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AB-1903 International commercial arbitration: procedure. (2023-2024)

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Assembly Bill No. 1903

CHAPTER 90

An act to amend Sections 1297.12, 1297.72, 1297.92, 1297.171, and 1297.172 of, to amend, renumber, and add Section 1297.91 of, to amend the heading of Article 3 (commencing with Section 1297.91) of Chapter 2 of Title 9.3 of Part 3 of, and to add Sections 1297.20, 1297.73, 1297.90, 1297.173, 1297.174, 1297.175, 1297.176, 1297.177, 1297.178, 1297.179, and 1297.180 of the Code of Civil Procedure, relating to international commercial arbitration.

[Approved by Governor July 15, 2024. Filed with Secretary of State July 15, 2024.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1903, Maienschein. International commercial arbitration: procedure.

(1) Existing law provides a framework for the arbitration and conciliation of international commercial disputes. Existing law requires an arbitration agreement subject to this framework to be in writing, specifying that an agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication that provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another.

This bill would further specify that an agreement is in writing if it is contained in an exchange of electronic mail or in an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

(2) Existing law provides that an arbitral tribunal may, at the request of a party, order a party to take an interim measure of protection with respect to the subject matter of the dispute, but does not explicitly define "interim measure of protection." Existing law allows any party to an arbitration to request that the superior court enforce an award of an arbitral tribunal to take any interim measure of protection.

This bill would define "interim measure of protection" to mean any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, an arbitral tribunal orders a party to: (1) maintain or restore the status quo pending determination of the dispute; (2) take action that would prevent, or refrain from taking action that is likely to cause, harm or prejudice to the arbitral process; (3) provide a means of preserving assets out of which a subsequent award may be satisfied; or (4) preserve evidence that may be relevant and material to the resolution of the dispute. The bill would require that in most instances, a party requesting an interim measure of protection must satisfy to the arbitral tribunal that it would be irreparably harmed if the measure is not granted, that the harm substantially outweighs the harm likely to result to the party against whom the measure is directed if the measure is granted, and that there is a reasonable possibility that the requesting party will succeed on the merits. The bill would allow a party to, without notice, request an interim measure of protection along with a preliminary order directing a party not to frustrate the purpose of the interim measure requested. The bill would also allow a party against whom a preliminary order is directed to object to the preliminary order before the arbitral tribunal. The bill would provide that a party

requesting an interim measure or preliminary order is liable for any costs and damages caused by the measure or order to any party if the arbitral tribunal later determines that the measure or order should not have been granted.

This bill would provide that an interim measure issued by an arbitral tribunal must be recognized as final and binding, and may be enforced upon application to the superior court. The bill would provide that a superior court may refuse to recognize or enforce an interim measure only under specified circumstances.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1297.12 of the Code of Civil Procedure is amended to read:

1297.12. This title, except Article 2 (commencing with Section 1297.81) of Chapter 2 and Article 3 (commencing with Section 1297.90) of Chapter 2, applies only if the place of arbitration or conciliation is in the State of California.

SEC. 2. Section 1297.20 is added to the Code of Civil Procedure, to read:

1297.20. (a) In the application of this title, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(b) Questions concerning matters governed by this title that are not expressly settled in it are to be settled in conformity with the general principles embodied in this title.

SEC. 3. Section 1297.72 of the Code of Civil Procedure is amended to read:

1297.72. An arbitration agreement shall be in writing.

SEC. 4. Section 1297.73 is added to the Code of Civil Procedure, to read:

1297.73. (a) An arbitration agreement is in writing if its content is recorded in any form, including, but not limited to, in a document signed by the parties or in an exchange of letters, telex, telegrams, electronic mail, or other means of telecommunication accessible for subsequent reference that provides a record of the agreement.

(b) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

(1) "Electronic communication" means any communication that the parties make by means of data messages.

(2) "Data message" means information generated, sent, received, or stored by electronic, magnetic, optical, or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex, or telecopy.

(c) An arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.

(d) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

SEC. 5. The heading of Article 3 (commencing with Section 1297.91) of Chapter 2 of Title 9.3 of Part 3 of the Code of Civil Procedure is amended to read:

Article 3. Court-Ordered Interim Measures

SEC. 6. Section 1297.91 of the Code of Civil Procedure is amended and renumbered to read:

1297.90. It is not incompatible with an arbitration agreement for a party to request from a superior court, before or during arbitral proceedings, an interim measure of protection, or for the court to grant such a measure.

SEC. 7. Section 1297.91 is added to the Code of Civil Procedure, to read:

1297.91. A superior court shall have the same power to issue an interim measure of protection in relation to arbitration proceedings, irrespective of whether the place of arbitration is in California, as it has in relation to proceedings filed in the first instance in the superior courts.

SEC. 8. Section 1297.92 of the Code of Civil Procedure is amended to read:

1297.92. Any party to an arbitration governed by this title may request the superior court to enforce an interim measure of protection granted by an arbitral tribunal pursuant to Article 2 (commencing with Section 1297.171) of Chapter 4.

SEC. 9. Section 1297.171 of the Code of Civil Procedure is amended to read:

1297.171. (a) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.

(b) An interim measure of protection, or interim measure, is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to do any of the following:

- (1) Maintain or restore the status quo pending determination of the dispute.
- (2) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself.
- (3) Provide a means of preserving assets out of which a subsequent award may be satisfied.
- (4) Preserve evidence that may be relevant and material to the resolution of the dispute.

SEC. 10. Section 1297.172 of the Code of Civil Procedure is amended to read:

1297.172. (a) The party requesting an interim measure under paragraph (1), (2), or (3) of subdivision (b) of Section 1297.171 shall satisfy the arbitral tribunal that both of the following conditions are met:

- (1) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.
- (2) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination of this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(b) With regard to a request for an interim measure under paragraph (4) of subdivision (b) of Section 1297.171, the requirements in paragraphs (1) and (2) of subdivision (a) shall apply only to the extent the arbitral tribunal considers appropriate.

SEC. 11. Section 1297.173 is added to the Code of Civil Procedure, to read:

1297.173. (a) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(b) The arbitral tribunal may grant a preliminary order provided that it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(c) The conditions defined under Section 1297.172 apply to any preliminary order, provided that the harm to be assessed under paragraph (1) of subdivision (a) of Section 1297.172 is the harm likely to result from the order being granted or not.

SEC. 12. Section 1297.174 is added to the Code of Civil Procedure, to read:

1297.174. (a) Immediately after the arbitral tribunal has made a determination with respect to an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(b) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(c) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(d) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(e) A preliminary order shall be binding on the parties, but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

SEC. 13. Section 1297.175 is added to the Code of Civil Procedure, to read:

1297.175. The arbitral tribunal may modify, suspend, or terminate an interim measure or a preliminary order it has granted upon application of any party, or in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

SEC. 14. Section 1297.176 is added to the Code of Civil Procedure, to read:

1297.176. (a) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(b) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

SEC. 15. Section 1297.177 is added to the Code of Civil Procedure, to read:

1297.177. (a) The arbitral tribunal may require any party to promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(b) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, subdivision (a) shall apply.

SEC. 16. Section 1297.178 is added to the Code of Civil Procedure, to read:

1297.178. The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

SEC. 17. Section 1297.179 is added to the Code of Civil Procedure, to read:

1297.179. (a) An interim measure issued by an arbitral tribunal shall be recognized as final and binding, and, unless otherwise provided by the arbitral tribunal, may be enforced upon application to the superior court subject to the provisions of Section 1297.180. Nothing herein is intended to preclude enforcement of the interim measure in any other competent court.

(b) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension, or modification of that interim measure.

(c) The superior court where recognition or enforcement is sought may, if the court considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

SEC. 18. Section 1297.180 is added to the Code of Civil Procedure, to read:

1297.180. (a) Recognition or enforcement of an interim measure may be refused only:

(1) At the request of the party against whom it is invoked if the court is satisfied that any of the following conditions are met:

(A) A party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the jurisdiction where the interim measure was made.

(B) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case.

(C) The interim measure deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the interim measure which contains decisions on matters submitted to arbitration may be recognized and enforced.

(D) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the jurisdiction where the arbitration took place.

(E) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with.

(F) The court otherwise determines that the arbitral tribunal did not have jurisdiction pursuant to Section 1297.95.

(G) The interim measure has been terminated or suspended by the arbitral tribunal, or, where so empowered, by the court of the jurisdiction in which the arbitration took place or under the law of which that interim measure was granted.

(2) If the court finds that any of the following conditions are met:

(A) The interim measure is incompatible with the powers conferred upon the court, unless the court decides to reformulate the interim measure to the extent necessary to adapt the interim measure to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance.

(B) The subject matter of the dispute is not capable of settlement by arbitration under the law of the United States.

(C) The recognition or enforcement of the interim measure would be contrary to the public policy of the United States.

(b) Any determination made by the court on any ground in subdivision (a) shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court in which recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.