The Arbitration Review of the Americas

2019

British Virgin Islands

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The Arbitration Review of the Americas 2019 provides an unparalleled annual update – written by the experts – on key developments. It is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put theory into context – which makes the report of particular value to those conducting international business in the Americas today.

GAR Global Arbitration Review

British Virgin Islands

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Summary

The legislation governing arbitration in the British Virgin Islands (BVI) is the Arbitration Act 2013 (the Act), which came into force on 1 October 2014 and repealed the Arbitration Act 1976 (the latter will nevertheless continue to govern arbitrations commenced before 1 October 2014). The Act contains comprehensive legal provisions that take into account modern principles and practices of arbitration and incorporates many of the articles of the UNCITRAL Model Law (Model Law). But this is not simply a modernising statute; it is one that, together with the BVI's accession to the New York Convention on 25 May 2014 (making an arbitral award from a BVI tribunal enforceable in other contracting states), is designed to make the BVI as popular a seat for international arbitration as London, Paris and New York. In particular, the Act provides for the establishment of a statutory body, the BVI International Arbitration Centre (IAC), with a governing board and the power to promulgate rules under the Act. John Beechey was appointed by Cabinet on 7 September 2015 as the first chairman of the IAC Board. Mr Beechey was president of the ICC International Court of Arbitration from 2009 to 2015. The IAC is now fully in operation, with a bespoke set of rules and an extensive panel of international arbitrators.

This article outlines the current legislation and focuses on important decisions. There are specific sections in the Act relating to mediators, but these are not examined in any detail here.

THE ACT

Overview and jurisdiction

The Act has as its object the facilitation and attainment of a fair and speedy resolution of disputes without unnecessary delay and expense. It applies to arbitration under an arbitration agreement, irrespective of whether the arbitration agreement is entered into in the BVI, if the place of arbitration is in the BVI. '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. 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. 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.

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.

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 the BVI courts are likely to follow those authorities.

The BVI courts are also likely to follow the approach of the English courts in upholding the arbitration agreement where possible, so as to give effect to the intentions of the parties that their differences should be resolved by the arbitral process and not the courts. The liberal interpretation of arbitration clauses – thereby avoiding semantic arguments about whether the dispute 'arose out of' or was 'in connection with' or 'arose under' a contract – was forcefully espoused in England in Fiona Trust Corp v Privalov & Ors, an approach that has been endorsed in the BVI in Victor International Corporation and Victor (BVI) Limited v

Spanish Town Development Company Limited & Ors.1 In summary, absent express words to the contrary, parties are to be taken to have intended that all their disputes should be arbitrated.

A question that frequently arises is whether applications to appoint liquidators, or claims by minority shareholders in relation to unfairly prejudicial conduct, fall within the exclusive jurisdiction of the BVI courts or are arbitrable. In Zanotti v Interlog Finance Corp,2 the BVI court held that an arbitrator could grant relief in unfair prejudice proceedings. As far as winding-up applications are concerned, in these writers' view, an order appointing liquidators over a BVI company may only be made by the BVI court. In Artemis Trustees Limited & Ors v KBC Partners LP & Ors,3 the BVI court held that the position is different in relation to limited partnerships. The court held that because a limited partnership, unlike a limited company, has no identity separate from the identities of its constituent members, and because the winding up or dissolution of the partnership would have no effect on the rights and interests of third parties (again, unlike the winding-up of a limited company), there was no legal obstacle to the making by an arbitrator of an order dissolving or winding up a limited partnership.

Article 16 of the Model Law is incorporated in the Act, expressly giving the tribunal the competence to rule on its own jurisdiction, including:

- any objections with respect to the existence or validity of the arbitration agreement;
- whether the tribunal is properly constituted; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement.

The tribunal may rule on jurisdiction either as a preliminary question, or in its award on the merits. If, by way of preliminary question, the tribunal rules that it has jurisdiction, the court may be requested, by a dissatisfied party, to decide the question. There is no appeal from the court's determination, nor is there any appeal (including to a court) from a ruling by the tribunal that it does not have jurisdiction.

If a party commences court proceedings concerning a matter that is the subject of the arbitration agreement, then any party to that agreement can ask the court to refer the matter to arbitration. The court must make that referral (and stay the court action) unless it finds that the arbitration agreement is null and void, inoperative, or incapable of performance.

The relationship between those mandatory stay provisions and the insolvency process has been explored in a number of cases, both under the 1976 Act and the 2013 Act. The tension that arises is between the test to be adopted on a creditor's winding-up application and on an application to set aside a statutory demand, in circumstances where the underlying debt is disputed but where the parties have agreed to submit disputes to arbitration. It seems to be settled that the mandatory stay does not prevent an application to appoint liquidators over a company on the grounds of insolvency: C-Mobile Services Ltd v Huawei Technologies Co Ltd,4 because winding up is a class remedy and not a claim for payment. To this extent, BVI law accords with English law. Tugging that thread further, in Alexander Jacobus de Wet v Vascon Trading5 (a case decided under the 1976 Act), the Commercial Court considered how its discretion to wind up should be exercised, and stated as follows: '. . . the Court must first decide, on the evidence before it, whether there is a dispute at all. If the evidence (as in this case) discloses no ground at all for challenging the debt, then it is irrelevant that there

may be an exclusive jurisdiction or arbitration provisions.' That approach – finding first that the debt is genuinely disputed on substantial grounds before looking at the arbitration clause – is not how the English courts have resolved the issue. In Salford Estates (No. 2) Ltd v Altowest Ltd (No. 2) [2015] Ch. 589, the English Court of Appeal held that its discretion to wind up should be exercised consistently with the pro-arbitration policy of the legislation, and absent 'wholly exceptional circumstances' the winding-up application (or application to set aside a statutes demand) should be stayed or dismissed so as to compel the parties to arbitrate the dispute.

So the English court will not address the question of whether the dispute is genuine and on substantial grounds. The BVI court, however, maintains the distinction between the tests. The discretion to appoint a liquidator (or set aside a statutory demand) will continue to be exercised as it always has been (ie, it will depend on whether the debt is genuinely disputed on substantial grounds). The existence of an arbitration clause is no more than a relevant factor in the exercise of the court's discretion. In the most recent reported case on the topic, Jinpeng Group Ltd v Peak Hotels and Resorts Ltd,[6] the Eastern Caribbean Court of Appeal rejected the Salford approach, holding that it was not necessary for there to be 'exceptional circumstances' before a creditor's insolvency application could proceed. If a debt is not genuinely disputed on substantial grounds, then the creditor should be free to go ahead. If there is a genuine dispute, then the parties should be held to their chosen dispute resolution method and the matter should be referred to, or stayed in favour of, arbitration. Peak was, however, followed in L Capital KDT Limited v Retribution Limited.[7]

Despite the clarity of the reasoning of the Eastern Caribbean Court of Appeal, in a recent unreported first instance decision, the Commercial Court held that although it was not satisfied that the debt in question was genuinely disputed on substantial grounds, it would nevertheless hold the parties to their bargain and stay the application to set aside the statutory demand in favour of arbitration.

The relationship between the Arbitration Act 2013 and the New York Convention was explored in Hualon Corporation v Marty Limited.[8] The claimant had started proceedings in the BVI, and some time after service of its statement of case, became aware of the existence of an arbitration clause in the defendant's charter. The claimant then commenced arbitration proceedings and applied for a stay of the BVI court process. The defendant's position was that the application came too late, such as to make the arbitration clause inoperative. The court focused on the difference between the mandatory stay provisions in the Arbitration Act, which require a party to request a referral to arbitration by the court no later than when submitting its first statement on the substance of the dispute, and the Convention, which contains no such time constraint. The court held that the New York Convention 'trumped' the Model Law, which is 'subject to' the Convention, and that therefore the claimant could have its stay.

Section 84(2) of the Act imposes a mandatory rule that 'Any Convention award which is enforceable [under the Act] is to be treated as binding for all purposes on the persons between whom it was made…'. The meaning of the phrase 'binding for all purposes' was raised in proceedings between Sonera Holding BV and Cukurova Holding AS. The scenario in issue (which is referred to further below) was that the BVI Court had determined that a Convention award was made with jurisdiction and had enforced that award as a judgment of the BVI Court. A different arbitration tribunal (again with jurisdiction) issued a second Convention award, which determined that the first award had been made without jurisdiction.

Cukurova sought to rely on the second award to resist further enforcement of the first award. The Court of Appeal, whilst recognising the importance of the question of 'competing' awards, held that the first award could be enforced. It is anticipated that Cukurova will appeal the decision to the Privy Council.

Limitation

Limitation periods are governed by the Limitation Act 1961, which expressly extends to arbitrations and provides for when arbitrations are deemed to be commenced for the purposes of calculating the relevant time limits. Contract and tort claims may not be brought after the expiration of six years from the date on which the cause of action accrued. The same time limit applies to common law actions on an award. In cases of fraud or concealment, time does not start to run until the fraud or concealment has been – or, with reasonable diligence, could have been – discovered.

The Act also expressly provides that where the court orders an award to be set aside, the period between the commencement of the arbitral proceedings and the date of the set-aside order shall be excluded in computing the time prescribed by a limitation enactment.

Conflicts of law

The BVI courts apply common law conflict of laws rules. The choice of law for contract provides that a contract is governed by its proper law that, in the absence of an express or implied choice by the parties, is the law with which the contract has its closest and most real connection. To the extent that foreign law is contrary to the public policy of the BVI or to the provisions of any statute that has overriding effect, foreign law cannot be applied in arbitration proceedings in the BVI.

Under the relevant conflict rules, the BVI courts consider limitation provisions that extinguish a right as substantive, but legislation that bars the remedy and not the right is considered procedural.

Selection of the tribunal

The parties are expressly stated to be free to determine the number of arbitrators, including the right to authorise a third party, including an institution, to make that determination. If the parties fail to agree on the number of arbitrators, the IAC will decide whether it should be one or three, depending on the circumstances of the case. The court or the IAC is empowered to intervene and make appointments in circumstances broadly similar to those set out above, with articles 11, 14 and 15 of the Model Law having been given effect in the Act.

Article 13 of the Model Law, which sets out the procedure for challenging an arbitrator, is given effect in the Act.

The Act expressly provides that in the absence of an express statutory provision, the court will not interfere in the arbitration of a dispute, because subject to the observance of such safeguards as are necessary in the public interest, parties should be free to agree how their dispute should be resolved. The Act mandates that where the court does interfere, it should as far as possible give due regard to the wishes of the parties and the provisions of the arbitration agreement.

This provision has been construed by the Commercial Court, and subsequently the Eastern Caribbean Court of Appeal, in Sonera Holding BV v Cukurova Holding AS.9 In what is undoubtedly an unusual factual scenario, Sonera obtained leave from the BVI court to

enforce an ICC Arbitration Award against Cukurova in the same manner as a BVI judgment. Cukurova applied to set aside that judgment on the basis that the arbitration tribunal had acted in excess of jurisdiction. Cukurova's challenge failed. Cukurova then commenced ICC arbitration proceedings itself, seeking among other things a declaration that the first tribunal had indeed acted in excess of jurisdiction, and other relief. Sonera had participated in that second arbitration, however, following the issue of a partial award in Cukurova's favour, Sonera sought an anti-arbitration injunction from the BVI court. Sonera failed at first instance, on the basis that the Arbitration Act did not permit the court to interfere in a foreign arbitration and had taken away the court's inherent jurisdiction to grant an injunction pursuant to the Supreme Court Act. Sonera prevailed, however, on appeal, albeit only in part. The Eastern Caribbean Court of Appeal held that its inherent jurisdiction had not been ousted, and that the non-interference provision in the Arbitration Act was a warning that could be ignored where a party was using the foreign arbitral process vexatiously, oppressively or abusively. The Court of Appeal did not restrain Cukurova from pursuing the second arbitration as a whole, but only from pursuing the particular heads of relief (restraining Sonera from enforcing the original enforcement judgment and seeking to unwind a consequential charging order over Cukurova's assets) that the Court considered undermined its process.

The Act also expressly provides (by importing article 18 of the Model Law) that the arbitral tribunal is required: to be independent; to act fairly and impartially between the parties, giving them a reasonable opportunity to present their cases and to deal with their opponents' cases; and to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means of resolving the dispute.

A person approached for a possible appointment as an arbitrator must disclose any circumstances likely to give rise to justifiable doubts about his or her impartiality or independence, and that obligation continues throughout the appointment.

The Act provides that the IAC may issue a code of conduct for arbitrators and mediators, as well as guidelines with respect to the procedures to be followed by and the conduct expected of 'persons connected with' the operation of the Act.

Procedure

The Act imports articles 10 to 24 of the Model Law and therefore contains detailed provisions on the procedure of the tribunal. That procedure is, subject to the provisions of the Act, very much left to the parties to agree on. Again subject to the provisions of the Act, if there is no agreement between the parties, the tribunal may conduct the proceedings in the manner that it considers appropriate. It also contains express provisions giving arbitral tribunals immunity from liability for acts or omissions in the performance of their functions, save where they have acted in bad faith.

Interim remedies

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 power to grant interim measures – however, in the absence of such agreement, the tribunal is given 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).

An applicant for interim relief must 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.

The court itself 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 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 a 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 – see the judgment of Adderley J in PT Ventures SGPS SA v Vidatel Ltd.[10]

THE AWARD

Under the Act, articles 29 to 31 of the Model Law provide for decision-making by the tribunal (by a majority in the case of more than one arbitrator, unless otherwise agreed by the parties), for an award on agreed terms after a settlement, and for the form and contents of the award.

Article 33 of the Model Law is brought into effect, enabling parties to apply within 30 days of receipt of the award to request the tribunal to correct errors in computation, or clerical or typographical errors, or to ask the tribunal to make an additional award in respect of claims omitted from the first one.

Challenging an award

The Act provides for awards to be set aside or appealed in the following circumstances:

- the court may set the award aside in the event of a successful challenge to the arbitrator;
- where the arbitration agreement provides that the award may be challenged on the grounds of serious irregularity (or where those grounds of challenge apply automatically by virtue of the arbitration agreement having been entered into prior to 1 October 2014 and being a domestic arbitration agreement or one under which the parties have expressly provided that the agreement is to be dealt with under the 1976 Act);
- subject to the leave of the court, or the agreement of all parties, where the arbitration agreement provides that the award may be appealed on a question of law. It should be noted that an agreement to dispense with reasons for the award will be treated as an agreement to exclude the court's appeal jurisdiction and that the court has no

other jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award;

- with the leave of the court under the provisions of article 34 of the Model Law. Accordingly, an award may be set aside upon a party furnishing proof that:
- a party to the arbitration agreement was incapacitated;
- that the agreement was not valid either under the law to which the parties subjected it, or absent such indication, BVI law;
- the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
- 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. If the problematic parts can be separated from the rest, then only the problematic part may be set aside; or
- the composition of the tribunal or the procedure adopted was not in accordance with the parties' agreement, unless that agreement was in conflict with a provision of the New Act from which the parties cannot derogate, or failing the parties' agreement, was not in accordance with the New Act;
- the court finds that the subject of the dispute is not capable of being settled by arbitration under BVI law; or
- the court finds that the award is in conflict with the public policy of the BVI.

On hearing an appeal, the court may confirm, vary or remit in whole or in part the award to the tribunal, or set it aside in whole or part.

An application under the New Act to set aside the award may not be made after three months from the date the party received the award.

An appeal upwards to the Eastern Caribbean Court of Appeal from an appeal at first instance is permissible with the leave of the Court.

Enforcement of foreign awards

In principle, the Act does not affect the enforceability in the BVI of Convention awards. Pursuant to section 36 of the 1976 Act, the enforcement of Convention awards was mandatory, save in specific circumstances that mirrored those set out in the Convention; for example, where the arbitration agreement was invalid, a party was unable to present its case or where enforcement of the award would be contrary to public policy. Both foreign non-Convention awards and domestic awards could be enforced by application under the 1976 Act, which provided that an award on an arbitration agreement might, by leave of the High Court, be enforced in the same manner as a judgment or order of the High Court to the same effect. Where leave was granted, judgment could be entered in terms of the award. Awards could also, of course, be enforced by action on the award at common law, and enforcement is a gateway for permission to serve any such proceedings out of the jurisdiction.

Enforcement of awards issuing from the UK was obtained pursuant to the Reciprocal Enforcement of Judgments Act 1922, which provides that the court may, if in all the

circumstances it considers it just and convenient to do so, order the award to be registered and enforced in the BVI. The 1922 Act provides for certain circumstances in which registration should not be ordered, and these largely mirror the grounds for refusing to enforce a Convention award, such as where the tribunal acted without jurisdiction, the award was obtained by fraud, was contrary to public policy and so on.

The decision of the Privy Council in Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] 1 WLR 1041 is highly likely to be followed in the BVI, so that an arbitration award may be used to raise a defence of issue estoppel in fresh proceedings between the same parties.

The Act essentially continues the same well-tested regime for the enforcement of foreign awards from the 1976 Act, but with improvements. The principal changes are that:

- the Act explicitly provides that the grounds for refusal of enforcement that apply to a New York Convention Award also apply to the enforcement of a non-Convention Award, and in both cases those grounds are fully incorporated into the Act itself; and
- a UK arbitral award now counts as a New York Convention Award in the BVI so recourse is no longer needed to the 1922 reciprocal enforcement legislation.

Confidentiality

The Act contains several provisions intended (save in limited specified circumstances) to maintain the confidence of arbitral proceedings, including that any court proceedings should be heard in chambers, imposing reporting restrictions and prohibiting parties from disclosing, publishing or communicating any information relating to the arbitration proceedings or the award. Where the court considers that a judgment given in closed court proceedings is of legal interest, it may direct publication in the law reports, subject to appropriate safeguards in respect of the anonymity of the parties or to delaying publication for an appropriate period not exceeding 10 years.

Remedies

As far as the remedy or relief to be awarded is concerned, the Act expressly empowers the tribunal to award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings. Unless otherwise agreed by the parties, the tribunal also has the same power of the court to order specific performance or any contract, other than one relating to land or an interest in land. Despite its wide terms, we do not think the New Act empowers an arbitral tribunal to make a winding-up order. The position in relation to punitive damages is unchanged.

Costs

Under the Act, where a challenge on the basis of serious irregularity or an appeal or application for leave to appeal is pending, the court may order the applicant or appellant to provide security for costs. There is also provision for the arbitral tribunal to include directions with respect to costs (including its own fees and expenses) in the award. Costs are entirely at the discretion of the tribunal and must be assessed by the tribunal unless the parties have agreed on an assessment by the court. The tribunal may refuse to deliver its award until its costs have been met. The parties are jointly and severally liable for those costs.

The Act also contains express provisions in respect of interest, enabling the tribunal to award interest on any monetary award and on costs, the rate and time frame of such interests to be at the discretion of the tribunal.

Notes

1 Victor International Corporation and Victor (BVI) Limited v Spanish Town Development Company Limited & Ors (BVI HCV 2007/0293).
2 Zanotti v Interlog Finance Corp (BVI HCV 2009/0394).
3 Artemis Trustees Limited & Ors v KBC Partners LP & Ors (BVIHC (COM) 2012/0137).
4 C-Mobile Services Ltd v Huawei Technologies Co Ltd (BVIHCMAP2014/0006).
5 Alexander Jacobus de Wet v Vascon Trading (BVIHC (COM) 2011/0029).
6 Jinpeng Group Ltd v Peak Hotels and Resorts Ltd (BVIHCMAP2014/0025 and 2015/0003).
7 BVIHC (COM) 2015/0089.
8 Hualon Corporation v Marty Limited (BVIHC (COM) 2014/090).
9 Sonera Holding BV v Cukurova Holding AS (BVIHCMAP2016/0005).
10 PT Ventures SGPS SA v Vidatel BVIHC (Com) 117 of 2015.

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