

With women hugely under-represented in ADR, its institutions have a key role to play in ensuring greater diversity in appointments, according to international arbitrator Melanie Willems FCI Arb, and a number of her peers

Redressing the balance

By Jill Evans
Photography: Peter Searle

IMAGINE YOU'RE CASTING THE lead role in the most important movie of your career. Your own and other's livelihoods depend on its success. Do you pick the untried actor who you've heard is good, or the tried and tested star performer? Actors know the answer to this one only too well.

When appointing an arbitrator or mediator, the parties to a dispute don't take chances either. They pick a dispute resolver who has a host of similar roles behind them, and this has led to the top of the arbitration profession being dominated by men.

Women are becoming more involved in ADR, although hitherto the majority have been in training and administrative roles. Since 2009, the number of women joining CI Arb has doubled, from around 50 to 100 each year. Women account for about 14 per cent of CI Arb's membership; there are currently 1,809 women out of a total of 12,501 members. Of those that have expressed an interest in a specific discipline of ADR, around a quarter have an interest in arbitration, slightly fewer in mediation, and a much smaller proportion in adjudication. Nearly half (40 per cent) of female arbitrators are interested in international arbitration.

This is potentially a fruitful area of work for female arbitrators. Melanie Willems FCI Arb is a law firm litigator and

international arbitrator based in London. She thinks the amount of arbitration work now stemming from the Far East and the former Soviet republics, often involving arbitrator appointments by the arbitration institutions, could provide "an open door for the selection of women as arbitrators".

However, women arbitrators are conspicuous by their absence in international investment treaty arbitration. In a recently published paper (*Perspectives*, The Vale Columbia Center on Sustainable International Investment) York University, Toronto, law professor Gus Van Harten says that of the 631 appointments in 249 known cases up to May 2010, only 41 were women - 6.5 per cent. Most of those (75 per cent) went to two arbitrators, Gabrielle Kaufmann-Kohler and Brigitte Stern.

The two most frequently appointed men only accounted for 5 per cent of male

appointees. The lack of women in this context is important, says Van Harten, "not because women would necessarily make different choices to men, but because arbitrators who make decisions of public importance should reflect the make-up of those affected by their decisions".

Willems says: "The way to change things is through the institutions - for people who are in a position to appoint outside the usual list to take a chance occasionally when they have the opportunity. We need to hold the institutions to account on appointments and on the composition of panels, and ask them where the women are on their lists."

"I would be very interested to know how many women are practising as full-time arbitrators, and how many appointments the ICC, LCIA and ICSID are making a year. If the institutions do appoint a woman, it's one woman getting appointed six times. That doesn't reflect any kind of diversity."

The small proportion of women currently getting to the top in ADR seems to have a parallel in law firms. Recent research from legal recruiters Laurence Simons shows only 16 per cent of partners in the UK's Magic Circle law firms are women, but this, along with the Netherlands, is the highest proportion in Europe. Two-thirds of the female lawyers in the survey stated gender as a barrier to their success.

"Arbitrators should reflect the make-up of those affected by their decisions"

PROFILE

WOMEN IN ADR

➔ “In the law there are all sorts of workplace practices that lead to high attrition rates and not enough women in the pipeline,” says Fiona Woolf, consultant at CMS Cameron McKenna, and former President of the Law Society of England and Wales. “I’m not sure what we should be doing about [the shortage of women] in ADR,” she says. “I tend not to think there is active or passive discrimination as such.”

CI Arb past president and Chartered Arbitrator Hew Dundas FCI Arb thinks the male:female ratio in CI Arb membership has remained virtually constant at all levels up to Chartered Arbitrator - unlike law firms, where high attrition rates keep women’s numbers low at the top, but more equal with men at the bottom. He also points out that CI Arb has had two female presidents since 2000, and the Worshipful Company of Arbitrators two lady masters - “one of the very few livery companies to do so”, he says.

He’s not convinced about bias in arbitrator appointments either. “In my time as President, I don’t recall ever thinking about gender in making appointments,” he says. “I was looking at facts on a CV and choosing the best candidate for the job. I have been involved in arbitrations where my co-arbitrator is female and the chair is female, but they’ve been chosen not because of that, but because they are the best people. I’ve not seen any discriminatory bias, either express or implied. But I don’t say it doesn’t happen.”

Louise Barrington FCI Arb is a practising Chartered Arbitrator in Hong Kong, where there are a couple of dozen people working in arbitration full-time, only a quarter of whom are women. She’s been involved in arbitration since 1986.

Finding herself one of a handful of women rising through the arbitration ranks, in 2005 she co-founded an organisation called ArbitralWomen, dedicated to fostering the role of women in international dispute resolution, through networking communications and training. Starting with 80 members, the organisation now has around 500 women members worldwide. In addition to organising meetings for members, it has provided a mentoring programme and sponsors teams attending the Vis Arbitration Moots in Vienna or Hong Kong, provided they are composed of at least 50 per cent women.

She attributes her own success at getting appointed partly to “longevity”, but also to “being in the right place and making people aware I’m here and can do the job”. She would advise women starting out in arbitration today

WOMEN AT THE TOP

Off the record, some women in ADR describe the under-representation of women in the higher echelons as “scandalous” and “disgraceful”. On the record, these women are more circumspect, fearing injuring their own professional reputations.

One woman said she was “furious” about the under-representation of women as arbitrators, but felt unable to put her views in the public domain. She told *The Resolver*: “There is definitely a problem. I have seen many talented women give up simply because they don’t want to fight any more - having to continually assert their worth when their male equivalents are not given the same degree of scrutiny. I’ve come across a male arbitrator whose written award was such gobbledegook he was censured by the court, but who is still practising and getting appointed. We’ve had a couple of elderly gentlemen who fell asleep during hearings.

“Ultimately there is a small group of arbitrators currently practising who are doing very well out of it. They don’t want the competition of extra people on board. Until they retire there’s not much of an incentive to change things.”

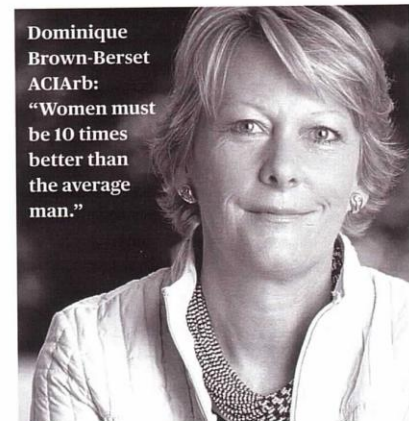
to “get hands-on experience - without it you won’t go anywhere”. While she thinks “being a woman in this business can be an attribute” she also says that “playing the female card in an obvious way is to be avoided”.

“There are still certain people who look on women in arbitration as an aberration, and some men are threatened by such behaviour, although that’s much less the case than 15 years ago. The best thing women can do is to be super-competent, to persevere and have a relatively thick skin.”

“The best thing that women can do is to be super-competent, persevere and have a thick skin”



Louise Barrington FCI Arb co-founded networking organisation ArbitralWomen



Dominique Brown-Berset ACI Arb: “Women must be 10 times better than the average man.”

International arbitrator Mark Kantor FCI Arb was chosen last year to receive ArbitralWomen’s Honourable Man award as someone who “takes affirmative steps to help advance women in the field”, says current president Lorraine Brennan. Kantor thinks women have been prevented from having a greater presence in the ADR field by “the same barriers that any woman who seeks a career as a professional faces. A residual structural sexism - a system that is geared around decision-making by men - the biological fact that women bear children and men do not, and the social allocation of responsibility for child-rearing mainly to women.”

But he says that the international treaty world does offer hope for correcting the imbalance because “states actually play a bigger role than foreign investors in selecting arbitrators”. He says when it comes to promoting diversity, “you get a little more bang for your buck when you aim at the state, and try to get it to change its approach towards whom it selects as arbitrators”.



International arbitration litigator Melanie Willems believes a demand for arbitrators in the Far East and former Soviet republics could open the door for the appointment of women

→ EVENING UP THE BALANCE

Possible measures to achieve better representation of women at the top of the ADR profession:

- Introducing a quota system for women arbitrator appointments by arbitral institutions;
- All ADR training to include a section on taking gender into consideration;
- Positive action, such as ensuring equal numbers of men and women serve on influential committees within institutions;
- Lobbying states to include more women on rosters from which arbitrators are selected for investment treaty arbitration.

Willems, who is also a member of ArbitralWomen, thinks a quota system could address the problem, although she admits she has the same knee-jerk negative response to the idea as other women: "There are as many good women as men in this profession who could be brought to the fore, and the anti-quota issue is profoundly discouraging women from fulfilling their role in society." She accepts that the small pool of regularly appointed arbitrators is arbitration's "strong

core of excellency", but thinks objective criteria in the selection process would ensure that broadening this pool would not lower standards.

Amanda Bucklow FCI Arb (Mediation) is one of the few women at the top in her profession. She thinks a quota system would be counter-productive, just as political correctness in the wake of equal opportunities legislation "didn't remove the glass ceiling, it just made it more difficult to see".

"To succeed," she says, "women still have to compete on men's terms."

She thinks better negotiations skills training could help more women get appointed.

"There is a myth that women are not as strong as men in getting what they want in a negotiation because they have a tendency to accept lower value settlements," she says.

She thinks this is because women have a capacity to take more into consideration, so they will give up more value in monetary terms for alternative tangible benefits. "If women boost their negotiation skills" she says, "and understand better what helps them make decisions, they will be better at speaking the language that makes people confident they are the right people to hire as mediators."

Dominique Brown-Berset ACI Arb, a member of ArbitralWomen and founding partner of a dispute resolution law firm in Geneva, says the number of arbitrations she takes on are limited by her lead counsel work, a much rarer role on the continent for women than as arbitrators. She thinks to be successful in arbitration women must have two things. They must be "10 times better than the average man", she says "and have someone to share everything with. I could not have done it without my husband being a full-time carer sometimes for three weeks at a time when I had hearings and our kids were very young."

She's not in favour of quotas, but wonders whether institutions should not be adopting the same kind of positive action as European law schools, appointing women before men when faced with two equal candidates.

Ultimately, what's needed is cultural change, she says. "I was the first woman co-chair of the arbitration committee of the International Bar Association. We really started to develop a culture, followed by all my successors, of requiring that it should be half women and half men on the committee. And I made sure that after I stepped down there would be another woman in charge. When this kind of culture is ingrained, we will see positive changes, little by little."

Louise Barrington is similarly optimistic. She thinks women have already made great strides in arbitration, and believes the feminisation of the legal profession will eventually correct the imbalance. "Women will, in a grassroots sense, become more and more visible in all areas of arbitration as more women go into law. It will happen," she says.

Jill Evans is a legal journalist

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