

Kluwer Arbitration Blog

Women in Arbitration in Brazil

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The development of arbitration in Brazil has been accelerated in recent years. In fact, although the Brazilian Arbitration Act was enacted in 1996, only five years later the Brazilian Constitutional Court (the “Supremo Tribunal Federal”) recognized the constitutionality of the law and ratified the understanding that any disposable right could be the object of arbitration.

But it was not until 2002 that Brazil ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards. Thus, it was only in 2002 that the arbitration system – with regards both to internal and international awards – was duly regulated in Brazil.

With a proper arbitration system established, the use of this alternative method of dispute resolution has increased significantly over the past years. For example, in 2013, 147 arbitral proceedings were administered by the five most important Brazilian arbitration chambers, in comparison to 2005, when these chambers only administered 21 proceedings. In addition, the number of proceedings conducted under the ICC Rules involving at least one Brazilian party is also evidence of the development of arbitration in Brazil: in 2012, 82 disputes were arbitrated under the ICC Rules, placing Brazil as a country with the fourth largest number of arbitral proceedings in the world, and the country with the most such references in Latin America.

One aspect on which scholars and practitioners have not focused is gender diversity in Brazil’s arbitration field. In view of that, we have conducted research to analyze the present situation regarding women in arbitration in Brazil and we found the current panorama not as promising as desired.

In order to understand the role of women in arbitration, it is important to first analyze the current situation of women in the legal field generally. Law schools were created in Brazil in 1827, but women were only allowed almost 80 years later, after the enactment of Decree n. 3.903, in 1901.

Regarding the presence of women in law school, in 2012, from the 2442 students who were enrolled at the University of São Paulo, one of Brazil’s most prestigious universities, women represented only 37% (968 students). If we turn our attention to women graduates and analyze their presence in the legal field, women represent 45% of all lawyers regularly registered with the

Brazilian Bar Association, in contrast to men that represent the other 55%.

Although the proportion of men and women in the law market is higher than women attending law schools, it is not enough to demonstrate the real scenario of women in Brazil. In fact, we were able to verify that many women start their careers as lawyers; however, few of them reach the top of their careers. This phenomenon is called “pipeline leak” where identified causes are: (i) a sexist working environment; (ii) difficulties in juggling more than one career, such as working both as a lawyer and as a mother or manager of the household; (iii) shortage of women as role models or mentors; and (iv) absence of flexibility at work or, even where there is some, women are not encouraged by their employers or other employees to achieve leading positions. (See Lucy Greenwood & Mark Baker “Getting a Better Balance on International Arbitration Tribunals” 28(4) Arb. Int’l (2012) 653, 657.)

Focusing our attention specifically on the arbitration field, it is important first to consider the international scenario. In 1995, the ICC appointed or confirmed 766 arbitrators: 22 women (3%) and 744 men (97%). Three years later, this proportion had not significantly changed: the London Court of International Arbitration (LCIA), for example, nominated 66 arbitrators, only one of whom was a woman (1.5%). (Lucy Greenwood & Mark Baker, op. cit., at 663-664). Although the situation is changing, there is still a lot to do: in 2011, from the 318 arbitrators appointed by the ICC Court, 36 were women, i.e. 11.32%. (This number was kindly provided by Mirèle Philippe, Special Counsel, ICC International Court of Arbitration.)

The lack of women acting as arbitrators is not just a problem in international commercial arbitrations. Investment arbitrations also tend to have fewer women than men as members of arbitral tribunals. From the 254 proceedings concluded by the Centre for Settlement of Investment Disputes (ICSID) between 1972 and 2012, of the 746 arbitrators who served, only 42 were women (6%), while 704 were men (94%).

Brazil, unfortunately, follows the same scenario. The percentage of women listed as arbitrators the most prominent Brazilian chambers is very low, and this underrepresentation has not changed very much in recent years. From 2013 to 2014, for example, not only was the average female presence on these lists between 8% and 26%, but in some chambers the number of women decreased during the same period.

Even if women are represented on the arbitration chambers’ lists, very few are effectively nominated to act as arbitrators. In March 2014, for example, from 129 arbitral proceedings, the Center for Arbitration and Mediation from the Chamber of Commerce Brazil-Canada (CCBC) had 48 women acting as arbitrators, which represented 37% of the total nominated arbitrators. From a total of 23 arbitrations administered by the Arbitration Chamber of the Stock Exchange (CAM), a chamber that administers arbitral proceedings related primarily to corporate and capital market disputes, only 3 women participated as arbitrators; that represented only 17% of the total number of nominated arbitrators. It is important to note that, although the presence of female arbitrators in CCBC proceedings is higher than that in CAM arbitrations, the 48 CCBC proceedings mentioned above do not involve 48 different women acting as arbitrators. The universe of women that are chosen to act as arbitrators is in fact small, some women benefitting from repeat appointments.

Some possible reasons for the obstacles that women have to face when pursuing arbitration careers in Brazil were identified by the authors in the process of conducting research for this article. First, as few women reach the top of their careers, the younger generation of women arbitration lawyers

has few role models to follow. The lack of successful women in the field, with few exceptions, also discourages younger women to follow this path. Moreover, there is still unequal treatment when men analyze women doing their jobs: in fact, men tend to presume competence and attribute a higher level of skills to other men. Thus, women usually feel that it is necessary for them to prove their competence and skills on a day-to-day basis.

Furthermore, as in international scenarios, in Brazil, the parties typically agree that the co-arbitrators will choose the president of the tribunal. In the appointment process, it is possible to verify that male co-arbitrators are not concerned with appointing women, preferring the nomination of the so-called “usual male suspects”. (See also, Lucy Greenwood & Mark Baker, op. cit., at 661). Additionally, even if arbitration is increasing exponentially in general, based on the current practice, we were able to conclude that this area is still restricted to few practitioners – “repeat players” –, which is also a reason why it is difficult for women to insert themselves into the equation.

From the above, we can conclude that at a first glance women might be discouraged to pursue and achieve higher accomplishments in the arbitration field. This should instead represent a departure point for every young woman lawyer interested in arbitration. If now there are few women working and representing women in arbitration, the future generations should act together with the successful female arbitrators, to benefit from their experience and their desire to enlarge women’s presence in this law field. In this context, it is worthwhile mentioning that some organizations offer mentorship programs to achieve this purpose, such as for example ArbitralWomen.

Also, young generations may also wish to look for institutional assistance on access of women to arbitration and generally in the legal field that many law firms and non-governmental organizations provide. Education on how skilled women can lead or contribute to the work of arbitral tribunals should also encourage parties and co-arbitrators to designate them as arbitrators or presidents of tribunals, in order to avoid the “pipeline leak” of talented women in the field.

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?2 Partner, Castro, Barros, Sobral, Gomes

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