

# Moving Forward: Cooperation and Competition to Build the Caribbean Arbitration Market

29 January 2018

Nassau, The Bahamas

**The Honourable Justice Barry Leon**  
Commercial Division, Eastern Caribbean Supreme Court  
British Virgin Islands

# 5 Topics

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1. Arbitration to Enhance a Jurisdiction's Economy
2. Competition: A Lesson from Canada
3. Chartered Institute of Arbitrators'  
Principles for an Effective, Efficient and Safe Seat  
for International Arbitration

## 5 Topics cont'd

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4. A Rising Tide Lifts All Boats – Cooperation Trumps Competition
  
5. Thoughts on Building the Caribbean Arbitration Market  
+  
12 Things We Can Do Now to Increase Arbitration in the Caribbean

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# Arbitration to Enhance a Jurisdiction's Economy

# Lord Chief Justice Thomas

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“The contribution legal services make to the U.K. economy is substantial.”

***The Lord Chief Justice, Lord Thomas***

*24 July 2017*

*at opening of Business and Property Courts for Wales*



**CI Arb**  
evolving to resolve

# Close the Gap

Building the Industrial Strategy and the ADR sector  
Chartered Institute of Arbitrators (CI Arb)

# “Close the Gap: Building the Industrial Strategy and the ADR Sector”

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**£25.7 Billion**

- **Legal services market's contribution to UK economy valued at £25.7 Billion**
- **1.6% of U.K. GDP**

*Chartered Institute of Arbitrators (CI Arb)*

*June 2017*

# Arbitration in Toronto: An Economic Study

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***2012, Charles River Associates, Economic  
Consultants***

***commissioned by Arbitration Place***

**“Arbitration has a significant footprint  
on Toronto economy.”**





## Arbitration worth over a quarter-billion dollars a year to Toronto economy *Study discloses economic impact of confidential process*

Sept 12, 2012 (Toronto) – Toronto will play host to an estimated 425 arbitrations this year bringing \$256-million into the city's economy, according to a study commissioned by Arbitration Place, a state-of-the-art Canadian arbitration centre, and conducted by consultants at global consulting firm Charles River Associates (CRA).

Arbitration involves the private resolution of business disputes and public data is not collected. **Arbitration in Toronto: An Economic Study** is believed to be the first report to gather this type of information and quantify the sector's financial impact on Canada's largest city.

"These results confirm what many of us have suspected for some time: Arbitration has a significant footprint on the Toronto economy and it should be on the radar screen of anyone promoting Toronto as a business and financial centre," says Kimberley Stewart, CEO and founder of Arbitration Place. "Arbitrations employ a significant range of legal and financial experts but Toronto's hotel and restaurant workers, taxi drivers, retail outlets, airport and airline employees will also benefit from the \$256-million being spent here this year."

To put the value of arbitration in context, the Toronto International Film Festival issued a report in 2010 concluding it generated an economic impact of \$170-million on the city's economy from its year-round activities.

Consultants at CRA surveyed Toronto-based arbitration lawyers in the spring of 2012, asking them to provide estimates of all-in costs that they've incurred on arbitrations in the past three years including for legal fees, arbitral expenses and other associated items such as travel, accommodation and meals. The completed responses provided a pool of almost 3,000 arbitrations from which to draw data.

The result sheds some light on the historically confidential proceedings. It shows the vast majority of arbitrations, 68.9%, are resolved within two years from the time they begin – much faster than court trials.

The study also compares the economics of an arbitration between Canadian parties and an international arbitration, with the results making it clear that bringing an increasing number of international disputes to Canada – a neutral jurisdiction comfortable with both common and civil law – could be very big business for Toronto.

A 2010 World Bank study cited by CRA researchers suggests Canada is well placed to win an increasing amount of lucrative international arbitration work. It ranks Canada fifth out of 87 countries for conditions favourable for arbitrating commercial disputes, behind the UK, Singapore and France – among the world's top international arbitration centres – and well ahead of the United States.

Arbitration Place, which has forged formal affiliations with the London Court of International Arbitration ("LCIA") and ICC Canada, the Canadian National Committee of the International Chamber of Commerce, has been working to raise Canada's profile as a global hub for arbitration, says Yves Fortier, one of the centre's Resident Arbitrators.

"Toronto has everything it takes to be an international seat of arbitration," says Fortier. "It is a cosmopolitan city, relatively close for US companies, it shares a similar legal system and uses English as its predominant legal language. Toronto provides a neutral non-US jurisdiction and our courts have a great reputation for supporting arbitration and enforcing arbitral awards."

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- Toronto to host estimated 425 arbitrations in 2012 bringing **CDN \$256 Million** into city's economy.

*By way of comparison . . .*

- Toronto International Film Festival – 2<sup>nd</sup> largest film festival in the world – generated economic impact of **CDN \$170 Million** on Toronto's economy in 2010.

➤ **Arbitrations generate considerable accompanying economic activity:**

- ❖ **Use local lawyers, experts and arbitrators**
- ❖ **Use support services: reporting; interpretation; translation; printing; audio visual**
- ❖ **Also use beneficiaries of business tourism: hotels, restaurants, caterers, taxis, retail outlets, entertainment facilities, airports and airlines**

- **“Arbitration should be on the radar screen of anyone promoting Toronto as a business and financial centre.”**

- **“The potential impact on the local economy can be significant.”**
- **“The more that can be done to draw arbitration to Toronto, the faster spending will grow.”**

# Major Financial Centres are Arbitration Centres – Not a Coincidence

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- **Dubai**
- **Geneva**
- **Hong Kong**
- **London**
- **New York**
- **Singapore**
- **Stockholm**

# Competition: A Lesson from Canada

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- **Several Canadian cities pursuing international arbitration:  
Montreal, Toronto, Calgary and Vancouver**
- **U.S and Switzerland have similar experience – unlike France, UK, Sweden, Hong Kong and Singapore**
- **2012 Arbitration Place opened in Toronto**
- **State-of-the-art arbitration hearing centre in heart of Toronto's financial district – Ranked among top 10 in the world, *with substantial support from across Canada***



## The London Centenary Principles 2015

The following 10 Principles are necessary for an effective, efficient and "safe" Seat for the conduct of International Arbitration



# 10 Principles for Efficient and Effective Seat of Arbitration

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## 1. Law

A clear, effective and modern arbitration law that recognises and respects the parties' choice **of arbitration as the method for settlement of their disputes by:**

**(a) providing the necessary framework for facilitating fair and just resolution of disputes through the arbitration process;**

**(b) limiting court intervention in disputes that parties have agreed to resolve by arbitration;**

**(c) striking an appropriate balance between confidentiality and appropriate transparency, including the growing practice of greater transparency in investor state arbitration.**

# An Observation on Arbitration Law as Competitive Advantage

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- **UK Law Commission 13th Programme of Law Reform, December 2017**
  - ❖ **includes possible future reform of Arbitration Act 1996**

## ➤ **Commission notes**

- ❖ **London continues to be one of world's leading centres for international commercial arbitration**
- ❖ **Concern that rival jurisdictions, such as Hong Kong, Singapore, Paris and Dubai, could soon “catch up”**
- ❖ **Since 1996, other jurisdictions enacted equivalent legislation plus provisions reflecting recent developments**

# CIArb London Centenary Principles cont'd

## 2. Judiciary

An independent judiciary experienced in international commercial arbitration and respectful of party autonomy.

# An Observation on Judges and Arbitration

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- **Modern Mindset of Judges:**  
Arbitration is an alternative method, chosen by parties, for parties to resolve their dispute
- ***Not***  
a subservient and untrustworthy process that undermines courts as instruments of a State and needs to be ‘watched like a hawk’

➤ **‘Supporting’ Judge concept**

**v.**

**‘Supervising’ Judge concept**

- **One or more specialized Judges –  
experience and expertise  
[as contemplated by New York Convention drafters]**
- **Specialization particularly important for arbitration  
cases: global jurisprudence, practices and soft law**

- **Judicial Training: important generally ... but also there are particular international implications**
- ❖ **“One bad decision” – word spreads almost instantly around the arbitration world through social media, ‘trade publications’, etc.**
- ❖ **Impairment of jurisdiction’s arbitration reputation takes a long time to repair**



- **Judges need only guard against fundamental flaws in an arbitration**  
per *New York Convention* and *UNCITRAL Model Law* grounds to set aside or refuse to enforce an arbitral award
- **Arbitration can relieve overloaded courts**
- **Arbitration can provide faster and more efficient determination of disputes**

# CIArb London Centenary Principles cont'd

## 3. Legal expertise

**A legal profession experienced in international commercial arbitration and international dispute resolution, offering choice to those seeking representation in arbitration and before the national courts.**

## 4. Education

**A commitment to education of all key players and to the development of learning in the field.**

## **5. Right of representation**

**A clear right for parties to be represented in arbitration by party representatives of their choice whether from inside or outside the seat.**

## **6. Accessibility and safety**

**Easy accessibility, adequate safety and protection for parties, their documentation and information.**

## **7. Facilities**

**Functional facilities for the provision of all services required to run an effective and efficient arbitration.**

## **8. Ethics**

**Professional and other norms embracing a diversity of legal and cultural traditions and the developing norms of international ethical principles governing the behaviour of arbitrators and party representatives.**

## 9. Enforceability

**Adherence to international treaties and agreements on the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the seat of the arbitration in other countries.**

## 10. Immunity

**A clear right to arbitrator immunity from civil liability for matters done or omitted to be done in good faith in capacity as arbitrator.**

# A Rising Tide Lifts All Boats – Cooperation Trumps Competition

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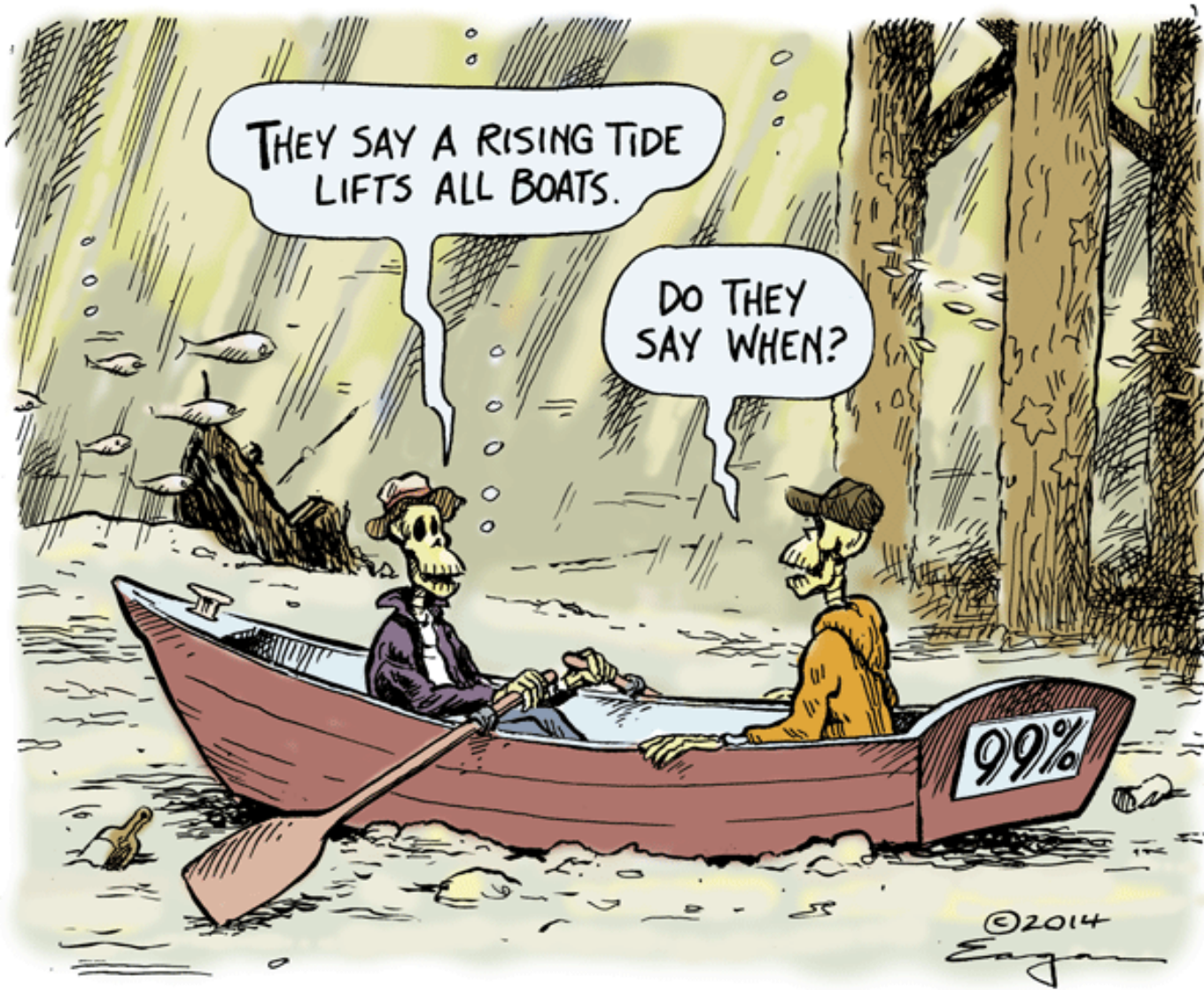
A rising tide lifts all the boats.

(John F. Kennedy)

izquotes.com

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**On the other hand ...**





# Thoughts on Building the Caribbean Arbitration Market

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- **Recognize and accept that Caribbean consists of many small jurisdictions**
- ❖ **Limits ability to be major global arbitration players**

# Thoughts on Building the Caribbean Arbitration Market cont'd

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- ❖ **Makes ‘bricks and mortar’ hearing facilities more difficult**
- ❖ **But, provides ready supply of international transactions**
  - ❖ **within the region**
  - ❖ **between businesses in countries in Caribbean and businesses in countries elsewhere**

- **Caribbean jurisdictions should work together to**
  - ❖ **make the Caribbean “arbitration friendly”**
  - ❖ **grow use of arbitration in the Caribbean for both domestic and international disputes**
  
- **Compete by**
  - ❖ **innovating where appropriate**
  - ❖ **benchmarking**
  - ❖ **striving to be among the most arbitration friendly countries in Caribbean**

- **In limited circumstances, win-win outcome will not be possible – in such cases, fair and respectful competition is fine and beneficial**
- **What goes around, comes around**

# **12 Things We Can Do Now to Increase Arbitration in the Caribbean**

- 1. SELF-ASSESSMENT.** Each jurisdiction should assess itself against CIArb's Centenary Principles
- 2. ARTICULATE A PLAN.** Each jurisdiction should articulate a plan, with timelines, to improve where necessary / desirable
- 3. ENCOURAGE AND SUPPORT OTHERS JURISDICTIONS.** Each jurisdictions should encourage and support improvements in other jurisdictions

4. **RAISE AWARENESS.** Make business people and transactional lawyers more aware of benefits of using arbitration, and encourage them to include arbitration clauses in their contracts
5. **GARNER LITIGATORS' SUPPORT.** Demonstrate to Caribbean litigators that arbitration will not reduce their work/income but can increase it
6. **LITIGATOR EDUCATION AND TRAINING.** Build capacity of counsel in the Caribbean with arbitration awareness, education and training

- 7. GARNER GOVERNMENT SUPPORT.** Make case to governments on importance of arbitration and having the necessary legal infrastructure
- Arbitration can
    - ❖ boost country's economy
    - ❖ reduce court costs and delays
    - ❖ improve dispute resolution in the country
  - Encourage enactment of modern arbitration laws where do not exist



## **8. STRENGTHEN JUDICIAL CAPACITY IN ARBITRATION.**

**Increase facility of judiciary in arbitration**

- **easier with our relatively small and collegial judiciary**
- **training available, for example, through International Council for Commercial Arbitration (ICCA)**

- 9. RAISE CARIBBEAN'S PROFILE IN ARBITRATION.**  
Caribbean has relatively low profile on international arbitration stage – raise it through cooperative effort and visibility
  
- 10. IDENTIFY COMPETITIVE ADVANTAGES / FIND AND DEVELOP OUR NICHES.** Need to identify Caribbean's competitive advantages in arbitration, and find and development niches in which Caribbean countries can make their mark

## **11. CARIBBEAN ARBITRATION PROMOTION COORDINATING COMMITTEE.**

**Establish Coordinating Committee representing all interested Caribbean jurisdictions to promote, in coordinated manner,**

- (a) awareness, understanding and use of arbitration in the Caribbean, and**
- (b) the Caribbean as a place for (seat of) international arbitration**

## 12. **New Book on *Arbitration in the Caribbean*.**

**Publish new book on *Arbitration in the Caribbean* covering each jurisdiction**

- ❖ **country chapters – written by different author(s) (leading arbitration practitioners) covering specific aspects of arbitration in that jurisdiction**
- ❖ **foreword by distinguished Caribbean jurist**
- ❖ **international distribution by leading arbitration publisher**

## **New Book on *Arbitration in the Caribbean* cont'd**

- ***To get the book going, Dancia Penn and I will take on the project, secure authors, contribute, and serve as editors***
- **An ideal international arbitration publisher is interested, as is a distinguished jurist for the foreword**
- **Aiming for publication in 2018**



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