

SETTLEMENT OF INTERNATIONAL INVESTMENT DISPUTES ACT

Definitions

1. (1) In this Act

(a) "award" means an award rendered by the Arbitral Tribunal, established by Article 37 of the Convention, and includes an interpretation, revision or annulment of the award under the Convention.

Comment: The definition of "award" refers to Paragraph (2) of Article 53.

(b) "Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on March 18, 1965, the text of which is set out in the schedule.

Comment: The Convention is set out in the schedule for dissemination purposes. The Act does not give the force of law to the Convention.

(2) Unless the context otherwise requires, all words and expressions used in this Act have the same meaning as in the Convention.

Comment: This is a standard provision. (see Subsection 1(2) of the Uniform International Commercial Arbitration Act).

Interpretation

2. (1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.

Comment: This is a standard provision. (see Subsection 14(1) of the Uniform International Commercial Arbitration Act).

Comment: In applying or interpreting the Convention it is recommended, in particular, to refer to the following documents: (1) International Centre for the Settlement of Investment Disputes, Basic Documents, ICSID/15, Washington D.C.,

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1985, 107 p.; (2) International Centre for the Settlement of Investment Disputes, Analysis of Documents concerning the Origin and the Formulation of the Convention, Vol.I, Washington D.C., 1970, 403 p.; (3) Ibid., Vol.II Part I & Part II, Washington D.C., 1970, 1088 p.; (4) International Bank for Reconstruction and Development, "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States", (1965) 4 I.L.M., pp. 524-544; and, (5) ICSID Review - Foreign Investment Law Journal. These documents can be ordered from ICSID, 1818 H Street, N.W., Washington, D.C. 20433, USA. (see paragraph [63] of the Report).

(2) In the event of any inconsistency between this Act and any other Act of the legislature of [name of province or territory], this Act prevails to the extent of the inconsistency.

Comment: The ICSID arbitration process is of specific application and differs from existing general arbitration regimes in Canada. A prevailing provision is included in case of inconsistency with other Acts. (see paragraphs [36], [53], [54] and [56] of the Report).

Comment: This is a standard provision. (see Section 5 of the Uniform International Sale of Goods Act and Section 7 of the Uniform International Factoring (Unidroit Convention) Act and of the Uniform Act respecting International Child Abduction (the Hague)).

Purpose of Act

3. The purpose of this Act is to implement the provisions of the Convention concerning the jurisdiction and powers of the [name of court] with respect to the recognition and enforcement of awards.

Comment: It is important to specify the object and scope of the Act as it does not give the force of law to the Convention but only implements the provisions necessary for the specific role of the domestic courts under the Convention.

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Scope of Act

4. This Act applies in respect of agreements recording consent to arbitration or conciliation proceedings entered into under the Convention, and awards rendered, including those entered into or rendered, as the case may be, before the coming into force of this Act.

Comment: The terminology "agreements recording consent to arbitration" includes: arbitration agreements, arbitration clauses and actual consent to invoke arbitration.

Comment: The Act has retroactive effect regarding ICSID awards and agreements recording consent to arbitration and/or conciliation proceedings under the Convention. It is important to allow Canadian investors and governments in Canada to consent in advance to ICSID's jurisdiction - before the coming into force of the Convention for Canada - for possible proceedings under the Convention when it will come into force for Canada. As for ICSID awards, the retroactive aspect of the provision would only cover ICSID awards between foreign investors and foreign States. Thus, it will allow foreign investors to enforce in Canada awards rendered - before the coming into force of the Convention for Canada - against foreign States. The Act will have no retroactive effect with regard to conciliation proceedings that would have taken place before the coming into force of the Convention for Canada. Thus, Section 11 of the Act will have no effect if it was invoked by a foreign investor against a foreign State with regard to conciliation proceedings that would have taken place before the coming into force of the Convention for Canada.

Binding on Crown

5. This Act is binding on the Crown in right of [name of province] other than a Crown corporation [or other similar entity] of [name of province].

[OR

Binding on Government

5. This Act is binding on the Government of the [name of territory] other than an agent or a wholly owned corporation [or other similar entity] of the Government of the [name of territory].]

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Comment: Article 25(1) of the Convention provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute [...] between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State [...]". Jurisdictions not wishing to be designated under Article 25(1) should not enact this provision. Furthermore, only agencies of a Contracting State could be designated; the plain meaning of Article 25 does not allow the designation of agencies of a constituent. Consequently, provinces will have to limit the application of the Act by excluding entities such as Crown corporations and agencies of the Province and territories will have to exclude entities such as agencies, authorities, boards, councils, commissions and corporations of the government of a Territory. (see paragraphs [6]-[8], [14]-[16], [24] and [43] of the Report).

Enforceability of awards

6. On production to the [name of court] of a certified copy of an award it shall be registered in that Court and, when registered, it has the same effect, and all proceedings may be taken to enforce it, as if it were a final judgment obtained in that Court.

Comment: This provision implements Paragraphs (1) and (2) of Article 54 of the Convention. (see paragraphs [11] and [57] of the Report).

Enforceability against Crown

7. An award is enforceable against the Crown in right of [name of province] in the same manner and to the same extent as a judgment is enforceable against the Crown in right of [name of province].

[OR

Enforceability against Government

7. An award is enforceable against the Government of the [name of territory] in the same manner and to the same extent as a judgment is enforceable against the Government of the [name of territory].]

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Comment: Only jurisdictions enacting Section 5 of the Act should enact this provision. This provision incorporates Paragraph (3) of Article 54 of the Convention with regard to the law governing the enforcement of awards against the Crown in right of a province or the government of a territory. (see paragraphs [9], [20]-[22] and [57] of the Report).

Comment: This is a standard provision. (see subsection 12(2) of the Uniform International Commercial Arbitration Act).

Remedies

8. An award is final and binding and is not subject to appeal, review, setting aside or any other remedy except as provided in the Convention.

Comment: This provision implements the first sentence of Paragraph (1) of Article 53 of the Convention. (see paragraphs [10] and [35] of the Report).

Stay of enforcement proceedings

9. Where enforcement of an award is stayed under the Convention, the [name of court], on the application of a party to arbitration proceedings, shall stay proceedings in relation to enforcement of the award.

Comment: This provision implements Paragraph (2) of Article 50, Paragraph (4) of Article 51 and Paragraph (5) of Article 52. (see paragraphs [10], [34], [55] and [56] of the Report).

Interim measures

10. Unless the parties have so stipulated in their agreement recording their consent to arbitration proceedings, a party may not request a court or an administrative tribunal to order interim measures, before the institution of the proceedings or during the proceedings, for the preservation of the party's rights and interests.

Comment: This provision implements ICSID Arbitration Rule 39(5). This provision will override Article 9 of the UNCITRAL Model Law on International Commercial Arbitration in the case of ICSID proceedings. (see paragraphs [53] and [54] of the

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Report).

Comment: The terminology "agreements recording consent to arbitration" includes: arbitration agreements, arbitration clauses and actual consent to invoke arbitration.

Conciliation

11. Except as the parties otherwise agree, neither party to conciliation proceedings is entitled in any other proceedings, whether before a court of law, an administrative tribunal or arbitrators, or otherwise, to use

(a) any views expressed or statements, admissions or offers of settlement made by the other party in the conciliation proceedings; or

(b) the report or any recommendations made by the Conciliation Commission.

Comment: This provision implements Article 35 of the Convention. (see paragraph [51] of the Report).

Regulations

12. The [name of regulation-making authority] may make regulations for carrying out the purposes and provisions of this Act including

(a) prescribing the terms and conditions under which the Crown in right of [name of province] (or the Government of the [name of territory]) may enter into an agreement recording consent to arbitration proceedings under the Convention; and

Comment: It would be advisable that governments proceed with caution in order to avoid multiple proceedings concerning the same dispute and put in place an internal control mechanism. Investment agreements will need to be carefully drafted to take into account agreements the investor may have with another federal, provincial or territorial government in Canada in respect of the same investment. (see paragraphs [16]-[19] of the Report).

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Comment: The terminology "agreements recording consent to arbitration" includes: arbitration agreements, arbitration clauses and actual consent to invoke arbitration.

(b) regulating the practice and procedure of the [name of court].

Comment: Some jurisdictions may need extra Rules of Court. (see paragraph [60] of the Report).

(c) exempting any person or class of persons from the application of an enactment or any of its provisions, on such conditions as may be specified in the regulations, to permit them to act in a professional capacity in an arbitration or conciliation proceeding.

Comment: This provision will only appear in provincial and territorial implementing legislation. This provision should encourage foreign parties, agents, counsel and advocates to hold ICSID proceedings in Canada. It should also encourage Canadian parties, agents, counsel and advocates to participate in ICSID proceedings being held in Canada in jurisdictions for which they are not members of the Bar. (see paragraphs [60] and [61] of the Report and Section 38 of the International Commercial Arbitration Act, S.B.C. Chap. 14).

Coming into force

13. This Act comes into force on the day on which it is assented to.

Comment: As the Convention will come into force in all 13 Canadian jurisdictions on the same day and only 30 days after the date of deposit of Canada's Instrument of Ratification, it is important that we provide for an effective and simple provision regarding the coming into force of the Convention. It is not recommended to proclaim the implementing legislation in force on the day the Convention comes into force for Canada, because the time between learning the effective date and the date itself may be too short to issue a Proclamation. Instead, it is recommended that the legislation implementing the Convention come into force on Royal Assent, with the understanding that the Act has no effect until the Convention comes into force for Canada (see paragraph [59] of the Report).

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Application of Convention

14. The Convention applies in [name of province or territory] on the day on which it enters into force for Canada in accordance with paragraph 2 of Article 68 of the Convention.

Comment: See comment for Section 13 above.

Publication

15. The [name of regulation-making authority] shall publish in the Gazette a notice setting out the date that the Convention enters into force.

Comment: It is necessary to publicise the coming into force of the Convention. (see paragraph [60] of the Report).

SCHEDULE

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

[*The text of the Convention appears on the Web site of the Uniform Law Conference of Canada at <http://www.law.ualberta.ca/alri/ulc/acts/esiida.htm>]*