
Judiciary Committee

HB 2169

Title: An act relating to international commercial arbitration.

Brief Description: Creating the international commercial arbitration act.

Sponsors: Representatives Goodman, Rodne, Morrell and Jinkins; by request of Washington State Bar Association.

<p style="text-align: center;">Brief Summary of Bill</p> <ul style="list-style-type: none">• Establishes an International Commercial Arbitration Act providing rules and procedures governing international commercial arbitration agreements and proceedings.

Hearing Date: 1/17/14

Staff: Edie Adams (786-7180).

Background:

Arbitration is a form of alternative dispute resolution where parties to a dispute voluntarily agree in writing that they will submit the dispute to a neutral third-party for resolution. The Washington Uniform Arbitration Act provides a procedural framework for initiating and conducting the arbitration proceeding, including provisions relating to appointment of an arbitrator, attorney representation, witnesses, depositions, and awards. The arbitrator's decision is final and binding on the parties, and there is no general right of appeal. A court may, however, review an arbitration decision to confirm an award, modify or correct an award, or vacate an award under limited circumstances.

Arbitration has become a common method used for resolving disputes arising from international commercial transactions. Reasons often stated for the attractiveness of arbitration in international commercial matters include: distrust of foreign legal systems; a streamlined and more efficient decision-making process; freedom for the parties to select and design the arbitral

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

process; commercial expertise of arbitrators; confidentiality of the arbitration process; and greater certainty with respect to enforcement of international arbitration agreements and arbitral awards.

The greater certainty regarding enforcement of arbitration agreements and arbitral awards is facilitated under several multi-national agreements, most notably the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The New York Convention, which has been incorporated into U.S. law in the Federal Arbitration Act, obligates contracting states to recognize and enforce international arbitration agreements and foreign arbitral awards issued in other contracting states, except under limited circumstances.

The United Nations Committee on International Trade Law (UNCITRAL) has adopted a Model Law on International Commercial Arbitration (Model Law), with a stated purpose of providing a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations. The Model Law generally provides default rules allowing the parties significant control over methods for conducting arbitration proceedings. The Model Law covers issues ranging from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, limited scope of court assistance or intervention in the arbitration process, and standards for recognizing, enforcing, and setting aside arbitral awards. The Model Law has been adopted in over 60 nations and in eight states in the U.S. (California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas).

Summary of Bill:

An International Commercial Arbitration Act (Act) is established. The Act is modeled on the UNCITRAL Model Law and provides rules and procedures governing international commercial arbitration agreements and proceedings.

Application

The Act applies to international commercial arbitration, subject to any agreement between the United States and any other country or countries. The Act applies only to arbitrations that take place in the state, except for provisions of the Act governing the superior court's authority to refer matters to arbitration, issue or enforce interim measures, or recognize or enforce arbitral awards.

An arbitration is international if: (a) the parties to the agreement have their places of business in different countries; (b) the place of arbitration, or the place where a substantial part of the obligations are to be performed or the subject matter of the dispute is most closely connected, is outside the country or countries in which the parties have their places of business; or (c) the parties have agreed that the subject of the arbitration agreement relates to more than one country.

Rules of Interpretation and General Principles

In interpreting the Act, regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith, and questions are to be resolved in conformity with the general principles on which it is based.

In interpreting the Act, reference may be made to certain reports and commentaries of the UNCITRAL, and the explanatory note by the UNCITRAL Secretariat on the Model Law.

The freedom of the parties to determine a particular issue includes the freedom to authorize a third party, including an institution, to make the determination. Any provision of the Act referring to an agreement of the parties includes any arbitration rules referred to in that agreement.

A party is deemed to waive the right to object to any noncompliance with a requirement of the arbitration agreement if the party proceeds with the arbitration without objecting in a timely manner.

Arbitration Agreement

An arbitration agreement is an agreement between parties to submit to arbitration all or certain disputes in respect to a defined legal relationship, whether contractual or not. An arbitration agreement must be in writing, meaning its content is recorded in any form, including through electronic communication if the information is accessible for subsequent reference.

An arbitration clause within a contract is treated as an agreement independent of the contract, and an invalidation of the contract does not automatically invalidate the arbitration agreement.

Court Action

A court hearing a claim that is subject to an arbitration agreement must, if requested by a party, refer the agreement to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of performance. Arbitration proceedings may be commenced or continued, and an award may be made, while the issue is pending in the court.

Arbitrators

A person may not be precluded from acting as an arbitrator based on the person's nationality unless otherwise agreed by the parties. An arbitrator has the same immunity as a judicial officer from civil liability when acting in the capacity of arbitrator.

The parties may determine the number of arbitrators and the procedure for appointing the arbitrator or arbitrators. Failing an agreement, the number of arbitrators is three, each party appoints one arbitrator, and the two appointed arbitrators appoint the third arbitrator.

The court may appoint an arbitrator upon request of a party if an arbitrator is not appointed pursuant to the agreement of the parties. When making an appointment, the court must consider any arbitrator qualifications required in the agreement and the independence and impartiality of the arbitrator. In the case of an appointment of a sole or third arbitrator, the court must consider the advisability of appointing an arbitrator of a nationality other than those of the parties.

An arbitrator must disclose any circumstances that are likely to give rise to justifiable doubts about the person's impartiality or independence. A party may challenge an arbitrator only if such circumstances exist. The parties may agree to the procedures for challenging an arbitrator. Absent an agreement, the arbitral tribunal decides on the challenge. The challenging party may appeal the arbitral tribunal's ruling to the court, whose decision is not subject to appeal.

An arbitrator's mandate terminates if the arbitrator is actually or legally unable to perform, or fails to perform in a timely manner. The parties may agree to the termination, the arbitrator may

withdraw, or a party may seek judicial termination. A substitute arbitrator is appointed using the same procedures for appointment of the initial arbitrator.

Arbitral Proceedings

Unless otherwise agreed, arbitral proceedings commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent. The parties to an arbitration must be treated with equality and given a full opportunity to present their cases.

Claims and Defenses: Unless otherwise agreed, the claimant must provide a statement of facts supporting its claim, the point at issue, and the relief or remedy sought, and the respondent must provide a statement of its defense, within times agreed by the parties or established by the arbitral tribunal. Unless otherwise agreed, if a claimant fails without sufficient cause to provide its statement of claim, the arbitral tribunal must terminate the proceedings. If the respondent fails to provide its defense, the arbitral tribunal must continue the proceedings without treating the failure in and of itself as an admission to the allegations. If any party fails to appear at a hearing or produce evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Jurisdiction: The arbitral tribunal may rule on its own jurisdiction including any objections regarding the existence or validity of the arbitration agreement. The arbitral tribunal may rule on a plea that it lacks jurisdiction or has exceeded its authority either as a preliminary question or as an award on the merits. A party may request a court to review the arbitral tribunal's decision if it rules as a preliminary question, and the decision of the court is not subject to appeal.

Interim Measures and Preliminary Orders: The arbitral tribunal may issue interim measures unless otherwise agreed by the parties. Interim measures include orders to prevent harm or prejudice to the arbitral process and to preserve assets or relevant evidence. A party requesting an interim measure must show that the harm resulting from failure to order an interim measure outweighs the potential harm to the party against whom the measure is directed and that there is a reasonably probability the requesting party will succeed on the merits. A court has the same power to issue an interim measure in relation to arbitration proceedings as it has in court proceedings, regardless of whether the place of the proceedings is in the state.

A party requesting an interim measure may request a preliminary order prohibiting a party from frustrating the purpose of the interim measure. A preliminary order is binding on all parties, but does not constitute an award, and is not enforceable in a court.

An interim measure is binding on the parties, and unless otherwise provided by the arbitral tribunal, may be enforced in court regardless of the country in which it was issued. A court may refuse recognition and enforcement of an interim award if: the arbitral tribunal's order regarding security has not been met; the interim measure has been terminated or suspended; the interim measure is incompatible with the powers of the court; or a ground for refusing recognition of an award exists.

Conduct of Proceedings: The arbitral tribunal has the power to decide a number of issues relating to the arbitral proceeding if the parties have not agreed on these issues. This includes the power to choose the place of arbitration and the language to be used in the proceedings, conduct the arbitration in the manner it considers appropriate, determine the admissibility and weight of

any evidence, determine whether to hold oral hearings or meetings, and appoint experts to report on specific issues.

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request assistance from the superior court in taking evidence. If agreed by all parties to multiple arbitration agreements, the superior court may order the consolidation of arbitration proceedings, and appoint an arbitral tribunal for the consolidated proceedings where the parties are unable to reach agreement.

Applicable Rules of Law: The arbitral tribunal must decide the dispute according to the substantive rules of law chosen by the parties. If the parties fail to choose the applicable law, the arbitral tribunal must apply the law determined by the conflict of laws rules it considers applicable. The arbitral tribunal must decide the dispute in accordance with the terms of the contract considering the usages of the trade applicable to the transaction.

Decision Making: Unless otherwise agreed, in proceedings with more than one arbitrator, decisions must be made by a majority of the arbitrators. Questions of procedure may be decided by a presiding arbitrator if authorized by the parties or all members of the arbitral tribunal.

Settlements and Awards: If the parties settle the dispute, the arbitral tribunal must terminate the proceedings, and if requested by the parties, record the settlement as an award on agreed terms, which has the same effect as any other award.

The arbitral award must be in writing, signed by the arbitrator or arbitrators, and state the reasons upon which it is based, unless the parties agreed that no reasons are to be given or the award is on agreed terms. A signed copy of the award must be delivered to each party.

A party may, within specified time periods, request the arbitral tribunal to correct any errors in the award or give an interpretation of a specific point or part of the award. The arbitral tribunal may correct an error in the award on its own initiative within 30 days of the award. Unless otherwise agreed, a party may also request the arbitral tribunal to make an additional award as to claims presented in the proceedings but omitted from the award.

Termination of Proceedings: Arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal when the claimant withdraws its claim, the parties agree on termination, or continuation of the proceedings has become unnecessary or impossible.

Setting Aside of Arbitral Award

A party may apply to a court to set aside the award. The application must be made within three months after the party receives the award. The court may suspend the setting aside proceedings to allow the arbitral tribunal to cure the grounds for setting aside the award.

A court may set aside an arbitral award only under the following circumstances:

- A party to the arbitration agreement was under some incapacity or the agreement is not valid under the applicable law.
- A party was not given proper notice of appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present its case.

- The award deals with a dispute or matters beyond the scope of the submission to arbitration.
- The composition of the arbitral tribunal or the arbitral procedure did not comply with the agreement of the parties or with the act.
- The subject matter of the dispute is not capable of settlement by arbitration under state law.
- The award is in conflict with the public policy of the state.

Recognition and Enforcement of Arbitral Awards

An arbitral award must be recognized as binding and enforced by the courts irrespective of the country in which it was made. A court may refuse recognition or enforcement of an award under the same circumstances that allow for the setting aside of an award. Recognition or enforcement of an award also may be refused by a court if the award has not yet become binding or has been set aside or suspended by the country in which, or under the law of which, the award was made.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.