

BRITISH VIRGIN ISLANDS

DELOS GUIDE TO ARBITRATION PLACES (GAP)

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FOR FURTHER INFORMATION

[GAP TABLE OF CONTENTS](#) | [GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS](#) | [FULL GAP ONLINE](#)

[GAP COMBINED SUMMARIES FOR IN-HOUSE AND CORPORATE COUNSEL](#)

[GAP COMBINED SUMMARIES FOR ARBITRATION PRACTITIONERS](#)

[EN DELOS MODEL CLAUSES & LIST OF SAFE SEATS](#)

[ES DELOS CLÁUSULAS MODELO & LISTA DE SEDES SEGURAS](#)

[FR DELOS CLAUSES TYPES & LISTE DE SIÈGES SÛRS](#)

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 14 JUNE 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Key places of arbitration in the jurisdiction	Road Town (Tortola).
Civil law/common law environment?	Common law.
Confidentiality of arbitrations?	Arbitration proceedings conducted are private and confidential to the parties.
Requirement to retain (local) counsel?	There are no restrictions on foreign law firms engaging in and advising on arbitration in the BVI.
Ability to present party employee witness testimony?	An arbitral tribunal in the BVI is not bound by the rules of evidence of the Court and may receive any evidence that it considers relevant to the proceedings, including employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	Hearings and meetings do not have to be held in the BVI.
Availability of interest as a remedy?	Section 78 of BVI Arbitration Act 2013 (the " Act ") prescribes that, unless the award made by an arbitral tribunal provides otherwise, interest is payable on money awarded by the tribunal from the date of the award and at the 5% rate specified in section 7 of the Judgments Act 1907.
Ability to claim for reasonable costs incurred for the arbitration?	An arbitral tribunal may direct that costs, including the fees and expenses of the tribunal, be paid by one party to another. The arbitral tribunal may only allow costs that are reasonable having regard to all of the circumstances (Sections 72-78 of the Act).
Restrictions regarding contingency fee arrangements and/or third-party funding?	There is no statutory provision for contingency fee arrangements or third-party funding in the BVI. As such, the BVI follows the English common law position where third-party funding of litigation is permitted, provided that it does not offend common law principles; however legal practitioners in the BVI are prevented from entering into contingency fee arrangements.
Party to the New York Convention?	The BVI is a signatory to the New York Convention.
Other key points to note	<p>The issue of whether anti-arbitration injunctions are available in the BVI was recently addressed by the Court of Appeal in <i>Sonera Holding BV v. Cukurova Holding AS</i>.¹ In limited circumstances, such injunctions are available in BVI.</p> <p>These proceedings concerned the attempts by Sonera Holding BV ("Sonera") to enforce an ICC arbitration award made in Geneva in 2011. There have been hearings in this matter up to the Privy Council (the highest appellate court for BVI) and the facts are complex. In summary, Sonera appealed against the decision of</p>

¹ BVIHCM(COM)2011/119.

the BVI Court at first instance to dismiss its application for an anti-arbitration injunction in connection with Cukurova Holding AS's ("CH") claim in a second arbitration relating to the same dispute.

The Court considered Section 3(2)(b) of the Act, which states that *'the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act'*. The judge at first instance held that the BVI Court had no discretion to interfere with the ongoing arbitral proceedings.

Sonera appealed on the grounds that, despite the wording of the Act, the BVI Court had jurisdiction to grant injunctions under Section 24(1) of the West Indies Associated States Supreme Court (Virgin Islands) Act (the Supreme Court Act) and that it ought to have exercised that jurisdiction in this case.

The Court of Appeal agreed with *Sonera* that the Court retained a general power and jurisdiction to grant an anti-arbitral injunction. The Court held that the Act expressed a principle of non-intervention that did not remove the Court's independent jurisdiction under the Supreme Court Act, stating:

Any provision of a statute which seeks to oust the Court's jurisdiction must be expressed in clear terms. The statement of policy contained in Section 3(2)(b) of the Act does not meet this standard.

The Court then held that the jurisdiction to grant injunctions to restrain foreign arbitral proceedings should be exercised with caution and only granted in exceptional circumstances, being an infringement of a legal or equitable right of a party, or if the proceedings were vexatious, oppressive or unconscionable.

Despite this apparently high bar, the Court held that *Sonera's* appeal should be allowed and the injunction granted. It appears from the judgment that the Court's decision was influenced by its perception that the second arbitration pursued by CH was designed to avoid the results of the first arbitration award and to nullify the BVI Court's decision. The Court held that CH's actions in bringing the second arbitration were:

"specifically aimed [...] at interfering with the Court's judgment and ought not to be permitted. The Court is duty bound to step in to protect its processes and judgments."

CH's appeal to the Privy Council against the decision was withdrawn, as a result of the final award coming out before the appeal could be heard.

Consolidation of Arbitral Proceedings

Section 6 and Schedule 2 of the Act provide that the BVI Court may consolidate two or more arbitral proceedings, if the parties expressly agree to that procedure. The consolidation may be ordered if, upon the application of a party to the arbitral proceedings, it appears to the BVI Court that:

	<ul style="list-style-type: none"> a) a common question of law or fact arises in both or all of the arbitral proceedings, b) the rights to relief claimed in those arbitral proceedings are in respect, or arise out, of the same transaction or series of transactions, or c) for any other reason it is desirable to make an order.
WJP Civil Justice score (2018)	φ

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The Act came into force on 1 October 2014.
UNCITRAL Model Law? If so, any key changes thereto?	The Act incorporates the UNCITRAL Model Law on International Commercial Arbitration (the " Model Law "), with minor additions and modifications.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The BVI has a dedicated Commercial Court which was established in 2009 as a division of the Eastern Caribbean Supreme Court. The Commercial Court currently has two judges sitting full time and is experienced in dealing with arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<p>Unless otherwise agreed by the parties, an arbitral tribunal may at any time prior to the issuance of the award by which the dispute is finally decided, grant temporary measures ordering a party to:</p> <ol style="list-style-type: none"> 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 itself; c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or d) Preserve evidence that may be relevant and material to the resolution of the dispute. <p>Article 43 of the Act also prescribes that, on the application of a party, the BVI Court may, in relation to any arbitral proceedings which have been or are to be commenced in or outside the BVI, grant an interim measure. For further details, please see paragraph 4.4.</p>
Courts' attitude towards the competence-competence principle?	<p>Article 32 of the Act incorporates Article 16 of the Model Law which provides that the arbitral tribunal may rule on its own jurisdiction.</p> <p>If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may apply to the BVI Court to determine the question of jurisdiction within thirty days after having received notice of the tribunal's ruling. The BVI Court's decision on jurisdiction is final.</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	There is no general right of challenge or appeal to the BVI Court on the ground of errors of fact or law on the face of the award, although the parties are entitled to reserve such a right by including an express provision within their arbitration agreement permitting a challenge on the grounds of serious irregularity or on a question of law arising out of an award made in the arbitral proceedings.

	<p>Article 79 of the Act incorporates Article 34 of the Model Law, which provides that an arbitral award may only be set aside by the BVI Court if a party provides proof that:</p> <ul style="list-style-type: none"> a) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it; or b) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Act; or <p>The BVI Court finds that:</p> <ul style="list-style-type: none"> a) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of the BVI; or b) the award is in conflict with the public policy of the BVI.
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Pursuant to section 81(1) of the Act, an award, whether made in or outside the BVI in arbitral proceedings by an arbitral tribunal is, by leave of the BVI Court, enforceable in the same manner as a judgment or order of the BVI Court that has the same effect.</p> <p>However, it is also expressly provided under section 83(1)(f)(ii) of the Act that the BVI Court may refuse to enforce an arbitral award if the award has been set aside or suspended by a competent authority of the foreign country where the award was made.</p>
<p>Other key points to note?</p>	<p>ϕ</p>

JURISDICTION DETAILED ANALYSIS

1. Arbitration Agreement

1.1 Is the arbitration law based on the Model Law?

Yes. The Act came into force in the BVI on 1 October 2014. The Act implements the Model Law in the BVI, meaning that the framework is in line with international standards and is recognised globally.

In addition, the BVI Arbitration Rules (the "**Rules**") are based on the 2010 UNCITRAL Arbitration Rules.

1.2 If yes, what key modifications if any have been made to it?

While the Act derived from and is almost a wholesale incorporation of Model Law, the key modifications are in the definitions and rules of interpretation.²

1.2.1 Umpire

The Model Law is silent on the appointment of an umpire. Thus, the Act is specifically crafted to include the procedures of appointment of an umpire.³

The Act allows the parties to freely determine the number of arbitrators, whether it is even, uneven or with a sole arbitrator only. In the event where there is an even number of arbitrators, an umpire may be appointed at any time upon the appointment of the arbitrators, unless the parties agree otherwise.⁴

In addition, the parties are free to agree on what functions an umpire may serve.⁵ Only if the parties do not decide on the specific functions will the functions prescribed under section 29 of the Act apply.

1.3 When was the arbitration law last revised?

The Act has not been revised since coming into force on 1 October 2014.

2. The Arbitration Agreement

2.1 How do the Courts in the jurisdiction determine the law governing the arbitration agreement?

Generally, subject to the mandatory rules of the law of the seat of the arbitration, the law chosen by the parties governs arbitral proceedings.⁶

In the absence of an express or implied choice of law by the parties, the governing law is determined by the common law conflict of laws rules.⁷ Thus, the governing law is the law which the contract has its closest and most real connection, and is usually the seat of arbitration.⁸

² The Act, Section 2; According to s. 2(1), this whole section is the substitution of article 2 of the Model Law.

³ The Act, Section 2(1) and (2); "arbitral tribunal" means a sole arbitrator or a panel of arbitrators, and includes an umpire in specific to cater for the customers and professions in BVI.

⁴ The Act, Section 28.

⁵ The Act, Section 29.

⁶ Dicey & Morris, *The Conflict of Laws*, Volume 1, at page 592.

⁷ The Act, Section 62 (incorporating Article 28 of the Model Law); Dicey & Morris, *op. cit.*, para. 16-12 *et seq.*

⁸ Dicey & Morris, *op. cit.*, n. 6, at page 592.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Section 32 of the Act acknowledges that the arbitration clause is a separate contract from the rest of the agreement. This section is a direct reproduction of Article 16 of the Model Law, which allows the arbitral tribunal to treat an arbitration clause as an agreement independent of other terms of the contract.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

'Arbitration agreement' is defined as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not.⁹ An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement, but must be in writing.¹⁰

The interpretation of 'in writing' is given a broad and purposive definition that aims at capturing diverse expressions of intention of contracting parties. For example, it is considered to be 'in writing' if its content is recorded in any form, by conduct, or by any other means.

The Act contains various mandatory provisions that will principally apply to arbitration agreements entered into before 1 October 2014 and a number of opt-in provisions that parties may choose to include in their arbitration agreement by reference.¹¹

2.4 To what extent if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Except where third parties agree to be bound, an arbitration agreement (and any award) will generally only affect the parties to it. There are English authorities to the effect that an award may, in certain circumstances, be relied on in a claim against a third party for an indemnity and these authorities are likely to be persuasive in the BVI Courts.

2.5 Are there restrictions to arbitrability?

The statute does not expressly define those matters that are arbitrable, and the common law will therefore govern whether a dispute is capable of being resolved by arbitration or not, which depends largely on the intention of the parties. Generally speaking, the BVI Court is likely to follow the English principles when construing the intention of the parties.

In Fiona Trust Corp v Privalov & Ors, the Court adopted a liberal interpretation of the arbitration clauses in question.¹² It was held that, absent express words to the contrary, parties are to be taken to have intended that all their disputes should be arbitrated. This forceful approach was followed in a BVI case, Victor International Corporation and Victor (BVI) Limited v Spanish Town Development Company Limited & Ors¹³. Thus, the Court is likely to uphold the arbitration agreement where possible, to give effect to the intentions of the parties that their differences should be resolved by the arbitral process and not the Courts.

Unfair prejudice claims arising from shareholder disputes are also arbitrable provided that the scope of the clause is sufficiently clear.¹⁴ However, in cases where the parties agree that the Courts of another country has jurisdiction, the Court may not be as willing to grant remedies.¹⁵

⁹ The Act, Section 17.

¹⁰ The Act, Section 17(1); Essentially Article 7 of the Model Law.

¹¹ The Act, Part XI.

¹² [2007] EWCA Civ 20.

¹³ BVI HCV 2007/0293.

¹⁴ *Ennio Zanotti v Interlog Finance Corporation*.

¹⁵ *Re Nasbulk Limited*.

3. Intervention of Domestic Courts

The Act imposes clear limits on the role of the Court in disputes between parties to a valid arbitration agreement. A party that contends that Court proceedings have been commenced in breach of such agreement must apply to have the dispute referred to arbitration not later than when submitting his first statement on the substance of the dispute.¹⁶

3.1 Will the Courts stay litigation if there is a valid arbitration agreement covering the dispute?

If the Court is satisfied that there is a valid arbitration agreement, the action must be stayed unless the agreement is then determined to be null and void, inoperative or incapable of being performed.¹⁷

3.1.1 If the place of the arbitration is outside of the jurisdiction?

Pursuant to section 18(1) of the Act, the Court has a power to stay the litigation even if the place of arbitration is outside of the jurisdiction.

3.2 How do Courts treat injunctions by arbitrators enjoining such Courts to stay litigation proceedings?

Generally, section 3(2)(b) of the Act, states that *'the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act'*.

However, while the Act expresses a principle of non-intervention, it does not remove the Court's independent jurisdiction under other acts to intervene.

3.3 On what ground(s) can the Courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

When determining whether they must grant a mandatory stay of a winding up petition in favour of arbitration proceedings, the Courts must consider whether there exists a *bona fide* dispute on substantial grounds.

4. The Conduct of the Proceedings

Conduct of arbitral proceedings is governed by Part VII of the Act. A significant portion of Part VII is a duplication of the Model Law, except section 44 which expressly substitutes Article 18 regarding equal treatment of parties.

The key difference between section 44 and Article 18 is that more requirements are inserted to emphasise the importance of equal treatment. For instance, the arbitral tribunal is explicitly required to be independent, to act fairly and independently between parties, and to provide fair means for resolving disputes.

4.1 Can parties retain outside counsel or be self-represented?

Yes. There are no restrictions on foreign law firms engaging in and advising on arbitration in the BVI.

4.2 How strictly do Courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the Court to accept a challenge or do Courts require that the undisclosed circumstances justify this outcome?

Section 44(3)(b) requires the tribunal to be independent, to act fairly and impartially as between parties, giving them a reasonable opportunity to present their cases and deal with the cases of their opponents and to use procedures that are appropriate to the particular case.

¹⁶ The Act, Section 18(1).

¹⁷ The Act, Section 18(4).

4.3 On what grounds do Courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

According to section 22,¹⁸ the parties are free to agree on a procedure of appointing the arbitrator(s), subject to paragraphs 4 and 5 of Article 11 of the Model Law.¹⁹ If the Arbitration Rules apply, pursuant to of the Rules, if the parties fail to agree on the number of arbitrators within 30 days after the commencement of the arbitral proceeding, three arbitrators shall be appointed.

The Court is identified as the default appointing body in section 22(1) of the Act, in which it is provided that the Court may appoint an arbitrator upon the request of a party in the following circumstances:

- *Multiple Arbitrators*
 - if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party; or
 - if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment; or
- *Sole Arbitrator*
 - in arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator; or
- *Appointment Procedure Agreed by the Parties*
 - a party fails to act as required under such procedure, or
 - the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
 - a third party, including an institution, fails to perform any function entrusted to it under such procedure.

4.4 Do Courts have the power to issue interim measures in connection with arbitrations?

The Court's power to issue interim measures in connection with arbitrations is provided for in Part VI of the Act. Section 43(2) of the Act gives the BVI Court power to grant interim measures.

The Court is empowered to grant interim measures in support of any arbitral proceedings that have been or are to be commenced in or outside the BVI.²⁰ This provides a statutory basis for free-standing injunctive relief. In relation to arbitral proceedings outside the BVI, interim relief can only be granted where the proceedings are capable of giving rise to an award that may be enforced in the BVI and the nature of the interim measure sought is of a type or description the BVI Court is able to grant in relation to arbitration proceedings. There is no appeal from the Court's grant or refusal of an interim measure under the Act.

In the leading authority on free standing interim relief in BVI, Court exercised a power to grant free-standing injunctions to safeguard assets in support of foreign proceedings.²¹ Yet, the Court must be satisfied that such relief is necessary in the circumstances; and that the relief sought in the main proceedings before the foreign Court will lead to a judgment which will be enforceable in the BVI.

¹⁸ Essentially Article 11 of the Model Law

¹⁹ For instance, no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

²⁰ The Act, Section 43(2) (Incorporating Article 17] of the Model Law)

²¹ *Black Swan Investment ISA v Harvest View Limited* BVIHC (Com) 2009/399

4.4.1 If so, are they willing to consider *ex parte* requests?

Yes. Under section 68(1) of the Act, the arbitral tribunal may award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in the Court. Therefore, the ordinary rules for application for injunctive measures apply. The Court may consider *ex parte* requests in cases of genuine urgency or secrecy.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Arbitration in the BVI is confidential. Although the Act is silent on the point, there is an implied duty of confidentiality in all arbitration agreements as a matter of common law.

4.5.2 Does it regulate the length of arbitration proceedings?

There is no restriction on the length of arbitration proceedings.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Section 46 allows the parties to freely agree on the place of arbitration. However, if no consensus can be reached, the arbitral tribunal may then determine the place of arbitration by having regard to the circumstances of the case.

4.5.4 Does it allow for arbitrators to issue interim measures?

Under the Act, articles 17 and 17A to 17G of the Model Law are brought into effect. The parties are able to agree that the tribunal **should not have** the power to grant interim measures. However, in the absence of such agreement, the tribunal has wide powers to:

- preserve the status quo;
- prevent harm or prejudice to the arbitral process itself;
- preserve assets and evidence; and
- make preliminary orders (which are binding on the parties but not subject to enforcement by the Court).

The parties may make an application to Court for interim relief if they can satisfy the tribunal that:

- costs are not an adequate remedy;
- the harm to the applicant in the absence of the remedy substantially outweighs the harm to the respondent if the remedy is granted; and
- there is a reasonable possibility he will succeed on the merits.

A party requesting a preliminary order or interim measure will be liable for any costs or damage caused to the other party in the event the tribunal ultimately determines that the order should not have been granted.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings. However, it must give the weight that it considers appropriate to the evidence adduced.

The arbitral tribunal may direct evidence to be given by affidavit, it may direct the attendance before the arbitral tribunal of witnesses in order to give evidence or to produce documents or other evidence and it may administer oaths to, or take the affirmations of, witnesses and parties and examine witnesses and parties on oath or affirmation.

4.5.6 Does it make it mandatory to hold a hearing?

Under section 50 of the Act, it is up to the parties to decide whether or not to hold a hearing. Unless the parties have agreed not to hold a hearing, the arbitral tribunal must hold such hearing at the appropriate stage of the proceedings.

In addition, the arbitral tribunal has the power to decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on basis of document and other materials.

4.5.7 Does it prescribe principles governing the awarding of interest?

Section 77 of the Act governs the award of interest specifically. It is provided that unless otherwise agreed by the parties, an arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from the dates, at the rates, and with such rates that the tribunal considers appropriate.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The parties may agree costs in the terms of reference. Alternatively, provisions relating to the question of costs are generally contained in the relevant rules under which the arbitration is being conducted. Under the Act, costs are dealt with in Part VIII, sections 72 to 78.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Part XIII of the Act gives civil immunity to arbitrators. For anything done in good faith in the exercise of their powers and performance of their functions, arbitrators will have civil immunity.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding

Unless the criminal acts have taken place in BVI, the BVI Courts would not ordinarily have criminal jurisdiction over the parties to the arbitral proceedings.

5. The Award

5.1 Can parties waive the requirement for an award to provide reasons?

Article 34 of the Rules provides that the parties may expressly agree that no reasons need to be given; otherwise the arbitral tribunal shall state its reasons.

5.2 Can parties waive the right to seek the annulment of the award?

The parties can agree to exclude the right to appeal on a point of law. The right to challenge for lack of jurisdiction and serious irregularity are non-excludable.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

In arbitral proceedings with more than one arbitrator, the award may be decided by a majority unless otherwise agreed by the parties. The award must be in writing and be signed by the arbitrator or arbitrators.

Unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms, the award must state the reasons upon which it is based and shall state its date and the place of arbitration. A copy of the award must be delivered to each party.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

5.4.1 If yes, what are the grounds for appeal?

There is no general right of challenge or appeal an award to the Court on the ground of errors of fact or law on the face of the award, although the parties are entitled to reserve such a right by including an express provision within their arbitration agreement permitting a challenge on the grounds of serious irregularity or on a question of law arising out of an award made in the arbitral proceedings.

In the absence of such a provision, an arbitral award may be set aside by the Court only if it is proved by the Applicant that:

- (i) a party to the arbitration agreement was under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the BVI; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the governing law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the governing law; or

if the Court finds that:

- (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the BVI; or
- (ii) the award is in conflict with the public policy of the BVI. The Court may set aside an award made by an arbitral tribunal, which includes an arbitrator whose appointment is the subject of a successful challenge which the Court upholds.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

5.5.1 Recognition and Enforcement of Awards

5.5.1.1 A New York Convention Award (Foreign)

A New York Convention award can be enforced in the BVI by instituting an action in the Court or by applying to seek leave of the Court.

5.5.1.2 Instituting an Action in the Court

To institute a claim in the BVI, a party must start proceedings under the Eastern Caribbean Civil Procedure Rules 2000 ("**CPR**") Part 8 with a claim form, statement of claim and affidavit (exhibiting the arbitral award).

If the party against whom enforcement is sought is a foreign defendant, this will involve applying for leave to serve out of the jurisdiction. Therefore, in most cases it is much more straightforward to use the second available method and apply to seek leave from the Court to enforce the award.

An application for leave is made under CPR 43.10 (which relates to enforcement of awards made by outside bodies). This is similar to an application for registration of a Court judgment under the Reciprocal Enforcement of Judgments Act 1922. Once the award is registered, then it can be enforced as if it was a BVI Court judgment.

5.5.1.3 By applying to seek leave of the Court

The application for leave is made by way of application notice, supported by affidavit evidence. The application can be made without notice to the other party to the arbitral award. It is not a requirement to appoint counsel to enforce judgments in the BVI, but the procedures are complex so it is advisable. The application is made to the High Court. Fees can include Court fees of:

- US\$300 for an inter partes application.
- US\$500 for an ex parte application.
- Filing fee of US\$100 for an affidavit (plus US\$25 for an exhibit).

Under CPR 43.10(5) the applicant must:

- Exhibit the award (or a copy of it) to the affidavit.
- Give an address for service for the person against whom the applicant seeks to enforce the award.
- If the award is for the payment of money, certify the amount remaining due to the applicant.

Further guidance is given on the necessary affidavit and exhibits (section 85 of the Act). The applicant must include:

- The duly authenticated original award or a duly certified copy of the original award.
- The original arbitration agreement or a duly certified copy of the arbitration agreement.
- If necessary, a translation of the award into English certified by an official or sworn translator or by a diplomatic or consular agent. Applications for leave to enforce can take three to four months, depending on Court availability.

Applications made by instituting an action will take much longer if foreign defendants are involved and the proceedings must be served out of the jurisdiction.

If leave to enforce is granted, the order must be served on the other party who can then apply to appeal and set aside that decision.

5.5.1.4 Non-New York Convention Awards

These can only be enforced by applying to seek leave from the Court. This is done in the same way as for New York Convention awards. The only difference is that the BVI Court has slightly broader powers to refuse leave.

5.5.2 Time-limits

The BVI Limitation Ordinance 1961 applies to arbitrations in the same way as it applies to Court actions. So, for example, the Limitation Ordinance imposes a six-year limitation period, commencing on the date on which the cause of action accrued, on actions founded on a contract.

5.5.3 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Stay of enforcement is not automatic. Application for staying the enforcement has to be made to the Court.

In context of foreign arbitral awards, the Court before which enforcement of the award is sought can, if it thinks fit, adjourn proceedings for the enforcement of the award and, on the application of the party seeking to enforce the award, order the person against whom the enforcement is invoked to give security.²²

5.5.4 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Section 83 sets out the grounds for the Court to refuse enforcement of an award. For instance, the Court may refuse the award if:

- a party to the arbitration agreement was, under the law applicable to that party, under some incapacity;
- the arbitration agreement was not valid under the law that the parties subjected it;
- the person was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings;
- the award deals with a difference not contemplated by, or not falling within, the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submissions or arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
- the award has not yet become binding on the parties;
- for any other reason the Court considers it just to do so.²³

5.5.5 Are foreign awards readily enforceable in practice?

There is no distinction between domestic and foreign arbitral awards. Any award, whether New York Convention or otherwise, can *prima facie* be enforced, subject to the considerations and the BVI Court's discretion. Yet, there is a distinction between awards made under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and non-New York convention awards.

As a starting point, arbitral awards are more broadly enforceable than foreign Court judgments that (generally) must be final and conclusive money judgments.

Awards containing injunctions or prohibiting a party from carrying out certain acts are enforceable. However, the parties must have agreed that the arbitral tribunal can make such orders. If there was no such agreement, then the party against whom the injunction or order was made will have a defence to the enforcement application in the BVI.

The party with the benefit of the award must apply to the BVI Court for leave to enforce it under Part X of the Act before taking any enforcement action. Once leave has been granted, the award has the same effect as a judgment or order of the BVI Court.

²² The Act, Section 86(5).

²³ The Act, Section 83(2).

6. Funding Arrangements: Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

There is no statutory provision for legal aid within the BVI for civil matters. Most litigation fees are structured on a time spent basis and conditional and contingency fee arrangements are infrequent.

Third-party funding of litigation is permitted provided that it does not offend common law principles against champerty and maintenance. Insurance can cover the cost of litigation.

7. Is there likely to be any significant reform of the arbitration law in the near future?

The Act is a relatively new statute and no changes are currently under consideration.

Bibliography

Case Law

Black Swan Investment ISA v Harvest View Limited BVIHC (Com) 2009/399

Ennio Zanotti v Interlog Finance Corp. & Ors BVIHCV 2009/0394

Fiona Trust & Holding Corp v Privalov & Ors [2007] EWCA Civ 20

Re Nasbulk Ltd BVIHC (COM) 65/2012

Sonera Holding BV v. Cukurova Holding AS. BVIHCMAP2015/0005

Victor International Corporation and Victor (BVI) Limited v Spanish Town Development Company Limited & Ors BVI HCV 2007/0293

Legislation

The British Virgin Islands' (BVI) Arbitration Act 2013

The British Virgin Islands' (BVI) Arbitration Rules

The British Virgin Islands' (BVI) Reciprocal Enforcement of Judgments Act 1922

The Eastern Caribbean Civil Procedure Rules 2000 (CPR)

Text Book

Dicey & Morris, *The Conflict of Laws*, Volume 1