A Brief Overview of Bill 7, the Arbitration Act for Family Law Professionals

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About the Bill

British Columbia Bill 7 affects two provincial statutes, the Arbitration Act and Family Law Act, and introduces a minor consequential amendment to the Family Maintenance Enforcement Act. The bill will repeal and replace the current Arbitration Act, and re-establish that act as a vehicle for commercial arbitrations alone while introducing specific provisions for the arbitration of family law disputes to the Family Law Act.

The bill was tabled in the legislature for first reading on 19 February 2020. Although no timetable has been fixed for second reading, the committee stage, third readying and royal assent, it seems likely that the bill will become law sometime around mid-summer 2020, coincident with the coming into force of the amendments to the Divorce Act.

The Arbitration Act

Section 2(5)(b) of the new act provides that it does not apply to the arbitration of "family law disputes," as defined by section 1 of the Family Law Act.

The Family Law Act

Section 73 of the bill adds a new Division 4, "Arbitration," to Part 2 of the Family Law Act, the part of the act addressing dispute resolution, including the functions of family justice counsellors (Division 2) and the appointment of parenting coordinators (Division 3). Sections 19.1 to 19.22 of the amended Family Law Act will come into force by order in council and create a complete, self-contained regime for the arbitration of family law disputes.

Entering arbitration

Section 19.2 concerns *arbitration clauses* in family law agreements and arbitration *participation agreements*, which is the only interpretation that makes sense out of the otherwise apparently contradictory statements in subsections (1), (2) and (3). Assuming this to be the case:

a) a family law agreement may contain a clause requiring the use of arbitration to resolve future disputes concerning the subject matter of the agreement or the implementation of the agreement (section 19.2(1) and (3)); whereas,

b) an arbitration participation agreement may not be executed until after the dispute to be resolved has arisen (section 19.2(2)).

Arbitration clauses and participation agreements may, however, be set aside under section 19.3 if the agreement is void at common law or one party took "improper" advantage of the vulnerability of the other when the parties entered the agreement.

Section 19.2(4) condenses a number of sections of the former Arbitration Act into five short rules about the potential content of both arbitration clauses and participation agreements. These agreements may specify:

a) the arbitrator, or the means by which the arbitrator will be appointed;

b) the issues to be resolved;

c) the law to be applied by the arbitrator;

d) the procedures to be followed in the arbitration hearing, including the process for disclosure, the process for the examination of witnesses, the use of expert witnesses and the form of the arbitrator's award; and,

e) the arbitrator's jurisdiction over certain procedural steps, including interim awards and costs of the arbitration.

Effect of entering arbitration

Arbitration proceedings are confidential. Under section 19.22, neither the parties nor the arbitrator may disclose evidence, documents or information produced in connection with the arbitration that are not otherwise:

a) in the public domain;

b) subject to a legal disclosure requirement;

c) required for the purposes of a Family Law Act proceeding; or,

d) disclosable by court order.

Under section 19.4, where the parties have executed an arbitration clause or an arbitration participation agreement and a party commences a court proceeding on the subject matter of

that agreements, another party may apply to court for a stay. The court must grant the stay unless the agreement is void. However, section 19.5 creates an important exception to section 19.4 allowing a party to apply for orders for the protection of persons or property.

Under section 19.16, arbitrator's awards are final and binding on all parties.

Role and authority of arbitrator

Under section 19.8, arbitrators must be independent and impartial. Upon being approached to act as arbitrator, an arbitrator must promptly disclose any circumstance likely to give rise to doubt as to their independence and impartiality.

Under section 19.10(2), the arbitrator may choose the applicable law, where the parties have not done so in an arbitration clause or arbitration participation agreement under section 19.2(4)(c). Under section 19.10(3) and (5), the arbitrator must the decide the dispute by applying the designated law. However, under section 19.10(6), the arbitrator must resolve:

a) disputes about *parenting* by considering only the best interests test set out at section 37 of the Family Law Act; and,

b) disputes about *relocation* by considering the best interests tests and the additional factors set out at section 69(4)(a) of the Family Law Act.

Note that despite the power of the parties and the arbitrator to select the law applicable to a dispute, under section 19.20(2), a provision of an award that is inconsistent with the Family Law Act or the Divorce Act is not enforceable.

Section 19.10(4) repairs some serious deficiencies of the old Arbitration Act in the context of family law disputes. Under this subsection, arbitrators may now grant injunctions, make declarations and award equitable remedies.

Subject to the terms of an arbitration clause or arbitration participation agreement to the contrary, arbitrators have the general power to establish procedures and make procedural orders for the conduct of an arbitration under section 19.13, including the power to make interim awards. Under section 19.11, arbitrators are not required to apply the law of evidence and are able to determine all evidentiary matters in a dispute, including admissibility. Under section 19.12, arbitrators may compel the production of oral and documentary evidence from third parties by issuing subpoenas.

Arbitrators have a limited immunity from prosecution for damages for anything arising from an arbitration under section 19.21, except for actions and omissions committed in bad faith.

After the arbitration hearing

Under section 19.14, arbitral awards must:

a) be in writing;

b) be signed by the arbitrator;

c) be delivered to each party;

d) state the place of the arbitration; and,

e) state the date on which the award is made.

Awards must contain reasons, unless the award is a consent award or the parties have agreed that no reasons will be provided.

Under section 19.15, the parties have 30 days from receipt of "an arbitration award" – including therefore interim awards as well as final awards – to ask the arbitrator to correct arithmetical or typographical errors and provide "an interpretation" of an aspect of the award. (The arbitrator may decide to correct their award on their own initiative within the same period.) The arbitrator has a further 30 days to consider the parties' requests but may extend this deadline as necessary.

Terminating an arbitration

Under section 19.7, a party may not unilaterally revoke the appointment of an arbitrator, effectively terminating an arbitration proceeding; the consent of all other parties is required, under section 19.17(2)(b).

The issuance of a final award will normally terminate an arbitration proceeding under section 19.17(1), however under subsection (2), the arbitrator must terminate an arbitration:

a) at the request of all parties; or,

b) if they conclude that continuing the arbitration has "become unnecessary or impossible."

Role and authority of court

The court may:

a) under section 19.4, stay a court proceeding on the subject matter of an arbitration clause or participation agreement;

b) under section 19.5, make orders for the protection of persons or property without terminating an arbitration proceeding;

c) under section 19.6, appoint an arbitrator if a specified arbitrator cannot act;

d) under section 19.9, revoke the appointment of an arbitrator if "there are justifiable doubts" as the arbitrator's independence or impartiality;

e) under section 19.12(4), set aside a third-party subpoena issued by an arbitrator;

f) under section 19.22(2)(c), authorize the disclosure of documents, evidence and information normally produced in connection with an arbitration that would otherwise be confidential;

g) under section 19.18(1), set aside or vary an award if there are doubts about the arbitrator's independence or impartiality, a party was not provided an opportunity to be heard, the award was obtained by fraud or duress, the award addresses subject matter outside the arbitration agreement, or the arbitrator otherwise acted outside their authority;

h) under section 19.18(3), set aside or vary an award for any reason that an order on the same subject matter could be set aside or varied under sections 47, 60, 152, 167, 174, 187 and 215 of the Family Law Act; and,

i) under section 19.20, enforce arbitral awards in the manner of court orders.

Appeals

Under section 19.19 appeals may be brought to the Supreme Court on:

a) questions of law; or,

b) questions of mixed law and fact.

The appeal period is 40 days, beginning the day after the party receives an arbitration award.