an anomaly. Most arbitration lawyers have simply never practiced before a woman. "Lawyers are sometimes embarrassed, and don't know what to call me," laughs Kaufmann-Kohler. "Do they say, 'Madame la presidente' or 'Madame le president?'"

The real embarrassment is that Kaufmann-Kohler was one of only two women listed as arbitrators in last year's Focus Europe survey of large arbitrations. As both advocates and arbitrators, women are vastly underrepresented by every measure in this decentralized world. Consider the field's most prestigious advisory boards, appointment panels, and Who's Who guides: Women comprise 11 percent of the International Chamber of Commerce International Court of Arbitration, 5 percent of the International Council of Commercial Arbitration, 5 percent of the ICSID Panel of Conciliators and Arbitrators, 0 percent of the London Maritime Arbitrators Association, and 4 percent of those listed in the Guide to the World's Leading Experts in Commercial Arbitration.

"There is absolutely no biological or intellectual reason why you wouldn't find the same percentage [of women as men]," says Brigitte Stern, who directs the Center for International Law at Universite Paris I. Stern is painfully aware that she and Kaufmann-Kohler form a category unto themselves: They are the only women who have served as arbitrators in more than one dispute between nations and investors under the aegis of the World Bank. The field's hottest corner, state-investor disputes typically call into play government policy and taxpayer dollars. "Especially now, with state-investor cases presenting important social questions," Stern says, "all society should be represented. When it comes to the big questions, there are not enough women. It is changing very, very, very slowly."

By consensus, the main reason for the dearth of women in high-stakes cases is a bias in appointments. The clients who make appointments--for instance, the general counsel of energy or engineering multinationals--prefer experienced lawyers who project an image of gravitas, or at least an image of gravitas with which they are familiar. This creates an echo-chamber effect. Arbitration is dominated by a few aging men, many of whom pioneered the field. In the words of Sarah Francois-Poncet of Salans, the usual suspects are "pale, male,

and stale." Because arbitration is private, the appointing parties and institutions are not subject to political pressures for diversity. Because arbitration has traditionally been confidential, the appointing parties and institutions have not, until now, been subject to pressure from the media.

Observers differ as to whether the systemic bias against women is accidental, or amounts to discrimination. Advocate Lucy Reed, a partner at Freshfields Bruckhaus Deringer, takes the benign view. "One has to remember," she says, "that it's a huge responsibility when billion-dollar decisions are decided by judges you pick yourself. It's hard to vote for anything except a proven track record of experience. Until recently there were very few women in the ranks with the experience to be selected as chief advocates or arbitrators because of how relatively new the practice is." Like most of the trailblazers interviewed for this story, Reed is confident that fair representation will come with time.

Cherie Booth Blair, the wife of British prime minister Tony Blair, is a labor law barrister who often practices before the Permanent Court of Arbitration in The Hague. She is less forgiving about the gender gap in international law disputes. "It is no longer credible," she told Focus Europe by e-mail, "to suggest that the underrepresentation is due solely to a lack of suitably qualified candidates. The more likely causes include the lack of priority that is attached to the issue, persistent ideas about the nature of suitable candidates that work against women, and systematic barriers."

Malign assumptions are hard to prove, but anecdotal evidence supports Blair's assertions. Louise Barrington, an arbitrator in Hong Kong, says she was told by a male colleague, "When a woman walks into the room for a negotiation, I assume she's a pushover until she shows me differently." Thomas Walde, a professor at the University of Dundee, tells of a male general counsel who made an even more astonishing confession. This GC told Walde that he consciously favors "old boys" in making appointments. He reasons that because the other arbitrators on a panel are likely to be old boys, he maximizes his chances of influencing them by appointing his own. As he put it to Walde, "We make appointments not to challenge perceived prejudices, but to cater to them."

This comes as no surprise to Francois-Poncet, who at 45 coheads the arbitration group at Salans. Although she will never be an old boy, she says her practice has boomed since she hit early middle age. "I have a far greater level of credibility having crossed the Rubicon of 40," she says. And while she's not doing anything to speed the aging process, she's not fighting it either. "I wasn't traumatized when I had to buy my first pair of reading glasses," says Francois-Poncet. "I thought maybe it will add to my perceived level of gravitas."

Rachel Thorn, a 33-year-old senior associate at Latham & Watkins in Paris, is nowhere near the gravitas zone. Several years ago, she says, she found herself arguing opposite an English barrister in his fifties. When they met for the first time in court, he asked her for transcripts. Sensing his confusion, Thorn responded

politely that he'd better ask the court stenographer. "It was just an unconscious act of sexism," she says.

But anecdotal evidence can as easily prove the absence of sexism as its presence. Freshfields's Lucy Reed worried how Iranian lawyers would react when she was chosen in 1989 as the chief American counsel at the Iran-U.S. Claims Tribunal in The Hague. When Reed's Iranian counterpart learned the news from Reed's deputy, he expressed dismay--for an unexpected reason. "Mrs. Reed," he exclaimed. "But she's so tall!" It seemed that the Iranian was more troubled by Reed's height advantage than her lack of a Y chromosome.

Whether the barriers they surmounted were sexist or circumstantial, it's clear that today's female arbitration stars have beaten the odds. How did they do it? Reed, who serves as lead advocate in cases of the first magnitude, says her stint in The Hague gave her the stature to compete with any male advocate. Universite Paris I's Brigitte Stern, similarly, credits a high-profile post in the public sector--serving on the U.N. administrative tribunal--with boosting her to the status of superarbitrator. But most arbitration players, male or female, made their way up the law firm ladder step-by-step. Gabrielle Kaufmann-Kohler toiled as an advocate at Baker & McKenzie in Geneva for 15 years before the panel appointments started to come with regularity. Then, in 1995, she moved as a lateral partner to the Geneva office of a leading Swiss firm, Schellenberg Wittmer.

Women who have come up through the ranks at law firms often describe a common experience of being thrown into an arbitration case as a youngster and falling in love with the field. Abby Cohen Smutny, a leading partner at White & Case in Washington, D.C., is exceptional in having chosen arbitration out of conviction rather than happenstance. After growing up on a kibbutz near the Golan Heights, under fire from the Syrian army, she resolved to pursue the peaceful resolution of cross-border disputes. Smutny's career is typical, however, in that she found a law firm mentor. For her it was White & Case's Charles Brower, who moonlights as a judge on the Iran-U.S. Claims Tribunal, and would probably be on most lists of arbitration's old boys.

Judith Gill, who heads the arbitration group at Allen & Overy, has been a pioneer since 1978, when she became the first woman admitted to her college at Oxford University. Gill studied law and parlayed her degree into a busy practice minimizing insurers' exposure to mass tort settlements. Like several women interviewed, Gill stresses that arbitration demands travel, and thanks her husband for his flexibility. "The fact that their father is home with the kids," she says, "has made it a great deal easier for me to pursue a career in arbitration."

Claudia Salomon, an associate at Squire, Sanders & Dempsey, also gives some credit for her success to her spouse--and to sheer serendipity. Salomon started her career as a local lawyer, representing counties and municipalities in Richmond. She followed her husband in his graduate studies to Arizona and joined Squire, Sanders's Phoenix office, which, improbably, is active in

international arbitration. In autumn 2001, she flew to Prague on five days notice, in what was supposed to be a stopgap assignment, to help the Czech Republic fend off a massive arbitration claim filed by Nomura Group Companies (Japan). That proved to be a key career move. Salomon never left Prague, which she describes as "ground zero" for investor-state arbitration. Her husband had the freedom to follow, and Salomon became cohead of Squire, Sanders's ten-lawyer arbitration group in Central Europe.

The future of women in arbitration may depend on the development of associates like Salomon into partners like Gill. Women already form about half the arbitration associate pool at most firms. So far, the leading firms have mixed track records in promoting them. At White & Case, six of 28 arbitration partners are women, and two of five counsel. At Freshfields, four of 36 arbitration partners are women. At Shearman & Sterling, none of the 12 arbitration partners are women. "We recognize that it's a disgrace," says Shearman's group head Emmanuel Gaillard. "We hope to fix it through internal promotions."

Some lawyers are not content to let the passage of time redress gender disparities. Louise Barrington, the Hong Kong arbitrator, became attuned to the problem a decade ago, when she noticed at an arbitration conference in Bahrain that she was nearly the only woman in the room. Barrington began gathering the names of her peers. Soon after moving from Paris to Hong Kong in 1997 to open the ICC's Asia branch, she founded "Arbitral Women." Accessed through the Yahoo! Internet portal, Arbitral Women offers a forum in which about 80 women lawyers share knowledge and opportunities. "It's not a feminist group," says Barrington. "We're there as a counterpart to the 'old boys' network."

In addition to helping themselves, women sometimes benefit from affirmative action. Francois-Poncet, for instance, believes that she has received referrals that a man might not have received from the American Arbitration Association's International Center for Dispute Resolution.

To a greater or lesser extent, all the major U.S. arbitral institutions promote diversity actively. Peter Phillips, a vice president at the CPR Institute for Dispute Resolution, headed a recent initiative to increase the diversity of his institution's panel of recommended arbitrators. Phillips says that CPR was responding to requests from Fortune 250 general counsel. Partly this may reflect the increasing representation of women in the ranks of U.S. corporate counsel, and a broad-based, ideological commitment to diversity. Partly it may reflect a different mix of cases. The American institutions sponsor both international and domestic arbitration. International cases generally pit one multinational against another, while in domestic cases, corporate parties often face employees or consumers, who like to see an adjudicator they can identify with.

The contrast with overseas sponsors is palpable. Perhaps the world's leading arbitral institution by reputation, the Paris-based ICC International Court of Arbitration named about a thousand arbitrators last year. Although it carefully collects statistics on the adjudicators' nationality, it keeps no statistics on their

gender. The ICC Court's secretary general, Anne Marie Whitesell, states that it has no official position on gender diversity.

Nonetheless, progress is discernible. In the early nineties, there were no women managing the legal teams within the ICC Court secretariat that oversee ICC awards. Today half the ICC Court counsel are female. And at one point this winter, so were all the legal interns.

From her vantage point as secretary general, Whitesell claims, she sees women making steady progress at every level. "New parties are coming in to the system all the time," she says. "New parties name new arbitrators, and they are not the old names that everyone knows. Of course with that, you are going to find more and more women coming in." Whether through law firm promotion, self-help, affirmative action, or the natural expansion of the arbitral system, more women are surely coming. For the record, Gabrielle Kaufmann-Kohler prefers to be called, "Madame la presidente." And it's a fair bet she'll find other women colleagues in our 2005 survey of big arbitrations.

*Originally published in American Lawyer - Focus Europe - Summer 2004
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