BRITISH COLUMBIA MODERNIZES ITS *ARBITRATION ACT*

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Introduction

Arbitration is often chosen in the belief that it will lead to a faster, more informal and confidential process for reaching a binding decision. This promise of arbitration can only be fulfilled where there is supportive arbitration legislation. Recent amendments to the legislative framework governing domestic commercial arbitration in British Columbia should achieve a two-fold purpose: to make it more likely that arbitration will meet parties' expectations, and to minimize the risk of counterproductive "litigation over arbitration".

British Columbia's new *Arbitration Act* **(the "New Act")**[1] and *Arbitration Regulation* **(the "New Regulation")** came into force on September 1, 2020, replacing British Columbia's former *Arbitration Act* **(the "Former** Act")[2] and regulation.[3] The New Act and the New Regulation represent a significant overhaul of the province's domestic arbitration legislation by, amongst other matters, incorporating principles from the UNCITRAL Model Law on International Commercial Arbitration. The purpose of the New Act is to streamline arbitrations in the province by creating a more uniform and modern approach to arbitration.

The New Act applies to arbitral proceedings commenced on or after September 1, 2020, except those governed by the *International Commercial Arbitration Act* and those classified as family law disputes under the *Family Law Act*.

The New Act clarifies several grey areas in the Former Act relating to:

- appeal procedures;
- interim measures and preliminary orders;
- the jurisdiction of arbitral tribunals;
- witness and expert evidence;
- confidentiality of proceedings;
- consolidation of proceedings; and
- a designated appointing authority.

Appeal Procedures

Under the New Act, parties that have agreed to appeal awards on questions of law may now do so directly to the British Columbia Court of Appeal. Previously, if a party had agreed to a right of appeal of an arbitral award, it needed to bring the appeal to the court of first instance, British Columbia's Supreme Court. This would sometimes lead to paradoxical situations where a panel of three distinguished retired judges could see a single judge of the Supreme Court review their decision on an appellate standard before parties launched a further appeal to the British Columbia Court of Appeal.

As under the Former Act, the new legislation allows parties to opt out of their rights of appeal if they explicitly communicate such an intention in their arbitration agreement. If the parties' contract is silent on appellate rights, leave to appeal on questions of law may now be sought from the Court of Appeal.

Going forward, the Supreme Court will only hear applications to set aside an award rather than appeal it on the merits. A setting aside application is limited to narrow circumstances, such as arguments that: a) the arbitration agreement is void, inoperative or incapable of being performed; b) the dispute does not fall within the terms of the agreement; or c) the award contains a decision on a matter that is beyond the scope of the arbitration agreement.

Parties now have only 30 days (reduced from 60 days) from the date of the award to appeal the award or apply to set it aside.

Interim Measures and Preliminary Orders

Arbitrators remain permitted to grant interim measures and preliminary orders such as preservation orders and security for costs (i.e., orders preserving assets and orders for posting security for an unsuccessful party's costs). The New Act offers guidance on how to apply and enforce such measures whereas the Former Act was silent. The New Act also allows a party to apply for these measures without giving notice to the other party. However, a party who applies for a preliminary order must provide security, unless the court decides otherwise.

Jurisdiction of the Tribunal

The New Act follows the *International Commercial Arbitration Act* by expressly allowing an arbitrator to rule on his or her own jurisdiction. This should confirm the application of the "competence-competence" doctrine to domestic arbitration, meaning that a challenge to an arbitrator's jurisdiction should normally be heard by the arbitrator in first instance. If the arbitrator rules on his or her own jurisdiction as a preliminary matter, a party can then appeal the jurisdictional decision to the British Columbia Supreme Court. If a party exercises this right, the decision of the court is final.

The New Act also recognizes the arbitrator's responsibility to encourage settlement between the parties, and allows the arbitrator to record a settlement as an award upon request of the parties.

Witness and Expert Evidence

The New Act brings key changes to evidentiary procedures involving testimony by witnesses and experts.

First, the New Act specifies the format of the direct evidence of witnesses. Previously, there was no guidance on the method to tender direct evidence, leading many arbitrators that were more familiar with traditional litigation to prefer *viva voce* (i.e. oral) direct evidence. The New Act requires that direct evidence be in written form, unless the parties agree or the arbitrator directs otherwise. This approach, which is the standard in international arbitration proceedings, allows parties to avoid examinations for discovery, as they will know the evidence of each witness before the hearing. This approach also shortens the length of hearings by reducing the time for direct examination.

Second, the New Act clarifies that the arbitrator may issue a subpoena to require a person who is not a party to the dispute to give evidence or produce records. Once issued, the subpoena has the same effect as if it was issued by a court.

Third, the New Act authorizes arbitrators to appoint an expert and order a party to provide the expert with information and access to records, goods, or other property for inspection.

Lastly, the New Act clarifies the duty of experts, which is to assist the decision-maker and not be an advocate for any one party.

Confidentiality of Proceedings

Under the Former Act, there was no explicit requirement of confidentiality of arbitrations. Absent an express confidentiality obligation in the parties' contract, or an implied duty of confidentiality found by the arbitrator, parties were free to disclose the existence and contents of arbitrations. By contrast, the New Act restricts parties and the decision-maker from disclosing proceedings, evidence, documents or information in connection with the arbitration, including an award. However, disclosure is still permitted if it is required by law, required to protect or pursue a legal right, or if it is authorized by a court order.

Commencement and Consolidation of Proceedings

Where parties chose ad hoc arbitration, the Former Act was silent on the manner in which proceedings were started. The New Act clarifies that notice of the arbitration to the other party can be accomplished by the appointment of an arbitrator, a request to appoint an arbitrator, a request to have an authorized third party appoint an arbitrator, or a direct demand against the other party to commence arbitration.

Once an arbitration is commenced, the British Columbia Supreme Court can also consolidate similar arbitration proceedings for greater efficiency. The ability to consolidate proceedings was available under the

Former Act. However, parties to two or more arbitral proceedings are still required to give consent before a consolidation can occur.

Designated Appointing Authority

Under the Former Act, the rules of the British Columbia International Commercial Arbitration Centre **("BCICAC")** applied to domestic commercial arbitrations unless the parties agreed otherwise. The BCICAC rules filled in many of the gaps in the Former Act, such as the manner in which notice of the arbitration was to be given.

On September 1, 2020, the BCICAC changed its name to the Vancouver International Arbitration Centre **(the "VIAC")** and released a new version of its domestic arbitration rules. Both the New Act and the New Regulation designates the VIAC as the designated appointing authority. Under this new designation, where the parties have elected an ad hoc arbitration, the VIAC can appoint arbitrators when parties do not agree, and summarily determine any fees and expenses that are payable to an arbitrator in the event of a dispute. Prior to the New Regulation, absent an express or implied choice of arbitration institution, applications to appoint arbitrators or determine fees and expenses were made to the Supreme Court.

Significance of the New Arbitration Act

The New Act closes several gaps and perceived deficiencies in the Former Act, streamlines arbitration procedures, expands the powers of arbitrators, and affords greater protection and flexibility to parties in an arbitration.

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[1] SBC 2020, c 2.
[2] RSBC 1996, c 55.
[3] BC Reg 96/2019, OC 215/2019.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.