

CANADA'S PLACE IN THE WORLD OF INTERNATIONAL ARBITRATION

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I. INTRODUCTION

On the occasion of the first issue of the *Canadian Journal of Commercial Arbitration*, it is fitting to include a perspective on the international arbitration community in Canada, its history to date, and its prospects for playing a significant role on the world stage in the years to come. This brief article, fashioned from a recent speech given by the author, provides such a perspective. It begins by recounting key events in the development of the field in Canada and acknowledging a number of the individuals who have contributed to that development. It goes on to describe the economic importance of promoting major Canadian centres as seats and hearing venues for international arbitrations; and it concludes with some observations on the prospects for fostering a legal community to support Canada as an important centre for international arbitration.

II. A BRIEF HISTORY

The history of the international commercial arbitration community in Canada is brief. Until the beginning of this century, the Arbitration Committee of the ICC Canadian National Committee was the only permanently formed national professional organization in Canada dedicated to international arbitration. When the author was admitted to the roster, there were just 32 members, only one

* Professor, Osgoode Hall Law School, Vice Chair, ICC Canada. This article is based on the author's keynote address at the 2018 Annual Symposium of the Chartered Institute of Arbitrators, Canada Branch upon receiving the CIArb Canada Award for Distinguished Service in Arbitration in Canada. The author wishes to thank the Honourable Barry Leon, FCIArb for his substantial assistance in adapting the speech for publication; and Gerry Ghikas, QC, C. Arb for his helpful suggestions.

of whom was a woman.¹ The Arbitration Committee was then in the early stages of admitting new members.²

In previous decades, the ICC National Committee consisted of a small group of distinguished arbitrators,³ the most successful of whom pursued careers in cases overseas. With a few important exceptions,⁴ its membership was based primarily in Montreal and Toronto, with annual meetings of the ICC National Committee alternating between the two locations. Significant early contributions to the development of the field occurred in Québec, notably an international colloquium organized by Professors Nabil Antaki and Alain Prujiner in Quebec City in 1985, following which all the provinces and the Federal government adopted the Model Law, and Canada ratified the New York Convention. The Canadian participants included Edward Chiasson QC, Paul Gélinas, Professor Jean Gabriel Castel QC and McGill scholar, Professor John Brierley. This was one of a series of high-level conferences organized by Nabil Antaki to follow.

However, under the successive presidencies of David Haigh QC, the late Honourable Benjamin Greenberg, John Lorn McDougall, Gerry Ghikas QC, and the Honourable Barry Leon, the ICC National Committee spread its membership across the country and began holding annual meetings in Vancouver and Ottawa. In 2002, as interest in discussing arbitral procedure developed, the Arbitration Committee introduced an informal symposium on Friday afternoons before the Saturday morning annual meetings. The symposium has since grown into a significant annual international arbitration conference with 150 or more attendees coming from a dozen or more countries; and ICC Canada has established a proud tradition of contributing to the work of the ICC Commission and the ICC

¹ The late Paule Gauthier, PC, OC, OQ, QC, https://en.wikipedia.org/wiki/Paule_Gauthier.

² The roster grew steadily over the years until it was transformed in 2014 into a web-listing open to all members of the Arbitration Committee of ICC Canada.

³ Such as Yves Fortier, PC, CC, OQ, QC, Ad.E., Marc Lalonde, PC, OC, QC, and Henri Alvarez, QC.

⁴ For example, the Honorable Edward Chiasson, QC, FCI Arb, who led the Committee from 1975-1995) following its initial leader, Professor Jean Gabriel Castel (1960-1975); and David Haigh, who led the Committee from 1995-2002.

Court.⁵ At that time, in 2003, the annual John E. C. Brierley Memorial Lecture was launched at McGill University Faculty of Law and has since hosted some of the leading thought leaders in the field.

In 2004, a small group from ICC Canada served in an advisory role to establish the Young Canadian Arbitration Practitioners ("YCAP"), comprising young Canadians in arbitration who are located in Canada and around the world. YCAP has since gone from strength to strength as an organization supporting the development of the careers of younger members of the profession.⁶

On the young arbitration practitioners front, since 2000, Canadian teams have been among the most successful at the Vis International Commercial Arbitration Moot in Vienna.⁷ It is a special tribute to Professor Anthony Daimsis, in coaching the teams from the University of Ottawa as they have been unsurpassed in their history of success in the competition. Other Canadian teams have also excelled in their performance, regularly winning prizes for written and oral advocacy, including those from McGill University Faculty of Law; Queen's University Faculty of Law, coached by Professor Joshua Karton; and Osgoode Hall Law School, coached by the author, who won the Moot in 2004. These achievements are emblematic of the collective commitment of a growing international arbitration community in Canada to foster the practices of younger members. Many Canadian arbitration practitioners supported these important mentoring efforts, by hosting practice rounds and providing valuable feedback. Many Canadian arbitration practitioners have served as arbitrators at the Moot and at the sister moot in Hong Kong, the Vis East Moot, which was founded and is organized each year by Canadian Louise Barrington, C Arb.⁸

Another signal development was a series of annual conferences from 2001-2006 organized by Babak Barin, now the Honourable Justice Barin of the Quebec Superior Court. These conferences made important contributions to the development of the field in Canada, both by enhancing the legal and practical knowledge of Canadian

⁵ <http://www.chamber.ca/arbitration/>.

⁶ <http://www.ycap.ca/>.

⁷ <https://vismoot.pace.edu/>.

⁸ <https://www.cisgmoot.org/>.

arbitration practitioners about international arbitration, and bringing many leading arbitration practitioners to Canada from the U.S. and Europe to learn more about arbitration in the Canadian jurisdictions and to meet members of the Canadian international arbitration community. The conferences were held each year under the auspices of the Canadian Bar Association in conjunction with various leading arbitral institutions and bodies, including the ICC, LCIA, UNCITRAL and ICDR, and were held in Toronto, Montreal, Calgary, Ottawa and Halifax. This five-year series of international arbitration conferences led up to the 2006 International Council for Commercial Arbitration (“ICCA”) Congress in Montreal,⁹ which was organized by Babak Barin with the Honourable Marc Lalonde PC, OC, QC.

ICCA 2006 was immediately followed by the 2006 Biennial Conference of the International Law Association, ILA2006, in Toronto,¹⁰ co-chaired by the Honourable Barry Leon, Milos Barutciski, and the author, who were aided by a large and impressive organizing committee. ILA 2006, which was the largest ILA biennial conference ever, included an arbitration track of programs. One of these may have been the first program anywhere to highlight the importance of diversity in international arbitration, under the name “The Changing Face of International Arbitration”. It featured a 15-member panel reflecting the increasing diversity in gender, race, age and geography of the international arbitration community.

These two conferences in 2006 proved to be the largest international commercial arbitration events to date in Canada. They were significant in enabling Canadian practitioners to meet many of the world leaders in the field, and enabling practitioners from around the world to see first-hand the promise of the Canadian legal community to distinguish itself in the field of international arbitration. A number of other international arbitration conferences and symposia have been held since 2006, including the arbitration programming of the 2010 Annual International Bar Association Conference in Vancouver, the LCIA and AAA/ICDR

⁹ 18th ICCA Congress “International Arbitration 2006: Back to Basics?”, organised by the International Council for Commercial Arbitration (ICCA) - Montreal (Québec) - 31 May to 3 June 2006, <https://www.arbitration-icca.org/>.

¹⁰ 72nd Biennial Conference of the International Law Association, “The World Is Here” - Toronto (Canada) 4-8 June 2006, <http://www.ila-hq.org/>.

symposia and conference, an IBA regional international arbitration conference, and a Rocky Mountain Mineral Law Foundation conference on international arbitration. Most recently, IBA Arbitration Day was held in Montreal in March 2019, accompanied by an LCIA symposium.

In 2004, a group, initially composed of ten arbitration practitioners, established an informal supper club, the Arbitration Roundtable of Toronto ("ART").¹¹ ART members met regularly to discuss the latest developments in arbitration and to share experiences and recent insights with one another. The idea caught on in the West with the Western Canadian Arbitration Roundtable (WCART)¹² soon being formed. From time to time, the Arbitration Roundtable of Toronto held outreach events to spread the awareness and understanding of arbitration, for example, by holding breakfast sessions for commercial lawyers and corporate counsel on the subject of arbitration agreements; and it promoted Toronto and Canadian arbitration at conferences held outside Canada, including with hockey pucks bearing tag lines such as "Arbitrators Who Give a Puck".¹³

At that time, the author was invited to head the first chapter of the North American Branch of the Chartered Institute of Arbitrators ("CI Arb"), the Toronto Chapter. With most of the members of the Arbitration Roundtable being fellows of the Chartered Institute, ART meetings and outreach activities effectively replicated those of a CI Arb chapter, leaving only the need to provide information to those interested in joining the CI Arb or finding out more about the Institute's courses.

After a number of years of seeking ways to expand the Arbitration Roundtable of Toronto without changing its intimate and informal format, its members eventually settled on re-constituting it as the Toronto Commercial Arbitration Society ("TCAS"),¹⁴ with membership open to all who were interested in international arbitration. Since its formation in 2010, TCAS has flourished as an organization

¹¹ <http://arbitrationroundtable.com/members.html>.

¹² Now the Western Canadian Commercial Arbitration Society: <https://wccas.ca/>.

¹³ A phrase coined by the late Randy Pepper, an ART member.

¹⁴ <https://torontocommercialarbitrationsociety.com/>.

supporting commercial arbitration, both domestic and international. The TCAS mission includes arbitration programming in Toronto and importantly, promoting the use of commercial arbitration in Canada and the use of Toronto as a seat and a venue for international arbitration. TCAS hosts an annual symposium and other events supporting various initiatives. It sponsors a full-year course on arbitration led by William Horton, called the TCAS Gold Standard Course.¹⁵ Shortly after ART transformed into TCAS, WCART became the Western Canada Commercial Arbitration Society (“WCCAS”). Among other activities, WCCAS holds annual arbitration conferences in Calgary focussed on the oil and gas industry.

Also of note in arbitral organizations, the ADR Institute of Canada (“ADRIC”)¹⁶, with its regional affiliates, is an organization that administers arbitrations and is primarily devoted to domestic arbitration and mediation. ADRIC was the product of a merger of the Canadian Foundation for Dispute Resolution (Calgary) (“CFDR”) with the Arbitration and Mediation Institute of Ontario. CFDR was initially led by William Hartnett of Imperial Oil, who was passionate about the use of arbitration in disputes in the energy industry. Since 2002, ADRIC has published the bilingual *Canadian Arbitration and Mediation Journal*.

In 2012, Arbitration Place was founded under the inspired leadership of Kimberley Stewart.¹⁷ Arbitration Place has helped to raise the profile of Toronto and Canada as a leading-edge location for international arbitration, both as a seat and as venue for hearings. It provides world class arbitration hearing facilities in Toronto and now in Ottawa and is ranked among the leading ten hearing centres in the world, hosting many large international commercial and investment treaty arbitrations, and bringing leading international arbitration practitioners to Canada.

The year 2012 was significant for the Chartered Institute in Canada because Tom Heintzman OC QC took up the reigns of the Toronto Chapter and led the efforts of the Toronto and Montreal chapters to establish a Canadian Branch. This initiative bore fruit

¹⁵ <https://torontocommercialarbitrationsociety.com/gold-standard-course/>.

¹⁶ <http://adric.ca/>.

¹⁷ <https://www.arbitrationplace.com/>.

in 2017 with the launch of CIArb Canada, currently chaired by Paul Tichauer, and the creation of new chapters in Vancouver and Calgary. In recent years, the International Centre for Dispute Resolution established ICDR Canada and, in 2015, issued Canadian Dispute Resolution Procedures.

Throughout much of this time, the understanding of the law and practice of international arbitration has been supported by authors such as Brian Casey, whose *Commercial Arbitration in Canada* is currently in its third edition, and many others who have published monographs and articles in the field. These include the bilingual *Journal of Arbitration and Mediation*, founded in 2010 and supported by the Université de Sherbrooke Faculty of Law, Université de Montréal Faculty of Law, and the Winkler Institute for Dispute Resolution at Osgoode Hall Law School; and the bilingual *McGill Journal of Dispute Resolution*, founded in 2015. Now, thanks to Juris and all those involved in editorial, advisory and article-writing roles, Canada has its own journal of commercial arbitration, this *Canadian Journal of Commercial Arbitration*.

The history of the international commercial arbitration community in Canada is necessarily incomplete in failing to recognize the many Canadians, too numerous to name individually, who have served with distinction as counsel and arbitrators and in leadership roles around the world in international arbitration institutions and organizations. All of this highlights how far the international arbitration community in Canada has come in such a short time; and as in recent bids for the ICCA Congress to be held in Vancouver, how closely the members of the arbitration community from across the country have worked together to build the field. However, it is the foundation for the message to be conveyed in this essay.

III. PROSPECTS AND OPPORTUNITIES

Looking ahead, it will be important for all Canadian arbitration practitioners to recognize that international dispute resolution and, in particular, international commercial arbitration is rapidly gaining significance as an integral feature of the world economy. Strategic investments in strengthening the arbitration community can secure important competitive advantages for Canadian businesses and for Canada.

Becoming an attractive seat for arbitrations can have a profound impact on the potential for attracting international commercial activity and for supporting a thriving economy. It is difficult to overstate the economic significance of this. To offer just a few illustrations, the 2016 UK Legal Services Report noted the legal services sector contributed £25.7 billion to the UK economy and generated £3.3 billion in annual export revenue.¹⁸ In a similar recognition of the economic significance of international arbitration, the Singapore government is completing a project to triple the size of the main hearing facility in Singapore, Maxwell Chambers.¹⁹ In Toronto, at the opening of Arbitration Place in 2012, the economic consulting firm Charles Rivers Associates was commissioned to study the economic impact of arbitration in Toronto. It concluded that the approximately 425 arbitrations that occurred annually in Toronto at that time contributed some \$265 million to the economy (an amount exceeding that of the Toronto International Film Festival, the second largest film festival in the world).²⁰

The news today is full of the global flux in trading patterns and the effect it is having on dispute resolution: in anticipation of Brexit, several international commercial courts have been established in Europe to draw on potential losses of cases from the Commercial Court in London.²¹ Shifting U.S. immigration and foreign policies have resulted in hearings being held in Toronto in cases where visa access to the US has become difficult. Also, to mention a few of the effects of the Belt and Road initiative, it has encouraged the ICC to open offices in the PRC²² and CIETAC to open offices outside the PRC, including in Canada.²³ In the spring of 2019, the Beijing Arbitration Commission and Arbitration Place signed an MOU to

¹⁸ Taken from The City UK, UK Legal Services 2016 (July 2016).

¹⁹ https://en.wikipedia.org/wiki/Maxwell_Chambers.

²⁰ <http://www.crai.ca/publication/arbitration-toronto-economic-study>.

²¹ Janet Walker "Specialised International Courts: Keeping Arbitration on Top of its Game" (2019) 85 Arbitration 2.

²² <https://iccwbo.org/media-wall/news-speeches/new-shanghai-office-lays-groundwork-for-icc-asia-developments/>.

²³ http://www.cietachk.org/portal/newsPage.do?pagePath=%5Cen_US%5Cnews%5C47b2705e0eb49c7f001&type=center.

establish greater cooperation and understanding. These developments in trade and their related developments in dispute resolution alone serve to make case for responding to the challenges and the opportunities opening up for Canada in the world economy.

IV. A WORLD-CLASS ARBITRAL SEAT?

Over the last year, the author had the privilege of pursuing an initiative with the support of Global Arbitration Review and the Chartered Institute of Arbitrators to establish an index of the world's arbitral seats ("GAR-CI Arb Seat Index") based on the *CI Arb Centenary Principles for a Safe Seat for International Arbitrations*,²⁴ which seeks to facilitate the evaluation of established and newer seats for their ability to support an effective arbitral process and to secure an enforceable result. The first edition of the Index, reviewing six seats, was launched in November 2018.²⁵ As few arbitration practitioners have a genuinely global perspective on arbitral seats, the Index aspires over time to serve as a source of guidance for commercial parties in selecting arbitral seats,²⁶ particularly in a world of dramatically shifting trading patterns. In time, Toronto and the other centres in Canada will be added to the Index. The question that might well occur is, "how would Canadian centres fare?" Indeed, for many reasons that are obvious to Canadian arbitration practitioners, they would fare well.

Canadians are privileged to enjoy cities that are safe, clean, relatively inexpensive, and have well-functioning infrastructure to support the logistical needs of conducting business and managing disputes. Arbitration Place has secured a reputation for world-class service and facilities, reflecting the convenience and effectiveness of hearing facilities in Toronto and elsewhere in Canada. Canada has

²⁴ Informally called, the "London Principles" they were developed by a working group led by Lord Peter Goldsmith QC and CI Arb Companion Professor Doug Jones AO.

²⁵ Following a rigorous assessment based on input sought from around the world by Global Arbitration Review, a knowledgeable Assessment Panel convened by the author, and a renowned Advisory Board, overseen by the co-chairs Lord Goldsmith and Professor Jones: <https://globalarbitrationreview.com/edition/1001277/gar-ci-arb-seat-index>.

²⁶ Janet Walker "The London Principles and their Impact on Law Reform" (2018) 84 *Arbitration* 174.

long been among the most multicultural of countries,²⁷ and the business community has developed strong connections with business communities around the world. Canadians welcome and support that engagement, and they are eager to promote ready access to Canada for those involved in commercial dealings and the disputes that might arise.

Further, Canada was the first jurisdiction to adopt the UNCITRAL Model Law, and in response to the 2006 revisions to the Model law, the Uniform Law Conference of Canada commissioned, and adopted in 2012, the Report of the Working Group on International Commercial Arbitration led by Gerry Ghikas, QC, which considered the options for a uniform statute.²⁸ The comprehensive and thoughtful analysis contained in this report provided a solid foundation for representations to the legislative committee in Ontario in 2017 by a group from TCAS to support the implementation of the current version of the Model Law, which has since been implemented in British Columbia. With the Model Law, Canada has the state of the art in arbitration laws. All of this bodes well for the future.

On a point that may be less obvious, Canada has a legal profession that is of an extraordinarily high standing. The effect of requiring an advanced degree for admission to practice, and maintaining strict limits on the number of accredited law schools and stringent requirements for the accreditation of foreign-trained lawyers, has been to create an almost unparalleled competition for places in the educational programs that serve as a gateway to the profession. Even as restrictions on access to the legal profession are eased, the legal community in Canada continues to enjoy a reputation for a level of expertise and dedication among practitioners and jurists that is outstanding among the most advanced legal systems of the world.

All these factors are of critical importance for the support of Canada as a centre for international arbitration. They are necessary features, but not sufficient for excellence as an arbitral seat. As is evident from the analysis of other seats in the Seat Index, one

²⁷ <https://www.bbc.com/news/world-us-canada-46086919>.

²⁸ <https://www.ulcc.ca/en/civil-section/108-civil-section-current-topics/1318-international-commercial-arbitration>.

feature common to the world's greatest centres for arbitration is a rich and deep knowledge of international arbitration across a broad sector of the legal community – not just the capacity to step up to the mark and learn what is needed if called upon to participate in an international arbitration, and not just the necessary expertise among a small group of specialists – but a demonstrably solid understanding of arbitral law and practice among a critical mass of practitioners and judges across the legal community.

There is a significant strength in the field of domestic arbitration in Canada, but the challenge remains to establish a sufficient foundation in the field of international arbitration to encourage commercial parties from around the world to look regularly to professionals in Canada for the many services they can provide. These include designing international dispute resolution protocols; advising when disputes arise; representing parties in arbitrations and in the courts in arbitration-related matters; and serving as arbitrators in these matters. Arbitration practitioners from Canada who have gained an international reputation have a strong standing in the field and are highly regarded. However, they remain a small group of specialists, not the critical mass necessary to support a place for Canadian centres among the world's great seats of arbitration.

It is vitally important to disseminate knowledge of the field to those in Canada who might seek to develop a practice in arbitration, and to increase the awareness of arbitration among those who might foster its use. The more that the legal and business communities in Canada know about arbitration and the more they are seen to know, the more that Canadians will be sought out for reliable advice and representation in disputes, and in the business deals in which disputes arise; and the more the members of the world business community will want to seat their arbitrations in Canada.

The contributions of those mentioned in this article, and of others are important to strengthening the profession in Canada in the field of arbitration, and to realizing Canada's promise for joining the ranks of the world's great centres of international arbitration. The *Canadian Journal of Commercial Arbitration* aspires to further this important endeavour. It is a privilege to contribute to it.

