NEW BOOKS AND MEDIA

A Practitioner's Guide to Commercial Arbitration, edited by Marvin J. Huberman. Irwin Law, 2017. 520 pages (paperback), $115.

Reviewed by Barry Leon*

In British Columbia, as in many jurisdictions, a common complaint one hears about commercial arbitration, both domestic and international, is that it does not live up to its promise of being a less expensive, more efficient and faster method of adjudicating disputes, with the benefit of an adjudicator with appropriate expertise.

Why is that the case, and how can the prospects of achieving arbitration's promise be enhanced?

The use of commercial arbitration in British Columbia continues to expand as more businesses and their legal counsel seek the benefits that arbitration can offer over court adjudication, particularly at a time when courts face delays that often are incompatible with the pace of business today.

As a result of the increased use of arbitration, B.C. has a growing number of experienced commercial arbitrators and a growing number of legal counsel who are familiar with arbitration.

Still, achieving the promise of arbitration remains a work in progress.

The parties, arbitration counsel and arbitrators engage in a "blame game", each saying that the failure of arbitration as a dispute resolution

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process, or the failure of a particular arbitration, to meet "the promise of arbitration" is due to failures by one, or both, of the others. Often it is heard that an arbitration cost as much (if not more) than court litigation, took as long or longer, and was determined by an arbitral tribunal that did not understand the applicable industry, area of law, or both.

Marvin J. Huberman, the editor of a new Canadian book, *A Practitioner's Guide to Commercial Arbitration*, sets out his goals for the book as follows:

> I hope this book will (1) dispel the notion that one size fits all in dispute resolution, especially in commercial arbitration, (2) evoke a greater interest in commercial arbitration and help move us toward full realization of its promise as a means of effective dispute resolution, and (3) serve as a practical guide for all those who have an interest in or are passionate about commercial arbitration.

The book achieves these goals.

Importantly, it provides an opportunity for parties, counsel and arbitrators in B.C. and across Canada to make fundamental changes in their approach to arbitration that should go a long way toward enabling them to achieve the promise of arbitration. The book articulates how to approach and conduct an arbitration to achieve arbitration's potential, or at least to maximize the chances of doing so.

Huberman and his all-star "team Canada" contributors to *A Practitioner's Guide to Commercial Arbitration*, among the most knowledgeable and experienced arbitration practitioners in Canada, have produced a book that should enable parties, counsel and arbitrators to obtain the promised benefits of arbitration. That is, if they understand, take to heart and apply the essential knowledge and wisdom set out in this book's pages.

One of the authors, Vancouver arbitrator and counsel Ken McEwan, Q.C., reminds readers that "[a] successful arbitration is one that is resolved according to a fair process and one whose result reflects the informed and deliberate consideration of the dispute by a tribunal having the necessary expertise to appreciate its particular nuances".

A Practitioner's Guide to Commercial Arbitration outlines clearly and concisely the applicable law (including in chapters by Anthony Daimsis and Marina Pavlović, Graeme Mew, J. Brian Casey, and Harvin Pitch and Lucas Kittmer, with the citation of some five pages of authorities). But it goes much further.

Various authors articulate their wisdom on achieving arbitration's potential. While each of them expresses his or her advice in somewhat different words and in his or her own style, there is a strong common theme and teaching, leading persuasively to the conclusion that to achieve arbitration's promise, a different mindset and different approaches and practices are

needed from those in Canadian courts on which Canadian lawyers were weaned.

Canadian court procedures, while varying somewhat from jurisdiction to jurisdiction, are good compared to court procedures in many other parts of the world. Yet Canada represents a small portion of the global population, even of the world's common law population. Participants should not enter arbitration thinking that the way things are done in their own courts are the be all and end all—that they are the only way to do things.

Having assumed a judicial appointment in early 2015 as the commercial court judge in a different jurisdiction (British Virgin Islands) from where I practised commercial arbitration and litigation (Canada), where court procedures are similar to but different from Canadian procedures, I quickly saw that other ways of doing things have their merits (which is not to say that some Canadian ways may not be preferable in certain instances). Of course, I had come to see that earlier as a lawyer and arbitrator both in Canada and internationally during my latter years living and practising in Canada.

So many of the authors in *A Practitioner's Guide to Commercial Arbitration* make the point that things need to be done differently in arbitration to achieve its potential that readers may feel they have run the gauntlet, each time being hit with the same focused message. Yes, there is strength in numbers!

Expression of the message of "doing things differently" can be found throughout the book.

One of the contributors, Vancouver arbitrator Kenneth J. Glasner, Q.C., points out that "doing things differently" begins at the beginning. He advises that the management of the arbitral 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".

The benefit of party autonomy and the freedom to customize the process is emphasized at the outset by Anthony Daimsis and Marina Pavlović, who point out that "[a]nother reason to prefer arbitration to the courts, both domestically and internationally, is that it allows parties a great deal of freedom to craft and tailor the process. Private arbitration parallels this freedom by allowing parties to select the very rules and laws that govern the resolution of their disputes."

Stephen Morrison emphasizes this teaching, noting that "the most knowledgeable advocates of arbitration will also identify the most significant advantage of arbitration: the ability of the parties working in conjunction

with the arbitrator to design a procedure most [suitable] to the nature of their dispute". Similarly William Horton points out how his own thinking developed in this way: "Surely, I reasoned, a better process [than the court process] must exist. Arbitration holds out that promise. But often the same lawyers using more or less the same procedures in arbitration as in court actions tend to achieve similar results, leading to the same complaints."

Likewise, Wendy Earle notes that "too many cases, if not most, grind through the various litigation steps prescribed by the … [court] Rules … until the parties, worn down by the accumulated legal fees, worn out by the drain on their time and emotional resources, and terrified by the ever-present risk of losing and having to pay costs, settle".

What about arbitration advocacy? *A Practitioner's Guide to Commercial Arbitration* is by no means short on guidance for being an effective advocate in arbitration, with chapters by Sheila Block, John Judge and Paul Pape on the topic.

When it comes to effective advocacy in arbitration, perhaps no one in Canada can match the pragmatic wisdom offered by Sheila Block. She points out that "[t]here is much to be learned from past generations, both attributes to emulate and adapt and attributes to modify or avoid. As complicated, overburdened, and dense as cases have become, our challenge remains—to pick our points and articulate them clearly in beautiful, simple language that persuades."

John Judge emphasizes that "[w]ith the growth of arbitration, particularly in commercial disputes, Canadian litigators bring their litigation strategies, skills, and practices into the arbitral forum, thinking that it is just like a court but private. That is a mistake. While some litigation skills can be translated into the arbitration environment, many cannot … . Many Canadian litigation counsel … fail to appreciate both fundamental and nuanced differences in arbitration."

The Hon. Stephen Goudge adds that "the lawyers who present arbitration cases are a little more interested in getting to a result as effectively and efficiently as they can. And I think that has a whole lot of implications for the system."

An important difference between arbitration and most Canadian court litigation is stressed by the Hon. Robert P. Armstrong, Q.C.: "Arbitration is very different because in court adjudication, you never see the trial judge until the day you finally get to court. The reverse happens in arbitration in that the arbitrator is there from the beginning."

Two of the authors focus on the scope for considerable innovation that arbitration presents. In the chapter titled "Commercial Arbitration without

Hearings: The Court of Innovative Arbitration", Richard McLaren and Kaleigh Hawkins-Schultz describe the innovative procedures of that institution, modelled after the Basketball Arbitral Tribunal, "established in late 2015 to provide an expedited commercial arbitration process in response to the reality that commercial arbitrations were becoming more lengthy and costly". Similarly, in the chapter titled "Med-Arb: Crossing the Line", Leslie Dizgun reviews the advantages and disadvantages of med-arb and generally takes the position that med-arb is a useful and cost-effective dispute resolution mechanism.

Party autonomy is fundamental to arbitration: the parties to an arbitration can determine how they wish their arbitration to be conducted. But it may not be asking too much of the parties to require that they give informed consent if they wish to conduct their arbitration like a court case. Perhaps they should be required at least to hear the risks of using court procedures and even (notionally) to sign a waiver ("We, the parties, having been informed of the risk of using court procedures, understand that our arbitration may cost more, take longer, etc.").

Also discussed in the book is expert evidence in arbitration, including with chapters by Dominique T. Hussey and Will Bortolin ("Stepping into the Hot Tub: Concurrent Expert Evidence in Commercial Arbitration") and Neal Mizrahi ("The Use of Experts and the Assessment of Economic Damages in Commercial Arbitration").

Various issues relating to arbitration, including public arbitration, arbitration's effect on the development of the common law and ethical implications of the entrepreneurial nature of arbitration, are discussed in an interview of the Hon. Robert P. Armstrong, Q.C., the Hon. Stephen Goudge and the Hon. W. Ian C. Binnie, CC, Q.C. by Shantona Chaudhury.

For those interested in pursuing arbitration further, the book includes a ten-page list of "arbitration resources" (texts; continuing legal education seminars; journals and periodicals; arbitration centres and associations; Canadian legislation; and international legislation, treaties and instruments).

Marvin Huberman and the book's authors have made an important contribution to arbitration literature in Canada and to the practice of arbitration in Canada and by Canadians. All those involved in the arbitral process, and in dispute resolution more broadly, would be well advised to take on board the teachings of these Canadian thought leaders in arbitration.