

**Access as an Impediment to Diversification:
the Caribbean Young Professional Experience**

Diversity in international arbitration is vital to the process' efficacy, sustainability and legitimacy. Including perspectives emanating from different legal traditions, experience levels, nationalities, cultures and regions enhances the quality of a tribunal's reasoning and decision-making process. Furthermore, greater diversity in arbitral tribunals will diminish criticisms regarding lack of impartiality and the view that decisions are made by an 'old boys' club' controlled by American and European institutions.¹ Creating diversity involves implementing initiatives that change the gender composition of arbitration tribunals, as well as taking meaningful steps which narrow age, race and cultural disparities.

The lack of diversity in international arbitration is not limited to underrepresentation of Caribbean nationals on tribunals, but extends to the paucity of Caribbean international arbitration advocates, in particular young practitioners. From the perspective of a young, Jamaican female professional living in Saint Lucia, a small island with a hybrid legal system of English common law and French civil law, this presentation aims to explore the challenges faced by young Caribbean practitioners who seek to enter the international arbitration field, highlight some of the strides that have been made in the region and suggest further steps to build on these achievements, so as to enable young Caribbean nationals to take a greater role in the arbitration community and thereby improve diversity in international arbitration.

Challenges faced by young Caribbean professionals

- a. *Fear/misconceptions of the unknown* - litigation is the traditional mode of dispute resolution in the Caribbean. It is seen as the 'bread and butter' of many Caribbean lawyers. There are misconceptions held by members of the Caribbean legal fraternity concerning arbitration. These misconceptions include:
 - i. fear of encroachment into litigation by non-Caribbean nationals
 - ii. the perception that the field of arbitration is 'western centric'
 - iii. the view that the process is overcomplicated

¹ Dr K.V.S.K. Nathan, 'Well, Why Did You Not Get the Right Arbitrator?' 15 Mealey's Intl. Arb. Rep. 24 (July 2000).

- iv. the view that arbitration is the same as the court process
- v. the reluctance by attorneys drafting contracts to include arbitration clauses for fear that if a dispute arises they will not be given the job to handle the dispute.

b. *Underutilisation of arbitration largely due to limited public education programmes*

- i. "A cinematic view of community life in any Caribbean nation would reveal a culture which contains a mixture of stereotypes, prejudices, superstitions and beliefs which often compound the issues of what justice is and what is expected of it in the mind of the average citizen." – Abiola Innis, ACIArb Mediator.
- ii. Many persons still insist that the only route to justice and the settlement of their disputes is by having their lawyer argue their case before judge and jury on their day in court.
- iii. Within the region there is substantial ignorance concerning what constitutes arbitration, the benefits of it and how it works.

c. *Lack of Experience*

- i. The issue is not a lack of capacity from a competence/intelligence perspective – the real challenge lies in lack of experience. The quality of arbitral disputes in the Caribbean tend to be small-scale, as opposed to large-scale disputes in Europe and the US.
- ii. Due to the fact that the arbitration field in the Caribbean is underdeveloped, overseas parties with large scale disputes do not often choose to settle them in the Caribbean region.
- iii. Limited regional career prospects - few opportunities to participate in international arbitrations; even local parties to commercial disputes often opt to use overseas arbitrators despite availability of CIArb trained local arbitrators;²
- iv. limited regional experience in turn makes selection for international arbitrations as either counsel or arbitrator less likely.

² <http://caribbeanimpact.org/website/wp-content/uploads/2017/04/IMPACT-Justice-Project-Implementation-Plan-Version-Sept.-2015-2.pdf>.

d. *No list of Caribbean Arbitrators*

- i. Parties often peruse lists of arbitrators in order to find a suitable appointment. When parties utilise international lists, Caribbean appointments to tribunals are less likely as there is no Caribbean list – less likely to find Caribbean arbitrators.

e. *Paucity of trained Caribbean arbitration specialists resulting in a dearth of mentorship opportunities*

f. *Lack of effective policy support from Governments*

- i. **Policy approaches and strategies to buttress justice reforms and the political resolve to implement those approaches and strategies are lacking in some countries**
- ii. In a few instances, policy-making capacity is weak and in others economic constraints, misunderstanding and conflicting interests obstruct the development of policy. In most other cases, policy development is significantly handicapped by the lack of access to the relevant ADR development statistics by policymakers, which could considerably guide planning for improvements in arbitration as a dispute resolution mechanism.
- iii. The above results in:
 - undeveloped arbitration legislative framework and legislative policy in some Caribbean states; e.g. Grenada, Saint Kitts and Saint Lucia are not signatories to the **New York Convention**
 - antiquated arbitration legislation - e.g. the Arbitration Acts of St Lucia, Belize, and Guyana are based on the **English Arbitration Act 1889** which has long been replaced in England; Jamaica, the BVI, Bermuda, Barbados are the only territories that have incorporated the UNCITRAL Model Law.
 - under-funded ADR delivery mechanisms.
- iv. Overall effect: all of the above results in the region not being viewed as an attractive arbitration destination.³

³ Regional ADR Survey prepared for the IMPACT Justice Caribbean Project Implementation Plan (Annexes) (July 2014), p. 45.

Initiatives implemented in view of making the region 'diversification ready':

- a. *Significant initiatives have been executed to foster increased awareness regarding the benefits of international arbitration:*
- i. The CIArb Caribbean Branch founded in 2006 has since its inception created six chapters (Jamaica, Barbados, BVI, Saint Lucia, Guyana and Trinidad) and has a complement of 164 members. In its 11 years, it has executed extensive training programmes in over 9 different countries in addition to forming strategic alliances with national courts such as the Caribbean Court of Justice and the Eastern Caribbean Supreme Court. The Caribbean Branch has also worked with regional and national bar associations with the mandate of fostering a greater awareness of the value of arbitration.
 - ii. As a result of those efforts, the Caribbean region has seen the advent of Court annexed arbitration in Belize, the creation of new arbitration institutions, e.g. the BVI International Arbitration Centre, the Jamaica International Arbitration Centre Limited, ("JAIAC") formerly, the Mona International Centre for Arbitration and Mediation and the Dispute Resolution Foundation of Saint Lucia. Antigua and Barbuda,⁴ Barbados⁵ and Bahamas⁶ have announced their intention to follow suit.
 - iii. The ICC and the CIArb are very active in the Caribbean. ICC has hosted several conferences in the region. The last one done in conjunction with the Caribbean Branch and the JAIAC on August 2017 in Jamaica themed "Boosting the Use of Arbitration in the Caribbean". The ICC Young Arbitrators Forum's Caribbean series is a set of events held throughout the Caribbean region that contribute to growing regional dialogue on the usefulness of international commercial arbitration. The last such conference held in Bridgetown, Barbados explored Entrepreneurship and Commercial Arbitration.
 - iv. The work of organisations such as the LCIA in seeking out regionally trained arbitrators as well as the national committees of the ICC have provided a beacon of hope as these initiatives provide an avenue for parties to have access to Caribbean arbitrators when these bodies are appointing persons to tribunals.

⁴ <http://www.abcsi.org/arbitration-center-on-the-horizon-for-antigua/>.

⁵ <https://www.barbadosadvocate.com/news/barbados-taking-steps-become-commercial-arbitration-centre>.

⁶ http://www.jamaicaobserver.com/news/Bahamas-seeking-to-become-international-arbitration-centre_55792.

- v. Kuala Lumpur Regional Centre for Arbitration has provided institutional support in the Caribbean over the past few years and in August 2017 signed a MOU with the Jamaica International Arbitration Centre. This MOU establishes a basis upon which both organisations may explore areas for further co-operation in respect of the use of facilities and ADR services provided by both institutions.
- vi. The CIArb Caribbean Branch has also created strategic links with the North American Branch via the Atlanta International Arbitration Society (Atlas) which annually sponsors 3-4 arbitrators from the Caribbean to attend their conferences in order to obtain international exposure.
- vii. Organisation for the Harmonisation of Business Law in the Caribbean (OHADAC), a supra-national body created in 2007 and covering 38 states in the Greater Caribbean is a driving force in the promotion of arbitration in legal trade & investment disputes. In keeping with ODAHAC's mission of harmonising arbitration - this September saw the launch of the OHADAC Caribbean Centre for Arbitration and Conciliation in Pointe-à-Pitre, Guadeloupe, which has since published Model Rules of Arbitration for adoption.
- viii. The work of Improved Access to Justice in the Caribbean (**IMPACT Justice**) - a NGO that was established by the Caribbean Law Institute of the University of West Indies under the auspices of CARICOM with financial support from the Canadian government. The NGO operates in CARICOM member states and aims to create a modern, harmonised, enabling structure to improve trade, investment and development. It has trained lawyers in legislative drafting, mediation, arbitration and in expanding and operating legal databases with a view to legal harmonisation. It has also recently formed a Model Arbitration Legislation Committee which has drafted a Model Arbitration Bill for the region.
- ix. The CIArb Caribbean Branch in conjunction with ICSID are also in the planning stage of hosting a CIArb Energy Conference in Guyana in April 2018.

b. *Modernisation of arbitration laws in some States*

- i. Barbados and Cuba (2007), The Dominican Republic (2008), the Bahamas (2009), BVI (2013) and Jamaica (2017), all aligned on the UNCITRAL Model Law.

c. *Use of international arbitration in interstate disputes*

- i. Barbados v Trinidad & Tobago (2006)

d. *Involvement by several Caribbean islands in ICSID arbitrations*

- i. either as the country of nationality of the Claimant (the Bahamas, Barbados, Grenada, St Kitts & Nevis);
- ii. or as the Respondent State (the Dominican Republic, Grenada, St Kitts & Nevis, St Lucia, Trinidad & Tobago).

Further steps that may be taken by the regional and international community in order to build on these achievements and foster greater diversification in international arbitration:

The advancement of international arbitration in the Caribbean has had a slow start, but the use of arbitration as a favoured dispute resolution mechanism is gaining traction and jurisdictions across the region are on the road to meeting the demand for international arbitration facilities in this part of the world. However, despite the aforementioned progress, this has not resulted in a major increase in work for Caribbean arbitrators. Notwithstanding the efforts of the arbitration centres and the Caribbean branch, the region has not seen significant buy-in from the private sector, the public sector and the attorneys as there remains a great deal of misconceptions regarding arbitration. An approach to ADR strengthening and reform that is comprehensive, all-inclusive and reinforcing is required in order to achieve sustainable results. Political and judicial leaders from the region must provide infrastructural and policy support to ADR development and reform efforts. To achieve sustainability, regional ADR reform and implementation efforts must be buttressed by institutional support provided by appropriate regional and international institutions.

How?

a. *Greater governmental policy and legislative support*

- i. Modernisation of arbitration legislation - Much of the legislation in the region continues to be based on archaic models, better suited for the commercial dealings of their era, rather than modern transnational trade that characterises the present global market. This indicates that these jurisdictions have not yet gained an appreciation the importance of modern arbitration legislation in boosting their attractiveness as investment hosts. In deciding whether a particular jurisdiction is

ideal for investment, potential investors consider their ability to protect their investment by being able to enforce awards from arising from related disputes. Therefore, in order to improve their domestic international arbitration regimes, it is suggested that countries which have not updated their domestic arbitration legislation, look to the UNCITRAL Model Law for guidance in upgrading their arbitration laws in order to gain significant benefits.

- ii. **Public education initiatives** - In order to enhance and maintain public trust and confidence in the justice system, the regional citizens must be better apprised on the use of arbitration as a means to facilitate the resolution of disputes, which directly impinge on their quality of life as well as their professional and business pursuits.
 - b. International arbitration internships/mentorships and employment opportunities with international institutions specifically geared toward attracting young Caribbean nationals.
 - c. Hosting flagship events in non-traditional markets, such as the Caribbean, as a way of promoting diversification in international arbitration.
 - d. Establishing links between regional firms and international firms in order to foster an exchange of knowledge and expertise.
 - e. Using Caribbean arbitrators as co-counsels or secretaries of in international arbitrations in an effort to equip Caribbean arbitrators with skills and experience they may not otherwise have the opportunity to garner.

Conclusion

Having recognised the benefits of diversity in international arbitration and having acknowledged the existing challenges faced by young Caribbean professionals desirous of entering the field, it is incumbent on the regional Governments and the international community to implement measures which promote international arbitration as an integral dispute resolution mechanism. The advances already made and those still in motion are but a small step in preparing the region for its inclusion and recognition as an attractive and sustainable pool from which qualified arbitrators may be appointed. By improving diversity in international arbitration, the international community stands to reap the invaluable reward of reasoned decisions being made by a melting pot of the world's best minds.