

## British Virgin Islands Arbitration is an important new member of the global arbitration community

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The BVI International Arbitration Centre (the **BVIAC**) opened its doors on 16 November 2016. Its facilities have already impressed lawyers attending Court of Appeal hearings held there in the week after it opened. The modern facilities match the new legal framework introduced by the Arbitration Act 2013 that came into force in 2014 (the **Arbitration Act**), backed up by the BVI's accession to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**) and the adoption of Arbitration Rules effective from 16 November 2016 (the **BVIAC Rules**). In a further development, access to the BVI from the US is being enhanced by new direct flights.

The expectation is that the BVIAC will prove attractive to parties seeking a neutral arbitration centre with world class facilities in an accessible place that is subject to an arbitration-friendly legal environment. The parties are expected to be entities from the American continents seeking these characteristics, in addition to companies incorporated in the jurisdiction serving investments and projects around the world.

#### The key aspects of the legal framework

The Arbitration Act incorporates the UNCITRAL Model Law (the **Model Law**) which ensures that BVI arbitration is in accordance with international standards. The BVIAC Rules are based on the UNCITRAL Rules: the BVIAC website contains a marked up version of its rules showing the differences.<sup>1</sup>

The Arbitration Act covers all stages of the arbitral process including the arbitration

agreements, the jurisdiction of the tribunal, the scope of court's intervention and the recognition and enforcement of awards. The Arbitration Act recognises that it is in the public interest that parties should agree as to how the dispute should be resolved and the court is required to give due regard to the provisions of the arbitration agreement: generally, the court will not intervene.

### *The tribunal*

The Arbitration Act and BVIIAC Rules provide that the parties are free to provide for the number of the arbitrators. Failing such agreement, the Arbitration Act and BVIIAC Rules provide for the appointment procedures for the arbitration tribunal whether it is a sole arbitrator, an even or uneven panel. The Arbitration Act, adopting the Model Law, also provides the procedure for challenging an arbitrator.

The arbitration tribunal is required:

- a) to be independent;
- b) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and
- c) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.

### *Interim relief*

The tribunal is given wide powers including power to grant interim measures (unless otherwise agreed between the parties). An application for interim relief must satisfy the tribunal that if the measure is not ordered, the harm to the applicant substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted. Further, the tribunal will grant interim relief if there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

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. This power may in principle be exercised by the court irrespective of whether or not similar powers may be exercised by an arbitral tribunal.

The BVIIAC Rules do not provide for emergency arbitrator appointments and so interim relief required prior to the commencement of an arbitration in the BVI must be obtained from the court. Of course, the Commercial Court in the BVI has great experience of granting interim relief in anticipation or in support of litigation. The position is therefore different from that in England with LCIA arbitrations: LCIA rules provide for emergency arbitrators and as a result the

court has declined to grant interim relief in support of an arbitration before the arbitration commenced on the basis that the court did not in the circumstances have power to intervene under the English Arbitration Act. In *Gerald Metals*<sup>2</sup>, the claimant had applied to the LCIA for the appointment of an emergency arbitrator and the LCIA had declined to do so.

In relation to arbitral proceedings which have been or are to be commenced outside the BVI, the court may grant an interim measure only if the arbitral proceedings are capable of giving rise to an arbitral award, whether interim or final, that may be enforced in the BVI and the interim measure sought is of a type or description of interim measure that may be granted by the court in the BVI. A decision, order or direction made or issued by the court in respect of an interim measure cannot be appealed.

### *Recognition and enforcement*

On 25 May 2014, the BVI became a party to the New York Convention. As a result, those parties participating in the BVI arbitration proceedings can be confident that the award will be enforceable in all the countries that have acceded to the New York Convention.

The BVI's accession to the New York Convention has no doubt simplified the matters of the enforcement of the Convention awards but it does not mean that the enforcement practices are new to this jurisdiction. The BVI has for a long time been robust in enforcing foreign arbitration awards and that process is largely unchanged: it is the ready export of BVI awards that has been ensured by the accession to the New York Convention.

Notably, the Arbitration Act contains explicit provisions in relation to the grounds for refusal of enforcement relating to New York Convention awards and non-Convention awards.

Distinguishing between the two, the Arbitration Act provides that:

- i. the enforcement of Convention awards is mandatory save in circumstances where the party against whom enforcement is invoked provides a Convention defence; and
- ii. non-Convention awards may also be enforced within the BVI but the courts have discretion to refuse the grant of an award in circumstances when it is unjust to do so.

### **Conclusion**

The Arbitration Act and the BVIIAC Rules provide a framework to put BVI arbitration in contention for becoming a major arbitration centre. The BVIIAC, located in Ritter House in Road Town, has world class facilities and passed its first test in its first week of opening when the Eastern Caribbean Court of Appeal sat there.

Whilst parties can of course appoint arbitrators of their choice, it is a sign of confidence in the future of BVI arbitration that the BVIIAC already has world class arbitrators on its panel.<sup>3</sup>

Now that the BVIIAC is up and running, the next question will be where in the world parties find BVI arbitration particularly attractive. One likely answer is disputes arising from the American continents where the parties seek a neutral arbitral body outside the United States. With improved transport links, the BVI is easy to get to from the Americas and there is no reason why parties from that part of the world who have historically chosen European arbitration centres as a neutral alternative will not want to try the BVI.

<sup>1</sup> <http://bviiac.org/Dispute-Resolution-Services/Rules/BVI-IAC-2016-Rules>

<sup>2</sup> Gerald Metals SA v The Trustees of the Timis Trust & others [2016] EWHC 2327

<sup>3</sup> For a list of arbitrators see <http://bviiac.org/Dispute-Resolution-Services/Arbitrators>

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