

B.C.'s New Arbitration Legislation comes into force

September 01, 2020

Introduction

On September 1, 2020 the Arbitration Act, S.B.C. 2020, c. 2 (the New Act), along with its regulation, Arbitration Regulation, B.C. Reg. 160/2020 (Regulation), came into force by way of Order in Council. The New Act and Regulation will repeal and replace the Arbitration Act, R.S.B.C. 1996, c. 55 (the Old Act) and the Arbitration Act Application Regulation, B.C. Reg. 96/2019.

The New Act is modeled on the Uniform Model Arbitration Act (2016), which was adopted by the Uniform Law Conference of Canada on December 1, 2016 to encourage uniformity of arbitration laws throughout Canada. The Uniform Model Arbitration Act (2016) was itself based on the UNCITRAL Model Law on International Commercial Arbitration as amended and updated in 2006. Accordingly, the New Act is better aligned with British Columbia's international arbitration legislation and arbitration best practices internationally, and furthers the goal of making the province a more pro-arbitration jurisdiction.

The New Act introduces some key changes to arbitration practice in British Columbia, including changes to the appeal process and limits on judicial intervention. Other changes in the New Act are "new" to the extent that they are now expressly stated, including clarification regarding the arbitral tribunal's powers and codification of procedural mechanisms. These changes are welcome updates to British Columbia's arbitration landscape and are likely to bring clarity, predictability and transparency to those engaged in arbitral proceedings going forward.

In order to capitalize on these changes, parties considering arbitration agreements in their contracts, or who are renegotiating contracts containing an arbitration agreement, should consider which provisions of the New Act are mandatory, as opposed to opt-out provisions, and consult with legal counsel to draft an arbitration agreement that best fits their business needs.

Expanded and clarified powers and duties of the arbitral tribunal

In many respects, the New Act expands upon and clarifies the powers and duties of an arbitral tribunal. Whereas s. 22 of the Old Act incorporated the British Columbia International Commercial Arbitration Centre (BCICAC) Rules by default, which addressed many of these procedural matters, the New Act removes s. 22 and expressly refers to these concepts. With respect to the powers of an arbitral tribunal:

- An arbitral tribunal is now clearly empowered to issue subpoenas to non-party witnesses requiring the person to give evidence or produce records in the **person’s possession or control**;
- Where an arbitration agreement is silent on the law applicable to the dispute, the arbitral tribunal may choose the applicable law; and
- The New Act expressly grants a tribunal the power to appoint a tribunal expert and order a party to provide the expert with information and access to records or other property for inspection.

The general duties of the arbitral tribunal are also clarified in the New Act. Where the Old Act was silent on the arbitral tribunal’s duty relating to delay, the New Act affirms the tribunal’s duty to strive to achieve a just, speedy and economical determination of the proceeding on its merits. Further, the New Act clarifies the tribunal’s duty to adjudicate the dispute with reference to equitable rights and defences, in addition to legal principles.

The New Act also explicitly references the “competence-competence principle”. Although this principle was understood to be adopted in British Columbia through the combined operation of the Old Act and the BCICAC Rules, the New Act expressly states that an arbitral tribunal has the jurisdiction to determine questions of its own jurisdiction. It further clarifies that the arbitral tribunal has the jurisdiction to rule on both the scope of the arbitration agreement and the validity of the arbitration agreement and provides procedural guidance on how parties may appeal such a ruling to the Supreme Court of British Columbia.

Updated and clarified procedural mechanisms

Unlike the Old Act, which was silent on many of the procedural matters involved in an arbitral proceeding, the New Act sets out various default regimes for commonly **encountered procedural issues and, in some cases, limits the parties’ rights to appeal** the decisions made by the tribunal on such matters. Among other things, the New Act:

- **Clarifies the mechanism for commencing arbitral proceedings:**
The New Act provides a mechanism for commencing arbitral proceedings, if the procedure is not specified in the arbitration agreement.
- **Clarifies that limitation periods apply:**
The New Act expressly states that the limitation periods applicable to court proceedings apply to arbitral proceedings and provides the arbitral tribunal with the jurisdiction to make rulings on that issue.
- **Limits opportunities for parties to engage in procedural disputes:**
The New Act limits the opportunities for parties to engage in procedural disputes relating to issues such as consolidation, reception of direct evidence and confidentiality. In this regard, the New Act adopts a more comprehensive consolidation regime similar to that found in the International Commercial Arbitration Act, R.S.B.C. 1996, c. 233, which still requires the consent of all

parties to consolidation but clarifies the role of the court with respect to the consolidated arbitral proceedings. Similarly, consent of all parties is now required in the New Act to displace the default procedures that direct witness evidence will be received by the arbitral tribunal in writing and that the arbitral proceeding is private and confidential.

- **New procedures to enforce interim measures:**
The New Act sets out significant new provisions relating to the process of obtaining and enforcing interim measures and preliminary orders, including establishing a specific regime through which parties may request interim measures as preliminary orders. It is now understood that when granting interim relief, the arbitral tribunal, has the authority to require the requesting party to provide appropriate security and provide prompt disclosure of any material change in the circumstance on the basis of which the interim measure was granted.
- **Streamlines enforcement of awards made across Canada:**
Under the New Act, enforcement of both interim orders and arbitral awards made in other Canadian provinces is streamlined. Subject to certain grounds for refusing recognition or enforcement that are set out in the New Act, an interim measure issued by an arbitral tribunal must be recognized as binding and enforced on application to the Supreme Court of British Columbia. Under the New Act a party is also able to apply directly to the Supreme Court of British Columbia to have an arbitral award made in another Canadian jurisdiction recognized and enforced (the process for which was not explicitly provided for in the Old Act).

The New Act is also designed to be read in conjunction with the new Vancouver International Arbitration Centre (VANIAC) Rules (previously the BCICAC Rules), which also come into force September 1, 2020. The VANIAC Rules are designed to supplement the New Act and provide procedural structure for the VANIAC’s new responsibilities as the “designated appointing authority”. However, as under the Old Act, parties are able to agree to use a different set of procedural rules if they wish.

Limits on judicial intervention

The New Act contains significant changes to the appeal process and limits judicial intervention in arbitral proceedings with a view to bolstering the efficiency and finality of arbitral process:

- The New Act moves the jurisdiction over appeals of arbitral awards, which remain only on questions of law, to the Court of Appeal of British Columbia;
- The New Act provides the option for parties to opt out of an appeal of an arbitral award on questions of law, which in the Old Act was not permitted;
- The New Act makes it clear that certain decisions of the Supreme Court cannot be appealed further, for example, decisions involving procedural matters (such as consolidation, appointment of the tribunal, appeals relating to the competence of the tribunal, and tribunal fees and expenses). However, a decision by the Supreme Court to set aside an arbitral award can still be appealed to the Court of Appeal, with leave of a justice of the Court of Appeal; and
- The New Act extends the power to make certain procedural determinations to the designated appointing authority, the VANIAC (previously known as the BCICAC). Notably, if the designated appointing authority makes a determination

in lieu of the Supreme Court of British Columbia, these decisions, in general, are not appealable.

The move towards more limited judicial intervention is likely to be considered a positive change to the domestic arbitration regime by most parties. These changes serve to put the appeals process for domestic arbitral awards on an equal footing with court proceedings in British Columbia in terms of finality and number of appeals. This is designed increase interest in arbitral proceedings as a dispute resolution mechanism in the province.

In particular, the option to expressly exclude appeals of an arbitral award to the Court of Appeal on questions of law will likely have a certain allure to parties who are seeking to limit the total cost of a dispute and who seek finality in the first instance. However, a party should have a thorough understanding of which legal issues may be engaged before agreeing to rely on this mechanism to exclude the appeals process.

Key takeaways

The New Act is a welcome update to British Columbia’s arbitration landscape, bringing both clarity and predictability to arbitral proceedings in British Columbia. Significantly, it sets out transparent, default processes for domestic arbitration in British Columbia that expand the powers and duties of an arbitral tribunal, clarify procedural matters and impose limitations on judicial intervention in arbitral proceedings, even providing parties with the opportunity to opt out of their right to appeal an arbitral award. These changes are likely to allow parties to determine the issues between them on their merits in a more efficient, cost effective manner.

Going forward, parties who are considering arbitration agreements in their contracts or who are renegotiating contracts containing arbitration agreements will want to consider which provisions in the New Act are mandatory and which are default procedures of which parties may agree to opt out. Parties should also determine whether the New Act’s default procedures are suitable for their particular contractual relationship - for example, with respect to the manner in which the New Act addresses commencement. If the statutory default is not a good fit, parties should consult with legal counsel to determine what alternative procedures best suit their needs and ensure that these are clearly recorded in the arbitration agreement.

| | Arbitration Act, R.S.B.C. 1996, c. 55 | 2020 Arbitration Act, S.B.C. 2020, c. 2 |
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| Commencement of Arbitral Proceedings | No clear procedure if the agreement does not set out how to commence arbitral proceedings | Provides clear procedure regarding how a party may commence arbitral proceedings if not specified in arbitration agreement (s. 8(2)) |
| Consolidation of Arbitrations | General allowance for consolidation if the parties agree. | Sets out a consolidation regime consistent with that found in the <i>International Commercial Arbitration Act</i> , which expressly |

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| | | sets out the limits of the BCSC's ability to make orders. Specifically states that BCSC decisions regarding consolidation cannot be appealed (s. 9). |
| Limitation Periods | No clear guidance on applicability of limitation period | Clearly states that the law with respect to limitation periods for commencing court proceedings applies to commencing arbitration proceedings and grants jurisdiction to the arbitration tribunal to determine disputes relating to limitation periods (s. 11). |
| Designated Appointing Authority | Does not delegate powers to resolve procedural disputes. | Delegates power to the Vancouver International Arbitration Centre to resolve procedural disputes including, appointing the arbitrator (s. 14); and determining of fees and expenses (s. 55(2)). Arbitration Regulation, 160/2020 [effective September 1, 2020] |
| Competence to rule on its Own Jurisdiction | Not expressly stated in the Act. | Clarifies that an arbitration tribunal may rule on its own jurisdiction, including with respect to the existence or validity of the arbitration agreement (s. 23). |
| Direct Evidence from Witnesses | No clear guidance on how direct evidence is to be provided. | Provides that direct evidence is to be provided in written form unless otherwise agreed by the parties (s. 28(3)). |
| Subpoena of Non-party Witnesses | No clear guidance on how to obtain evidence from non-parties | Provides that a tribunal has the power to issue a subpoena to a non-party witness and provides a regime for assistance by the BCSC (s. 29). |
| Tribunal Appointed Experts | No clear guidance on whether or how a tribunal may appoint an expert. | Codifies a tribunal's power to appoint an expert, who may participate at the hearing and whose duty is to assist the tribunal (s. 34). |
| Interim Measures and Preliminary Orders | Provides the power to award interim awards, but does not provide clear procedure. | Provides a clear regime for obtaining interim measures and/or preliminary orders (ss. 36-45). |
| Settlement | No clear guidance on procedure if parties settle. | Codifies a tribunal's power to record the settlement in the form of an arbitration award (s. 47). |

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| Appeal of Arbitral Award | Provides that the parties may make an appeal to the BCSC. | Provides that the parties may only appeal questions of law to the BCCA. However, the parties may opt out of appeal rights (s. 59) Preserves the right of the parties to apply to the BCSC to set aside the arbitral award. |
| Confidentiality | No clear guidance on privacy and confidentiality. | Expressly prohibits disclosure of information relating to the arbitral proceeding that is not otherwise in the public domain, unless otherwise agreed by the parties (s. 63). |

If you have questions about how these changes may affect you, please reach out to any of the key contacts listed below.

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