# UPDATING BC'S ARBITRATION ACT: LESSONS LEARNED

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On September 1, 2020, with the coming into force of British Columbia's new *Arbitration Act*,[1] the most recent chapter in the story of the evolution of BC's arbitration legislation began. The *Act* modernized the *Commercial Arbitration Act,* RSBC 1996, c. 55 (the "Previous Act"), the non-international arbitration statute enacted in the 1980s.[2]

Once upon a time, the Previous Act was introduced to the legislature as part of the government's focus on economic recovery from the recession of the early 1980s and a desire to stimulate business. Coincident with Vancouver hosting Expo '86, the Province established the British Columbia International Commercial Arbitration Centre (the "BCICAC"), an institution to administer arbitrations, and enacted new commercial arbitration legislation for both international and non-international arbitrations. The *International Commercial Arbitration Act* (*ICAA*)[3] adopted the then brand new *UNCITRAL Model Law on International Commercial Arbitration* ("1985 Model Law"). The Previous Act was based on the English *Arbitration Act, 1979*,[4] and also integrated the BCICAC

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[1] SBC 2020, c 2. For a summary of the *Act,* see Tina Cicchetti and Jonathan Eades, "The New BC *Arbitration Act*" (2021) 1:2 CJCA 144.

[2] As part of legislative housekeeping reforms, an interim update in 2013 renamed the *Commercial Arbitration Act* the *Arbitration Act* and included new provisions relating to non-commercial arbitrations. This update did not affect the substantive provisions applying to non-international commercial arbitrations in the Province, but it did pull in non-commercial arbitrations including family law arbitrations.

[3] RSBC 1996, c 233.

[4] 1979, c 42.

arbitration rules to apply by default, providing parties with a more detailed default procedure for non-international arbitrations than what was available in the legislation alone. Other than providing default rules, the other key difference between the international and non-international regimes was that a limited right of appeal to the courts was retained for non-international arbitrations.[5] Commercial parties who preferred the international regime and its greater finality could opt into the *ICAA* by agreeing that the subject matter of their dispute was international.

When the *Act* was introduced in the legislature, it brought the non-international regime into modern times. The then Attorney General stated:

> I'm pleased to introduce the Arbitration Act. This bill repeals and replaces British Columbia's domestic Arbitration Act. It will modernize British Columbia's domestic arbitration regime and achieve greater harmony with the International Commercial Arbitration Act, benefiting business parties, legal counsel and arbitrators.
>
> British Columbia's domestic Arbitration Act has not had major revisions in more than 30 years. Many of its provisions are outdated and no longer reflect best arbitration practices.
>
> In 2017, government requested recommendations for domestic arbitration reform from a group of leading arbitration practitioners — the then Attorney General's

[5] The Previous Act abolished the stated case mechanism and replaced it by a limited right of appeal. The *ICAA,* which applied to international commercial disputes provided for no right of appeal; international awards could be set aside in certain, limited circumstances related to issues of fundamental fairness or public policy.

> arbitration advisory group. We continued that work, and I would like to thank this group for the many hours of work they put into this project. This bill is based on their recommendations.
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> Family law arbitration has some similarities to commercial arbitration, but there are significant differences. The provisions related to family law arbitration are being moved into the Family Law Act. Generally, the policy underlying family law arbitration is being retained using updated language that aligns with the new Arbitration Act provisions. A separate advisory group of family law arbitrators and practitioners has provided recommendations to government regarding the move.[6]

The *Act* was the culmination of more than two years of work by the Legislative Subcommittee of the Arbitration Advisory Group, a volunteer group of senior arbitration practitioners and businesspersons assembled to advise the BC Attorney General on matters of importance to arbitration (the "AAG").[7] BC's arbitration legislation had not been substantively revised since it was initially adopted in the 1980s and in the meantime UNCITRAL had updated the 1985 Model Law in 2006 to incorporate additional mechanisms seen as desirable in international arbitration. In May 2018, on the recommendation of the AAG, BC updated the *ICAA* to adopt these innovations and then attention turned to updating the non-international regime.

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[6] "Bill 7 – Arbitration Act", 1st reading, *Legislative Assembly Debates*, 41-5, No 309 (19 February 2020) at 11016 (Hon David Eby), online (pdf): <https://www.leg.bc.ca/content/hansard/41st5th/20200219pm-Hansard-n309.pdf>.

[7] The AAG began its work on the *ICAA* revisions that were passed in 2018, and then turned to the *Act.*

In considering potential amendments, the AAG had in mind the policy behind the legislation—to facilitate the effective determination of commercial disputes—as well as both internal and external audiences. The guiding principle was to ensure that the non-international arbitration regime continued to meet the needs of its users by providing an efficient and effective alternative to litigation in the courts. Most commercial arbitration parties are not repeat or regular users of arbitration. Put differently, only a minority of arbitration users see disputes as a regular part of their commercial operations. It was necessary to structure the new legislation in a way that is accessible to all parties who may find themselves in an arbitration governed by the *Act,* and that provides for some default best practices that increase the odds of an efficient and effective arbitration process for all parties, regardless of their level of experience with arbitration. It was also important that BC maintain its international reputation as an arbitration-friendly jurisdiction. The jurisprudence arising out of the *ICAA* respects party autonomy and is supportive of international commercial arbitration. As the recent Supreme Court of Canada decision in *Uber Technologies Inc v Heller*[8] demonstrates, courts can be persuaded to take a different view of party autonomy when the parties to an arbitration agreement are less sophisticated or when their contractual relationship is not clearly commercial in nature. Given this context, the AAG saw retaining a distinction between the regimes governing international commercial arbitration and non-international arbitration as desirable.

It was accepted that the audience for the non-international regime differed from that for the *ICAA*, and that it had evolved to include non-commercial parties. The Previous Act had been revised to include within its scope family law disputes and other arbitrations provided for by statute that were not based on the traditional model of party consent found in commercial arbitration. After consultation with the family law bar, it was

[8] 2020 SCC 16.

decided that arbitrations related to family law disputes should be migrated to the *Family Law Act*. Aside from this carve-out, the *Act* would continue to be a catch-all for arbitrations with their place of arbitration in BC, so it would need to address the needs of diverse types of users.[9]

Against this backdrop, the legislation was reviewed section by section. In performing this review, the AAG kept in mind the 2006 UNCITRAL Model Law, the newly revised *ICAA*, the Uniform Law Commission of Canada's (ULCC's) 2016 Model Law, arbitration acts from other comparable jurisdictions, the BCICAC Rules and the more than thirty years of jurisprudence applying the Previous Act. The discussions were also informed by the practical experience of the AAG members as counsel and arbitrators in proceedings under the Previous Act.

Some recommendations were easy to agree upon. For example, the overall structure needed to be overhauled to make it more logical and accessible. As noted, a return to a specialized regime for family law disputes was also seen as desirable by arbitration practitioners and was readily accepted by members of the family law bar. The provision relating to stays of proceedings was seen as functioning smoothly, and maintaining it was seen as important to avoid disrupting the case law that had developed around this section.

On the other hand, many sections of the *Act* were the subject of extended study and discussion before recommendations were made. For the purposes of this essay, four of these will be discussed further: the provisions addressing appeal rights and set aside, the default to a set of rules not part of the act itself, confidentiality obligations and arbitrator immunity. For each, I will describe how the AAG came to formulate its

[9] See *Act*, s 2(5). In addition to international commercial disputes and family law disputes, there is also a third carve-out for certain prescribed government agreements which had been swept into the *Act* through the 2013 revision.

recommendation, and offer some suggestions as to what other provinces might learn from BC's experience.

## I. APPEAL RIGHTS AND SET ASIDES

The Previous Act had given rise to what were considered to be negative developments in the case law relating to court review of arbitral awards. Recommendations were focused on ensuring that arbitration remains an effective alternative to litigation with limited interaction between the two processes.

In general, the possibility of an appeal on a question of law from a non-international award was not seen as problematic. In fact, the availability of appellate review appears to match the expectations of parties who hail from a common legal background, have a shared understanding of the applicable law, and expect that an arbitral tribunal's decision will be consistent with that law.[10] The jurisprudence on what constitutes an error of law has developed significantly in recent years, and was seen to have evolved to provide appropriate limits on appeals from arbitral awards.[11] Courts have limited appeals to extricable errors of law and closed the door on the position that an error in interpretation of the contract amounts to an error of law. This was seen as an appropriate balance between finality and legal correctness.

However, the procedure for challenging awards set out in the Previous Act was found to be problematic, as it had led in a number of cases to protracted post-award proceedings.[12] The *Act* addresses this problem in two ways. First, it puts arbitration awards on the same footing as decisions of the Supreme Court

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[10] Sophisticated commercial parties who prioritize finality and certainty over the risk of a legally incorrect result can opt into the *ICAA*, and parties can opt out of appeals under the *Act.*

[11] See *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 [*Sattva Capital Corp*].

[12] See, for example, *Boxer Capital Corporation v JEL Investments Ltd*, 2013 BCCA 297.

by directing all appeals to the Court of Appeal. This was intended to reduce the number of leave applications and appeals in respect of the same award. Second, it removes the possibility of commencing set-aside and appeal proceedings simultaneously which led to mischief by expanding the scope of materials submitted to the court. By separating out these processes, the *Act* limits the scope of the record available to the court on appeal, recalling that in British Columbia, the question of law that motivates the appeal must arise from the award and not from the arbitration proceeding.[13]

Other Canadian jurisdictions, particularly those that have retained a separate act for commercial arbitration, may want to consider whether it is desirable to maintain any possibility for appeal of a commercial arbitration award.

## II. MAKING EXPLICIT CERTAIN PROVISIONS PREVIOUSLY FOUND ONLY IN THE PROCEDURAL RULES

As mentioned, the Previous Act provided for the rules of the BCICAC to apply by default in the event that other procedural rules had not been selected by the parties. This provision contributed to the creation of a culture of institutional arbitration in BC and to the use of codified procedural rules, which differs from that in other provinces. After three decades of this default, practitioners in BC had become accustomed to arbitration rules that simplified the procedure in arbitrations, rather than importing rules of court into a private dispute

[13] The recent decision of the BC Court of Appeal in *Escape 101 Ventures Inc v March of Dimes Canada*, 2022 BCCA 294 [*Escape 101 Ventures*] may reignite this debate, as some consider the Court to have endorsed a review of the underlying submissions in the arbitration in identifying an error of law, rather than doing so based on the arbitral award itself. The court in *Escape 101 Ventures* arguably also eroded the advancements in the jurisprudence that limited the scope of extricable errors of law following the Supreme Court's decision in *Sattva Capital Corp* and the cases that followed the restrained approach advocated there as to the review of factual determinations in commercial arbitration. See *Sattva Capital Corp, supra* note 11 at para 104.

resolution system. Now that this culture is established, it was seen as unnecessary to continue providing for a default, so the AAG recommended returning the selection of the applicable rules to the parties.[14]

Even under the Previous Act, the parties were free to agree to other rules or to dispense with the application of the BCICAC rules. When parties did so, this created gaps in the legislation, which in some circumstances relied on the rules to articulate certain powers or to provide guidance on best arbitration practice.

To remedy this situation, some concepts were expressly imported into the *Act* from the BCICAC Rules. For example:

- Section 23 of the *Act* now expressly incorporates the core concepts of competence-competence (the ability of the arbitral tribunal to determine its own jurisdiction) and the doctrine of separability (that the arbitration agreement is an agreement separate from the agreement in which it is contained, so that termination or invalidity of the main agreement does not automatically deprive an arbitral tribunal of jurisdiction).
- The BCICAC Rules also set out a non-exhaustive list of powers conferred on the arbitral tribunal, but the *Act* itself was unclear as to whether a tribunal could apply equity and grant equitable remedies. Section 25 clarifies that, to the extent equity and equitable remedies form part of the applicable law, tribunals have the power to grant such remedies on an equal footing with courts. Section 32 of the *Act* now sets out a non-exhaustive list of the tribunal's procedural powers.
- Section 28 protects the efficiency of arbitration procedure by confirming that the strict rules of evidence,

[14] Coincident with the revisions to the *Act*, the BCICAC rebranded as the Vancouver International Commercial Arbitration Centre ("VanIAC") and updated its rules. The VanIAC rules continue to provide an excellent option for parties to arbitrations seated in BC and elsewhere.

developed in the context of court proceedings, do not apply. Tribunals are expressly empowered to decide all evidentiary matters. Further, the well-established best practice in international proceedings of direct evidence being provided in writing, rather than by live examinations in chief, has been incorporated into the *Act* in order to limit the time needed for hearings and to allow parties to focus on the issues in dispute in cross-examination.

- Section 31 empowers arbitral tribunals to receive oral evidence and submissions by electronic means. In hindsight, this provision was prescient in that it clarified an issue that is the subject of doubt in other jurisdictions, *i.e.,* whether parties have the right to insist on an in-person hearing.[15]
- Section 50 confirms that a tribunal has the discretion to award costs and that these can include actual legal fees to the extent those fees are considered reasonable. This helpfully displaces any suggestion that cost scales applied in court have any application in arbitration proceedings. A provision confirming that costs can be assessed summarily was included to overcome the notion that had arisen in a problematic line of cases that doing so was somehow unfair.[16]

Other jurisdictions reviewing their non-domestic arbitration legislation may wish to consider whether the legislation should provide guidance as to procedures that can assist in achieving the benefits of arbitration over litigation. While *ad hoc* arbitration proceedings work well for sophisticated parties with a shared legal culture, not all parties in arbitration or their counsel have experience with arbitration practices. Providing some framework or default arbitration procedure could assist

[15] See Chester Brown et al, "Does a Right to a Physical Hearing Exist in International Arbitration?" (2022), online (pdf): <https://cdn.arbitration-icca.org/s3fspublic/document/media_document/ICCA_Reports_no_10_Right_to_a_Physical_Hearing_final_amended_7Nov2022.pdf>.

[16] See *Williston Navigation Inc v BCR Finav No 3 et al*, 2007 BCSC 190.

in developing familiarity with arbitration practices intended to resolve disputes efficiently and expeditiously. This could also assist in providing a distinction between court practice and arbitration practice and resist the temptation to default to court practices that are ill-suited to commercial arbitration, which is a private means of dispute resolution between parties in a contractual relationship.

## III. CONFIDENTIALITY OBLIGATIONS

It is uncontroversial that arbitration proceedings are private. What is less clear is whether they are confidential. Different jurisdictions have arrived at different conclusions on this question and the matter has not been decided by courts in Canada. The AAG determined that most users of arbitration in BC expect that arbitration proceedings will be confidential, and that it was valuable to provide a clear direction in the *Act* to this effect. Such an addition also brings the *Act* into line with the *ICAA*. Parties are able to displace this default rule by agreement.

## IV. ARBITRATOR IMMUNITY

Another important modernization included in the *Act* is an immunity provision for arbitrators that protects them against suits for acts or omissions in the course of the arbitration proceedings unless committed in bad faith. Arbitration practice has seen an increase in arbitrator challenges, and the AAG saw immunity provisions as a necessary tool to protect arbitrators from spurious challenges. It is expected that jurisdictions that provide immunity in this way will be popular choices as the seat of arbitration. Further, including an immunity provision in the *Act* is consistent with making arbitration proceedings analogous to court proceedings, as the immunity is similar to that provided by statute to other adjudicators in BC.

## V. CONCLUSION

While it is still early in the story of the *Act,* as cases subject to it are only now starting to appear in the courts, it already

shows signs of delivering a more efficient process for non-international arbitrations. The first appeal subject to the *Act* has now been heard by the Court of Appeal. The case was decided after a single leave-to-appeal application followed by the appeal on the merits, all determined by the Court of Appeal. This procedure was decidedly more efficient than that under the Previous Act, which would have created the possibility of an appeal of the decision to grant leave before the merits of the appeal could be heard.[17]

Another positive lesson arising from the process used to revise the *Act* is that collaboration between the stakeholders in arbitration and legislators through the AAG resulted in better legislation. The coordination between these groups allowed for practical solutions to the perceived problems with the Previous Act and, ultimately, legislation that better serves the policy considerations that animate it.

A number of promising features have been built into the *Act.* It is hoped that the new provisions of the *Act* will continue to deliver on the expectations of efficient and effective non-international arbitration proceedings that meet the needs of users of arbitration seated in BC.

However, the moral of the story: that commercial arbitration as a consensual form of binding dispute resolution serves a unique role as an effective alternative to court litigation has yet to be fully embraced by the courts. For policy reasons, the *Act* prioritizes a final result with limited review over a correct result. For this policy to prevail, practitioners must assist in educating the judiciary as to the appropriate limits of review in

[17] See note 14, above. Although the process relating to the leave to appeal in *Escape 101 Ventures* operated as expected and the appeal was notionally limited to an extricable error of law, some consider the approach of the court in deciding the appeal to be problematic, as it reviewed the record of the proceedings in arriving at the conclusion that the arbitrator had made an error of law.

this context and a culture of arbitration as distinct from court litigation must continue to develop.