



Try Toronto?

With a new arbitration hearing facility launched in April and a project under way to review and update Canada's broader commercial arbitration legislation, **Kyriaki Karadelis** examines whether Toronto is set to be the next big arbitral seat

Toronto's vital stats

On paper, Toronto has the makings of a perfect arbitral seat. A truly multi-cultural, international city – around 50 per cent of its 2.5 million population was born outside Canada – it is well connected internationally with direct flights to every major business centre in the Americas, Europe, Asia and the Middle East.

It is located in a neutral, stable jurisdiction, with less tortuous visa entry requirements than the US, and where French and English traditions and language coexist across the provinces. At the same time, the city's global economic importance is growing – it has a strong banking and finance system and hosts the business headquarters of many companies in Canada's rapidly expanding oil and gas, mining and high-tech sectors that are attracting increasing attention from foreign investors.

In terms of its legal framework, it is also in a good position; Canada was one of the first countries in the world to adopt the UNCITRAL Model Law in 1986, and to date around a third of all Model Law jurisprudence emanates from Canadian courts. Ontario, the province of which Toronto is the capital, incorporated the Model Law into its local legislation through the International Commercial Arbitration Act of 1988.

The province – and the country more broadly – also benefits from arbitration-friendly commercial courts and judges who are willing to assist arbitration proceedings with minimal intervention and judicial review. John Judge, an arbitrator and senior partner at Stikeman Elliott, notes that with the benefit of strong pro-arbitration decisions from the appeal courts and the Supreme Court of Canada, the provincial courts have become experienced at performing important roles under the Model Law, such as appointing arbitrators in ad hoc arbitrations.

The Superior Court of Ontario in particular has made it clear through a practice direction that matters concerning the Model Law will be moved to the Commercial List, where judges with a strong commercial background will handle applications.

Judge adds that Toronto has “extremely good quality counsel” used to delivering high quality advocacy including “rigorous intellectual analysis of legal issues” – in part because most civil trials and virtually all trials of commercial disputes are heard by a judge alone. “The jury system does not dominate the court system, nor permeate advocacy styles and strategies as it does in the US,” he says.

Many counsel are also experienced in both common law and civil law by virtue of the different legal traditions in different provinces; Quebec is a civil law jurisdiction when it comes to civil or private cases, while the remaining nine provinces and three territories are common law.

In addition to counsel, Toronto boasts experienced international arbitrators, including the latest to lease an office in the city, L Yves Fortier CC QC (who is originally from Montreal and maintains an office there).

“We have a lot going for us, beginning with the fact that we're not the US and we have fewer visa restrictions,” says Earl A Cherniak QC, an arbitrator and a partner at litigation firm Lerners. He notes that Toronto's only equal as a multi-cultural, multiracial city in North America is New York.

Despite Toronto being described by many as a “logical” neutral ground to host arbitrations, particularly between US and European parties, the city has failed to garner the same

attention as famous Western seats such as London, New York and Paris. That may change, however, as Toronto's burgeoning arbitration community actively seeks greater international recognition.

A recent buzz

In April, *GAR* attended the launch of Arbitration Place, a purpose-built hearing venue with arbitrators' offices in the same vein as Maxwell Chambers in Singapore, located in the heart of Toronto's financial district.

A private venture by Canadian businesswoman Kimberley Stewart, who also runs the Ottawa-based court reporting business ASAP Reporting Services, the centre has 13 hearing rooms, advanced technology and an in-house counsel who can be hired as a tribunal secretary. It is the first purpose-built hearing centre to open in the city and has, for a while now, been hosting an education programme called “Arbitrator of the Month” where prominent arbitrators address the public.

Five arbitrators have already leased office space at Arbitration Place, including Fortier and a former justice of the Supreme Court of Canada, Ian Binnie QC. The others are Coulter Osborne QC (a former associate chief justice of Ontario), Stanley Fisher QC, who joined Arbitration Place from Heenan Blaikie, and Thomas Heintzman OC QC, who used to be a litigator at McCarthy Tétrault.

The centre also has a list of “non-resident arbitrator members” who do not have offices there, including Cherniak, Judge and the past president of ArbitralWomen, Hong Kong-based Canadian Louise Barrington.

Arbitration Place is not the only recent addition to the city's arbitration infrastructure. Just a couple of days before its launch, the originally US arbitration services provider JAMS also opened up a resolution centre in Toronto with three resident arbitrators. The office is only the second that JAMS has opened outside the US – the first being its international arm in London, which opened in 2011. Remarking on the opening of the Toronto centre, JAMS president and CEO Chris Poole said “we're seeing an increasing trend in international arbitrations and we know Toronto will play a major role in that arena”.

Academic activities and events are also beginning to take place with more frequency in the city and across the country. Cherniak and several other arbitrators from across Canada, including William G Horton, recently organised an arbitration ethics videoconferencing programme that was simultaneously held in Calgary, Montreal, Toronto, Ottawa and Vancouver.

In late June, Errol Mendes and Anthony Daimsis, professors at the law faculty of the University of Ottawa, also led a two-day workshop on international commercial arbitration at the university. The workshop featured Barry Leon, the head of international arbitration at Perley-Robertson Hill & McDougall, and Brian Casey, an independent arbitrator and counsel who recently left Baker & McKenzie, as guest speakers. Daimsis tells *GAR* that the inaugural event was purposefully kept on a small scale, with 16 attendees representing a number of Canada's national firms. Arbitration Place was one of the sponsors and will likely host the event when it is repeated in Toronto in the autumn.

Next May, Arbitration Place is also set to host a conference on international arbitration and investment in Brazil, in conjunction with the Arbitration Centre of the Brazil-Canada

Chamber of Commerce and the Pontifical Catholic University of Rio.

Meanwhile, there are plans afoot to review and modernise Canada's Uniform International Commercial Arbitration Act, which applies nationwide and across all the provinces. Gerald Ghikas, a senior commercial litigation and arbitration partner at Borden Ladner Gervais in Vancouver, is leading a project to update the legislation for the Uniform Law Conference of Canada, incorporating changes made to the UNCITRAL Model Law in 2006 and other enhancements in line with best practice. A working group of government lawyers and private practitioners has already formulated several recommendations that will be presented to the ULCC on 18 August and, if approved, will form the basis of a new act. Ghikas says the aim is to have a draft prepared by August 2013, and to get it adopted by the different provincial legislatures as soon as possible after.

Finally, Arbitration Place has commissioned the economic

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consultancy Charles River Associates to conduct an economic impact study on the value that arbitration brings to Toronto. The survey is already under way, with results expected on 11 September.

Cherniak says it's "a happy accident" that all of these developments have come together. He notes that they are contributing to a new era of awareness of international arbitration in Toronto, which has "been slow off the mark" compared to other cities selling themselves as a seat.

History of a new hub

Historically, there has been little distinction between domestic and international arbitration in Canada because the majority of arbitrations have been ad hoc, William Horton tells *GAR*. So while international parties have arbitrated disputes of varying size from C\$1 million to C\$1 billion in Toronto, a key difference with other cities has been the lack of use of arbitral institutions and rules – leading to reduced awareness of international norms and practice. This is something Arbitration Place has sought to address through forging relationships with the LCIA and ICC Canada, both of which have endorsed the centre and are listed as partners on its website. "It will be interesting to see whether users are converted," Horton says.

Canadian arbitrator J William Rowley QC is a director member of the LCIA's management committee and also serves on the advisory board of Arbitration Place, as well as being its liaison director for the institution. He explains the relationship between the centre and the LCIA is one of "mutual support", but that they have not formed a joint venture as the LCIA has

done with local players in the Gulf and Mauritius. Nor will the London-based institution provide any funding.

The relationship is rather based on mutual promotion: the LCIA will recommend the use of Arbitration Place for hearings it is managing when the parties request input, and the venue will recommend the LCIA as a suitable institution to administer cases for those who don't want to go down the ad hoc route. The centre will also make rooms available for LCIA staff when they visit Toronto. Indeed, on 20 September, LCIA director general Adrian Winstanley will visit Arbitration Place to address general counsel and corporate lawyers at an invitation-only lunch co-hosted by the centre and 10 Canadian law firms.

ICC Canada – whose role it is to nominate arbitrators for ICC cases when the parties cannot agree, as well as to promote ICC arbitration generally – will also have a supporting relationship with the centre. The chair of ICC Canada, Barry Leon, envisages Arbitration Place as more than just a hearing facility, but as a resource hub. He notes that the task of promoting Toronto as a seat for ICC cases will be aided by the announcement this February that the ICC International Court of Arbitration is to open a branch of its secretariat in New York, adding to its existing bases in Paris and Hong Kong. Having an ICC case management team within the same time zone will encourage Canadian businesses to adopt ICC rules, Leon says.

John Lorn McDougall, a non-resident arbitrator at Arbitration Place and member of 3 Verulam Buildings in London who was chair of ICC Canada before Leon, notes that the support of the ICC Court's departing secretary general Jason Fry and its chairman John Beechey has been crucial in developing greater cooperation between ICC Canada and the secretariat – and the results have been "startling". Canadian arbitrators are experiencing many more recommendations from the ICC than years ago, McDougall notes. "The Canadian national committee was always reasonably good but it was not set up in the way that Paris wanted. We have come a very long way in 10 years from where we started. The committee is much more mindful now of meeting the needs of the particular arbitration and selecting arbitrators to deal with the problem. Today, ICC Canada's panel of arbitrators includes the country's best."

Aside from the LCIA and ICC Canada, Arbitration Place is also known to be in discussions with other institutions such as the AAA/ICDR.

Brian Casey, the author of *Arbitration Law of Canada: Practice and Procedure*, says the growing presence of the arbitral institutions is "very good news" and that the existence of Arbitration Place finally provides a physical focal point where people can share ideas, marketing strategies and education. He says this has already been going on for some years in a low profile way, initially though the Toronto Arbitration Roundtable: an 11-strong group of commercial litigation lawyers and academics that used to meet for dinner and discussion. Set up by John Judge, the roundtable became known to the wider community after it handed out promotional hockey pucks at ICCA Montreal in 2006, featuring slogans such as "Toronto arbitrations: like New York as run by the Swiss".

In early 2010, the roundtable gave way to a more formal membership organisation, the Toronto Commercial Arbitration Society, with the principal aim of promoting Toronto as a

venue for international disputes – including by providing a searchable online database of members from which parties can seek arbitrators. Now chaired by Cherniak, the society has attracted more than 165 members in three years and is open to all regardless of their geographical base (it even has members in the US).

Other membership organisations have also cropped up over the years. The Advocates Society, a Canada-wide professional association with its headquarters in Toronto, launched an arbitration and mediation advocacy practice group last summer. A Young Canadian Arbitration Practitioners group (YCAP) has also been in existence since 2004, providing professional development and networking opportunities for lawyers under the age of 45. Three of YCAP's directors are based in Toronto and the group has held several events in the city.

Another non-profit professional association, the ADR Institute of Canada, has around 1700 members, although it covers mainly domestic arbitration and mediation, and has its own domestic arbitration rules. Moreover, Toronto is also home to a private company, ADR Chambers International, which has its own international arbitration rules (intended to be supplementary to the UNCITRAL rules). The institution can be hired to administer disputes and offers rosters of arbitrators and mediators, many of whom are retired judges.

And aside from Arbitration Place, other arbitrators' offices have sprung up where independent, self-employed individuals can avoid the conflicts of interest brought on by associations with private practice law firms – similar to barristers' chambers in the UK. The idea for Neeson Arbitration Chambers, where Bill Horton is based, was born in 2009 when arbitrator and former judge Ed Saunders decided to hire an office in a court reporting business premises owned by Kim Neeson. Saunders spread the word and others followed suit, until there were around five arbitrators resident in the same premises with hearing rooms attached. Another Toronto court reporting service, Victory Verbatim, also provides hearing space.

Fortier himself elected to lease an office at Arbitration Place after standing down from his long-held role as chairman emeritus of Norton Rose OR (formerly Ogilvy Renault) last year on account of conflicts issues. He predicts that more arbitrators' chambers will spring up in Toronto – the first Canadian city in which they have appeared.

Why so late?

Given Toronto's clear benefits as an arbitral seat, why has the city taken a while to market itself and gain international recognition? One reason may be that there was no need for international arbitration until recently since Canada's courts have proved good at handling regional business disputes. But with the country's economy growing significantly more globalised in the last 10 to 15 years, especially in sectors such as natural resources and technology, and Canadian companies increasingly doing business in all parts of the world, they have started to require an alternative forum than the courts to iron out issues.

Joel Richler, a partner at Blakes and a member of the Toronto Commercial Arbitration Society's executive committee, admits that Canadian lawyers have typically been a bit provincial in their outlook and have taken years to look outside their borders. As business needs change, however, their focus is becoming more global. "While lawyers with international

practices were unique six to eight years ago, that is no longer the case", he says. "Now our lawyers are branching out, people have noticed us."

But Cherniak notes that, despite the strides made, Canada does not yet have many lawyers working solely on international arbitration like those at White & Case in Paris or Freshfields Bruckhaus Deringer in the UK, who are the types of practitioners to wield influence with in-house counsel over the choice of seat. Cherniak describes it as a chicken and egg situation: if the business is there, then more lawyers will become solely engaged as arbitration practitioners and more firms will devote resources to the practice – but it's difficult to drum up business without dedicated counsel.

Horton agrees that, while there is plenty of expertise in cross-border disputes, Canadian lawyers tend to practice both litigation and arbitration, and often continue to work as counsel while sitting as arbitrator. He thinks that the level of arbitration activity is likely to be driven by supply rather than demand. "Parties are more likely to put arbitration clauses in their contracts and chose a particular location if they're confident there is a large supply of available, competent, qualified arbitrators – and that's generally been proven in Toronto," he says. "It's just a question now of how much of a draw that will be outside our zone."

Horton says it is important that Toronto targets the correct market in the same way that Singapore has done in Asia. "The success of the Singapore model depends on its location near the Indian and Chinese markets and its common law background. Strategically it is doing the right thing for its market," he says. "Similarly, Toronto's strategic market is not to persuade a French or Russian company to arbitrate here, or to attract arbitration tourism, but to capitalise on cross-border disputes

“Toronto’s strategic market is to capitalise on cross-border disputes between the US and any other country”

between the US and any other country. Within the world of US and European entities, Canada is a very natural choice.”

Ian Binnie suggests Canadian arbitrators also need to become quicker in coming forward. Like a lot of high-tech companies that have developed products in Canada, he thinks lawyers have been slow to wake up to the fact that there is a global market for their product. "Modesty is built into the national psyche," he says. "Having recognised the platform is there, we need to pursue it more actively".

Brian Casey takes a similar view: "The problem is not that people think ill of us, it's that they simply don't think of us at all," he says. "We have to constantly remind them that we exist."

Fortier is more pragmatic; he says the principal reason that Toronto has been slow to develop as an arbitral seat is that there

wasn't a brave enough entrepreneur with the funds and the energy to invest – until now. "I think Kim Stewart has seized the moment," he says. "She'll be able to build on the reputations of a significant gaggle of lawyers from different provinces who practise as arbitrators – including the likes of Bill Horton, Marc Lalonde, Bill Rowley and Henri Alvarez – to get us on the map."

The view from abroad

Many Canadian lawyers have established successful arbitration practices abroad, so *GAR* asked some of them for their thoughts on Toronto as a seat – including whether they would consider moving their practice there.

Andrew de Lotbinière McDougall is in a good position to comment having practised arbitration for three years in Ottawa at Perley Robertson Hill & McDougall, the firm co-founded by his father, in between stints at White & Case in Paris, where he currently works. He says that Toronto is not the first Canadian city to make a push to become an arbitral seat, although in the past 10 years it has been the most focused. Vancouver made a big push in the 1980s after Canada enacted the UNCITRAL Model Law, with the establishment in 1986 of the British Columbia International Commercial Arbitration Centre. In the same year, Québec also launched the Canadian Commercial Arbitration Centre. "Both have been pretty quiet though," he says.

McDougall adds that Toronto's effort is the most concerted and the city offers a lot of the attributes that should help – good facilities, a favourable pro-arbitration court system, perceived neutrality and cost-effectiveness. The challenge is that it's hard for any city to equal Paris or London in terms of location and arbitral tradition, he says. "When you're in Paris or London you're geographically in the centre of the world in terms of travel as well as in the centre of the arbitration world."

He also notes that there is a lot of competition from cities trying to promote themselves as seats of international arbitration such as New York, Miami, Hong Kong, Singapore, Kuala Lumpur, Dubai, Mauritius and Bahrain, all of which have established centres and arbitration laws.

That said, McDougall's confidence in Toronto's potential to deliver international arbitration services is reflected in his effort, over his three years in Canada, to develop a specialist arbitration practice at Perley-Robertson – a role that has now been assumed by Barry Leon, while McDougall remains special counsel with the practice. The firm features in the *GAR 100* and has made a name for itself as a respected referral outlet for international arbitration in Canada and elsewhere.

Robert Volterra, a Canadian barrister and English solicitor-advocate who runs the international arbitration boutique Volterra Fietta in London, has already counselled clients to put Toronto as the seat in their arbitration clauses and says he would happily consider moving his practice there in the future. "It has a broad network of international transportation, infrastructure, a sophisticated local bar, highly competent and impartial courts, a beautiful setting and all mod cons. It's a highly attractive seat for international arbitration," he says. "As well as all that, the quality of life beats London."

But Volterra says it will take time, usage and a body of practitioners situated there for Toronto to achieve the same status

as London, Paris or Geneva. In the meantime, he agrees with Horton that, Toronto should "try to position itself as a neutral venue for arbitrations involving a US party and a non-US party, particularly parties in the Western Hemisphere".

Canadian national Caroline Richard, an associate in the international arbitration group at Freshfields Bruckhaus Deringer in Washington, DC, thinks Toronto could be particularly suitable as a venue in investor-state disputes, where there is "a reticence or inability" to arbitrate in the US.

"I think it's fair to say that Paris, London and Washington, DC, have more to offer to arbitration practitioners in terms of work and professional development – there are simply more fully-dedicated arbitration practitioners and more international arbitrations in those cities. But what Toronto lacks in that sense it makes up for in other respects, for instance lower rates for venues, hotels and counsel, and ease of access – although parties and counsel from sunnier climes may want to think twice before going to Toronto in January!"

Richard adds that considerations that have often led parties to look to Canada for arbitrators – including the country's bi-judicial legal tradition and well-trained lawyers – should also work in favour of picking Toronto as a seat.

Recipe for success?

Perhaps the city that has been most successful in carving a strong name for itself in arbitration as a new arbitral centre in recent years is Singapore. How does Toronto measure up?

Despite the obvious comparisons between Arbitration Place and Maxwell Chambers, practitioners in Toronto point out that the Asian city state is in a different position as regards government-led legislative and financial support. As Joel Richler of Blakes points out, the chances of Toronto-based institutions obtaining substantial funds from the provincial government of Ontario, or of law firms getting tax breaks to open international offices, is slim. "Governments are not throwing around money loosely at the moment", he says.

What you can count on from Toronto politicians is generous moral support, Richler says, but it would be nice to get more active backing, such as the "high-quality, content-laden brochure" produced by the New York authorities to promote the city's arbitration services.

He notes, however, that the real key to success isn't government backing, but to "shine a light on the faces of in-house counsel" and to persuade them to put Toronto international arbitration clauses in their contracts. "In my experience, nobody has ever said no to Toronto as a seat," he says, adding that success could be "no more complicated than getting people yapping about it".

Those that have listened to the "yapping" seem to have been satisfied by their experience. As Robert Wisner, who heads the international arbitration group at McMillan, recounts: "I recently persuaded my US counterpart in an ICC proceeding to have the hearing held in Toronto. The tribunal flew in from Washington, Paris and Frankfurt and witnesses came from other locations, as well as testifying by video conference from Tripoli and Moscow. At the end, one of the arbitrators told me that the entire proceeding was a good advertisement for Toronto as a venue for arbitrations. Hopefully more tribunals will have similar experiences – and the word will spread."

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