NEW *ARBITRATION ACT* INTRODUCED IN BRITISH COLUMBIA

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The culture of dispute resolution has changed over the last few decades, particularly as it relates to the business community. The present challenge is to inform those parties who may not already be well versed in arbitration, and their counsel, about the advantages of arbitration over litigation and how the use of private decision makers as an alternative to the public process—the courts—benefits commercial parties.

In many areas of the business community, the paradigm shift in favour of arbitration has already occurred, particularly since the Supreme Court of Canada's 2014 decision in *Sattva Capital Corp. v. Creston Moly Corp.*[1] In a unanimous decision of a seven-judge panel, the court restored the decision of Leon Getz, Q.C., a senior lawyer with a depth of experience in corporate and commercial law who had served as arbitrator. What Mr. Getz accomplished in ten months (not an unusual time frame for a commercial arbitration) took the courts well over 5½ years.

Sattva illustrated significant attributes of arbitral culture. First, it was clear that the parties had appointed someone with a knowledgeable background to make a binding decision. Second, the parties had incorporated a flexible process to arrive at a binding decision. Third, the parties had incorporated one of the pillars of arbitration, though also reflected in this province's Supreme Court Civil Rules: striving to achieve a just, speedy and economical determination of the proceedings on its merits.

B.C. has enacted a new *Arbitration Act*[2] (the "new Act") in line with and perhaps exceeding similar legislation across Canada. To a great extent the new Act mirrors the model legislation adopted by the Uniform Law Commission of Canada ("ULCC") in December 2016. The new Act is to come into force by regulation, which has not yet been made.

In 1986, British Columbia had been a pioneer, being the first jurisdiction to adopt the UNCITRAL Model Law on International Commercial Arbitra-

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tion. At that time it also took a leading role in adopting new domestic legislation (then known as the *Commercial Arbitration Act*) influenced by the Model Law.

The new Act provides the arbitrator (or arbitral tribunal) with greater powers, many akin to those of a public judge, plus the added opportunity of being involved from the beginning of the process.

The Hon. Robert Armstrong, Q.C., once said: "Arbitration is very different because in court adjudication, you never see the trial judge until the day you finally get to court. The reverse happens in an arbitration in that the arbitrator is there from the beginning."[3]

The benefits introduced by B.C.'s new Act include:

1. The new Act has a logical, easy-to-follow structure divided into parts that track the main steps in an arbitration and their sequencing. Reading the new Act from start to finish will teach a reader much about the process of arbitration in a way that the present Act does not.
2. The new Act has a great amount of overlap with B.C.'s *International Commercial Arbitration Act*[4] ("ICAA"). This is important. The new Act is heavily influenced by the UNCITRAL model arbitration law, which has been enacted in over 100 jurisdictions around the world. British Columbia business parties, both internationally and now domestically, will be able to arbitrate their dispute following a proven, accepted, well-understood legal template.
3. Party autonomy is enhanced in the new Act. There are too many examples of this to list here. But the bottom line is that few sections are mandatory and party autonomy can change a good majority of the sections of the new Act.
4. The manner in which arbitral proceedings may be commenced is now included within the legislation (s. 8), rather than in external rules. This will be easier for parties to follow.
5. The new Act includes a comprehensive consolidation provision explaining the circumstances in which two or more arbitral proceedings could be consolidated with a court order (s. 9). This is the same provision recently enacted in amendments to the ICAA.
6. The new Act allows a suspension of an applicable limitation period if a party commences proceedings in court and that court proceeding is then stayed in favour of arbitration, if the claim is made in arbitral proceedings no more than 30 days after the court proceedings are stayed (s. 12).

7. The procedure for challenging an arbitrator is included in the new Act (ss. 17–20), rather than in external rules.
8. Arbitrators and parties are now under an express duty to try to achieve a just, speedy and economical determination of the proceeding on its merits (ss. 21–22).
9. The new Act makes clear that the arbitrator has jurisdiction to award equitable remedies (s. 25(4)).
10. The new Act creates a presumption that direct evidence of witnesses will be in written form (s. 28(3)).
11. The new Act expressly confirms hearing location flexibility (s. 31).
12. The new Act confirms the arbitrator's authority to establish procedures and make procedure (s. 32); the scope of such powers is extremely broad.
13. The new Act creates a mechanism for dealing with party default (s. 33).
14. The new Act confirms that experts appointed by the parties have a duty to assist the arbitral tribunal (s. 35), consistent with similar duties on experts in B.C. civil litigation practice.
15. The new Act contains an entire part—Part 6—covering "Interim Measures and Preliminary Orders".
16. The new Act confirms that cost awards may be made summarily (s. 50(2)).
17. The new Act provides that an arbitrator may award simple or compound interest (s. 51).
18. The new Act eliminates the unique B.C. concept of "arbitral error". Instead, the new Act has a set-aside provision (s. 58) similar to the ICAA and domestic arbitration legislation following the ULCC model elsewhere in Canada. Consistent with the ICAA, set-aside applications would be brought to the B.C. Supreme Court.
19. The new Act provides that appeals on questions of law arising out of an arbitral award are to be brought to the B.C. Court of Appeal (s. 59). Parties have the ability to opt out of appeals altogether.
20. The new Act reduces the time limit for bringing either a set-aside application or an appeal or application for leave to appeal from an arbitration award from 60 days to 30 days (s. 60).
21. The new Act includes a new privacy and confidentiality provision consistent with the ICAA (s. 63).

Adding to this favourable context for arbitration is the presence of the British Columbia International Commercial Arbitration Centre ("BCICAC"), a designated appointing authority whose services are invaluable to the arbitral community. BCICAC, which is soon to be known as the Vancouver International Arbitration Centre, was founded in 1986 and provides a number of services including, most importantly, a list of vetted arbitrators, coupled with a process for appointment.

John Bolton (not the one south of the 49th parallel) wrote a paper published in 1996[5] in which he quoted Lord Woolf, who had delivered a paper entitled "Why Can't an Arbitrator Be Just Like a Judge?" Lord Woolf turned the tables and asked, in essence, "Why can't a judge be just like an arbitrator?" He was, of course, referring to the flexibility that arbitrators have in dealing with issues in dispute.

The focus for a successful arbitral culture requires the stakeholders (the parties, their counsel, the arbitrator and arbitral institutions) to understand and implement the benefits of the new Act. As stated by Sir Anthony Clarke when referring to the Woolf report: "Changing the rules is one thing; changing how the rules are interpreted and applied is another thing entirely."[6]

ENDNOTES

1. 2014 SCC 53.
2. SBC 2020, c 2.
3. Shantona Chaudhury, "Effective Commercial Arbitration: A Conversation with Robert Armstrong, Ian Binnie, and Stephen Goudge" in Marvin V Huberman, ed, *A Practitioner's Guide to Commercial Arbitration* (Irwin Law, 2017).
4. RSBC 1996, c 233.
5. John Bolton, "Why Can't an Arbitrator Be Just Like a Judge?" (February 1996) Arbitration 34.
6. Sir Anthony Clarke, "The Woolf Reforms: A Singular Event or an Ongoing Process?" (address to the British Academy delivered on 2 December 2018).