LE DROIT MÈNE À TOUT ET PARTOUT : LOUISE BARRINGTON* : UNE AVOCATE ET ARBITRE CANADIENNE À HONG KONG

Entrevue préparée par Marie-Claude Rigaud**

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RAMJAM: How would you qualify Canada's place in the international arbitration community?

You might say that Canada is a victim of its success. Most trade in Canada has historically been interprovincial or with the United States, at least until about 15 years ago. The Canadian and American legal sys-

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tems being very similar, there was no real cultural clash, so one big reason for using arbitration was simply absent. Arbitration has not developed in Canada in the same way it has expanded in Europe for instance, where probably most business is international. Also, the private nature of arbitration, and the popularity of ad hoc or non-institutional arbitration in Canada, have kept arbitration as a rather low-profile activity here. Canadian lawyers like retired judges as arbitrators, as they know them, trust them, and expect from them to conduct the proceedings in a similar fashion, with familiar courts. In this context, the development of international arbitration in Canada has been relatively slow. That said, there are several really well-known and respected Canadian arbitrators, most of them having made their careers abroad.

RAMJAM: Why did you choose to practice arbitration and how did you start your career?

After my first few years of law practice with a Toronto firm, I moved to Paris to perfect my French and started a DEA program at the University of Paris (Pantheon-Assas) where I first learned about international arbitration. I was fascinated by the *Pyramid Plateau* case[1]. Also, as a Canadian amid a legal "culture shock", I could relate to arbitration and its "marriage" of different legal cultures. I stayed on in Paris teaching legal English and international law at a private institute and then returned to Canada for a couple of years teaching Common law at the University of Ottawa. My big break was when my dear friend Paul Gélinas told me about an opening at the ICC in Paris. I then worked from 1992 to 1996 as Director of the Institute of International Business Law. The ICC then sent me to Hong Kong to open the first ICC office abroad. It was supposed to be for two years, but even after leaving ICC I stayed on, and have been based there ever since. I first joined an English law firm based in Hong Kong that specialised in construction, and after they closed that office, I taught, first at City University and later at the brand-new Chinese University School of Law. I then spent about two years directing the LLM in Construction Law and Dispute Resolution programme at King's College in London, but have always returned at regular intervals to Hong Kong. In 2009, I decided to take the plunge as an independent arbitrator. I now do that more or less full-time, although I still do some teaching and consulting – and a lot of pro bono work for the Vis East[2], ArbitralWomen[3] and the Chartered Institute of Arbitrators. Most of my arbitrations have their seat in Asia or Europe, with a few in the Middle-East. I think Canadians are

1. ICC Case No. 3493, IX Y.B. Com. Arb. 111 (1984); 112 J. Droit Int'l (Clunet) 130 (1985).
2. <http://www.cisgmoot.org>.
3. <http://www.arbitralwomen.org>.

perceived as a comfortable compromise between Europeans and Americans, or between the Asians and Europeans.

RAMJAM: How has your experience of arbitration differed, if at all, between Asia, Europe and America?

In terms of development of an international arbitration culture, ethics and profession, Europe is very advanced. Asia does not share the same history of arbitration, as many Asian people traditionally view confrontation (and thus litigation and arbitration) very negatively, even as shameful. According to a Confucian proverb, "it is better to enter the mouth of the dragon than the door of the court." Some Asians perceive arbitration as a western invention and imposition made to favour their businesses by avoiding their domestic courts. This is changing quickly, especially as Asians, especially Chinese, become investors abroad, in Africa and in South America for instance, and begin to appreciate the neutrality and dependability of international arbitration to protect their own interests. With the rapid development of global trade, there are more disputes, and international arbitration has become the preferred method of settling them.

Let me open up a brief parenthesis to discuss my involvement with the Vis Moot and more specifically my role in setting the east branch of this world-renowned competition. When invited to arbitrate at the Vis Moot in Vienna I was amazed at the level of competition, the dedication of the students, their coaches and fellow arbitrators, and the unique international social experience it offered to all of us. I did notice that Asians were very much unrepresented at the Moot, and was able to persuade Moot Director Eric Bergsten to let me launch the Vis Moot (East) in 2003 as a little sister to the Vienna competition. Like the Vienna Vis, Vis East is an educational experience in the form of a competition, where law students learn in teams to develop research, drafting and advocacy. We began with 14 teams, and this year, 107 teams participated in the Vis East. Many students tell me that the Vis or Vis East has been a life-changing experience with many deciding to pursue a career in arbitration. For those who choose a different path, the Vis leaves them with good generic skills that will help them in whatever type of legal work they choose.

RAMJAM: What are the initiatives aimed at developing arbitration in Asia?

Going back to 1997 when I first arrived in Asia, Hong Kong had already developed arbitration, Singapore was in the process of develop-

ing the field, while Kuala Lumpur already had an arbitration centre but very few cases. Arbitration in Japan was considered like litigation, that is, as a loss of face. China provided arbitration under the wing of the government through the China Counsel for the Promotion of International Trade ("CCPIT") which evolved as the China International Economic and Trade Arbitration Commission ("CIETAC").

CIETAC has grown enormously and has a very significant caseload today. Its new Arbitration Rules came into effect in 2015 in an effort to adapt to the practice of international arbitration and to foster its development. That said, there are still pitfalls for an unwary western foreign investor. For instance, under CIETAC Rules, absent an agreement of the parties on the language of arbitration, Mandarin Chinese will normally be the language used – even if the parties never used it in their negotiations or when working together before the dispute. And this usually leads to appointing a panel of three Chinese arbitrators, since there are still relatively few foreign arbitrators capable of conducting an arbitration in Mandarin.

Elsewhere in Asia, just about every country now has its own arbitration centre, and many of them are busy and have excellent reputations globally. The Hong Kong International Arbitration Centre is now 30 years old and has a substantial and rapidly growing caseload. The Kuala Lumpur centre is even older, but has developed more recently, and even has a set of rules for arbitrations involving Moslem parties. The Singapore government has fostered its development as a major hub as well.

Hong Kong was one of the first jurisdictions in the world to adopt the UNCITRAL Model Law on International Commercial Arbitration. Hong Kong is very favorable to arbitration and annulments or enforcement refusals of awards are very rare. The Hong Kong government has been working at making Hong Kong an important arbitration seat for Asia and globally, regularly adapting its law to align with changes in the business world. Hong Kong's version of the Model Law is not identical to the Model Law, because Hong Kong is not a sovereign nation. Since its repatriation in 1997, under "one country, two systems", an award rendered in Hong Kong is not considered a foreign award in Mainland China, so the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is not applicable between Hong Kong and China. Since 1999 however, a bilateral "arrangement" ensures that awards made in either jurisdiction are enforceable in the other under provisions virtually identical to those of the New York Convention.

RAMJAM: Is Hong Kong an arbitration-friendly place for women?

There are a number of women doing arbitration work as counsel in Hong Kong, but there are still very few women acting as arbitrators. As part of my work as founder and honorary president of Arbitral Women, an international network of women in dispute resolution I founded with Mirèze Philippe in 2005 to promote women in arbitration, I conducted some research over the past year about the place of women in arbitration in Asia. I interviewed the heads of the ICC, of the CIETAC and of the Hong Kong International Arbitration Centre ("HKIAC") about the proportion of women acting as arbitrators in their cases. The HKIAC has close to 10 % women arbitrators on their lists, which does not mean they are necessarily appointed as arbitrators. CIETAC has several Chinese women that get appointed more than twice, meaning they are repeat appointments. One American woman that speaks Cantonese appears on CIETAC's list and has had several cases. Otherwise, the foreign arbitrators on the CIETAC list are rarely appointed. This may change as it administers more disputes where English is the language of the arbitration. The ICC told me they do not keep those figures for Asia, but I know there are very few Asian women acting as ICC arbitrators. Those of us who do occasionally get appointed are usually expatriate European or North Americans living in the region. As a member of the ICC national committee for Hong Kong, I participate in the choice of arbitrators by the Court. We do try to recommend Chinese women arbitrators with ICC experience, but there are so very few. It is really a struggle to find women to act as arbitrator unless it is a very small case and ICC experience is not a requirement.

At the Vis East Moot, women now represent at least 60 % of the participants. There are many all-women teams, and female coaches. Yet, so many few are appointed as arbitrators in real cases. I remember for the tenth anniversary of the Vis Moot, all winners of the first edition were contacted to enquire about their careers. The best oralist of the first Moot I contacted, a young American woman, explained she was working in a small construction firm in California. I was very surprised since she had been very keen to work in arbitration. But the jobs are not always there for graduate students who want to start a career in arbitration. There is tremendous competition for the relatively few entry level jobs available in arbitration.

While it is challenging for almost all new grads, it can be even more difficult for women, who still tend to steer (or be steered) away from litigation, which is still seen, to a great extent, as a man's world. Even for those who do take the plunge, litigation and arbitration are still plagued by the

"leaky pipeline", as women tend to leave in their early to mid-thirties, thus falling off the partnership track where most arbitrators get their first cases. Combining law partnership and motherhood is just not realistic for many women. And while being a partner at 45 may be possible, being a mother is usually not. Many women have to make tough decisions. The one thing that I have always noticed, and is now confirmed by research, is that all women who are mothers and successful arbitrators (and arbitration counsel) have co-operative husbands who assume a large share of the home and childcare responsibilities. And even with that, the women work very long days, often returning to their files and telephone conferences after putting their children to bed.

Over the past ten years, attitudes towards women – of both law firms and their clients – have been evolving. There is a greater awareness about the benefits of diversity, including gender diversity. As we see more women in general counsel and in-house positions, we will probably see more women being appointed as arbitrators. People feel comfortable having their disputes judged by people who look like them. That being said, you pick the person that you think is going to do the best job, and quite often the first person that comes to mind is still the well-known and highly respected male arbitrator who was so effective in a prior case. That is especially true for the presiding arbitrator.

RAMJAM: Does your practice involve mediation? How is mediation practiced in Asia?

There is a great history of mediation in Asian countries. For many hundreds of years China has used mediation to deal with disputes. It may well be the wise old man at the street's corner who is approached by neighbors to settle their dispute, or more recently party cadres in China's closed economic system. It is common practice for Chinese judges to mediate in the course of court litigation, and the same tradition has flowed over into arbitration. This causes some consternation to western parties arbitrating in China. The Japanese, Koreans, Vietnamese and Philippines also have used mediation traditionally. In Asia, there is more of a tendency to ask the mediator to propose settlement solutions. These will very likely be agreed by the parties in order to resolve their dispute. The "facilitative method" popular in the west is still a novelty to most Asian disputants.

Litigating in Hong Kong is an extremely expensive process, with the result that over half of litigants are self-represented and access to justice is threatened. Some years ago the judiciary in Hong Kong issued a practice direction pursuant to which parties must attempt to mediate

their dispute before going before the judge, and submit a certificate of mediation to the judge. A party refusing to mediate will often be penalized by a cost award, as is done in England. This has resulted in more mediations. This not only gets the dispute settled faster and more cheaply for the disputing parties; it also eases the pressure on lengthy Hong Kong court dockets. That said, although I am an accredited mediator in Hong Kong, most mediation conducted in Hong Kong is in Cantonese which I do not speak fluently, so I teach mediation more than I practice it.

RAMJAM: What advice would you give to a young lawyer wishing to undertake a career in international arbitration?

Most students interested in working in arbitration complete an LL.M in arbitration or dispute resolution and some even do two LLMs, one in arbitration and one in dispute resolution or one in international law and one in arbitration. Intensive study, writing a thesis or a significant paper on a novel topic that might get published can help. At the very least, it can trigger interesting conversations with potential employers. Getting court room experience, whether in litigation or arbitration, gives a good sense of how practice works. Meet professionals in the field and tell them you are interested in practicing in arbitration. It is important to be persistent and to keep asking. There may be no positions available the first time you apply, but that can change; you need to stay on the radar, to be in the right place when that elusive job opening does open up. Maintaining contacts with friends already working in arbitration or even other law firm departments, keeping an ear to the ground, writing about an interesting case you read about in an arbitration journal, and not being shy about applying for a second or even third time – all these can be useful. Someone may quit, follow a spouse to another country, change specialties or go on maternity leave; a firm may decide to open a new arbitration department, or to strengthen an existing one. Be prepared to spend a few years abroad if that is where the work is. Language skills especially Mandarin and Spanish, will become increasingly useful as more cases are conducted in these languages. Admittedly, it is a full-time job to look for work effectively.

For those already working in a firm, it can help to find out whether anyone has arbitration cases. Offer to help. Perhaps you can assist with a specific issue, or you might even get to join a team handling a new case. As a professional, having a field of expertise in information technology, in construction and engineering or in banking for instance can help build credibility to get appointed as arbitrator. For example, in construction disputes, professionals with technical training or experience see

doors open more easily. My own experience was different, as I came with general litigation experience to become a specialist in international arbitration procedure. I am not a banker or an engineer, but have done cases in these and other fields, educating myself about the technical aspects as we proceed.

RAMJAM: 2015 marks the 100th year of the Chartered Institute of Arbitrators. As a fellow arbitrator (FCIArb), can you tell about the mission of the Chartered Institute of Arbitrators and how you see its role evolving in the next decades?

I have been involved with the Chartered Institute of Arbitrators for about twenty years. I have worked on education and membership in London, and have been a committee member in the East Asian Branch for a long time. I have also worked in North America and in Latin America, and taught and directed courses in dozens of countries on all continents.

The Institute's role as a professional body is to set recognized standards for arbitrators, mediators and adjudicators. It provides guidance and best practices and is great for networking. The institute is not the only organization carrying out this mission, but it is the only one that is global, with over 12,000 members in more than 70 countries. The challenge for the CIArb is to evolve from what began as a very British, common law oriented group to accommodate diverse legal cultures while maintaining a global "gold standard". The Institute's educational programmes are constantly under review and in recent years we have tended to make more use of international laws and models rather than centering the curriculum on English law. This is, in my view, the biggest challenge for the Institute's second century, just as the awareness and respect for other cultures is the biggest challenge for international arbitrators in general.