chapter three

Shifting the Paradigm: Moving from Litigation to Arbitration

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It is not the strongest species that survive, nor the most intelligent, but the ones who are most responsive to change.

— CHARLES DARWIN

A. INTRODUCTION AND SCOPE OF THIS CHAPTER

The practice of law and the development and acceptance of mediation and arbitration have changed dramatically since I was first appointed as an arbitrator in 1967 — in my third year of law. The playing field has changed. The acceptance of problem solving by clients and their counsel has grown notwithstanding pockets of resistance.

The present challenge is how to impart to lawyers the need to redirect their reasoning, and their competitive spirit, in advising their clients on resolving issues. Experience has taught me that lawyers, like other professionals, have some resistance to change — not only change in process (e.g., the rules of court) but also change in terms of a paradigm shift — the change from one way of thinking to another.

This concern is not limited to litigators who spend their time using the "have hammer — all nails" approach by seeking resolution only in the public courts. It also relates to the need for solicitors to understand, for example, that tacking on an arbitration clause from some precedent in a contract without understanding the divorce process has serious and unacceptable consequences for their clients.

After much consideration, I thought it best to deal with the subject matter not by preparing some academic paper but by setting out in some eclectic fashion primary information for the reader, providing, wherever possible, considerations for the practitioner entering this problem solving area — with an emphasis on domestic arbitration.

I have in this exercise relied upon papers I have written in the past together with papers and information gleaned from colleagues. Most of the caselaw and legislation referred to is from British Columbia. There is corresponding caselaw and legislation in other provinces.

Hopefully, you will take "a view from the balcony" with the result that you further understand the benefits for your clients of various forms of arbitration.

B. LEGAL CULTURE: THE SETTING

Legal culture has changed in the last thirty years. The skill set of lawyers of the 1970s is inadequate for problem solving in this decade. Professor Julie Macfarlane, in her book *The New Lawyer,* notes as follows:

> The new lawyer takes on all the traditional professional responsibilities of counsel as well as some additional ones. These include the responsibility to educate the client on a range of alternate process options, to establish a constructive relationship with the other side that does not undermine her loyalty to her client, to commit to the good faith use of appropriate conflict resolution processes and to model good faith bargaining, attitudes, to anticipate pressures to settle, and to advocate strongly for a consensus solution that meets, above all, the needs of her client. It is in relation to these additional responsibilities that the new lawyer faces the greatest challenges in developing an appropriate professional response to new (or reconfigured) ethical dilemmas.[1]

1 Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 221.

Rodney MacDonald, in a discussion paper, cites the Australian Law Reform Commission: "'significant and effective long term reform [of the system of civil litigation] may rely as much on changing the culture of legal practice as it does on procedural or structural change to the litigation system. In particular, lawyers, their clients and the courts may need to change the ways in which they perceive their relationships and responsibilities.'"[2]

Compare the following words from a paper by Peter Behie, QC, with those in the quotation below from Professor Macfarlane's book:

> It is hardly controversial to suggest that you and your client should know where a file is headed. As the inimitable Yogi Berra said, "If you don't know where you're going, you'll end up somewhere else." The development of a road map will fulfill this role. More importantly, the early development of a game plan or roadmap is essential if you are to solve your clients' problems in the most efficient way and in a manner that puts the client in the driver's seat (two goals that I also take to be not controversial) . . . .
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> I spent the first many years of my practice transforming my clients' problems and concerns into legal issues and the [*sic*] advancing those legal issues through the litigation process. I undertook this kind of approach in a rather unexamined sort of way. I simply saw myself as and referred to myself as a commercial litigator. I formed litigation strategies sometimes only vaguely related to clients' problems and, I am embarrassed to admit, without a keen awareness of the costs (both soft and hard) of delivering these legal outcomes.
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> I began to realize that this approach was impoverished. It often did not deliver results that clients expected or wanted, or did so at a price that was unacceptably high. Clients routinely reported feeling disaffected and dissatisfied. Worse still, I sometimes felt that my training and understanding of the process became an impediment to solutions and outcomes. Often disputes

2 Rodney MacDonald, "Legal Culture" (Civil Justice Reform Working Group Discussion Paper, 23 February 2005) at 2.

were not being resolved, not because the parties were not willing to resolve them, but rather because counsel, caught in the system, resisted resolution. More information was required; a higher level of understanding of the intricacies of the facts was needed; discoveries had to be completed. These I began to see were my needs not necessarily my clients' needs . . . .

Now, I say that what I do is solve clients' business problems often with, but not exclusively through, the litigation process. I also resist the temptation to merely transform clients' problems into legal problems and only address the latter and ignore the former. Clearly, one must apply legal analysis to the problems and use case law as a predictor of outcomes. The analysis should not, however, presuppose that litigation is inevitable or if the process is issued, that a trial is certain. The litigation trial should not wag the dog. When I use the litigation process I do so with an eye on the clients' commercial problem all [*sic*] times.

It is against that backdrop that I turn to the initial assessment. It goes without saying that if one's job is to solve commercial problems then the initial assessment has to focus on identifying what those problems are and developing a strategy that addresses the resolution of these commercial problems.

The goal, then, of the initial assessment is to form a strategy based on a clear understanding of the client's goals. It is my view that this strategy should be reduced to writing sent to and reviewed with the client. It should include the following:

(a) a description of the client's goals as you understand them together with the facts as you apprehend them;
(b) clear options for the client which should include options short of or separate from litigation;
(c) an honest estimate of the costs of each option;
(d) some rough time lines for each option;
(e) an analysis of the legal issues (both on liability and damages) and outcomes; and
(f) the probability of success to at least the litigation options (based on your judgment of the risks).

> There a [*sic*] number benefits to doing this. This road map will force discipline into your thinking from the outset, make you accountable to the client as the matter moves forward and gives the client the clearest possible picture of what lies ahead. It is a road map that will help you and your client avoid, as Yogi said, ending up somewhere else. In providing this road map, you will be allowing the client to exercise control over the decision making. In my view, it is no longer adequate to say that the litigation road has too many unexpected turns to undertake such any [*sic*] analysis or provide a road map. You can — and indeed must — explain the uncertainty of litigation and the difficulty of precision . . . .
>
> The first meeting is critical. You will want to expand on the information that has been provided to you. But more importantly, you will want to ask what the client wants to achieve. You must divine the client's goals; what they want, need and what can be done. You should obviously pay attention to the context in which the problem arises. Consider the relationships at play. Often I deal with shareholders' disputes in which the falling out is between old and dear friends or even family members. You must be attuned to these sorts of dynamics and they should weigh heavily on the judgment you bring to bear on [*sic*]course of action.[3]

Professor Macfarlane quotes a lawyer as saying "'I mean, we're trained as pit bulls, I'm not kidding you, I mean we're trained pit bulls and pit bulls just don't naturally sit down and have a chat with a fellow pit bull, the instinct is to fight and you just get it from the first phone call. I'm bigger and tougher and strong and better than you are.'"[4]

3 Peter Behie, QC, "Some Thoughts on the Initial Assessment and the Road Map of Dispute Resolution" (Paper delivered at the Dispute Resolution Conference of The Continuing Legal Education Society of British Columbia, Vancouver, BC, 26 May 2006).

4 Quoted in Macfarlane, above note 1 at 13.

And what of the client? How have clients viewed the culture of civil litigation? It was the British humourist Jerome K Jerome who wrote the following:

> If a man stopped me in the street, and demanded of me my watch, I should refuse to give it to him. If he threatened to take it by force, I feel I should, although not a fighting man, do my best to protect it. If, on the other hand, he should assert his intention of trying to obtain it by means of an action in any court of law, I should take it out of my pocket and hand it to him, and think I had got off cheaply.[5]

The Honourable George W Adams, QC, in his book *Mediating Justice*, comments on the present judicial culture:

> Lawyers increasingly distrust one another. The profession is no longer a seamless cadre of legal professionals. Recessions and the economics of lawyering have also increased the number of inexperienced lawyers willing to handle lawsuits. The courts have been slow to adopt modern management techniques to administer the growing caseloads primarily because our traditional conception of justice encourages judges to be passive, disinterested and impartial. Dealing primarily with "private" disputes, judges have tended to leave the pace of pursuit to the parties.[6]

We live in a cost-conscious global society where people want to solve their problems now — not in five years — and as inexpensively as possible. The late Honourable Willard Zebedee Estey, QC, wrote, "Disputes, unlike wine, do not improve by aging."[7]

When I refer to costs, it is not only to financial costs but also to emotional and productive costs. Many business people want to

5 Jerome K Jerome, *Three Men in a Boat and Three Men on a Bummel*, ed by Geoffrey Harvey (Oxford: Oxford University Press, 1998) at 217. Jerome was an English writer and humourist of the late nineteenth century.

6 The Honourable George W Adams, QC, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian, 2003) at 3.

7 The Honourable Willard Z Estey, QC, "Foreword" in D Paul Emond, ed, *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora, ON: Canada Law Book, 1989) at v.

solve their conflicts and get on with business. Many times, they would like to repair their long-term relationship with the other litigant.

Both business executives and their lawyers share a behavioural pattern. Former US Chief Justice Warren E Burger noted the following:

> A common thread pervades all courtroom contest: Lawyers are natural competitors, and once litigation begins they strive mightily to win using every tactic available. Business executives are also competitors, and when they are in litigation, they often transfer their normal productive and constructive drives into the adversary contest. Commercial litigation takes business executives and their staffs away from the creative paths of development and production and often inflicts more wear and tear on them than the most difficult business problems. The plaintive cry of many frustrated litigants echoes what Learned Hand implied: "There must be a better way."[8]

These words appear to be consistent with the view of the Australian Law Reform Commission, noted above, suggesting the need for the involvement of lawyers, their clients, and the courts in this paradigm change.

The relationship between private decision makers — namely, arbitrators — and public decision makers — namely, judges — is the subject of a paper by John Bolton in which he quotes Lord Woolf, who was delivering a paper entitled "Why Can't an Arbitrator Be Just Like a Judge?" Lord Woolf turns the tables and asks, in essence, "Why can't a judge be just like an arbitrator?"[9] He is, of course, referring to the flexibility that arbitrators have in dealing with issues in dispute.

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8 Quoted in Ernest G Tannis, *Alternative Dispute Resolution That Works* (North York, ON: Captus Press, 1989) at 129.

9 Quoted in John Bolton, "Why Can't an Arbitrator Be Just Like a Judge?" (February 1996) *Arbitration* 34.

In July 1996, Lord Woolf's *Access to Justice* report was published suggesting well over 100 changes to the civil litigation process.[10] One of the suggestions was the expansion of the Calderbank offer, a concept that now forms, in part, the amendment to Rule 9-1 of the British Columbia *Supreme Court Civil Rules*.[11] Since 1980, section 11 of the British Columbia *Arbitration Act* has granted an arbitrator discretion in awarding costs.[12] A Calderbank offer is a useful tool in the hands of a party that has made a fair settlement offer on a without prejudice basis, save as to costs (and where costs in British Columbia can be full indemnity).

C. PAST AND PRESENT METHODS OF RESOLVING DISPUTES

Some years ago, the *Lawyers Weekly* set out the pros and cons of various dispute resolution methods. I reproduce this information as Table 3.1, below, with certain modifications.[13]

Table 3.1: Past and Present Methods of Resolving Disputes — Pros and Cons

	Pros	***Cons***
Duel	• usually done at dawn (so it will not interfere with the workday)	• out of fashion • might get killed
Coin toss	• cheap • simple • a penny will do	• arbitrary
War	• good for business • great stories for grandchildren	• might get killed • world might end • determines not who is right but who is left

10 Lord Harry Kenneth Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1996).

11 BC Reg 168/2009.

12 RSBC 1996, c 55.

13 See *Lawyers Weekly* (pre-2000) [specific citation unavailable].

	Pros	*Cons*
Bare fists	• good exercise • cheap	• might need cosmetic surgery afterwards • dry-cleaning bill for blood on shirt
Litigation	• respectable • great fees (if you can collect them)	• expensive • drags on forever
ADR	• cheaper than litigation • quicker than litigation • pick your own decision maker or mediator • private • now very popular • most clients prefer it once they understand it • client driven	• used to be seen as flaky • misunderstood by those who are not on the "inside"

D. ARBITRATION'S RELATIONSHIP TO LITIGATION

The relationship between arbitration and litigation formed part of the subject matter addressed by Newbury JA in *MacKinnon v National Money Mart Co* where she cited Deschamps J in *Dell Computer Corp v Union des consommateurs*:

> The neutrality of arbitration as an institution is one of the fundamental characteristics of this alternative dispute resolution mechanism. Unlike the foreign element, which suggests a possible connection with a foreign state, arbitration is an institution without a forum and without a geographic basis . . . . *Arbitration is part of no state's judicial system . . . the arbitrator has no allegiance or connection to any single country . . . . In short, arbitration is a creature that owes its existence to the will of the parties alone . . . .*
>
> To say that the choice of arbitration as a dispute resolution mechanism gives rise to a foreign element would be tantamount to saying that arbitration itself establishes a connection to a given territory, and this would be in outright contradiction to the very essence of the institution of arbitration: its neutrality. This institution is territorially neutral; it contains no foreign element.

> Furthermore, *the parties to an arbitration agreement are free, subject to any mandatory provisions by which they are bound, to choose any place, form and procedures they consider appropriate*. They can choose cyberspace and establish their own rules. It was open to the parties in the instant case to refer to the *Code of Civil Procedure*, to base their procedure on a Quebec or U.S. arbitration guide or to choose rules drawn up by a recognized organization, such as the International Chamber of Commerce, the Canadian Commercial Arbitration Centre or the NAF. The choice of procedure does not alter the institution of arbitration in any of these cases. *The rules become those of the parties, regardless of where they were taken from*.[14]

E. MEDIATION VERSUS ARBITRATION

Mediation, a form of controlled negotiation, does the following:

1) looks to the future
2) focuses on relationships
3) seeks to restructure relationships
4) results in custom-made solutions
5) provides a role for the clients

In contrast, arbitration does the following:

1) looks to the past
2) focuses on facts
3) seeks to establish fault or liability
4) has winners and losers
5) is dominated by lawyers

Some of the advantages of arbitration as opposed to litigation are as follows:

1) Arbitration is generally less expensive than litigation, although it is not cheap unless carefully planned in advance.
2) The matter can if the parties cooperate be heard promptly.

14 2009 BCCA 103 at para 26, citing *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at paras 51–52 [emphasis and ellipses added by Newbury JA].

3) The evidence is heard in private.
4) The process and the award are generally confidential.
5) Parties can determine who the decision maker will be (a great advantage over the court system). One can have the best case possible and still run the risk of losing by drawing an inexperienced decision maker.
6) The process — namely, the rules of arbitration — can be determined by the consent of the parties as opposed to the process's being governed by a specified set of rules or the parties' being required to adopt such rules.

The lawyer's role in arbitration is similar to the lawyer's role in litigation: The lawyer is an identifier, selector, and marshaller of evidence. In fact, one text describes the litigator's role as that of a historian and litigation as largely a process of recreating historical facts.[15] One needs only to look at the division of time spent on a case. The majority of time is spent gathering and presenting the evidence as opposed to gathering and arguing the law.

During the process of dispute resolution, the client and his counsel deal with an evaluation of risk taking, by which I mean an assessment of risk — namely, the cost if things go wrong and the probability of that occurring. If the cost is high, the probability must be minimized. If the cost is low, the probability may be allowed to increase according to the client's personal assessment of acceptable risk.

Risks are controlled in the following ways:

1) elimination of risk
2) elimination of activities that produce undue risk
3) insuring for otherwise uncontrolled risk
4) informed consent of the client
5) establishment of standards, controls, and regulations

These approaches come into play in any dispute either as a proactive or as a reactive procedure.

15 David A Binder & Paul Bergman, *Fact Investigation: From Hypothesis to Proof* (St Paul, MN: West Publishing, 1984) at 4–7.

F. THE PROACTIVE ARBITRATOR: APPLYING MANAGEMENT PRINCIPLES TO ARBITRATION

By espousing the *proactive* arbitrator, I mean active rather than passive conduct by the arbitrator. The management skills required by an arbitrator are many. She is not, in fact, a public judge while still having judge-like powers, with the ability to bind the parties in a manner similar to that of a judge. An arbitrator is a decision maker. When an arbitrator acts as decision maker in the arbitration process, one party may be happy, and one party may not be. It is important for the arbitrator to ensure that she writes a decision that clearly explains to the unsuccessful party the reasons for the decision. If not, the arbitrator will be performing economic suicide.

There have been criticisms by lawyers and their clients of arbitrators who have failed to take a leading role in controlling the proceedings from the commencement of the arbitration to its completion. Such control is, I suggest, without arrogance, required in most arbitrations. Generally, counsel prefer an arbitrator who manages the whole hearing process so that decisions are made promptly, clearly, and concisely. People like to win, but when they do not win, they need to know that the process has been fair. Arbitrators need confidence in their expertise and experience, coupled with a working knowledge of business and management. One must remember that the arbitrator relies on the parties to perform his directions and orders so that the process works smoothly.

This process requires preplanning on the part of the arbitrator with substantial input from the parties, their counsel, or both, including deciding whether they are going to conform to a specific set of rules, adapt their own rules, or do both. Other forms of appropriate dispute resolution may be used. For example, it is not uncommon in certain situations to use Med-Arb (mediation-arbitration) or, in some cases, Arb-Med (arbitration-mediation).

The structure and process should evolve, and everyone should know what has to be done, who will be doing it, and within what time frame. Throughout this process, the arbitrator must have a

clear idea of the necessary personal duties and responsibilities while retaining command of the proceedings. This form of discipline and control must be evident, together with, hopefully, a trace of humility and gentle humour.

The process may commence with correspondence sent out by the arbitrator setting out a prehearing agenda and inviting counsel for input on the agenda. This letter is generally followed by a prehearing meeting preferably at an office to decide a number of issues. The alternative is to hold a conference call. By taking this approach, one ensures that no one is caught off guard or is subjected to trial by ambush.

It is important for an arbitrator to anticipate, think ahead of possible developments, and in a timely fashion to make the parties aware of events to come. The proceedings should be controlled with flexibility. The arbitrator must be prepared to make clear decisions and offer directions at critical stages. What is more, the parties must be aware of the arbitrator's objective at all times, which is to ensure that natural justice (procedural justice) and common sense, based on good commercial practice, prevail.

I suspect that no arbitrator comes close to being a Solomon, but certain leadership qualities are essential. Derek Sharp lists those qualities:

1. Knowing and understanding what is wanted by the parties and communicating it to all involved.
2. Creating a personal atmosphere, having the right appearance, body language, voice quality and formulating the appropriate package with flair.
3. Demonstrating integrity, fairness, truthfulness and the confidence to act alone.
4. Having the confidence to dominate encounters, meetings and hearings, being able to set the scene, begin to set the pace, keep control, manage change and stop proceedings when appropriate.
5. Remaining calm in crises, absorbing stress, standing off to see the whole problem, creating order from chaos, giving

simple, clear directions and knowing how to get relief from the tension after each crisis is resolved.

6. Making the parties aware of where their authority, responsibility and accountability lie and ensuring that each party performs their role and focuses on the desired results.
7. Maintaining discipline by establishing ground rules of behavior, being punctual and reliable and by offering a good example.
8. Gauging the place and timing of action, knowing the right moment to intervene, being consistent in directions and stimulating action by the parties at the right time.
9. Ensuring balanced, harmonious progress, tying up loose ends, giving clear directions on time and maintaining continuity and enthusiasm.
10. Maintaining good morale — we are all human and the best results are based on trust, recognition, rewards, satisfaction and fulfilment, allowing people maximum freedom of action.[16]

Bonita Thompson, QC, writes that most "of the problems that can plague the arbitration process can be avoided by:"

1. choosing counsel who are knowledgeable in the process;
2. choosing highly experienced arbitrators;
3. using rules of procedure that provide for an efficient and timely disposition of the arbitration;
4. citing the arbitration in a jurisdiction with laws that are supportive of the arbitral process.[17]

G. PARTICULAR CHALLENGES FOR COMMERCIAL ARBITRATORS

One of the greatest challenges faced by an arbitrator occurs when one party attempts to delay the process, thereby lengthening the

16 Derek Sharp, "Applying Management Principles to Arbitration" (February 1996) *Arbitration* 6 at 6.

17 Bonita Thompson, QC, "Commercial Dispute Resolution: A Practical Overview" in Emond, ed, above note 7, 89 at 118.

proceedings, adding to their costs and expenses, and antagonizing the other parties and their counsel.

An attempt to delay the process can come in the following forms:

1) jurisdictional challenge
   - the substantive law applied to the dispute
   - the governing law regarding the arbitration procedure
   - the validity of the arbitration clause
   - the rules of the administering organization
2) discovery challenge
3) perceived procedural irregularity
   - arbitrator's impartiality
   - unfair treatment by the arbitrator

While arbitrators have no ability to control delays before their appointment, after their appointment they can exercise good and active management skills from the preliminary hearing stage to the rendering of the final award, which will make the process move to a prompt conclusion, thereby giving effect to the positive aspects of private arbitration.

H. THE ATTITUDE OF BRITISH COLUMBIA'S COURTS TO ARBITRATION

The British Columbia Court of Appeal in *Hayes Forest Services Limited v Weyerhaeuser Company Limited*, a decision written by Chiasson JA, a judge well versed in the law of arbitration, stated as follows:

> Commercial arbitration is a private dispute resolution process designed to enable parties to deal with disputes efficiently, effectively and economically. In this case, applicable legislation is the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "*Act*"). Although the *Act* provides in s. 14 that arbitral awards are "final and binding on all parties", s. 31 gives parties a right to appeal to the court "any question of law arising out of the award", either by agreement or with leave of the court. Section 32 contains a limited privative clause.

> The parties expressed clearly their intention to resolve disputes efficiently and effectively by agreeing to arbitrate before a single arbitrator to be selected from an agreed list of named persons . . . .
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> In my view, a core value of the arbitration process — the efficient and effective resolution of private disputes — has been lost in this case, in part, because rather than simply ensuring the rights of the parties were determined on sound legal principles, the court usurped the function of the arbitrator and exceeded the authority granted to it by s. 31 of the *Act* . . . .
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> The Commission [referring to the Law Reform Commission of British Columbia and its 1982 report on arbitration] noted that the case-stated procedure was much criticized as increasing the cost and inefficiency of arbitration and had this to say at 72:
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> > Although arbitrations are intended to provide a less expensive and less cumbersome method of resolving disputes than litigation in the courts, the setting aside of an award can sometimes make arbitration a more costly and a less satisfactory procedure than litigation. It can also make a mockery of the two principal objectives of arbitration, namely early finality and a determination outside the courts.[18]

In August 2014, the Supreme Court of Canada rendered a seminal decision for the business and arbitral communities in *Sattva Capital Corp v Creston Moly Corp*.[19] Justice Rothstein, writing for the Court, established a number of principles including those regarding the deference to be given to commercial arbitrators and the limits of appeal, coupled with a practical, common sense approach to interpreting contracts:

> Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial

18 2008 BCCA 31 at paras 1–2, 4, and 31.

19 2014 SCC 53 [*Sattva*].

> decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.[20]

The dispute that led to *Sattva* was submitted to arbitration in February 2008. The case was heard in late September and early October. The arbitration award was released in December 2008 by Leon Getz, QC, a seasoned commercial arbitrator and retired professor of corporate law at the University of British Columbia. The award rejected the position taken by Creston Moly. The story of the leave to appeal proceedings that followed the rendering of the arbitration award is a sad commentary on the leave to appeal process. The entire arbitration was conducted and concluded within approximately ten months of the dispute's arising. The final resolution, which came with the rendering of the Supreme Court decision, took another five and a half years.

Consider only one of those benefits: the timeliness of the arbitration proceedings when contrasted with the glacial pace of the court process. In the end, what the arbitrator accomplished in less than a year in the prelude to the *Sattva* case provided the parties with more value than what the court system labored mightily to deliver in almost six. It will now be appropriate for provincial legislatures in Canada to consider amendments to the arbitration statutes that govern arbitration appeals. The subject of legislative change is a topic for the Uniform Law Conference of Canada (ULCC) in its current review of domestic arbitration legislation.[21]

20 *Ibid* at para 105.

21 See Kenneth J Glasner, QC, & William G Horton, "Judicial Review of Commercial Arbitration Awards North of the 49th Parallel" (2014) 32:10 *Alternatives to the High Cost of Litigation* 151, online: http://dx.doi.org/10.1002/alt.21553.

Within a year of the Supreme Court's *Sattva* decision, the British Columbia Court of Appeal dealt with a commercial dispute in *Boxer Capital Corp v JEL Investments Ltd*. The court, citing *Sattva*, made the following comments:

> Commercial Arbitration is intended to provide a speedy and, in the vast majority of cases, final determination of the issue or issues between the parties. The issues between the sophisticated commercial parties in the present case are not terribly complex. They involve the construction of a joint venture agreement. Yet I count two separate arbitrations and nine judicial proceedings to date in this saga. Surely that procedural history is inconsistent with the objectives of commercial arbitration.
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> . . .
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> This was recently confirmed by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, a decision released shortly after the appellant filed its factum in this appeal. In *Sattva*, Mr. Justice Rothstein for the Court observed that an appeal from an arbitral award "takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal" (at para. 104). In general, parties *choose* to submit their dispute to arbitration; they also choose the number and identity of their arbitrator or arbitrators. This means that the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, "is not entirely applicable" to appeals from arbitral awards (*ibid.*). For example, while the *Dunsmuir* framework merely affords deference to an administrative tribunal's factual findings, the *Arbitration Act* "*forbids* review of an arbitrator's factual findings" (*ibid.*, emphasis added).
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> . . .
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> *Sattva* held that questions of contractual interpretation should almost always be regarded as questions of mixed fact and law (at para. 50). (Historically they were seen as questions of law.) This means that, after *Sattva*, leave will rarely be granted to appeal an arbitral award on a question of contractual in-

> terpretation. (If *Sattva* had been decided earlier, leave arguably would not have been granted to appeal the parties' initial arbitral award and this lengthy saga would have been avoided.).
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> . . .
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> Finally, when leave is granted to appeal an arbitral award, it is important for the reviewing court to strictly honour the boundaries of the question or questions of law on which leave was granted. The appeal is not one at large. The reviewing court must constantly remind itself of the narrow question or questions before it, lest it improperly expand its search for error into areas that go beyond those questions, let alone areas that go beyond the scope of the dispute referred by the parties to the arbitrator. I proceed on this basis.[22]

The *Boxer* case is yet another sad commentary on the leave to appeal process. The first arbitration award was made in March 2009, and the dispute, after many appearances at various levels of the courts and a second arbitration award, was finally resolved by the Court of Appeal in June 2015,.

In November 2016, the Supreme Court heard an appeal from the British Columbia Court of Appeal in *Urban Communications Inc v BCNET Networking Society*. In upholding the Court of Appeal's decision, the Supreme Court dismissed the appeal by Urban Communications from the bench.[23] In its reasons, the Court of Appeal had stated, "*Sattva* changed the approach to be taken on commercial leave to appeal applications and, if granted, on consideration of the merits of the appeal from an arbitrator's award."[24]

Recently, the Ontario Court of Appeal dealt with a case where both the arbitrator's reasons and the court's reasons were reasonable. Justice of Appeal MacPherson in *Ottawa (City) v Coliseum Inc* referred to an earlier (January 2016) Ontario Court of Appeal decision in *Popack v Lipszyc* linking private consensual arbitration with the need for judicial deference:

22 2015 BCCA 24 at paras 3, 7, 9, and 11 [*Boxer*].

23 2016 SCC 45.

24 2015 BCCA 297 at para 53.

In a similar vein, in *Popack v. Lipszyc*, 2016 ONCA 135, 262 A.C.W.S. (3d) 841, Doherty J.A. linked the fact of a private consensual arbitration with the need for judicial deference to the result of that arbitration in this fashion, at para. 26:

> In addition to the generally applicable principles that urge deference in the review of all discretionary decisions, the nature of the specific order under appeal can also enhance the deference rationale. The application judge exercised her discretion in the context of a review of an award rendered in a private arbitration before a panel chosen by the parties to determine the dispute between them. *The parties' selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum.* The application judge's decision to not set aside the award is consistent with the well-established preference in favour of maintaining arbitral awards rendered in consensual private arbitrations. [Emphasis added, citations omitted.][25]

After referring to *Sattva*, MacPherson JA stated, "In my view, the arbitrator's reasoning was entirely faithful to this approach. His reasoning and result simply cannot attract the label 'unreasonable'."[26] Accordingly, the application judge had erred by setting aside the arbitrator's interpretation of the Minutes of Settlement at issue and substituting her own. The fact that the application judge's interpretation was also reasonable did not affect the result, as the arbitrator was owed deference on his reasonable interpretation.[27]

It appears that, at least in Ontario, when both the arbitrator's and the court's reasons are reasonable, the arbitrator's reasons will prevail.

25 2016 ONCA 363 at para 33.
26 *Ibid* at para 44.
27 *Ibid.*

I. ARBITRATION CLAUSES: DOS AND DON'TS FOR LAWYERS

While arbitration offers significant advantages over litigation, poorly drafted arbitration clauses (referred to as pathological clauses) not only lead to costly and time-consuming delays but also fail to meet the intentions and expectations of the parties — in particular, those that have entered into contracts to achieve some rational commercial purpose. Counsel should attach the same importance to a dispute resolution clause as they do to any other fundamental term of the agreement.

Agreements to arbitrate are formed either (1) during the negotiation of a contract or (2) after a dispute has arisen. The preferred sequence is to negotiate an arbitration process before entering into the main contract, not after acrimony has developed. The arbitration clause stands separate and apart from the main agreement. I refer you to *Premium Nafta Products Ltd v Fili Shipping Co*:

> On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.
>
> . . .
>
> That is not this case, however. The appellants' argument was not that there was no contract at all, but that they were entitled to rescind the contract including the arbitration agreement because the contract was induced by bribery. Allegations

> of that kind, if sound, may affect the validity of the main agreement. But they do not undermine the validity of the arbitration agreement as a distinct agreement. The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do. That being the situation in this case, the agreement to go to arbitration must be given effect.[28]

Considerations in domestic arbitration may be different from those in international arbitration. The starting point should be to carefully review the statutes that will be applicable in the client's case. Provisions dealing with costs, confidentiality, restrictions on the court, and a plethora of other matters must be considered in *each* case. There are few cases where one can apply a standard arbitration clause that will meet the needs and commercial expectations of the client. In addition, consideration must be given to a set of rules (such as institutional rules) dealing with the process that will govern, to whether rules will be decided on an ad hoc basis, or to a blending of the two.

The following is a checklist of dos and don'ts for considering arbitration clauses:[29]

1) *Do* the following:
   - have a clear, unequivocal agreement to arbitrate
   - consider the dispute resolution clause early in negotiations
   - consider whether to include a formal pre-arbitration procedure, for example, mediation

28 [2007] UKHL 40 at paras 18 and 35.

29 A number of these points were set out in an article by Karen Birch of Allen & Overy in the United Kingdom. While this article was available on Allen & Overy's website before 2010, it has since been removed. A copy is on file with the author. For another excellent arbitration clause checklist, see Barry Leon & Jana Stettner, "Arbitration Clause Checklist" (2008) 19:3 *Advocates' E-Brief* 3, online: www.advocates.ca/assets/files/pdf/e-brief/E-brief_Spring_08a.pdf.

- make an informed choice between institutional and ad hoc arbitration, and read any relevant rules (In British Columbia, I direct your attention to section 22 of the *Arbitration Act*.[30])
- specify the seat, or formal place, of arbitration
- specify an odd number of arbitrators, the manner of appointment, and if it is an ad hoc arbitration the appointing authority, if any
- specify the language of arbitratio
- consider the scope of the agreement to arbitrate
- specify the governing law
- consider whether a waiver of judicial review or appeal of the tribunal's decisions is desirable and enforceable (Subject to the applicable arbitration legislation, see, for example, sections 23, 31, and 35 of the *Arbitration Act*,[31] the parties should clearly state their intention with respect to appeals. Notwithstanding *Sattva*,[32] their joint intention should include that the decision of the arbitrator shall be final and binding and shall not be subject to appeal on a question of fact, law, or mixed fact and law.)
- consider providing for joinder or consolidation of disputes if the situation involves multiple parties or contracts (This is important in construction disputes.)
- obtain an understanding of the client's business, including whether products or services are sold within the province, the country, or another state
- consider the nature of relief that an arbitrator may impose, having regard to the law in the particular jurisdiction
- consider the effect of an arbitration clause on other agreements where the parties have other agreements in place[33]

30 Above note 12.
31 *Ibid.*
32 Above note 19.
33 See *Dancap Productions Inc v Key Brand Entertainment, Inc*, 2009 ONCA 135.

- consider that the client may wish to rely on the legal principles of *res judicata* and issue estoppel when the other party wishes to re-arbitrate the same issues[34]
- consider that in a recent English decision, the court considered the doctrine of abuse of process where after an arbitral award had been issued, a third party commenced court proceedings basically revisiting in a court of law what one of the parties to the arbitration thought had been settled at arbitration[35] (The lesson to solicitors is to ensure that all parties to a contract and those that rely directly on the contract buy in and are committed to the arbitral process *ab initio*.)

2) *Don't* do the following:
   - assume that dispute resolution provisions do not really matter
   - assume that arbitration is the best option for all disputes
   - assume that all jurisdictions are supportive of arbitration
   - blindly adopt an arbitration clause from another agreement
   - draft an arbitration clause without examining the rest of the agreement and related agreements
   - choose more than one governing law or seat (It is important to remember that the substantive rights may be different from the procedural law, or the *lex arbitri*. Generally, the seat of the arbitration will be the *lex arbitri*. This is one of the reasons why Canada is well-suited for international arbitration.)
   - choose arbitration rules that are inconsistent with the arbitration clause without specifying that such rules are being amended by agreement
   - assume that "split clauses," which give one party the option to arbitrate or litigate while the other party can only litigate, are valid in all jurisdictions

34 See *Ennax Energy Corp v TransAlta Generation Partnership*, 2015 ABCA 383.
35 See *Michael Wilson & Partners Ltd v Sinclair*, [2017] EWCA Civ 3.

- include restrictive criteria for the qualifications of arbitrators that may make it difficult or impossible to appoint suitable arbitrators
- specify as an appointing authority a person, position, or institution unless you are sure that she or it exists and will be willing to make the appointment
- assume that arbitration will be confidential (If the parties want confidentiality, provide for it expressly.)

J. CONFIDENTIALITY OF ARBITRATION AWARDS

One of the benefits of private arbitration is the assumption that not only will the process attendant upon the arbitration be confidential but also the award. Where an award is being reviewed by a court, a request may be made to the presiding judge that the award be sealed. Clearly, in his reasons, the judge would be careful with how he expresses his views on the contents of the award.

Consideration should be given to the following in drafting a confidentiality clause:

1) whether the issue of confidentiality is recognized by the law of the venue of the arbitration
2) whether the governing arbitral body has a confidentiality provision included in its rules

The importance of confidentiality was raised in *Emmott v Michael Wilson & Partners Ltd*.[36] There are circumstances where an award may not be kept confidential, including the following:

1) The subject matter of the dispute is required to be reported as material to the financial condition of a public company.
2) Disclosure is required by shareholders, partners, creditors, or others having a legitimate business interest.
3) One or more parties are subject to a fiduciary duty to disclose.
4) Parties have a duty of disclosure to their insurers.

36 [2008] EWCA Civ 184.

5) Parties are obliged to disclose evidence from the arbitration in a subsequent proceeding.

Consideration of these circumstances will help in designing the most appropriate confidentiality clause, as it relates not only to the process but also to the award.

K. *KOMPETENZ-KOMPETENZ*: JURISDICTION

Kompetenz-kompetenz (or competence-competence) refers to the tribunal's power or competence, in the first instance, to rule on its jurisdiction. Delays and court challenges would undermine the arbitral process if this were not so.

Jurisdictional challenges are sometimes made by a party seeking to have the court declare that the arbitrator lacks jurisdiction to hear a particular matter. This form of application is generally brought together with an application for a stay of proceedings. Both the *Arbitration Act*[37] and the *International Commercial Arbitration Act*[38] address the arbitrator's jurisdiction.

Section 22(1) of the *Arbitration Act* states, "Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration."[39] Rule 20(1) of the International Commercial Arbitration Centre's domestic commercial arbitration rules states, "The arbitration tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement."[40]

Section 16 of the *ICAA* states as follows:

37 Above note 12.

38 RSBC 1996, c 233 [*ICAA*].

39 Above note 12, s 22(1).

40 The British Columbia International Commercial Arbitration Centre, *Domestic Commercial Arbitration: Rules of Procedure* (Vancouver: BCICAC, 1998) r 20(1), online: http://bcicac.com/wordpress/wp-content/uploads/2016/12/DCARulesofProcedureAmendedJune1998.pdf.

16(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

(a) an arbitration clause which forms part of a contract must be treated as an agreement independent of the other terms of the contract, and

(b) a decision by the arbitral tribunal that the contract is null and void must not entail ipso jure the invalidity of the arbitration clause.[41]

L. ENFORCEMENT OF ARBITRATION AWARDS

Under section 29 of the *Arbitration Act*, with leave of the court, an award may be enforced in the same manner as a judgment or order of the court. Judgment is entered in the terms of the award.[42]

Under section 35, and subject to section 36, of the *ICAA*, "an arbitral award, irrespective of the state in which it was made must be recognized as binding and, on application to the Supreme Court, must be enforced."[43] This is consistent with Canada's being a signatory to the United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the *New York Convention*).[44] Over 150 countries have ratified the convention, the purpose of which is to give certainty to the issue of award enforceability, rather than having it depend on each country's national laws.

M. COSTS

In 1980, British Columbia amended section 11 of the *Arbitration Act* to give arbitrators discretion to award full indemnity for legal costs incurred by a party to the arbitration.[45]

41 Above note 38, s 16.

42 Above note 12, s 29.

43 Above note 38, ss 35 & 36.

44 10 June 1958, 330 UNTS 3, online: www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

45 Above note 12, s 11.

N. UNCONSCIONABILITY

Arbitration clauses have become commonplace in national and international consumer contracts, or contracts of adhesion. Coupled with the proliferation of these "standard form contracts" (take a look at your credit card contract) are arbitration clauses very favourable to one of the parties (e.g., the credit card issuer). The American courts have considered a number of these arbitration clauses to be unconscionable.

Paul Marrow sets out criteria for identifying procedural and substantive unconscionability.[46] In terms of procedural unconscionability, the following factors are to be considered:

1) Is the contract standard form?
2) Is the suspect clause boilerplate?
3) Was the clause hidden or made nonconspicuous?
4) Is the language used incomprehensible to a layperson?
5) Was there gross inequality in bargaining power?
6) Was there exploitation of a weakness such as lack of sophistication or education?

In terms of substantive unconscionability, the following factors are to be considered:

1) Is there significant price disparity?
2) Are there private penalties?
3) Is there a denial of a basic right or remedy?
4) Are there liquidated damages?
5) Are there disclaimers?
6) Are there covenants not to compete?
7) Are there limitations on remedies?
8) Is there an absence of mutuality concerning access to the judicial system?
9) Is there predispute mandatory arbitration?

46 Paul Bennett Marrow, "Policing Contracts for Unconscionability: Guidelines for International Arbitrators Subject to the Scrutiny of US Courts" (2007) 73:4 *Arbitration* 382 at 385–86, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1080357.

Marrow goes on to write as follows:

> Substantive unconscionability is about terms that operate in an unfair or unreasonable fashion. Within the context of mandatory arbitration, a group of factual situations have emerged raising questions about fairness and reasonableness:
>
> 1. Clauses that permit one party to select the arbitrator or specify qualifications.
> 2. Clauses that specify inconvenient locations for the arbitration proceedings.
> 3. Clauses that unnecessarily require one party or the other to incur burdensome expenses in the pursuit of a claim in arbitration.
> 4. Clauses that give the drafter the right to unilaterally alter the terms for arbitration.
> 5. Clauses that alter existing rights and remedies, examples being clauses that shorten a statute of limitations period or restrict the authority of arbitrators to impose punitive damages otherwise permissible by law.
> 6. Clauses that restrict class actions.
> 7. Clauses that lack mutuality, i.e. relegate one party to arbitration and give the other flexibility to pick and choose between arbitration and access to the judicial system.[47]

O. GOVERNING LAWS AND JURISDICTIONAL CLAUSES

The drafter of an arbitration agreement must distinguish between the governing law and jurisdiction. When the parties come from different jurisdictions, an attempt to deal with both concepts with the same wording may lead to confusion. The parties may agree on the jurisdiction of one party or the other, or they may agree on a third jurisdiction. Each choice brings into play different legal systems.

The following is an example of what may be considered an acceptable clause in British Columbia:

47 *Ibid* at 387–88.

> All disputes arising out of or relating to this contract, or the breach, termination, or validity thereof, shall be settled by arbitration. The arbitration shall be conducted in accordance with the *International Commercial Arbitration Act* of British Columbia. The seat of the arbitration shall be Vancouver, British Columbia, and the arbitration shall be conducted in the English language.

P. INTERNATIONAL ARBITRATION

My comments about international arbitration will be limited to (1) a 2015 White & Case survey report on international arbitration[48] and (2) making a pitch for Canada as the ideal place for international arbitration.

While international arbitration has been criticized for excessive delays and costs, the stakeholders consider it to be a better alternative than international litigation. A comprehensive study of international arbitration can be found in the White & Case report. The following are some of the key conclusions of the report:

- 90% of respondents indicate that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%).
- "Enforceability of awards" is seen as arbitration's most valuable characteristic, followed by "avoiding specific legal systems," "flexibility" and "selection of arbitrators".
- "Cost" is seen as arbitration's worst feature, followed by "lack of effective sanctions during the arbitral process", "lack of insight into arbitrators' efficiency" and "lack of speed".

48 White & Case LLP, International Arbitration Practice Group & Queen Mary University of London, Centre for Commercial Law Studies, School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (London: White & Case, 2015), online: www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf.

- The majority of respondents do not favour an appeal mechanism on the merits in either commercial or investment treaty arbitration.
- A growing concern in international arbitration is a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully ("due process paranoia") . . . .
- The five most preferred arbitral institutions are the ICC, LCIA, HKIAC, SIAC and SCC.[49]

Q. CANADA AS THE IDEAL PLACE FOR INTERNATIONAL ARBITRATION

Justice Barry Leon, (formerly) of Torys LLP, sets out a compelling argument in his paper "Canada on the World Stage in International Arbitration":

> The reason why Canada is a good place for international arbitration can be summarised in three words: supportive, accessible and acceptable. First, Canada's laws and its courts are supportive of arbitration. Canada has modern arbitration statutes. In fact, it led the way in implementing Model Law international arbitration statutes and acceding to the New York Convention. Canadian courts are as independent and competent as any in the world. Recent decisions dealing with *Kompetenz-Kompetenz*, subject-matter arbitrability, the scope of arbitration clauses, and recognition and enforcement of awards have consistently reaffirmed the support that Canadian courts will give to arbitration and indicated a strong judicial policy favouring arbitration.
>
> Secondly, Canada is acceptable to most of the world as a place for arbitration because it has a multicultural society, a reputation for fairness and neutrality, and both common and civil law systems. From the perspective of many Americans, although Canada is foreign, it is a known commodity. Even though there are marked

49 *Ibid* at 2 [footnote omitted].

differences between Canada and the United States, Americans appreciate and are comfortable with Canada's common law system; legal culture; litigation system (for example, an adversarial system with limited documentary and oral discovery) and style; use of the English language; and approaches to doing business. These similarities are appreciated by people in other common law jurisdictions too, with the added attraction that Canadians are similar to, but are not, Americans. People in Continental Europe, Latin America, Asia and other parts of the civil law world may also appreciate that Canadians are similar to, but are not, Americans. Canada has less of what they see as undesirable aspects of the US legal system. Canada is more international in outlook, has a civil law tradition and is an English/French bilingual country.

Thirdly, Canada is accessible — its major cities are well connected by air to almost all business centres in the world. It has good hearing facilities, with easy access to all modern technologies. For people in many leading business centres, Canada's time zones are more convenient than those in many other potential places for arbitration. Also, it is not insignificant that for arbitration participants from some parts of the world, Canada is easier to enter than the United States. And Canada's major cities are attractive places in which to spend time and are reasonably priced.[50]

In its construction, the *ICAA*[51] reflects the *UNCITRAL Model Law on International Commercial Arbitration*,[52] which is consistent with the legislation of the many states that have signed onto the model law. Enforcement of foreign awards in British Columbia is governed by the *Foreign Arbitral Awards Act*,[53] which incorporates the *New York Convention*.[54]

50 Justice Barry Leon, "Canada on the World Stage in International Arbitration" (2006) 72 *Arbitration* 143 at 143–46.

51 Above note 38.

52 21 June 1985, UN Doc A/40/17, annex 1, with amendments adopted 7 July 2006, UN Doc A/61/17, annex 1, online: www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [*UNCITRAL Model Law*].

53 RSBC 1996, c 154.

54 Above note 44.

The combination of the *UNCITRAL Model Law* and the *New York Convention* coupled with courts that are supportive of arbitration makes for a positive culture for international arbitration in Vancouver, Calgary, Toronto, and elsewhere north of the forty-ninth parallel.

R. UNIFORM LAW CONFERENCE OF CANADA

After extensive discussions and input from the arbitration community, and with the assistance of working groups, the ULCC recently dealt with both discussion papers on a new uniform international commercial arbitration act and proposals for a new uniform domestic arbitration act in Canada. Currently, the Ontario legislature is dealing with a new international arbitration act based upon the ULCC recommendations.

In December 2016, the ULCC adopted a revised *Uniform Arbitration Act*,[55] the purpose of which is to harmonize arbitral legislation in the provinces and territories. Gerald Ghikas, QC, of Vancouver led the two working groups' significant efforts that resulted in the suggested changes.

Recently, the minister of justice for British Columbia formed an arbitration advisory group to provide input on reforming and updating the *Arbitration Act* and the *ICAA*.[56] J Kenneth McEwan, QC, and Ludmila B Herbst note that

> Canada was, in fact, the first country to adopt the Model Law, and British Columbia was the first jurisdiction to adopt the Model Law anywhere in the world. British Columbia was particularly interested in attracting arbitration business as is reflected in the preamble to its *International Commercial Arbitration Act*, which was essentially a reworked version of the Model Law.[57]

55 Uniform Law Conference of Canada, "Domestic Arbitration in Canada: Proposals for a New Uniform Arbitration Act — Discussion Paper" (June 2015).

56 Above notes 12 and 38.

57 J Kenneth McEwan, QC, & Ludmila B Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Aurora, ON: Canada Law Book, 2004) (loose-leaf) at 1-10.

S. CONCLUSION

I can do no better than to quote former master of the rolls Sir Anthony Clarke's paper "The Woolf Reforms: A Singular Event or an Ongoing Process?":

> Changing the rules is one thing; changing how the rules are interpreted and applied is another thing entirely. The most perfect system implemented imperfectly is an imperfect system . . . .
>
> In my opinion, Woolf's greatest insight was the realization that discrete structural and procedural reforms were not both necessary and sufficient conditions for successful reform. Woolf proposed explicitly that not only should there be structural and procedural reform but that our litigation culture had to change as well. If the discrete structural and procedural reforms were to achieve the end of enabling litigation to be conducted expeditiously and economically, litigation had to be carried out in a radically different way.[58]

Someone once said, "As a businessman, if I don't listen to the market, I am not in business. If I were an attorney, I'd make sure I was involved in Alternative Dispute Resolution, because it may well be the service that the market will demand and I will have to offer in the future."[59]

The purpose of this chapter has been to provide the reader with an overview of domestic arbitration in Canada with the hope that the subject matter covered in an eclectic fashion will encourage both the solicitor and the litigator to adopt a more flexible problem solving approach where the parties have opted for some form of binding process other than litigation. To do otherwise would commit counsel to continue roaming in Jurassic Park.

58 Anthony Clarke, "The Woolf Reforms: A Singular Event or an Ongoing Process?" in Déirdre Dwyer, ed, *The Civil Procedure Rules Ten Years On* (Oxford: Oxford University Press, 2009) 32 at 43–44.

59 Quoted in Tannis, above note 8 at 131.

T. EPILOGUE

There are many sources of information available to both in-house and outside counsel on understanding the practical aspects of arbitration. The following are some of my favourites:

1) *Drafting ADR and Arbitration Clauses for Commercial Contracts* by Wendy Earle[60]
2) any material published by the International Institute for Conflict Prevention and Resolution, commonly called CPR and located in New York[61]
3) any publication by Richard Susskind
4) the following four books written by Professor Ugo Draetta:
   - *Behind the Scenes in International Arbitration*[62]
   - *Counsel as Client's First Enemy in Arbitration?*[63]
   - *Monads or Triads: Conflict and Cooperation among Arbitrators*[64]
   - *On the Side of In-House Counsel*[65]
5) any article written by Wendy Earle, Thomas G Heintzman, QC, William (Bill) Horton, Justice Barry Leon, and Michael MacIlwrath
6) *Arbitration Law of Canada: Practice and Procedure* by J Brian Casey[66]
7) *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* by J Kenneth McEwan, QC, and Ludmila B Herbst[67]
8) *Getting Past No: Negotiating in Difficult Situations* by William Ury[68]

60 (Toronto: Carswell, 2001) (loose-leaf).
61 Online: www.cpradr.org/.
62 (Huntington, NY: Juris, 2011).
63 (Huntington, NY: Juris, 2014).
64 (Huntington, NY: Juris, 2016).
65 (Huntington, NY: Juris, 2012). Each of these hardcover books is approximately 130 pages and very reasonably priced.
66 3d ed (Huntington, NY: Juris, 2017).
67 Above note 57.
68 (New York: Bantam Books, 1993). This is the source of my modified phase "a view from the balcony": see Section A, above in this chapter.