Kluwer Arbitration Blog

One Year Anniversary of British Columbia's New Arbitration Act

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British Columbia ("BC") was the first Canadian jurisdiction to introduce modern arbitration legislation based on international standards in the UNCITRAL Model Law in 1986. Despite being an early leader in arbitration in Canada, BC did not update its domestic legislation for over two decades, which caused some increasing discrepancies between BC's arbitration legislation, the UNCITRAL Model Law amendments in 2006, the *Uniform Commercial Arbitration Act* in 2016, and evolving best practices in arbitration.

Last year, BC introduced a new *Arbitration Act*, SBC 2020, c 2 (the "New Act"), replacing the *Arbitration A*ct, RSBC 1996, c 55 (the "Old Act"). The New Act is an attempt to modernize and streamline domestic arbitration and to enhance the efficiency and speed of proceedings.

The New Act applies to all arbitrations not expressly excluded (it does not just apply to commercial arbitrations). The New Act limits judicial intervention in an arbitration proceeding (specifically stating that a court must not intervene unless so provided in the New Act), underscoring that arbitration is an alternative form of dispute resolution. Arbitral tribunals have the jurisdiction to determine questions of their own jurisdiction. This article provides an overview of what's gone from the Old Act, what's new in the New Act, and then provides tips for drafting arbitration clauses in BC in light of these recent changes.

What's Gone?

The New Act eliminates the default application of the British Columbia International Commercial Arbitration Centre ("BCICAC", now "VanIAC") Rules, which applied under the Old Act unless the parties agreed otherwise. VanIAC's Rules must now be specifically incorporated into the arbitration agreement in order to apply, or the parties must agree to use the VanIAC Rules and have VanIAC administer the arbitration.

In parallel, also effective last year, the BCICAC changed its name to VanIAC, introduced new domestic arbitration rules (which are harmonized with the New Act), and is in the process of rebranding and modernizing the center. VanIAC's new domestic rules now include provisions for expedited proceedings, emergency arbitrators, optional appeals and virtual hearings. VanIAC is also in the process of revising and updating its international arbitration rules, which will be

released sometime in 2022.

Under the New Act, regardless of whether the arbitration is administered by VanIAC, VanIAC has the power to appoint arbitrators and to make decisions regarding arbitrator fees and only where they do not make the appointment is recourse available to the BC Supreme Court (section 14).

What's New?

The New Act has essentially filled its prior procedural gaps by taking the BCICAC rules and incorporating them into the legislation directly.

Some of the new key provisions are as follows:

- section 11(2): arbitral tribunals have the power to determine whether the arbitral proceeding was brought within the time limit specified in the arbitration agreement or the relevant limitation period;
- section 25: where an arbitration agreement is silent on the law applicable to the dispute, the arbitral tribunal may choose the applicable law;
- section 28: direct evidence in written form unless otherwise agreed or ordered;
- section 29: empowers arbitral tribunals to issue subpoenas to order a person who is not a party to give evidence or produce records, which have the same effect as if they were issued in court proceedings and can be issued to a person in BC or to a person outside of BC via a request to a court of competent jurisdiction;
- section 34: empowers arbitral tribunals to appoint experts to assist the tribunal;
- sections 36-45: clear regime for interim measures and preliminary orders; and
- section 63: ascertains the confidential nature of arbitration proceedings (unless otherwise agreed by the parties).

Setting Aside Awards

The BC Supreme Court maintains its jurisdiction to set aside awards where the arbitration agreement is void, the award deals with a dispute beyond the scope of the arbitration agreement, or there is a lack of procedural fairness. Section 58 explicitly provides that doubts as to the arbitrator's independence or impartiality may result in the setting side of an award. The time limit to set aside awards is 30 days.

Appeals

The New Act significantly alters the appeals process. Under the New Act, parties can appeal arbitration awards by seeking leave from the BC Court of Appeal within 30 days of the award. Under the Old Act, appeals could be made within 60 days to the BC Supreme Court. However, section 59 of the New Act provides that parties can opt out of appeal rights (see drafting tips on this below).

Section 60 provides that the jurisdiction over appeals on questions of law, on leave, will now reside directly with the BC Court of Appeal. The Court of Appeal may confirm, amend, or set aside the arbitral award, or remit the award to the tribunal, together with the Court of Appeal's opinion on the question of law at issue.

The limitation period for appeals has also been shortened from 60 days under the Old Act to 30 days.

Enforcement

Under the Old Act, there was no process provided for the recognition and enforcement of arbitral awards from other Canadian jurisdictions. The New Act contains specific provisions governing the recognition and enforcement of such awards on application to the BC Supreme Court.

Awards from other provinces must be recognized and enforced save very limited circumstances, such as where the court does not have jurisdiction to grant the relief sought or where the award has been set aside by a court of competent jurisdiction.

Tips for Drafting Arbitration Clauses in BC

The new model VanIAC Clause is as follows:

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration administered by the Vancouver International Arbitration Center (VanIAC) pursuant to its applicable rules by [one/three arbitrator(s)] appointed in accordance with the said rules. The place of arbitration shall be [City, Province]. The language of the arbitration shall be [Language]. The governing law is the law of [Province/Country].

The New Act does not list which provisions are mandatory, but it does state that certain articles apply "unless the parties agree otherwise". Therefore, unless the parties agree otherwise, the following default provisions will apply under the New Act:

- the number of arbitrators is **one;**
- the designated appointing authority is VanIAC;
- the arbitration must be commenced and (substitute) arbitrators appointed pursuant to the New Act;
- a challenge to the arbitrator must be pursuant to the New Act;
- the arbitral tribunal chooses the law applicable to the substance of a dispute (e.g. law of the contract);
- the arbitral tribunal control the procedure of the arbitration (including the granting of (*ex parte*) interim measures);
- direct evidence is presented in writing;
- an arbitral award must provide reasons;
- arbitral tribunal may award pre- and post-award (compound) interest and determine rate;
- costs are in the discretion of the arbitral tribunal; and

- appeals are available.

Some other optional components parties can include in the arbitration clause are the following:

- negotiation prior to arbitration or med-arb (place a time limit on length of negotiations);
- multi-party arbitration;
- arbitrator qualifications/language/technical skills;
- document disclosure limits;
- preliminary adjudication of threshold issues;
- allocation of costs and fees;
- interest;
- currency of award;
- virtual hearing and/or paperless hearing; and
- expedited arbitrations.

If the parties wish to provide for a right of appeal, they should draft the clause as follows:

The parties agree that either (any) party shall have a right of appeal pursuant to the VanIAC Rules with the grounds of appeal to be:

- *on a question of law with leave of the Appeal Tribunal;*
- *on a question of law;*
- *on a question of law or a question of mixed fact and law; or*
- *on a question of law, a question of mixed fact and law or a question of fact, in which case the appeal shall be only on the record.*

If the parties wish to provide for no right of appeal, they should draft the clause as follows:

- *Except for the appeal process under the VanIAC Rules, the parties agree that they will not appeal any arbitration decision, or decision of an Appeal Tribunal, to any court; or*
- *The parties agree that they will not appeal any arbitration decision to any court.*

Conclusion

Counsel should review and beware of precedents. This analysis will be particularly important where parties agree to use “boiler plate” arbitration clauses found in previous contracts. First, counsel should ensure that arbitration clauses are drafted in a manner that is consistent with the New Act and be mindful of the tips provided above, in particular with regard to appeals. Second, if counsel wish to have VanIAC’s rules to apply, they must specifically provide for this in their arbitration clause. Third, counsel should be wary of the default provisions that apply under the New Act and specifically agree otherwise if the parties don’t want all default provisions to apply.

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