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Arbitration in the BVI: an introduction

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The BVI International Arbitration Centre (***IAC***) opened on 16 November 2016 and the BVI IAC Rules (the ***BVI Rules***) came into force on the same date giving full force to the Arbitration Act 2013 effective as of 1 October 2014 in the British Virgin Islands (the ***BVI Act***).

The IAC in the BVI is the first centre of its kind in the Caribbean to provide a forum for dispute resolution by way of arbitration. The BVI's central location between North and South America means that parties with business and other interests in those locations are able to choose a neutral territory in which to resolve their disputes. The IAC also provides a perfect venue for arbitrations involving BVI incorporated companies.

The centre itself provides a modern hi-tech facility in which parties from around the globe can expect international high-class standards in a politically neutral environment. Amongst the facilities provided at the centre are simultaneous language interpretation services, audio and video conferencing facilities and a concierge service. The utility of the facilities is soon to be crystallised by direct non-stop flights between the BVI and Miami.

Signed up members of the IAC Panel grow by the month and includes Mr John Beechey, CBE who is the former President of the International Court of Arbitration of the International Chamber of Commerce and who also forms a member of the board of directors of the IAC and serves as its Chairman.

BVI Arbitration Act 2013

The BVI Act has three main features which are of interest:

1. It incorporates the UNCITRAL Model Law on International Commercial Arbitration as adopted by the UN Commission which is recognised internationally.

2. The BVI is signatory to the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the New York Convention.

3. The option to opt-in to a right of appeal to Court on a question of law arising from the arbitral award.

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In addition, other useful matters to note about the Act are the arbitral tribunal's power to consolidate two or more arbitrations in certain circumstances and a party's ability to apply to Court challenging the arbitral award on the ground of serious irregularity.

UNCITRAL Model Law

The incorporation of the UNCITRAL Model Law (the ***Model Law***) into the BVI Act enshrines well-established international principles. The same may be said of the BVI Rules as they are based on 2010 the UNCITRAL Arbitration Rules (the ***Rules***). The BVI Act and Rules recognise firstly, that the parties are free to choose the terms of the arbitration clause subject to the usual common law rules on validity; and secondly, the parties are able to appoint their preferred number of arbitrators.

The effect of the incorporation of the Model Law is that a number of matters codified in the Model Law apply to the BVI Act. These are: (i) the arbitral tribunal's ability to rule on jurisdiction further to section 32 (ii) the doctrine of severance or separability under section 32 (iii) the ability to challenge the appointment of or to remove an arbitrator further to section 23 and (iv) the power of the tribunal to grant interim measures under section 33. All of these provisions follow closely the Model Law.

Jurisdiction

Jurisdiction challenges are common in arbitrations so it is important that the arbitral tribunal retains the power to rule on its own jurisdiction in order to avoid unnecessary delay. The tribunal is able to hear any objections with respect to its jurisdiction including in relation to the existence or validity of the arbitration agreement without needing to take the dispute to Court. The jurisdictional power of the arbitral tribunal includes the power to decide whether the tribunal is properly constituted and to decide what matters have been submitted for resolution in accordance with the arbitration agreement.

Severance

The doctrine of severance or separability further to section 32 of the BVI Act gives the arbitral tribunal the power to sever the arbitration clause as a contract separate from the rest of the agreement in which it is contained. Consequently, if the main agreement was never properly formed, or if it exists but subsequently fails or is found to be invalid, this does not inevitably result in a finding of invalidity of the arbitration clause.

Challenge to the appointment of an arbitrator

Sections 23 and 24 of the BVI Act set out that the appointment of an arbitrator may be challenged along with the procedure for doing so. These sections follow the wording of the Model Law. An arbitrator's appointment may only be challenged where circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or where the arbitrator does not possess the qualifications agreed upon by the parties. In the first instance, the parties are free to agree the procedure for the challenge. Failing agreement, the parties have 15 days after becoming aware of the tribunal's constitution or of the circumstances giving rise to the challenge to send a written statement of the reasons for the challenge to the tribunal. If a challenge is unsuccessful, the challenging party has 30 days from receipt of the notice declining the challenge in which to request the BVI Court to decide on the matter.

Interim measures

Unless otherwise agreed by the parties, the arbitral tribunal has wide powers to grant interim measures. Article 17 of the Model Law is fully adopted by section 33 of the BVI Act and provides that an 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 making of the final award, the arbitral tribunal orders a party to: (a) maintain or restore the status quo pending determination of the dispute (b) 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 (c) provide a means of preserving assets out of which a subsequent award may be made or (d) preserve evidence that may be relevant and material to the resolution of the dispute.

The applicant must be able to satisfy the tribunal that if the interim measure is not granted, harm not adequately reparable by damages is likely to result by the applying party, and that such harm substantially outweighs the harm that is likely to result to the party against which the measure is directed. The applicant must also satisfy the Court that there is a reasonable possibility that it will succeed on the merits of the substantive claim.

Section 43 of the BVI Act enables the Court to grant interim measures irrespective of whether the arbitral tribunal is capable of granting the same relief in relation to the same dispute. Whilst arbitrators lack the necessary coercive powers to enforce interim measures, the Court may decline to grant an interim measure on the grounds that the relief being sought is the subject of arbitral proceedings and that the Court considers it appropriate for the measure being sought to be considered by the arbitral tribunal. Parties should therefore consider carefully on which side of the line the interim measure sought is likely to fall before applying either to the arbitral tribunal or to Court.

The BVI Act gives to the Courts jurisdiction to consider applications for interim measures in respect of arbitral proceedings which have been or about to be commenced outside the BVI. In these circumstances, the Court may grant an interim measure if: (1) the arbitral proceedings are capable of giving rise to an arbitral award whether interim or final which is capable of being enforced in the BVI under the BVI Act or any other enactment and (2) the interim measure being sought is of a type or description of interim measure capable of being granted by the BVI Court in relation to arbitral proceedings. A Court ordered interim measure is not subject to appeal.

Enforcement under the New York Convention

The BVI Courts have always been able to enforce foreign New York Convention awards. It is now possible to export BVI arbitral awards to other Convention states. The BVI became a signatory to the New York Convention on 24 February 2014 with effect from 25 May 2014 enabling enforcement of BVI arbitral awards in all other states which are signatories to the New York Convention of which there are currently over 150 members. The steps to enforcement in a Convention state are enshrined in sections 84 to 86 of the BVI Act which state that an action for enforcement in Court must be brought. Alternatively, enforcement may take place by producing to the BVI Court: (1) an authenticated original award or certified copy of the original award (2) the original arbitration agreement or a certified copy of it and (3) if the award is in a language other than English, a certified translation of the award.

Grounds under which the BVI Court may refuse enforcement of a Convention award include incapacity of the parties; lack of validity of the agreement; lack of proper notice of the arbitration to the respondent or inability

to present their case; where an issue not contemplated by the arbitration has been dealt with; or where the award is not yet binding on the parties or it has been set aside or suspended.

Enforcement of non-Convention arbitral awards

In respect of non-Convention awards, sections 81 to 83 of the BVI Act set out that the BVI Courts can give leave to enforce an arbitral award in the same manner as a judgment or order of the Court. Where such leave is granted, the Court may enter judgment in the terms as set out in the award. The grounds for refusal of enforcement of a non-Convention award are the same as for Convention awards with an additional ground of any other reason the Court considers just.

Notwithstanding the new statutory framework for the enforcement of arbitral awards in the BVI, for a long time, the BVI Courts have taken a tough stance in its approach to the enforcement of arbitral awards and the Courts have enforced awards wherever possible. For example, the BVI Court held in the case of ***Vendort Traders v Evrostroy*** (BVIHCAP 2012/0041) that it is not necessary to obtain a Court order enforcing an arbitration award, or indeed an ordinary judgment before a statutory demand may be presented in reliance on the award.

Opt-in to right to appeal on a question of law

Further to section 89 and Schedule 2 of the BVI Act, there are a number of provisions which the parties to an arbitration agreement may expressly include in the agreement. Arguably, the most important one of these is contained at paragraph 5, Schedule 2, which is the right to appeal the final award to Court on a question of law. An appeal may be brought wither by the agreement of all the parties to the arbitral proceedings, or with the leave of the Court. Leave to appeal will be granted only if the Court is satisfied that (a) the decision of the question of law will substantially affect the rights of one or more parties (b) the question is one which the tribunal was asked to decide and (c) on the basis of the factual findings in the award, (i) the decision of the arbitral tribunal was obviously wrong or (ii) the question is one of general importance and the decision of the tribunal is at least open to serious doubt.

It is important to note that the parties will lose the right to appeal, or to seek leave to appeal if they have agreed to dispense with the requirement to include reasons in the final award.

When hearing an appeal, the Court must decide the question of law which is the subject of the appeal on the basis of the findings of fact made in the final award. On hearing the appeal, the Court may make a number of different types of orders. These are an order: (a) confirming the award (b) varying the award (c) remitting the award to the arbitral tribunal in whole or in part for reconsideration or (d) setting aside the award in whole or in part.

This particular opt-in is of significant importance. Without choosing the right opt-ins, parties may find themselves with limited rights of appeal. The parties will need to give careful consideration in their choice on whether to opt-in to this right depending on how much Court involvement is desired.

Other matters

Section 6 and paragraph 2, Schedule 2 of the BVI Act, if included in the agreement permits the Court to consolidate arbitrations in two or more arbitral proceedings if it appears to the Court that there is a common question of law or fact in the arbitral proceedings and that the relief sought in those proceedings are in respect

of, or arise out of the same transaction or series of transactions. The Court has a residual power to consolidate arbitral proceedings for any other reason it considers desirable to make an order.

Further to paragraph 4 of Schedule 2 of the BVI Act, a party to the arbitral proceedings may apply to Court challenging the award on the ground of serious irregularity which has affected the tribunal, the proceedings or the award. Serious irregularity has a wide definition, and includes a failure by the tribunal to treat the parties with equality, failure on the part of the tribunal to: (a) remain independent (b) act fairly and impartially as between the parties giving them a reasonable opportunity to present their case or (c) use procedures that are appropriate to the case, avoiding unnecessary delay or expense.

Conclusions

The BVI is a new entrant to the arbitration market. Notwithstanding this, the Act and Rules draw on the well-established UNCITRAL Model Law, the 2010 UNCITRAL Rules and the jurisdiction is a signatory to the New York Convention on the Recognition and Enforcement of Awards. The Commercial Court which is located moments away from the IAC is an internationally respected Court and is arbitration friendly. The opening of the IAC is an extremely exciting development for the BVI and for dispute resolution by way of arbitration. The physical location of the BVI makes it a first class choice for the seat of an arbitration as it is accessible to clients from South America, the USA, Canada and other parts of the Caribbean.

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