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## Diversity Amongst Arbitrators and the Usefulness of Lists - An OGEMID Discussion by S. Nappert and S.P. Woolhouse

### About TDM

**TDM** (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

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### Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at [info@transnational-dispute-management.com](mailto:info@transnational-dispute-management.com): we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

**TDM** is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

# **Diversity Amongst Arbitrators and the Usefulness of Lists**

## **An OGEMID Discussion**

**Sophie Nappert\* and Sarita Patil Woolhouse\*\***

### **On Diversity – gender and otherwise**

‘Diversity’ is a catchword that can mean different things to different people.

To transnational corporations and organisations, it represents the practical necessity of ‘hiring outside the box’ to reflect the multi-textured world in which they carry on business. To lawyers pitching for work to these same corporations, it means a different fabric in the composition of their teams if they even want to be considered.

Others view ‘diversity’ as a word carrying connotations of positive discrimination by promoting incompetence, or inexperience, or both. When the Law Society of England and Wales published its Diversity Charter with the help of a number of FTSE100 companies, the comments in *The Lawyer* made interesting, if somewhat unedifying, reading.<sup>1</sup> Similarly, Michael Goldhaber’s article on women in arbitration (10 out of 250) published in *American Lawyer*<sup>2</sup> started a provocative discussion on OGEMID.

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<sup>1</sup> <<http://www.thelawyer.com/ftse-100-clients-demand-diversity/132942article>>

<sup>2</sup> <<http://www.law.com/jsp/law/international/LawArticleIntljsp?id=1202431862583>>

OGEMID encourages open discussions on such issues and it is not the first time the forum has alluded to this question.

Is diversity only to be promoted to ‘make ourselves feel good’, as stated by the anonymous responder who claimed that ‘there are more good men than women in arbitration’? The question appears to imply that anyone different from the standard arbitrator template in gender, race, age, profession - the ‘exotic arbitrator’ - is unpredictable and thus cannot be trusted with important decision-making. Best therefore to stick to known quantities, what the discussion participants called ‘the IBM of arbitrators’. Nevertheless, from the perspective of a party wishing to appoint, it is hard to escape the observation that most women arbitrators, even those recognised in the OGEMID discussion, just do not have the critical mass of experience of their male counterparts.

What then do women need to project to attract more appointments? Regional credibility, specialist or multi-cultural knowledge and abilities (notably linguistic) may provide significant advantages. Do we really believe that the traditional landscape of arbitration has a future where the thriving economies are in China, India or Brazil? What assumptions are being made about whom users of arbitration from the BRIC countries trust as a decision-maker?

FTSE100 corporations do not promote diversity to make themselves feel good. As a matter of business judgment, it is self-interest that drives a corporation’s promotion of diversity. Mike McIlwrath stated that GE wanted to ensure that those who represented their interests reflected the diversity of their employees, customers and the places where they do business. This is a business decision that also makes eminent sense for the choice of arbitrators. In fact, if the top echelons of the arbitration field do not reflect the realities of all corners of the world (and not just Western Europe and North America), the credibility and viability of arbitration as a method of international dispute resolution is stunted.

It is clear from reading the spontaneous exchange of communications on OGEMID that there is no shortage of recognised women arbitration practitioners in the field of international arbitration (although clearly, owing to the tit-for-tat nature of the

exchange, the 'list' of women arbitrators resulting from the discussion cannot claim to be exhaustive). Despite this, apparently only 4% of the top 250 arbitrators are women. Why this disparity? Corporations which, like GE, have an internal framework in place may do their own research, but there are many other users of international arbitration (especially ad hoc users) who depend entirely on the recommendation of their lawyers, or on names put forward by international arbitration institutions. Do they hear that there may be a choice of different names? Baiju Vasani put this interrogation to OGEMID members who are part of arbitration institutions, but was not exactly deluged with replies.

Lorraine Brennan of the CPR Institute did reply that in 80% of cases, institutions are not asked to make a recommendation. Nevertheless, the institutions could start making a difference in the 20% of requests that they do receive. Frederich Blasé suggested that different fee rates could apply in relation to different categories of arbitrators (along the lines of First, Business, Economy or Super Economy). This is the very model of a system that could foster another form of discrimination, creating closed shops and associating arbitrators to a category from which it might be difficult to escape.

Visibility and networking are important features of the arbitration world. Organisations like ArbitralWomen provide women with a means to share experience, make their own lists and be generous with their knowledge, contacts and recommendations. Yet, many women avoid women-only networks, just as many ethnic minority arbitrators avoid fraternising with each other. Efforts are concentrated on blending in and toning down differences; they do not want to be singled out as needing 'positive discrimination'. They believe that challenging the status quo and raising uncomfortable questions is against their interests and will diminish their chances of appointment. Are they right? The very reserved female participation in the OGEMID discussion on women arbitrators is striking.

### **The Usefulness of Lists**

Is Catherine Roger's proposed resource for arbitrators or ArbitralWomen's database the way forward? Would this not lead to the need for further lists for the other

‘adjectival’ arbitrators, as Dev Krishan aptly put it? Do we need more empirical research as is being carried out by Susan Franke *before* any action can be taken?

Some users of arbitration would welcome a list of women arbitrators or a database. Would women rather appear in an international all-inclusive list of arbitrators than in a list of women-arbitrators? Would South Asian arbitrators like to appear in a list of international arbitrators or one of South Asian arbitrators? How about Latin Americans, Chinese or other nationalities? Would appearance in a list mean that they will be more likely to be appointed as arbitrators? The most important impetus will come from arbitration users and their legal advisers.

As is often the case with OGEMID discussions on ‘difficult’ topics, we end up with more questions than answers. Yet the exchange of views indicates a (small) step forward.



**Read the discussions in the TDM OGEMID Archive:**

To access the archive you will need to sign in at TDM ([www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)) first. Once logged in you will find a navigation button in the menu which will take you to OGEMID section. The service is now operating, though we are striving to enhance it in terms of search efficiency and scope of content.

**# Too Few Top Women Arbitrators, Mark Kantor, 30 June 2009**

<http://www.transnational-dispute-management.com/members/ogemid/2009/06/threads.asp#00132>

*Followed by comments by: A.R. Boerner, Anthony Sinclair, Baiju Vasani, Catherine Rogers, Christian Campbell, Cynthia Lichtenstein, Domenico Di Pietro, Friedrich Blase, Hew R Dundas, Jane Wessel, Joseph Matthews, Liz Bossley, MARIS (OGEL & TDM publisher), Mark Kantor, Michael Bond, Michael McIlwrath, Sarita Patil Woolhouse, Sophie Nappert, Stephen Bond, Susan Franck, Tom Johnson, Tore Wiwen-Nilsson Victorino Tejera*

**# Too Few Top Women Arbitrators - A further anon response, 30 June 2009**

<http://www.transnational-dispute-management.com/members/ogemid/2009/06/threads.asp#00168>

**# Re: A further anon response, 30 June 2009**

<http://www.transnational-dispute-management.com/members/ogemid/2009/06/threads.asp#00131>

**# The importance of lists, anonymous, 2 Jul 2009**

<http://www.transnational-dispute-management.com/members/ogemid/2009/07/threads.asp#00003>

**# Adjectival Arbitrators, Devashish Krishan, 2 July 2009**

<http://www.transnational-dispute-management.com/members/ogemid/2009/07/threads.asp#00004>

As outlined in the article the above this was not the first time this topic was discussed:

**# Crossing the Gender - line (are there other lines to cross), Thomas Wälde, April 2008**

<http://www.transnational-dispute-management.com/members/ogemid/2008/04/threads.asp#00082>

<http://www.transnational-dispute-management.com/members/ogemid/2008/04/threads.asp#00085>

followed by a number of other posts that same month

<http://www.transnational-dispute-management.com/members/ogemid/2008/04/threads.asp>

**# Why no women party-appointed expert witnesses? US-non-US cultural divides, Thomas Wälde, February 2007**

<http://www.transnational-dispute-management.com/members/ogemid/2007/02/threads.asp#00029>

**# Women or Men - who are the better mediators?, Prof. Dieter Flader November 2006,**

<http://www.transnational-dispute-management.com/members/ogemid/2006/11/threads.asp#00091>

And a simple search in the TDM OGEMID archive for 'women' or 'gender' will show some more results.