An Offshore International Arbitration Centre For The Americas: Is There Room For Only One?

By Mark Chudleigh, Partner, Kennedys Law, Bermuda

The British Virgin Islands (BVI) has gone ‘all in’ to establish itself as a leading venue for international arbitrations, riding the current wave of popularity for resolving international commercial disputes through arbitration. The BVI has enacted a new, modern arbitration statute and established a dedicated arbitration centre, offering bespoke arbitration rules; a hand-picked panel of experienced arbitrators; concierge services for visiting arbitration participants; and a bi-annual international arbitration conference.

Now the BVI’s regional rivals, Bermuda and the Cayman Islands, are attempting to get in on the act, with both territories announcing an intention to open dedicated arbitration facilities to assist their efforts to establish themselves as jurisdictions of choice for international arbitrations.

This is seen by some as a ‘winner takes all’ race, with the first jurisdiction to attain critical mass and a global reputation as an international arbitration centre standing to dominate the region for decades to come.

The tangible economic benefits for these territories are obvious with well-heeled arbitration participants (including businesspersons, counsel, arbitrators and support personnel) requiring quality hearing facilities and hotel accommodation and a range of other services to be catered for by local providers, such as restaurants, taxi operators and IT support professionals. Of course, the local legal profession also stands to benefit, providing advice on arbitration procedures, representation when court intervention is required and advising and representing the parties on the substantive matters in dispute.

Bermuda, Cayman and BVI, all British Overseas Territories, have come under increasing pressure to diversify their economies away from narrow reliance on financial services and tourism. International arbitration is an obvious sector to develop, building on the presence of sophisticated service providers with lawyers and courts attuned to the needs of international business and on their existing tourism infrastructure that offers high quality hotel accommodation and air links to key hubs in the Americas and Europe.

But is it realistic to expect these small island nations to compete with established international arbitration centres like London or Paris? Why would commercial parties – who may have a wide choice of locations for resolving disputes – choose, for example, Road Town, BVI as the seat of their arbitration when they could choose London or New York?

In answer, the offshore jurisdictions point to the success of Singapore, also a small island nation, half a world away from most of the world’s leading arbitration practitioners, which is a thriving international arbitration centre. In 2018, the Singapore International Arbitration Centre had a caseload of 402 arbitrations compared to 317 at the London Court of International Arbitration (source: LexisNexis), much of which related to entities doing business outside of Singapore.

The promoters of the budding Caribbean region arbitration centres note that, whereas Asia has Singapore and Hong Kong as dominant regional centers, the West Indies has no comparable centre in the region. They believe that the Caribbean region, with its well-developed legal systems and strong track record in commercial law, is capable of successfully competing in the international arbitration market.

“Other opportunities arise from the offshore jurisdictions’ existing financial services industries and the increasing acceptance of arbitration.”
arbitration centres and Europe has London, Paris and Stockholm, there is no regional equivalent for the Americas. Of course, the United States sees a huge number of arbitrations from coast to coast, but most are of a purely domestic variety. Many international businesses are wary of the US court system and may view the prospect of dispute resolution through arbitration in the US with suspicion. In part, this is a result of the acceptance in some US sectors of party-appointed arbitrators who act as advocates for their appointing party, a dynamic that often leads to unsatisfactory and unreasonable ‘split the baby’ arbitration awards. As a result, businesses may negotiate to have disputes under US-related contracts subject to arbitration outside of the US: a trend that has, for example, led to US entities being the largest users of the International Court of Arbitration in Paris.

The so-called “Bermuda Form” dispute resolution clause, found in commercial insurance policies, is an example of the use of arbitration outside the US to resolve disputes with US entities. This clause reflects a compromise between US policyholders in need of excess limits insurance, and non-US insurers who are able to provide the capacity and are agreeable to contracts governed by US law but are unwilling to have disputes resolved in US courts. In some cases, this reluctance to engage in dispute resolution on US territory results from tax and/or regulatory considerations by the non-US insurers but it also reflects the tendency of many US courts to apply inapplicable public policy-driven case law, that is developed in a consumer context, to contracts between sophisticated commercial entities. The flexibility afforded by arbitration enables the parties to compromise on the substantive law to be applied, crafting a provision that applies the law of a particular US state but strips out specified irrelevant, consumer-driven doctrines.

There are also considerable opportunities for offshore arbitration as a result of political instability, corruption, and unpredictable court systems in many countries, including in Latin America. Parties contracting with entities in such jurisdictions may prefer that disputes be resolved by confidential arbitration in a neutral jurisdiction and overseen by an independent and commercially-minded judiciary.

Recent concerns over the stability of Hong Kong may lead to increased interest in offshore arbitrations for entities doing business through Hong Kong, with Hong Kong law firms able to manage the arbitrations locally but with recourse to the offshore courts and the Privy Council if necessary.

Other opportunities arise from the offshore jurisdictions’ existing financial services industries and the increasing acceptance of arbitration, including for resolving disputes under professional engagements, shareholder agreements and executive employment contracts. A potential future growth area exists for disputes relating to high net worth family trusts in relation to which offshore courts are increasingly reluctant to afford confidentiality. The use of confidential arbitration for resolving private family disputes is obviously a significant attraction.

As politically stable countries with independent judiciaries, legal systems based on English law, and rights of appeal to the Privy Council, Bermuda, BVI and Cayman are the natural regional candidates for international arbitration centres. All three are subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (with 160 signatory countries, including all major economies), and all have enacted arbitration statutes based on the UNCITRAL Model Law on Commercial Arbitration, which has been adopted in 104 jurisdictions.

Each of the Caribbean region centres exempts international arbitration participants from local bar admission and immigration restrictions, and modern technology enables procedural hearings to be carried out remotely with on-island activity generally limited to substantive hearings (and even these can be carried out elsewhere if convenience dictates).

Although the three Caribbean-region jurisdictions are direct competitors for offshore financial services business, they are distinguished by their geographic locations and business focuses. Contrary to the view that there is only room for one dominant player, it is conceivable that all three will develop into established international arbitration centres.

**“Bermuda, Cayman and BVI, all British Overseas Territories, have come under increasing pressure to diversify their economies away from narrow reliance on financial services and tourism.”**

Bermuda (which is, in fact, just outside the Caribbean) has a distinct advantage in terms of its relative proximity to London and New York and has significant experience of international arbitrations derived from its international insurance industry. Bermuda is perhaps the location best suited to arbitrations with a US interest.

Cayman is by far the largest of the three jurisdictions for banking and investment funds and, with the wealthiest government finances of the three, is best placed to source the funding required to maintain the arbitration infrastructure and to market the jurisdiction’s attractions internationally.

BVI has a significant advantage as the only jurisdiction out of the three that has opened a dedicated arbitration facility and it has enlisted the support of internationally-recognised arbitration experts. BVI’s location and current business mix make it an ideal location for Caribbean and LatAm region disputes with additional opportunities for the BVI to tap into its many Asian connections.

Whilst these aspiring arbitration centres are right to look at and learn from the success of Singapore, it is likely to be several years before they see a return on their investment: key onshore stakeholders will have to be persuaded of the benefits of offshore arbitration and be willing to insert appropriate arbitration clauses in their contracts. It could take many years thereafter for a meaningful number of disputes to arise.

BVI has taken a bold step towards the future with its plans and it is to be hoped that Bermuda and Cayman will follow BVI’s lead, with the combined effort of the three working to enhance the overall reputation of offshore commercial arbitration and its ability to cater to commercial dispute resolution for the Americas region and beyond. If international arbitration continues to see an increase in popularity, there are likely to be opportunities for all three jurisdictions to establish themselves amongst the leading global arbitration centres.