

10 'Arbitration' Resolutions for the New Year
by
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It is customary to begin a new year with resolutions that express aspirations for the next twelve months. What resolutions would I suggest in the field of arbitration?

The government proposed the Bahamas as a gateway for investment in the Western Hemisphere and a centre for international arbitration. Arbitration is the method of resolving disputes in which a neutral third party (an arbitrator), or a panel of three of them, conducts a hearing, reviews evidence and written submissions of the parties, and makes a decision binding on them. This method is fast, confidential, relatively inexpensive and is used in many contexts, ranging from war and peace to investment or commercial disputes. Generally speaking, methods of resolving disputes other than litigation are referred to as alternate dispute resolution (ADR), such as mediation and conciliation.

Here are 10 suggestions.

1. Resolve disputes peacefully, efficiently and inexpensively. This applies across many different domestic and international spheres. That is why I proposed that alternate dispute resolution be the basis of the next phase Urban Renewal 3.0; through justice or urban renewal centres, implement peaceful resolution of disputes in our communities. Demonstrate that differences can be settled without resorting to violence.

But, similarly, regarding financial services, trade, maritime, cruise ship, investment, trade, construction and other commercial disputes and types of arbitration, both domestically and internationally, wouldn't it be great if by year's end, this country had firmly established its availability and reputation for resolving disputes? The challenges range from domestic to international matters, and touch sensitive, critical nerve centres running through the spinal column of our society.

This article is concerned primarily with international commercial arbitrations which are probably at their highest tide in history. Therefore, this is an opportune time to launch the Bahamas' arbitration boat on the rising tide. For example, the Hong Kong centre reportedly completed about 450 cases per year producing millions of dollars of revenue for the city. Kuala Lumpur Malaysia had more than 200 cases. Singapore had an even larger number. China also has the China International Economic and Trade Arbitration Commission (CIETAC). With headquarters in Beijing, CIETAC has centres or sub commissions in Chongqing, Shanghai, Shenzhen

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and Tianjin. Those are major Pacific Rim Tigers. The numbers are as huge in other parts of the world, such as the Tigers of the Arctic (Canada and the Scandinavian countries). Middle East countries, notably Dubai, Bahrain and Qatar, built significant arbitration centres. Western cities, such as Paris, the Hague, London, New York, Miami and Dallas, continue to be prominent in the arbitration world.

2. Understand the root and scale of the problems, educate and train yourself in new mind and skill sets, and become a problem solver. We need to adopt completely different mind and skill sets, and to recognize that the difference between a developing society, such as ours, and a rich society that produces peace, wealth and prosperity for all, is a deep capacity to solve its problems and in particular the existence of institutions that constantly do so.

3. Change your thinking and behaviour, and become a magnet for business. This cannot be stressed too much. If you want big things to change, you have to make big changes. Start with yourself. Have confidence in yourself and in the Bahamian business environment. Beyond that, be an innovative, resourceful catalyst for positive change. As Gandhi put it, be the change you want to see. An holistic approach is needed. People must want to come to this country to do business quite apart from arbitration. Investors have many options. Therefore, effective steps need to be taken to increase business opportunities, expand the volume of business and improve the ease of doing business.

4. Reinvent yourself. Before the Industrial Tribunal, arbitration was widely used for example to deal with labour and other disputes. So we really have a long tradition with arbitration. But, stretch yourself. Step out of your comfort zone. For example, why not also engage in oil and gas arbitration? Engage the stakeholders in this arbitration field and others. We need to be on the radar of the many arbitration organizations, general counsel of multinational corporations, and other stakeholders worldwide.

5. But, at the same time, focus on what you do best. As a financial centre of choice, it is only natural that the Bahamas should be a centre for financial services arbitration. Financial services cover a lot of things. For example, the Trustee Amendment Act 2011 (TAA), under section 91A, enables any dispute or administration question related to a trust to be determined by arbitration in accordance with the provisions of the trust instrument. Any provision in a trust instrument referring a matter to arbitration shall operate as a arbitration agreement between the parties. Further, the TAA, in section 91B, gives the tribunal of a trust arbitration all of the powers of the Court in relation to administration, variation, execution, or the exercise of any other power under a trust. So, we should do more trust arbitrations.

Also, the impetus to sign the important New York Convention on the automatic enforcement of arbitral awards (NYC) came originally from the maritime sector. As arbitration is a preferred method to resolve maritime disputes and as The Bahamas has the third largest ship registry (after Liberia and Panama), signing onto the NYC was imperative in order to allow awards to be automatically enforceable in member

countries. This writer encouraged the Bahamas to be onboard the NYC, but also saw this as a timely opportunity to completely overhaul the arbitration law in The Bahamas and to make it an attractive arbitration centre. Now, we have both the NYC and the up-to-date Arbitration Act 2009, and need to take them to the next level by actively conducting arbitrations in the maritime and cruise ship sectors. We have lots of assets, such as Freeport as an excellent maritime arbitration centre, and also the Bahamas Maritime Authority and the board of ship owners, who should have the development of maritime and cruise ship arbitration placed squarely before them as a pressing item on their agenda.

Overall, a national plan is needed supported by adequate resources. Already an arbitration council has been in existence for more than a year that could provide the plans for a Western Hemisphere Arbitration Centre (WHAC) particularly involving Nassau and Freeport. Apart from international commercial arbitration and training and public education in ADR, WHAC could also earn its keep through providing mediation and ADR services to reduce the court backlogs, and also community mediation through urban renewal centres.

6. Get on with it. The big shakedown is here and now. So far, three countries in the region are very active in arbitration: Bahamas, Barbados, and Dominican Republic. They had the political will to differentiate themselves early from the rest of the competition by accepting the NYC and introducing modern, widely recognized and accepted laws based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law. Jamaica, and Trinidad and Tobago are not far behind. The ABC islands (Aruba, Bonaire and Curacao) are also interested in attracting more arbitral cases. Dramatically, the British Virgin Islands brought into effect its Arbitration Act 2013 on October 1, 2014, giving effect to the NYC and the UNCITRAL Model Law, and establishing an international arbitration centre (BVI IAC). Within the 15-member CARICOM alone, arbitration centres are proliferating like bunny rabbits.

Three lessons emerge. Firstly, many of them will not be viable. They are just too small. Secondly, most of the remaining jurisdictions are quite similar in their offerings. Thirdly, consolidation and cooperation among them is needed if they are to survive and compete with Miami, Atlanta, New York, Boston, Toronto, Montreal and other cities which are active on the North American east coast.

The WHAC should take proactive steps to generate more market activity, and to capitalize on our comparative advantage. Consisting of government and private sector including Chambers of Commerce, Bahamas Maritime Authority, Grand Bahama Port Authority and other bodies, it should aim to generate more activity in this area and position The Bahamas as leading arbitration hub in the region.

7. Build smart. The WHAC can leverage our modern legislative platform, our skills platform, and strategic location between East and West, and between North and South, and in the Eastern North American time zone. Build it they will come. People do business where they like to be. Bahamas is naturally an attractive market. But, advanced information technology and communication platforms, a pool of trained support staff, English real time translation, efficient translators,

interpreters and stenographers, and an enlightened immigration policy are also required. A custom designed high tech state of the art building or even a purpose built floor are not as important, in the initial stages, as well trained and able personnel.

8. Small is beautiful. Bigger is not necessarily better. Little things are important. It would be a great accomplishment if, among other things, a plan could be implemented, including sample arbitration clauses for the Bahamas, rules and a website, at an early stage during this year. Poor quality of arbitration clauses accounts for many problems. The use of good Bahamas arbitration clauses in contracts can be an important driver of business to the country.

9. Choose your friends wisely. Key strategic alliances are important. But, in a region that has over the past few decades been given bad press, keep your neutrality and the moral high ground.

The Permanent Court of International Arbitration (PCIA) in Mauritius gives it credibility. But, an alliance with one arbitral institution alone may identify the WHAC too closely with only that institution and discourage other institutional arbitral cases.

Join the Inter-American Convention on International Commercial Arbitration, adopted in Panama in 1975 (Panama Convention) and in force since 1976. The Dominican Republic is the only regional island state party to it. To be attractive to the rest of the hemisphere, the Bahamas should consider joining the Panama Convention as well, lodging a reservation similar to that of the United States. That reservation applies the Panama Convention to arbitration agreements in which the majority of the parties are citizens of states members of the Panama Convention and the OAS, unless the parties agree otherwise; and for other arbitration agreements, the NYC would apply.

10. Don't trample on other competitors, but instead find commonalities and work and cooperate with them to the extent possible. For example, the Prime Minister is at present the head of CARICOM. Is this not a time to cooperate with and convince other countries in the region, many of whom are aspiring to be arbitration centres, that the Bahamas is prepared to lead a cooperative effort. CARICOM also encourages the increased use of arbitration and ADR in the context of regional trade and the Caribbean Single Market and Economy.

Thus, The Bahamas and certain Caribbean countries have the potential to become "Atlantic Rim Tigers" in this field. Conditions appear to be present for them to play a significant role in providing international and regional commercial arbitration services. The Bahamas' WHAC should consider this year joining and participating in international arbitral institutions such as the International Federation for Commercial Arbitration Institutions (IFCAI), and raise the Bahamas' profile by choosing wisely among the abundance of arbitral institutions, mainly private non governmental organizations but notably also regional and international governmental organizations and the United Nations system.

Be sure to attend the 3rd Annual Arbitration and Investment Forum to be held at the Bahamas Bar Association building, Mackey Street on Friday January 23, 2015, from 8:30 am to 1 pm when these key issues will be dealt with by local and foreign experts, such as maritime, cruise ship, oil and gas, financial services and other commercial arbitration.

Therefore, as we make our resolutions for the new year, much can and should be tried and achieved by the Bahamas in the world of arbitration over the coming months.

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