

A study on female involvement in commercial arbitration in Vietnam

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ABSTRACT

Gender equality has been a significant concern in the process of policymaking as well as legislative promulgation, including domestic and international commercial arbitration, in Vietnam for years. Although women are given more opportunities to participate in commercial arbitration activities and contribute ideas on policy-making, their actual participation is still limited in practice as evidenced by the number of female arbitrators as well as cases resolved by them. This research aimed to provide a methodological approach to the participation of women in the operation of commercial arbitration centers in Vietnam, based on the fact that, in addition to harmonization in arbitration operations, diversity is becoming increasingly important. The paper came up with the reasons for lack of female participation in arbitration, which are (i) the traditional division of labour in Vietnamese -> households; and (ii) men holding leadership roles. Based on the reality of the lack of female representation in arbitration activities and the assumed reasons for this situation, the author argued that this situation should be concerned and changed due to the benefits achieved when more female arbitrators are involved in arbitration activities, such as reducing group-thinking, improving communication efficiency and controlling emotions during the arbitration process, and promoting the equality and effectiveness of arbitral awards. The statistical method was employed to draw a precise picture of the appearance of male and female arbitrators in various arbitration centers. In addition, the legal analysis approach was used to provide a perspective from legal prism on the factors that go into selecting the arbitrators in Vietnam. Lastly, the theoretical methodology was employed to provide the theoretical framework for practical analysis as well as provide the recommendations for discussion.

Key words: feminism, female, arbitration, arbitrators, gender equality

INTRODUCTION

Arbitration is an alternative dispute resolution that involves a neutral third party, selected by the disputing parties, who has the authority to provide the final and binding decision. For years, the popularity of commercial arbitration is increasing rapidly due to its advantages over other types of dispute resolution methods, which are, among others, high confidentiality and allowing the autonomy of the parties in choosing the arbitrators¹. By their own choice, the disputants can select the experts with in-depth knowledge of the conflicting matter that they trust to involve and make the best decision for their case.

It could be seen that the elected arbitrators often share some characteristics. As said by John Bickerman, chair of the American Bar Association Section of Dispute Resolution, “In terms of the big cases, we see the same names all the time, and they are the same very accomplished, well-established, high-profile white men that have been doing this for the past ten or fifteen years.”² Back in time, the same view had been thoroughly shared by Dr. K. V. S. K. Nathan

that “An observer from the planet Mars may well observe that the international arbitral establishment on Earth is white, male and English speaking (...)”³.

The dominant involvement of males in arbitration keeps remained until now even though women have been as numerous as men in law schools as well as law firms over the past decades. The point here is that this appearance is not reflected at all levels, as women are less likely to be at the top positions in different professional areas. For example, there are only 9 female heads of state in the world while there are 190 countries; or women make up just 2% of the CEOs of Fortune 500 companies in the U.S.⁴ Commercial arbitration is no exception, as women are less likely to be selected as arbitrators as well as chosen by disputants to be the one taking charge of solving the dispute.

In Vietnam, over the past years, women have played a more and more significant role in legal affairs. In general, they currently make up more than a half of total undergraduate students or law students,⁵ and of the workforce in private sectors⁶. Nevertheless, as the same tendency of other countries, this does not

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demonstrate the great discrepancy between job opportunities and the female workforce in arbitration in Vietnam.

This work aims to illumine (1) the fact of participation of females in arbitration activities in Vietnam; (2) the reasons behind this scenario; from that to lead to the discussion on (3) the negative consequences of the lack of women in commercial arbitration; or conversely, the benefits of women's participation in commercial arbitration activities; and come up with (4) various suggestions that can be taken to bring about change.

METHODOLOGY

To highlight the small number of female arbitrators in Vietnam, the statistics method was employed to draw a precise picture of the appearance of male and female arbitrators in different arbitration centers. Besides, the legal analysis approach was used to provide a view from legal prism on the elements in electing the arbitrators in Vietnam. Lastly, the theoretical methodology was employed to provide the theoretical background for practical analysis as well as provide the recommendations for discussion.

RESULTS

Statistics on the participation of women in arbitration

There are few publicly available data regarding the appointment process released by the arbitration centers. Instead, there are lists of arbitrators are opened for researchers. In Vietnam, there are 35 arbitral institutions, of which 34 are Arbitration Centres ("ACs")⁷. Most of such ACs have only 10 arbitrators or less. The surveys conducted for the 07 leading ACs show that:

- Pacific International Arbitration Centre (PIAC)⁸: 268 arbitrators, of which 223 males and 45 females (16.79%);
- Vietnam International Arbitration Center (VIAC)⁹: 166 arbitrators, of which 134 males and 32 females (19.28%);
- Southern Trade Arbitration Center (STAC)¹⁰: 104 arbitrators, of which 83 males and 21 females (20.19%);
- Vietnam Lawyers' Commercial Arbitration Center (VLCAC)¹¹: 70 arbitrators, of which 52 males and 18 females (25.71%);
- ASEAN International Commercial Arbitration Centre (ACIAC)⁷: 37 arbitrators, of which 33 males and 04 females (10.81%);
- Indochina Trade Arbitration Centre (ITAC)⁷: 33 arbitrators, of which 25 males and 08 females (24.24%);
- Vietnam Traders Arbitration Centre (VTA)⁷: 29 arbitrators, of which 20 males and 09 females (31.03%);

Consequently, the number of female arbitrators in the largest ACs in Vietnam accounts for one-third to one-tenth of the total arbitrators therein.

The situation in the smaller ACs seems to be light different. The ratio of female arbitrators and male arbitrators in smaller ACs tends to be more balanced. In these ACs, the female arbitrators occupy 20% - 50% in total number varies case by case⁷. However, due to the number of arbitrators in these ACs being quite small (05 – 06 arbitrators), it is hard to say these numbers represent the equal ratio of the female and male arbitrators.

At present, although no statistical figure shows the proportion of females designated to resolve disputes in Vietnam, it is recorded in the US, a pioneer in gender equality, women designated for arbitration make up a particularly small percentage of arbitrators¹². The statistics of the International Chamber of Commerce (ICC). in 2015 shows that women represented 10% of all appointments and confirmations¹³. The statistics of ArbitralWomen presents the percentage of women appointed as arbitrators in 2016 was around 17%, up considerably from 12% in 2015, and 6% in 2012¹⁴.

These statistics reveal a gender imbalance in arbitration, ranging from the number of female arbitrators appointed to the number of cases handled and resolved by female arbitrators, although the enumeration showed that the number of female students in the higher education and legal sector over the years is equal or more than that of male⁵.

Analysis of legal regulations and arbitration rules set out by related ACs

As required by the Law on Commercial Arbitration 2010, an arbitrator is selected by the concerned parties or appointed by an authorized AC or Court to deal with disputes [Article 3.5, 15]. That arbitrator must satisfy the following requirements: [Article 20.1, 15].

1. Full capacity for civil acts as prescribed by the Civil Code;
2. Undergraduate degree and a minimum of 5 years of professional experience;

3. For special cases, despite not satisfying the requirements of paragraph b above, a professional with high professional qualifications and gaining a wealth of hands-on experience can be selected as an Arbitrator.

The persons not allowed to hold the office of Arbitrator comprise: [15, Article 20.2].

1. Judges, Prosecutors, Investigators, Bailiffs, public officials at People's Courts, People's Procuracies, Investigation Authorities or Enforcement Authorities;
2. Accused, defendants, persons serving a criminal sentence or fulfilling such sentence but such sentence is considered as unspent.

However, each AC is entitled to impose further requirements stricter than those described in Clause 1 of this Article on its Arbitrators. So, no law prescribes gender discrimination against arbitrators.

Regarding the dispute settlement by an Arbitral Tribunal, the Arbitral Tribunal may consist of one or more Arbitrators as agreed by the parties [15, Article 39]. Arbitral Tribunal is organized in the 02 following forms: [15, Article 41].

Arbitral Tribunal at AC: Unless otherwise agreed by the parties or required by rules for arbitral proceedings, within 30 days after obtaining the petition and request for arbitrator selection served by AC, the concerned defendant must select a qualified Arbitrator and notify to AC or request the President thereof to appoint such Arbitrator, failing which such Arbitrator shall be appointed by that President within 07 days as from the end of such 30-day period. If more than one defendant is involved in the dispute, within 30 days after obtaining the petition served by AC, those defendants must reach the agreement on Arbitrator selection or request for such selection, failing which such Arbitrator shall be appointed by that President within 07 days as from the end of such 30-day period.

Ad-hoc Tribunal: Within 30 days after obtaining the petition of the petitioner, the defendant must select his/ her Arbitrator and notify the petitioner of such Arbitrator, failing which, and no further agreement on Arbitrator selection is reached by the parties, the petitioner may request an authorized Court to designate a proper Arbitrator. If more than one defendant is involved in the dispute, within 30 days after obtaining the petition and attachments, those defendants must reach the agreement on Arbitrator selection. In case no Arbitrator is selected and no further agreement on Arbitrator designation is reached by the parties within such period, either party or the parties

may request an authorized Court to appoint Arbitrator.

Thus, no legal provision or rule for arbitral proceedings adopted in Vietnam gives advantages to any arbitrator of any gender in Arbitral Tribunal or Arbitration Centre.

In consideration of the regulations on university enrolment and admission in Vietnam such as Law on Education No. 43/2019/QH14 enacted by the National Assembly on June 14, 2019, the Government's Decree No. 84/2020/ND-CP dated July 17, 2020, and related documents, women are not prohibited from or restricted to participation in higher education. The regulations on enrolment and admission introduced by certain educational institutions such as the Ho Chi Minh City University of Law¹⁶, Hanoi Law University¹⁷, University of Economics and Law – Vietnam National University – Ho Chi Minh City¹⁸, etc. give no limitation or restriction on gender. Thus, legal training and education also give no such limitation or restriction. In other words, under law, both men and women are offered equal opportunities for legal training and education.

Causes for lack of female participation in arbitration

The traditional division of labour in Vietnamese household

Vietnam is a country long influenced by Confucianism. This ideology imposes women and men in two opposing positions, in which men are often assigned important responsibilities such as earning money and making decisions. In contrast, Confucianism believes that women are on the “weak” side and should only play the role of supporting their husbands and taking care of the children. That is why so far, the division of labour in households in Vietnam has been mainly based on the gender role perspective and this view is mainly formed and maintained by Confucianism¹⁹.

However, due to the impact of globalization and the strong economic development in Vietnam, consumer culture, Western feminism, movements promoting women's rights and liberation as well as other economic empowerment movements for women, Confucianism is likely to be reduced in influence. The most obvious effect during the 40 years after opening-up is the increase in female proportion in the workforce, especially in recent years⁶, while in the previous period, the legal profession was being male-dominated and women primarily played the role of housewife caring for their families¹⁹. Consequently, the legacy of the traditional division of labour in Vietnamese families is

that women have not entered into labour relations for a long time which caused them troublesome to participate in professional areas that required high-qualified standards.

In the arbitration area, a large number of women are trained and educated on the processes of dispute settlement, however, in fact, the participation of these women in the arbitral tribunal is much more limited than men despite their higher qualifications than those of men. As mentioned above, the presence of women in the legal profession has been only improved recently. Since, in the past, women's job was to look after the families and men's one was to earn money, women did not get practical experience. In other words, women did not get enough experience to become arbitrators, a position requiring "considerable" experience in a related profession with several years of practice.

Lead positions held by men

It is said by the author that the major cause hindering women from being arbitrators is that women's prospects of promotion to higher or senior positions in the legal profession are much lower than men's. The number of women accounts for approximately a half of law graduates, however, in senior positions, on average, males outnumber females. The majority of directors and partners of leading law firms in Vietnam such as VILAF²⁰, Baker & McKenzie²¹, YKVN²², Nishimura & Asahi²³, etc. are males.

In addition, bar associations, colleges, universities, law schools, and available positions are managed or held by males, forming an invisible barrier to female participation because such positions are developed for well-qualified males. It is hard for women to compete for the same position as males.

The male dominance in arbitration results in the lack of role-model female arbitrators strives for. This is because the large number of females practicing in legal affairs has been shown in 14 recent years only (after Vietnam became a party to WTO), so they have not gained much trust or experience as males, their opportunities for being appointed to resolve the disputes are certainly less than males' ones.

The lack of highly experienced female arbitrators causes the increased participation of young women in the legal profession, resulting in the lack of role models inspiring and encouraging women's learning and supporting them to achieve success as arbitrators in commercial arbitration.

DISCUSSION

Based on the reality of the lacking of female presentation in arbitration activities as well as the assumed reasons for this situation, the author argued that this situation should be concerned and changed due to the benefits achieved when more female arbitrators involve in arbitration activities.

Minimizing "groupthink"

A larger proportion of females in arbitral tribunals is going to minimize the problems of decision-making by group or based on "groupthink". Irving Janis, in his study published in 1972, defined "groupthink" as "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."²⁴ It is demonstrated in a study that, when a decision is made by a group, the members thereof tend to draw harsher conclusions or unpopular opinions than those to be made in their capacity of individuals²⁵. This is because the persons involved in decision-making are not aware of their own responsibility for such decisions.

Such a phenomenon of groupthink becomes extremely dangerous if all members of the tribunal have similar characteristics and life experiences. In other words, risks of "groupthink" are exacerbated when "a very cohesive and tend not to see alternative solutions."²⁴ Conversely, a less cohesive group allows members to feel free to express critical opinions.

Some other studies also prove that the companies or corporations under the "gender-balanced leadership" are operated and run better and faceless risks than their male-dominated competitors². The operations of companies with 03 females or more in total senior managers are proved more efficient with respect to the work environment, motivation and leadership. "The arbitration is not untouched by this phenomenon", said Caroline dos Santos²⁶. The addition of females to arbitral tribunals is so essential to avoid unnecessary risks and provides high motivation and leadership for a successful arbitration.

Improving communication efficiency and controlling emotions during the arbitration process

In addition to their contribution to the reduction of gender bias and groupthink-related problems, women also have other gender-specific characteristics making them ideal candidates for the posts of arbitrators. Many studies carried out to analyze the differences in

communication and decision-making styles between men and women identify that women have some characteristics likely positively affecting arbitration.

Another study points out that, while stress impairs empathy, including emotional intelligence and the ability to perceive other people's viewpoints, and the ability to detect deception in men, stress increases all these things in women²⁷. Besides, for men, stress "reduces confidence and ability to distinguish their feelings and intentions from those of others."

This is particularly associated with the arbitration process since the arbitration environment is often of high stress, possibly causing men to lose their empathy, and resulting in troubles in communicating with the concerned parties of disputes or even coming to a decision unpleasant to others. Since stress does not affect the empathy in women, the addition of females to arbitral tribunals likely increases the empathy and understanding between the parties and the possibility of reaching a decision or award satisfactory or favorable to all parties, not only arbitrators.

In addition, women pay more attention to time and money and are more concerned about the impacts of their decisions on others²⁸. These qualities are of paramount importance in arbitration as the factors including time or cost-saving and avoidance of unnecessary negative impacts are among the major reasons why the parties desire to settle disputes through arbitration. The aforesaid addition of females to tribunals ensures that these major factors are fully considered in all aspects during decision-making, and therefore gaining the satisfaction of both arbitrators and clients.

Promoting the equality and effectiveness of arbitral awards

Sexism or gender bias has a significant impact on arbitrator appointments and the potential effect on arbitral awards. Therefore, the addition of females to arbitral tribunals may make more equal awards not subject to conscious or subconscious sexism. The foregoing is also confirmed by the studies analyzing the effects of arbitrators and gender on arbitral awards. In such a study conducted on more than 500 arbitral proceedings, the possibility of male arbitrators making awards appealed or complained by females is 74% higher than that of female arbitrators making awards appealed or complained by males²⁹. Moreover, both women and men, in any case, are treated equally by female arbitrators while such equality seems not to be assured if those arbitrators are males. Thus, it is further concluded that the female arbitrators have less sexism or gender bias during making arbitral awards

than males. For this reason, such an addition of female arbitrators likely helps eliminate such sexism or gender bias.

The campaign of "Equal Representation in Arbitration Pledge"

As a campaign to encourage people in arbitration areas to take a step towards more actively participating in the arbitration activities, the "Equal Representation in Arbitration Pledge"³⁰, supported by the Arbitral Women, a network of women from 40 countries in international dispute resolution founded in 1993³¹. The Pledge symbolizes the arbitration community's promise to diversify the arbitrator pool, crystalized in the signature of people concerned as a sign that we would keep that promise. By 2020, there are more than 4000 signatories of the Pledge, including leading ACs, i.e. LCIA and SCC³². This campaign aimed to raise the issue of diversity in arbitration with parties engaged, especially clients of the ACs, and asked for the compromises of the ACs. It is considered as one of the most concerning campaigns that hold for balance gender in arbitral activities.

CONCLUSION

A comparative approach shows that Vietnam also shares a common situation with several countries that the number of female arbitrators is still much smaller than that of their male counterparts although there is no significant difference between women and men in undergraduate and postgraduate training, including in the legal profession. This situation, unsurprisingly, does not come from the distinction in the law, but from various social reasons such as the tradition of the family division of labour, the absence of lead female lawyers, and lead female arbitrators for a long time that caused the absence of successive generations. However, with the benefits of diversifying the composition of arbitrators such as limiting group thinking, the author argues that diversifying the composition of arbitrators, including gender diversity, should be more concerned in Vietnam. To this end, one proposal was discussed that women are encouraged to actively participate in arbitration activities and campaigns to enhance women's influence in this area such as the "Equal Representation in Arbitration Pledge".

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The authors declare that they have no conflicts of interest.

AUTHOR'S CONTRIBUTION

All content of the article is done by the author only.

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TÓM TẮT

Bình đẳng giới đã và đang là một mối quan tâm trong quá trình hoạch định chính sách cũng như ban hành pháp luật trong nhiều lĩnh vực ở Việt Nam trong nhiều năm qua, trong đó có lĩnh vực liên quan đến hoạt động của trọng tài thương mại. Mặc dù phụ nữ được tạo cơ hội ngày càng nhiều hơn để tham gia vào hoạt động trọng tài thương mại và đóng góp ý kiến vào việc hoạch định chính sách, nhưng sự tham gia thực tế của họ vẫn còn hạn chế thể hiện ở số lượng trọng tài viên nữ cũng như các vụ việc mà họ đảm nhận giải quyết. Nghiên cứu này nhằm cung cấp một cách tiếp cận phương pháp luận đối với sự tham gia của phụ nữ vào hoạt động của các trung tâm trọng tài thương mại ở Việt Nam, dựa trên thực tế rằng, bên cạnh sự hài hòa thì sự đa dạng ngày càng trở nên quan trọng trong hoạt động trọng tài. Bài viết tổng hợp ra các lý do khiến số lượng ít phụ nữ tham gia trọng tài, có thể kể đến đó là (i) sự phân công lao động truyền thống trong hộ gia đình Việt Nam; và (ii) số lượng lớn nam giới nắm giữ vai trò lãnh đạo ở nhiều lĩnh vực. Trên cơ sở thực tế của việc thiếu nữ giới trong hoạt động trọng tài và những nguyên nhân dẫn đến tình trạng này, tác giả cho rằng tình trạng này cần được quan tâm và thay đổi do những lợi ích đạt được khi có nhiều trọng tài nữ tham gia vào hoạt động trọng tài, chẳng hạn như giảm tư duy nhóm, cải thiện hiệu quả giao tiếp, kiểm soát cảm xúc trong quá trình trọng tài và thúc đẩy sự bình đẳng và hiệu quả của các phán quyết trọng tài. Phương pháp thống kê đã được sử dụng để mô tả một bức tranh toàn diện về số lượng các trọng tài viên nam và nữ trong các trung tâm trọng tài khác nhau. Ngoài ra, cách tiếp cận phân tích pháp lý đã được sử dụng để cung cấp góc nhìn từ lăng kính pháp lý về các yếu tố dẫn đến việc lựa chọn trọng tài viên ở Việt Nam. Cuối cùng, phương pháp luận lý thuyết đã được sử dụng để đưa ra các khuyến nghị thảo luận.

Từ khoá: nữ giới, nữ quyền, trọng tài, trọng tài viên, bình đẳng giới

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