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Contents

Harneys is a global offshore law firm with expertise in BVI, Cayman Islands, Cyprus, Bermuda and Anguilla law. Its international client base includes the world's top law firms, financial institutions, investment funds and private individuals. It has been at the forefront of developing arbitration related jurisprudence in the BVI, including the nexus between arbitration and insolvency.

The firm is actively involved in the promotion and development of the BVI as an international arbitration centre. The team frequently advises onshore law firms, high net worth individuals and multinational corporations on international arbitrations, high value urgent interim relief applications and enforcement of arbitral awards. Harneys is uniquely placed to advise on enforcement strategy from the outset of a dispute.

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1. General

1.1 Prevalence of Arbitration

Litigation is more favoured than arbitration in the BVI (the BVI is a new entrant to the arbitration market). However, the BVI wishes to promote the growth of arbitration and thereto adopts a strongly pro-arbitration approach. The Commercial Court, which is located moments away from the International Arbitration Centre (IAC), is an internationally respected arbitration friendly court. The final appeal from the BVI courts is to the Privy Council in London.

It is hoped that the BVI's legal framework and stable political environment, as well as its central and neutral location, will enable it to rapidly become a leading arbitration hub for disputes involving Latin-American counterparties. The opening of the BVI IAC is an extremely exciting development for dispute resolution by way of arbitration. The physical location of the BVI makes it a first-class choice as it is accessible to clients from South America, the USA, Canada and other parts of the Caribbean.

1.2 Trends

Although the number of disputes referred to arbitration remains relatively low, international arbitration awards are frequently enforced in the BVI (most commonly against shares in BVI companies). This trend is expected to continue, along with applications for interim measures to preserve assets in support of arbitration.

According to the 2018 Queen Mary White & Case International Arbitration survey on The Evolution of International Arbitration, the enforceability of awards is still perceived as the most valuable characteristic of arbitration. In addition, when considering the factors most likely to have a significant impact on the future of international arbitration "greater certainty and enforceability of awards" was selected as the second most likely factor to have a significant impact. As the 2018 Queen Mary White & Case report points out, the fact that 43% of respondents to the survey thought that this factor would significantly impact the future of arbitration may be reflective of a mismatch between the theoretical ease of enforcing an award promoted by the New York Convention and the practical experiences respondents have of enforcing arbitral awards. This makes the BVI courts' pro-arbitration stance all the more relevant when parties consider options for enforcement.

1.3 Key Industries

The disputes that are most commonly decided in the BVI are shareholders disputes relating to shares in BVI companies, which often serve as holding or joint venture companies with valuable assets in the PRC, Latin America and Russia. We expect to see growth in the number of trust disputes seated in the BVI.

1.4 Arbitral Institutions

The BVI IAC was established in 2013 and demonstrates the government's significant commitment to and support of international arbitration as a means of resolving disputes. The opening of the BVI IAC is an exciting development for the BVI and for international arbitration more generally. Mr John Beechey CBE is the Chairman of the Board. Over 190 of the world's top arbitration practitioners have accepted invitations to join the BVI IAC's panel of arbitrators. The BVI IAC Arbitration Rules came into force on 16 November 2016 drawing on the 2010 UNCITRAL Arbitration Rules.

It is expected that the number of agreements incorporating the BVI IAC Rules will increase in the future. From an enforcement perspective, arbitral awards rendered under the LCIA, ICC, HKIAC, SIAC and SHIAC are commonly enforced in the BVI and BVI legal practitioners are familiar in dealing with awards issued by these institutions.

2. Governing Legislation

2.1 Governing Law

The Arbitration Act 2013 (the Act) governs international arbitration in the British Virgin Islands. It is based very closely on the UNCITRAL Model Law (the Model Law). The Act came into force on 1 October 2014 and repealed the Arbitration Act 1976. The Act takes into account modern principles and practices of arbitration. It was designed, along with the extension of the New York Convention to the BVI on 25 May 2014, to provide a platform to establish the BVI as a popular seat for international arbitration. It also established the BVI IAC. Under section 6 (2), the Act applies to arbitrations where the place of arbitration is in the BVI. Under section 6(3), where the place of arbitration is outside the BVI, only sections 18, 19, 43, 58 and 59 and Part X apply to the arbitration.

Although the Act does diverge from the Model Law, the differences are minor.

2.2 Changes to National Law

Given that the Act came into force in late 2014, the courts have not had the opportunity to consider and interpret all of its provisions yet, and it is still necessary to look to cases decided under the 1976 Act for guidance.

However, there is a steadily growing body of case law that interprets the Act in a progressive and pro-arbitration manner. For example in the recent *Koshigi Limited v Donna Union* BVIHC MAP 43 & 50/2018 judgment, the Court of Appeal has provided guidance on the scope of the court's powers to grant interim measures under section 43 of the Act, suggesting that the BVI courts may have wider powers than those conferred on the English courts under the Arbitration Act 1996.

3. The Arbitration Agreement

3.1 Enforceability

Section 17 of the Act gives effect to Article 7 of the Model Law, which provides that an arbitration agreement must be in writing. It may be in the form of an arbitration clause in a contract or in a separate agreement.

"Arbitration agreement" is defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship. An arbitration agreement is in writing if it is contained in a document, even if that document is not signed or if it is recorded by one of the parties made otherwise than in writing. The arbitration agreement will be enforced unless it is found to be null, inoperative or incapable of being performed. The termination of an underlying contract does not render the arbitration clause inoperative. The arbitration clause survives termination.

3.2 Arbitrability

The Act does not expressly define matters that are and are not arbitrable, which is a matter for the common law. The BVI courts will try to give effect to the parties' agreement to arbitrate unless there are policy reasons not to or if the matter in question is subject to the exclusive jurisdiction of the court (such as corporate and individual insolvency, criminal or family matters).

The enforcement of domestic and foreign arbitration awards is subject to certain narrow restrictions, which are specified in the Act (see paragraph 12 below). The BVI courts will not enforce the public laws of another state in matters such as taxation, neither will they enforce an award related to anything illegal in the BVI, such as gambling.

In an application by a creditor to appoint a liquidator, the party must show that there is a genuine dispute as to whether or not the debt is owed before the court will agree a stay in favour of arbitration. See *C-Mobile v Huawei*. As the application to appoint a liquidator affects third parties, BVI courts will first consider whether the debt is genuinely disputed on substantial grounds before taking into account the arbitration clause. The fact that there is an arbitration clause is only one of the factors that the court will take into account when exercising its discretion to appoint a liquidator. This is at odds with the English approach in *Salford*, which was rejected by the BVI Court of Appeal in *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd*.

The BVI courts confirmed that an arbitrator can grant relief in unfair prejudice proceedings in *Zanotti v Interlog Finance Corp* BVIHC 2009/0394, although if it is concluded that winding-up is the appropriate remedy, it will be necessary to make an application to the court for a winding-up order.

3.3 National Courts' Approach

The national courts in the BVI are pro-arbitration; arbitration agreements are usually enforced.

Under section 18 of the Arbitration Act 2013, a stay must be granted unless the arbitration agreement is null, void, inoperative or incapable of being performed. In *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd*, the Court of Appeal confirmed that a stay in favour of arbitration is automatic under section 18. However, in *C-Mobile Services Ltd v Huawei Technologies Co Ltd* BVIHCMAP 2014/0006 the Court of appeal confirmed that a mandatory stay does not prevent an application to appoint liquidators over a company that is unable to pay its debts as they fall due.

For a long time, the BVI courts have taken a tough stance in their approach to the enforcement of arbitral awards; for example, in *Vendort Traders v Evrostroy* (BVIHC 2012/0041) the court held that it was not necessary to obtain a court order to enforce an arbitral award or indeed convert it into an ordinary judgment before a statutory demand may be presented in reliance on the award.

3.4 Validity

An arbitral clause may be considered valid even if the rest of the contract in which it is contained is invalid. The arbitral clause is recognised as a contract in its own right. Section 32 of the Act incorporates Article 16 of the Model Law confirming that the rule of separability applies to arbitration clauses.

For the purpose of ruling on jurisdiction, an arbitral tribunal shall treat an arbitration agreement as an agreement independent of the other terms of the underlying contract in which it is contained. The Act also confirms that a decision by the arbitral tribunal that the underlying contract is null and void shall not automatically invalidate the arbitration agreement. The section confirms that a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

In a similar manner, an arbitral clause will survive the termination of a contract and may still govern disputes arising out of that contract. For example, in a shareholders' agreement the contract may be intended to govern the relationship between the parties such that any disputes arising out of that relationship would remain subject to the arbitration clause even if the contract itself expired after a fixed term.

4. The Arbitral Tribunal

4.1 Limits on Selection

Section 22 of the Act incorporates Article 11 of the UNCITRAL Model Law. There are no limits on the parties' right to select arbitrators, unless they fail to agree on either the number of arbitrators or fail to act as required by the appoint-

ing procedure, in which case the court or other appointing authority shall step in and assist under section 22 of the Act.

The parties are free to determine the number of arbitrators except where they fail to agree whether the number of arbitrators shall be one or three, which will decided by the IAC unless the parties have opted-in to paragraph 1 of Schedule 2 which provides that there will be a sole arbitrator.

4.2 Default Procedures

In line with the Model Law, section 22 of the Act provides that if the procedure for selecting the tribunal fails, the IAC or the court may step in to appoint the necessary number of arbitrators (depending on the circumstances).

The IAC is the default appointing authority; it provides a quicker method of resolving this issue rather than applying to the court.

4.3 Court Intervention

The court can only intervene in the selection of arbitrators if requested to do so by the parties where: (i) a party fails to act as required in accordance with the appointment procedure for the selection of arbitrators; (ii) the parties (or their respective arbitrators) are unable to reach agreement in line with the agreed procedure (for example on the appointment of the third arbitrator); or (iii) a third party, such as an institution, fails to perform any function entrusted to it under the selection procedure.

4.4 Challenge and Removal of Arbitrators

Sections 23 and 24 of the Act govern the grounds and procedure for the challenge or removal of arbitrators. Under section 23, adopting Article 12 of the UNCITRAL Model Law, an arbitrator can only be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality and independence or if he or she does not possess the qualification agreed to by the parties.

Article 12 of the IAC Rules provide for challenges to arbitrators if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. Article 13 sets out the procedure and timeline for the challenge.

4.5 Arbitrator Requirements

From the moment he or she is approached in relation to a potential appointment, an arbitrator is required to disclose without delay any information likely to give rise to doubts in relation to his or her impartiality or independence. This is an ongoing duty of disclosure during his or her appointment. Given that bias is the main ground for challenging an arbitrator, any failure to disclose a conflict of interest is likely to result in a successful challenge.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Criminal, corporate and individual insolvency and family matters are excluded from arbitration. Also, matters of public law under other states legislation, such as taxation, cannot be referred to arbitration in the BVI. Similarly matters that are contrary to the public policy of the BVI, such as gambling, cannot be arbitrated in the BVI.

5.2 Challenges to Jurisdiction

Section 32 of the Act, adopting Article 16 of the Model Law, enshrines the principle of competence-competence in BVI law. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitral tribunal may rule on a challenge to its jurisdiction either as a preliminary question or in an award on the merits.

The power of the arbitral tribunal to rule on its own jurisdiction includes the power to decide whether the tribunal was properly constituted and what matters have been submitted to arbitration in accordance with the arbitration agreement.

Under section 32 (4), where an arbitral tribunal rules that it does not have jurisdiction, that ruling is not subject to appeal. Notwithstanding section 18 which provides for a mandatory stay in favour of arbitration where the arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court shall decide that dispute if it has jurisdiction.

If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request within 30 days of receiving the ruling that the court specified in Article 6 decide the matter. The decision shall not be subject to appeal. The tribunal may continue the proceedings and make an award while the decision is pending.

5.3 Circumstances for Court Intervention

Under section 16 (3) of the Act, a party can challenge a tribunal's ruling on its jurisdiction by applying to the Commercial Court. The court's ruling on the issue is not subject to appeal.

5.4 Timing of Challenge

A party can challenge the tribunal's jurisdiction at any time before the submission of the statement of defence (although the tribunal can permit a challenge to be raised at a later stage if it considers the delay justified). The tribunal may rule on such a challenge either as preliminary issue or in an award on the merits of the dispute. If the tribunal rules on its jurisdiction as a preliminary issue, a party may challenge this ruling by applying to court within 30 days of receiving the tribunal's ruling (see paragraph **5.2 Challenges to Jurisdiction,** above).

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

The standard is deferential. The court will not review findings of fact. It will decide questions of law on the basis of the findings of fact in the award.

5.6 Breach of Arbitration Agreement

Section 18 of the Act provides for a mandatory stay of court proceedings in support of arbitration, which must be granted unless the arbitration agreement is null, void or inoperable. The Court of Appeal has clarified that the stay in favour of arbitration in section 18 is mandatory.

In line with the BVI courts' pro-arbitration stance, there is a strong reluctance to permit parties to litigate matters that are subject to an arbitration agreement.

5.7 Third Parties

An arbitral tribunal cannot assume jurisdiction over someone not a party to an arbitration agreement (whether domestic or foreign). If, in its award, a tribunal makes a decision affecting the rights of a third party, this could constitute grounds for the third party in question to challenge the award at the stage of enforcement.

If the arbitral tribunal has determined that it has jurisdiction over a non-party, the courts at the enforcement stage will not question the tribunal's decision provided that the tribunal has properly considered and explained its reasoning in the award and that the non-signatory has been served properly and had an opportunity to participate in the arbitration.

Similarly, the IAC Rules only permit joinder of third parties who are a party to the arbitration agreement.

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless otherwise agreed by the parties, an arbitral tribunal is empowered to grant interim relief pursuant to section 33 of Act (which adopts Article 17 of the Model Law). Interim relief is binding and can be converted into an award which is enforceable by the courts.

The types of interim relief that can be ordered by an arbitral tribunal prior to the issuance of the award are temporary measures to:

- maintain or restore the status quo pending the determination of the dispute;
- take action (or refrain from taking action) to prevent current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

The Act also adopts Article 17B and 17C of the Model Law permitting a tribunal to make preliminary orders in support of interim relief (including on an ex parte basis).

Interim relief is binding and can be converted into an award which is enforceable by the courts. Preliminary orders, though binding on the parties, are not enforceable by the courts.

6.2 Role of Courts

The courts play a role in preliminary or interim relief if a party makes an application for such relief in support of arbitration proceedings. They also play a role in the enforcement of interim measures issued by tribunals in BVI seated arbitrations pursuant to section 33 of the Act.

In exercising its power, the court will have regard to the fact that its power is ancillary to the arbitral proceedings and for the purpose of facilitating the process of a court or arbitral tribunal outside the BVI that has primary jurisdiction over the arbitral proceedings.

However, if the arbitration proceedings have already been commenced, the parties may need to apply to the arbitral tribunal for the interim relief they seek in the first instance.

In *Koshigi Limited v Donna Union* BVIHC MAP 43 & 50/2018, the defendant applied to the court for a freezing order. However, the rules governing arbitration required the party to apply to the arbitral tribunal for interim relief before applying to court, whereupon the court would only enforce the interim award if the tribunal retrospectively granted the order. The tribunal refused to do this with the result that Donna Union had to apply to the tribunal and then again to the court in the BVI to enforce the interim award freezing order.

Under section 43 of the Arbitration Act, the courts have wide jurisdiction to grant interim relief in support of arbitration that has been or is about to be commenced in or outside the BVI. The types of relief the courts can grant include freezing injunctions and the appointment of receivers to preserve assets pending the enforcement of an award. The court can exercise these powers regardless of whether they can be exercised by the arbitral tribunal under section 33 of the Arbitration Act in relation to the same dispute. The court may decline to grant interim measures if it considers that the interim measure being sought is currently the subject of arbitral proceedings and the court considers it more appropriate that the interim measure sought be dealt with by the tribunal.

The court has the same power to make any incidental order or direction for the process of ensuring the effectiveness of an interim measure in relation to arbitral proceedings outside the BVI as if the interim measure were granted in relation to arbitral proceedings in the BVI.

The court can only grant an interim measure if the arbitral proceedings are capable of giving rise to an interim or final arbitral award that may be enforced in the BVI.

A decision, order or direction issued by the court is not subject to appeal, as set out in section 43(10).

6.3 Security for Costs

The tribunal can order security for costs pursuant to section 54 of the Act unless otherwise agreed by the parties. Section 38 also provides for security to be ordered as a condition of the grant of interim or preliminary relief. The IAC Rules make provision for security to be ordered, mirroring the terms of both sections.

The courts also have the power to order security for costs in relation to an appeal from an arbitration.

7. Procedure

7.1 Governing Rules

The Act is the statute governing arbitration in the BVI. It contains detailed procedural rules, largely based on the Model Law.

In addition, the IAC (established by the Act) has its own set of procedural rules (the BVI International Arbitration Centre Rules 2016) which are based on the 2010 UNCITRAL Arbitration Rules. The rules contain some changes to the UNCITRAL Rules, among which are provisions for waiver of immunity from jurisdiction by the parties agreeing to arbitrate under the Rules and the requirement for prospective arbitrators to provide a statement of impartiality, independence and availability.

7.2 Procedural Steps

Generally, the parties are free to agree on the procedure applicable to an arbitration (and in this respect, the Act adopts Article 19 of the Model Law in section 45).

In the absence of such an agreement, the default procedure is set by the Act which, in line with the Model Law, contains very few mandatory procedural steps (although in order to commence an arbitration the claimant must send a request for arbitration to the intended respondent). If the parties cannot agree, the arbitral tribunal may conduct the arbitration in a manner that it considers appropriate. In such cases, procedure is largely left in the hands of the tribunal.

Under section 44 (3)(c) of the Arbitration Act, the arbitral tribunal is required to use procedures that are appropriate to the particular case so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.

7.3 Powers and Duties of Arbitrators

The Act provides arbitrators with very wide powers, including the power to order preliminary relief, interim relief and security for costs (see above). In the absence of agreement between the parties, arbitrators are also empowered to determine the procedure to be followed in the proceedings.

As for an arbitrator's duties, these are set out in section 44 of the Act. This requires the arbitral tribunal:

- to be independent;
- to act fairly and impartially between the parties, giving them an opportunity to present their case; and
- to use procedures that are appropriate to the particular case and avoid unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.

7.4 Legal Representatives

Legal representatives appearing before the courts are required to be admitted in the BVI. BVI qualified lawyers returning to the jurisdiction for a hearing will require a temporary work permit to work in the jurisdiction.

This requirement does not apply to legal representatives in international arbitrations seated in the BVI. In a very pro-arbitration move, in July 2017 the government approved an exemption for work permits under the Labour Code 2010, enabling certain business visitors, including those attending for arbitration and mediation, to enter the BVI without a work permit (this includes legal representatives, witnesses or experts).

8. Evidence

8.1 Collection and Submission of Evidence

Under section 45 of the Act, the parties are free to decide on the procedure governing the arbitration. The exact procedure to be followed will usually be that agreed between the parties under section 45 of the Act. Where there is no agreement between the parties, the arbitral tribunal can conduct the arbitration in the manner it sees fit, in accordance with the terms of the Act and/or the applicable rules.

The arbitral tribunal is not bound by the rules of evidence when conducting the arbitration. It may receive any evidence it considers appropriate and will decide what weight to give that evidence.

The Act gives the tribunal wide powers to decide matters relating to evidence, including whether there will be an oral hearing for the presentation of evidence (section 50(1)). Under section 54, the tribunal can also:

- direct the discovery/disclosure of documents;
- direct the delivery of interrogatories;
- direct that evidence is given by affidavit;
- direct that a person attend before the tribunal in order to give evidence or produce documents; and
- administer oaths or affirmations of witnesses and examine those witnesses.

In most international arbitrations, the collection and submission of evidence will be roughly the same as in litigation. Typically, the parties will be required to disclose documents relevant to the dispute, file written statements and put witnesses up for cross-examination at the hearing of the dispute.

8.2 Rules of Evidence

Under section 45 of the Act, tribunals are not bound by rules of evidence. This applies equally to domestic and international arbitration. The tribunal may be guided by the rules governing the arbitration, the IBA Rules on the Taking of Evidence and/or Prague Rules.

8.3 Powers of Compulsion

Under section 54 of the Arbitration Act 2013, the arbitral tribunal can direct the discovery of documents or the delivery of interrogatories and can direct evidence to be given by affidavit.

The arbitral tribunal (or a party with the tribunal's approval) can seek the assistance of the court in taking evidence and the court can compel a person to give evidence or produce documents to the tribunal. This is a powerful tool, and such orders are not appealable.

For this purpose, section 161 of the Evidence Act is extended to arbitral proceedings, permitting a court to:

- command the attendance of a person before the tribunal for examination or the production of documents; and
- direct a person to attend his own home or elsewhere if necessary or convenient to do so.

9. Confidentiality

9.1 Extent of Confidentiality

Under section 16 of the Arbitration Act 2013, unless the parties agree, no party can disclose information about the arbitral proceedings. However, the existence of the arbitral proceedings and the award can de disclosed:

- in enforcement proceedings;
- where required by law or to a professional; or
- to any other advisers of the party.

Typically, hearings in arbitration-related court proceedings conducted in accordance with the Act are not held in open court, further safeguarding confidentiality.

Under Article 34 of the IAC Rules, the IAC shall not publish any award or part of an award without the prior written consent of all parties and the arbitral tribunal. However, an award may be made public: (i) with the consent of all parties; (ii) where and to the extent disclosure is required of a party by legal duty; (iii) to protect or pursue a legal right; or (iv) in relation to legal proceedings before a court or other competent authority.

10. The Award

10.1 Legal Requirements

Section 65 of the Act, which adopts Article 31 of the Model Law, requires that:

- An award is required to be made in writing and signed by the arbitrator or arbitrators. If there is more than one arbitrator the signatures of the majority will suffice provided that the reason for any omitted signature is stated.
- The award must state the reasons on which it is based unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 64, which means a settlement recorded in the form of an award.
- The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

After an award has been rendered, a signed copy of the award shall be delivered to each party. The arbitral tribunal has the power to make an award at any time unless otherwise agreed by the parties pursuant to section 70 of the Act. The time for making an award if limited by the Act or otherwise may be extended by order of the court on the application of any party, whether the time period has expired or not. An order made by a court extending the time limit is not subject to appeal.

Although there is no statutory time limit on the delivery of an award, such limits maybe imposed in the rules governing the arbitration.

The IAC Rules provide that all awards shall be made in writing and shall be final and binding on the parties. The tribunal is also required to state the reasons upon which the award is based unless the parties have agreed that no reasons are to be given. Article 34 (2) also provides that the parties shall carry out all awards without delay.

10.2 Types of Remedies

Under section 68, an 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 before the court. Unless otherwise agreed by the parties, the tribunal has the same power as the court to make an order for the specific performance of any contract, other than a contract relating to land or interests in land.

An arbitral tribunal cannot award any remedy that would be contrary to public policy in the British Virgin Islands, and if it did this would provide a ground for challenging the award. The award must be an award that is capable of enforcement in the BVI. It is likely that the BVI courts will be influenced by the English approach to enforcement and that punitive damages or penalty interest may not be enforceable.

10.3 Recovering Interest and Legal Costs

Under section 67 of the Act, a tribunal may make an award of costs in respect of the arbitral proceedings. It also has the power to review the award of costs within 30 days of the date of the award if, when making the award, the tribunal was not aware of any information relating to costs, including any offer of settlement, which it should have taken into account. Alternatively, the parties can agree for costs to be assessed by the court.

The IAC Rules also empower the tribunal to award costs, including pre- and post-award simple or compound interest.

11. Review of an Award

11.1 Grounds for Appeal

One of the key features of the Act is that, further to section 89, the parties can opt-in to a right of appeal, which is contained in paragraph 5 of Schedule 2. A party to an arbitral award may appeal to the court on a point of law arising out of the arbitral award. Such an appeal may only be brought with the agreement of the parties or the leave of the court. The court will only grant leave to appeal if it is satisfied that: (a) 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 the decision of the arbitral tribunal was obviously wrong or the question is one of general importance and the decision of the tribunal is at least open to serious doubt.

Generally speaking, there will not be a hearing of the appeal (which will be decided on the papers unless the court considers that a hearing is necessary). But, on hearing an appeal, the court may make 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 in light of the court's decision; or (d) setting aside the award in whole or in part. Leave of the court or the Court of Appeal is also required for any further appeal from an order of the court under paragraph 5 of Schedule 2.

If the parties agree that the arbitral tribunal does not need to give reasons for its decision, this will be treated as an agreement to exclude the court's jurisdiction to hear an appeal. A party may also apply to court to challenge an award under paragraph 4 of Schedule 2 on the grounds of a serious irregularity which has affected the tribunal, the proceedings or the award. Serious irregularity has a wide definition and includes: a failure to treat the parties with equality; failure to remain independent; failure to act fairly and impartially as between the parties giving them a reasonable opportunity to present their case; and failure to use procedures that are appropriate to the case, avoiding unnecessary delay and expense.

If the parties have not opted into the option to a right of appeal in Schedule 2, then the only option open to them will be to attempt to have the award set aside under section 79 of the Act.

The grounds for setting aside the award are similar to the grounds on which the BVI courts can refuse to enforce an award, eg:

- a party was under some incapacity or the arbitration agreement was not valid under the law to which the parties subjected it or under the law of the country where the award was made;
- a party was not given proper notice of the appointment of the arbitrator or was unable to present his or her case;
- where the award deals with matters not falling within the submission to arbitration;
- the composition of the tribunal was not in accordance with the agreement of the parties;
- where the award was in respect of a matter not capable of settlement under the laws of the Virgin Islands; and
- it would be contrary to public policy to enforce the award.

The party seeking to set aside the award must do so not more than three months after receiving the award.

11.2 Excluding/Expanding the Scope of Appeal

There is no automatic right of appeal to the BVI courts. Under section 89, the parties must expressly opt-in to Schedule 2.

In the absence of the express agreement of the parties to opt-in, the provisions of Schedule 2 will only apply to an arbitration agreement if it was entered into prior to the coming into force of the Act, where the said arbitration is a domestic arbitration or if the arbitration agreement expressly provides that the arbitration will be dealt with under the 1976 Act.

11.3 Standard of Judicial Review

The standard is deferential. The court will not review findings of fact. It will decide the question of law on the basis of findings of fact.

12. Enforcement of an Award

12.1 New York Convention

The BVI acceded to the New York Convention on 25 May 2014. On 24 February 2014, the United Kingdom submitted a notification to the Secretary General of the United Nations to extend the territorial application of the Convention to the British Virgin Islands. The Convention is set out in Part X of the Arbitration Act 2013. By section 84 of the Arbitration Act 2013, convention awards are enforceable in the territory in the same manner as they would be in any other convention country.

12.2 Enforcement Procedure

The recognition and enforcement of a New York Convention award under sections 84-86 of the Act is a straightforward process, similar to the process under the English Arbitration Act 1996. The party seeking to enforce the award must produce: (i) the original award or a certified copy of the original award; (ii) the original arbitration agreement or a certified copy of the original arbitration agreement; and (iii) if the award or arbitration agreement is not in English then a certified translation by an official translator.

Under section 85 of the Act, permission to enforce a convention award will be granted on application, which is usually without notice to the other party. The court does not have a discretion to refuse permission to enforce and will issue an order confirming that the award will be recognised as a judgment or order of the court.

Under section 81, a non-convention award may be enforced with the permission of the court in the same manner as a judgment or order of the court that has the same effect.

With both New York Convention and non-New York Convention awards, it is for the party against whom the award has been made to make representation to the court regarding a refusal to enforce. The court will only refuse to enforce of its own volition if the applicant fails to provide the original or certified copies of the arbitration agreement and the award. In *IPOC v LV Finance Group Limited*, the Court of Appeal confirmed that the burden of proof lies on the party seeking to resist enforcement to prove one of the grounds for refusal in section 34(2) (now section 86(2) under the 2013 Act).

There are limited grounds in which the courts can refuse to enforce an award. However, the courts may refuse to enforce an award in the following circumstances:

- a party was under some incapacity;
- the arbitration was not valid under the law to which the parties subjected it or under the law of the country where the award was made;
- the party against whom the award was made was not given proper notice of the appointment of the arbitrator or was unable to present his case;
- the award dealt with matters not falling within the terms of the submission to 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 or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made;
- the award is in respect of a matter that which is not capable of settlement under the laws of the BVI;
- it would be contrary to public policy to enforce the award; and
- for any other reason the court considers it just to do so (this only applies in respect of a non-convention award)

Another option for enforcing an award in the BVI would be to show that the respondent company is unable to pay its debts as they fall due and appoint a liquidator under section 162 of the Insolvency Act 2003. Although the liquidation process is a collective remedy for enforcing class rights, it can be an effective way of accessing a respondent's assets when it is refusing to pay a debt due under an award.

Commencing liquidation proceedings can be a very effective way of putting pressure on a respondent to voluntarily comply with an award rather than engaging in an asset chase around the world. The decision whether to enforce or apply to the court to appoint liquidators is a tactical one and caution needs to be taken with the liquidation approach as it may be seen as an abuse of process in certain circumstances. The party seeking to appoint a liquidator will need to show that it made demands for payment but the respondent failed to reply or comply.

When seeking to enforce an award, it will also be helpful to highlight to the court, if possible, that the time for challenging the award under the law of the seat has passed. If an application to set aside the award has been made to the court of the seat or another competent authority, then the court before which enforcement is sought can, if it thinks fit, adjourn enforcement proceedings under section 86(5) of the Act. The court may also order the party that is resisting enforcement to pay security on the application of the party seeking to enforce.

If an award has been set aside in the seat of the arbitration, it is likely that the courts will refuse to enforce it because this is a ground for refusing to enforce the award under section 83(f)(ii) and section 86(f)(ii).

Although this has not yet been tested in the BVI, a state or state entity may attempt to raise the defence of sovereign immunity as a ground for setting an award aside on the grounds of public policy.

Interestingly, the IAC Rules provide that agreement to arbitrate under the rules constitutes a waiver of immunity from jurisdiction. The general position in most jurisdictions is that state immunity is waived upon entry into an arbitration agreement with a non-state entity. It is noteworthy that the effects of such an agreement have been codified in the rules.

Rule 1(4) provides that an agreement by a state, a state-controlled entity or an intergovernmental organisation to arbitrate under the rules with a party that is not a state, a state-controlled entity or an intergovernmental organisation constitutes a waiver of any right of immunity from jurisdiction in respect of the proceedings relating to the dispute in question, to which such party might otherwise be entitled. A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.

12.3 Approach of the Courts

The courts adopt a pro-arbitration policy and will not stand in the way of enforcing an award, subject to the applicability of the bars to enforcement in the Act. The courts have confirmed, for instance, that the public policy exception is a narrow one and only extends to breaches of the most basic notions of morality or justice. The courts have also confirmed that the burden of proof falls on the party resisting enforcement to prove that one of the statutory grounds for refusal applies.

In the case of *Vendort Traders v Evrostroy*, the court held that is was not necessary to obtain a court order to enforce an arbitration award, or indeed an ordinary judgment, before a statutory demand may be presented in reliance on the award. However, this option for enforcement will only be possible if the respondent is a company incorporated in or an individual resident in the BVI.

The BVI has historically taken a very strict approach to the enforcement of New York Convention awards.

This approach was confirmed by the Court of Appeal in *Pacific China Holdings Limited v Grand Pacific Holdings Limited*. In that case the Commercial Court at first instance took the view that it was possible to enforce an award even where a ground for refusal was made out if the result of the arbitration would not have been different. The Court of Appeal was not willing to go quite that far.

IPOC and *Pacific China Holdings* considered English case law on the public policy grounds for refusing recognition. The judgment refers to the English case, *Kanoria v Guinness*. In that case, an award was set aside because a party had not had an opportunity to present his case. He had informed the tribunal that he was ill but, nevertheless, an award was made against him. However, enforcement of the award was refused because he had never had the chance to present his case.

This case is a good practical reminder of ensuring that respondents are properly served throughout the arbitration proceedings and given an opportunity to participate and that this is discussed by the tribunal in the award itself in order to pre-empt a respondent from seeking to set aside an award on this ground.

The public policy defence to an enforcement application is one which has a narrow scope and extends only to a breach of the most basic notions of morality and justice; eg something as serious as seeking to benefit from an illegal contract or if enforcement of the award would be wholly offensive to the ordinary reasonable man in the BVI.

The most recent case dealing with an application to set an award aside on grounds of public policy in the BVI is *Belport Development Limited v Chimichanga Corporation*. It was decided before the Arbitration Act 2013 came into force, but these cases provide useful guidance on how the courts will likely approach the public policy defence in future.

In that case, the respondent objected to enforcement on the basis that he had not been allowed to cross-examine a witness on whom the tribunal had relied. The respondent argued that this was a breach of natural justice and that to enforce the award would be contrary to the public policy of the BVI. He relied on s36(2)(c) (unable to present case) and s36(3) (contrary to public policy) of the Arbitration Act 1976. Demonstrating the pro-arbitration approach of the courts, Bannister J concluded that: (i) it was not for him to go into the merits of the arbitration award; (ii) all the material was fairly and squarely in evidence before the tribunal; (iii) Chimichanga had sufficient opportunity to challenge the valuation, but their arguments were rejected; (iv) the valuation was not an expert report and had not been relied on as such by the tribunal; and (v) Chimichanga was not in any sense of the term "unable to present its case". Accordingly, neither s.36(2)(c) nor s.36(3) was successfully engaged.

13. Miscellaneous

13.1 Class-action or Group Arbitration

The Act does not expressly provide for class action arbitration or group arbitration. However, if the parties have opted-in under paragraph 2 of Schedule 2, the court may make an order consolidating two or more arbitral proceedings where a common question of law arises. It has not been tested as to whether this provision would serve to permit class action or group arbitration.

These claims would also be subject to standard limitations on arbitrability of disputes in the BVI.

13.2 Ethical Codes

The Arbitration Act 2013 provides guidance to arbitrators on the standards expected of them, including requiring arbitrators to disclose potential conflicts of interest and providing an opportunity for the parties to challenge the arbitrator if they believe that he or she has not acted impartially.

The IAC Rules require a positive statement from an arbitrator that he or she is impartial, independent, available to devote the necessary time and conduct the arbitration diligently. Arbitrators have a continuing obligation from the moment he or she is approached and throughout the arbitral proceedings to disclose any circumstance likely to give rise to justifiable doubts as to his or her impartiality or independence. (Article 11)

Counsel would be expected to adhere to the code of conduct in their jurisdiction of admission and possibly be subject to the code of conduct of the BVI Bar.

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13.3 Third-party Funding

The BVI still continues to adhere to the common law doctrines of maintenance and champerty, which have traditionally prevented a third party funding another person's litigation for a gain.

There is currently no legislation regulating third-party funding in the BVI. The position on third-party funding is not settled in the BVI, but it is hoped that the jurisdiction will follow the modern progressive approach adopted by other common law jurisdictions such as England and Wales, the Cayman Islands, Australia and New Zealand which have permitted third-party funding subject to certain criteria. A prudent approach is to file an application seeking court approval of any funding arrangement.

13.4 Consolidation

If paragraph 2 of Schedule 2 of the Act applies, the court may on the application of a party order two or more arbitral proceedings to be consolidated. The court may make this order where it appears to the court that:

- a common question of law or fact arises in both or all of the arbitral proceedings;
- the rights to relief arise out of the same transaction or series of transactions; or
- for any other reason it is desirable to make the consolidation order.

13.5 Third Parties

If the tribunal finds that third parties are bound by an arbitration agreement or award then, provided the tribunal has good reasons for so finding, it is unlikely the courts will interfere with this on enforcement.

The national courts will only be able to exercise their jurisdiction over a foreign party to the extent that the foreign party owns assets in the BVI.