British Columbia amends its *International Commercial Arbitration Act*

May 29, 2018

On May 17, 2018, British Columbia's *International Commercial Arbitration Act*, RSBC 1996, c 233, (ICAA) was amended when the changes passed by the Legislature on April 12, 2018, through *Bill 11 - International Commercial Arbitration Amendment Act, 2018*, received royal assent. The amendments significantly revise several aspects of the province's international commercial arbitration legislation and make British Columbia the second jurisdiction in Canada, after Ontario, to update its international commercial arbitration legislation to account for revisions in the 2006 UNCITRAL Model Law (2006 Model Law), as compared to the 1985 UNCITRAL Model Law on which most other Canadian legislation is based, along with other recent developments in the area.

Amendments to the *International Commercial Arbitration Amendment Act*

While the amendments primarily adopt certain changes seen in the 2006 Model Law, notably the expansion at Article 17 therein on interim measures and preliminary orders, the manner in which British Columbia does so is quite different from the approach taken by Ontario. Rather than schedule the 2006 Model Law to rather brief introductory legislation, the province has updated its statute throughout to account for changes in the 2006 Model Law and other developments that it wanted to capture. The latter point here is critical for those impacted by the new legislation: several differences are present in BC's international commercial arbitration legislation when compared to the 2006 Model Law itself. For example:

- Section 12(3)(a), with respect to challenging an arbitrator, states that "[a]n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's independence of impartiality." While this is virtually verbatim from the 2006 Model Law, the new ICAA also includes a new subsection 3.1 which reads "[f]or the purposes of subsection (3)(a), there are justifiable doubts as to the arbitrator's independence or impartiality only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration." This language is not found in the 2006 Model Law, and is adopted from other common law jurisdictions;
- Section 17(2)(e) specifically defines an "interim measure" as including tribunal orders to "provide appropriate security for costs in connection with arbitral proceedings";
- Section 21.01 makes it clear that "[a] party may be represented in arbitral proceedings by any person of that party's choice, including, but not limited to, a legal practitioner from another state" and that Section 15 of the *Legal Profession Act* does not apply to counsel appearing in arbitral proceedings; and
- Section 36(3) on recognition and enforcement stipulates that "third party funding for an arbitration is not contrary to the public policy in British Columbia" and then at subsection (4) states that such third party funding "means funding for the arbitration that is provided (a) to a party to the arbitration agreement by a person who is not a party to that

agreement, and (b) in consideration of the person who provides the funding receiving a financial benefit if the funded party is successful in the arbitration."

Takeaways

Notwithstanding the revisions in the 2006 Model Law, and the ensuing study by the Uniform Law Commission of Canada, which promulgated a proposed Uniform International Commercial Arbitration Act in 2014, it has taken some time for Canadian jurisdictions to look to revise their international commercial arbitration legislation to account for developments over the last several decades. BC now joins Ontario in making its legislation more current, accounting for both legal and commercial developments facing international arbitration. While this will undoubtedly increase BC's status as an arbitration friendly jurisdiction, the new amendments further increase differences in international commercial arbitration legislation between Canadian jurisdictions. Whether some or all of these are distinctions without a practical difference remains to be seen. Companies entering into arbitration agreements should carefully consider where they are choosing to seat an international commercial arbitration within Canada and what law will apply to any dispute.

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