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New Act Modernizes Ontario's International Arbitration Regime

On March 22, 2017, Ontario's new *International Commercial Arbitration Act, 2017* (the "**New Act**")[1] came into force, replacing the previous *International Commercial Arbitration Act, 1990* (the "**Previous Act**")[2]. The New Act is part of a larger effort on the part of the Ontario government to reduce the regulatory burden on businesses and achieve cost savings.

The New Act contains significant changes that modernize Ontario's international commercial arbitration regime, bringing it in line with many other jurisdictions and making Ontario an even more attractive jurisdiction for resolving cross-border disputes. This bulletin highlights three of the more significant changes brought about by the New Act.

Changes in the New Act

There are three significant changes in the New Act that affect Ontario's international arbitration regime:

1. It adopts the amendments made in 2006 to the Model Law on International Commercial Arbitration (the "**2006 Model Law**") by the United Nations Commission on International Trade Law ("**UNCITRAL**");

[1] S.O. 2017, c. 2, Sched. 5.

[2] R.S.O. 1990, Ch. I.9.

2. It formally incorporates into Ontario law the terms of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "**New York Convention**"); and

3. It lengthens the limitation period for enforcing and recognizing arbitration awards.

Adoption of The 2006 Model Law

First, the New Act adopts the 2006 Model Law and appends it as Schedule 2 to the New Act (the previous Act appended a prior version of the Model Law developed in 1985). The Model Law was originally designed to assist countries reform their laws on arbitration procedure to take into account the particular features and requirements of international commercial arbitration. It was modernized and amended in 2006 to better conform with international arbitration practices. Ontario is the first jurisdiction in Canada (and, at the time of writing, one of 17 jurisdictions worldwide) to adopt the 2006 Model law.

Two of the more significant changes contained in the 2006 Model Law are as follows:

1. Its provisions regarding interim measures have been substantially revised. The 2006 Model Law now contains a definition of interim measures (defined to mean any temporary measure granted by a tribunal at a party's request before a dispute is finally decided), and it sets out the tribunal's ability to issue interim measures in detail (including provisions relating to disclosure, costs and damages). It provides that tribunals may grant interim measures to preserve the status quo, prevent harm or prejudice and to preserve assets or evidence. It also provides that parties may seek a preliminary order, on an *ex parte* (or, without notice) basis, directing other parties not to frustrate the purpose of an interim measure. It further specifies that interim measures are to be recognized and enforced by Ontario courts, regardless of the country in which the interim measure was issued.

2. Its provision that arbitration agreements must be in writing has been modernized and broadened. Under the 2006 Model Law, an arbitration agreement is in writing if its content is "recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means." Arbitration agreements sent via "electronic communication", including email, are now considered to be "in writing."

Adoption of The New York Convention

Second, the New Act expressly incorporates the New York Convention into Ontario law and appends it as Schedule 1 to the New Act. Although Canada ratified the New York Convention in 1986 (and several other Provinces incorporated it into their international arbitration legislation), the Previous Act did not incorporate it (so Ontario courts relied exclusively on the enforcement provisions contained in the 1985 iteration of the Model Law). While the New York Convention did assist in the interpretation of the Previous Act, it did not have direct legal effect. The express adoption of the New York Convention in the New Act should provide more certainty for parties looking to enforce arbitration awards made elsewhere in Ontario.

New, Longer, Limitation Period

Third, the New Act extends the limitation period for commencing a proceeding to recognize and enforce an arbitral award to ten years from the date the award was made.[3] The New Act also provides that any arbitral award made before 2009 will be subject to a limitation period expiring on December 31, 2018.

[3] Notably, the limitation period in Ontario's domestic Arbitration Act, 1991 has also been extended to ten years as well.

This change comes in the wake of the Supreme Court of Canada decision in *Yugraneft Corp. v. Rexx Management Corp*,[4] in which the Court held that an application for recognition and enforcement of an arbitral award is subject to the general two-year limitation period applicable to most causes of action. The Supreme Court's decision did not address whether the limitation period began to run when the award was rendered or only when a party discovered that the debtor had assets in the jurisdiction that would be used to satisfy the debt. As such, a party seeking to enforce an arbitration award in Ontario had to bring an application within two years of the release of the Award, or risk running out of time even if a party was unsure of whether such an application would be productive. By extending the limitation period, the New Act gives award creditors more time to bring applications to enforcement awards.

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a cautionary note

[4] 2010 SCC 19.