

HOUSE BILL REPORT

HB 2169

As Passed House:
February 17, 2014

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.

Brief History:

Committee Activity:

Judiciary: 1/17/14, 1/21/14 [DP].

Floor Activity:

Passed House: 2/17/14, 95-2.

Brief Summary of Bill

- Establishes an International Commercial Arbitration Act providing rules and procedures governing international commercial arbitration agreements and proceedings.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 13 members: Representatives Jinkins, Chair; Hansen, Vice Chair; Rodne, Ranking Minority Member; Nealey, Assistant Ranking Minority Member; Goodman, Haler, Kirby, Klippert, Muri, Orwall, Roberts, Shea and Walkinshaw.

Staff: Edie Adams (786-7180).

Background:

Arbitration is a form of alternative dispute resolution where parties 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

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.

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

The greater certainty regarding enforcement of 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 United States 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 in 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 the rules and conduct of arbitration proceedings. The Model Law covers issues ranging from the arbitration agreement, composition and jurisdiction of the arbitral tribunal, 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: (1) the parties have their places of business in different countries; (2) the place of arbitration, or the place of contract performance or the subject matter of the dispute, is outside the country or countries in which the parties have their places of business; or (3) 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. In interpreting the Act, reference may be made to certain UNCITRAL reports and commentaries, and the explanatory note 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 reference 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. 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 from civil liability as a judicial officer.

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.

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 arbitral tribunal decides on the challenge unless the parties

have agreed on a different challenge process. 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.

Arbitral Proceedings.

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 remedy sought, and the respondent must provide a statement of its defense. 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 a 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. 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 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 under limited circumstances.

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, conduct the arbitration in the manner it considers appropriate, determine evidentiary issues and whether to hold hearings, and appoint experts to report on specific issues.

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, decisions by an arbitral panel 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 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. 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 or was otherwise unable to present its case.
- The award deals with 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 setting aside an award. Recognition or enforcement of an award also may be refused if the award has not yet become binding or has been set aside 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.

Staff Summary of Public Testimony:

(In support) International commercial arbitration is a growing and lucrative field of law. Businesses have become more interconnected worldwide, and they need a neutral way to resolve disputes. The arbitral seat is the most important aspect of the arbitration agreement since it will determine the rules of procedure and the enforceability of the award. Washington's current arbitration act is not hospitable to international arbitration because it provides for increased court intervention in the process. Foreign businesses do not want broad recourse to a state court that is not perceived to be neutral. There are legitimate reasons to provide greater court intervention and protections for domestic arbitrations where consumers may be parties. There is less of a need for those protections when you are talking about giant international conglomerates who are sophisticated parties to the agreement.

The Model Law is tried and tested. It provides a fair balance between common law and civil law systems. Washington is missing a great opportunity to host NAFTA disputes between Canada and Mexico. California, Oregon, Mexico, and Canada have all adopted international commercial arbitration laws based on the Model Law. Adopting a Washington international commercial arbitration law would make Washington a more attractive place to seat international arbitrations. Washington has a burgeoning group of international arbitrators. The substantial economic benefits of hosting international arbitrations have been well-documented. These disputes typically involve large multi-national companies with seven- to 10-figure dollar amounts at stake, include teams of lawyers, and take significant time for resolution. As a result, a single arbitration can have an economic impact of millions of dollars for the hosting jurisdiction.

(Opposed) None.

Persons Testifying: Representative Goodman, prime sponsor; and Kathryn Leathers and Jared Hager, Washington State Bar Association.

Persons Signed In To Testify But Not Testifying: None.