



BVI Arbitration – FAQ

The *BVI Arbitration Act, 2013* (“the Act”) will come into force on **1 October 2014**.

The Act is designed to bring the modern principles and practices of arbitration to the BVI and aims to establish a fair, efficient and flexible legal framework within which to resolve disputes. Below we answer some of the key questions relating to the Act.

Which disputes may be subject to arbitration under the BVI Arbitration Act? Are there any significant exceptions?

Any dispute which is the subject of a written agreement between the parties to submit to arbitration and which names the BVI as the place of arbitration may be subject to arbitration under the Act. There are no restrictions as respect subject matter or value.

Does the Act govern international arbitration?

Yes. The Act applies to any arbitration under an arbitration agreement which names the BVI as the place of arbitration.

How does the Act compare with the UNCITRAL model law?

The provisions of the UNCITRAL model law are included within the provisions of the Act, subject to the certain minor modifications and additions.

Is there a period of limitation for bringing an arbitration in the BVI?

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.

Are the parties free to choose the place of arbitration?

Yes. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

Does a BVI arbitration have to be conducted in English?

No. The parties are free to agree on the language or languages to be used in the arbitral proceedings. In the absence of such an agreement, the arbitral tribunal will determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, will apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

Where appropriate, the arbitral tribunal may order that any documentary evidence be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Will the arbitral tribunal apply BVI law in deciding the dispute?

The arbitral tribunal will decide the dispute in accordance with the law chosen by the parties as the applicable law of the substance of the dispute. If the parties have not designated the applicable law, the arbitral tribunal will determine the law which is to be applied by reference to the conflict of laws rules which it considers applicable and will reach its decision taking into account any usages of the trade which apply to the transaction.

Are BVI arbitration proceedings public?

No. They are private and confidential to the parties.

If any proceedings under the Act are required to be heard by the Court, then those proceedings will be heard in private ("closed Court") unless the Court otherwise orders (on the application of any party or if in any particular case) that it is satisfied that the proceedings ought to be heard in open Court.

Where closed Court proceedings are being heard by the Court, the Court will, on the application of any party, make a direction as to what information, if any, relating to

the proceedings may be published. The Court will not make a direction permitting information to be published unless all parties agree that the information may be published or the Court is satisfied that the information, if published, would not reveal any matter, including the identity of any party, that any party reasonably wishes to remain confidential.

However, where the Court gives a judgment in respect of closed court proceedings and it considers that judgment to be of major legal interest, or that it is in the public interest to do so, the Court may direct that reports of the judgment be published in law reports and other professional publications. Where the Court makes such a direction but any party reasonably wishes to conceal any matter in those reports (including the fact that the party was such a party), then he may apply to the Court and the Court will then make a direction as to the action to be taken to conceal that matter in those reports. If in such a case, the Court considers that a report published in accordance with its direction would still be likely to reveal that matter, it may direct that the report may not be published until after the end of such period, not exceeding ten years, as the Court may direct.

What happens if one party to the Arbitration Agreement starts Court proceedings?

If the action concerns a matter which is the subject of the Arbitration Agreement, then any party to the arbitration agreement may request that the Court refer the parties to arbitration and, unless the Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, the Court must refer the parties to arbitration and stay the legal proceedings in the action. The party making the request must act promptly and must make the request no later than when submitting his first statement on the substance of the dispute.

However, if the particular case warrants it, it is open to a party to request, before or during arbitral proceedings, an interim measure of protection from a court and the Court may grant such protection without infringing the jurisdiction of the arbitral tribunal.

Is there any restriction on who may be appointed as arbitrator in the BVI?

No one is precluded by reason of his nationality from acting as an arbitrator unless the parties otherwise agree. The BVI Arbitration Act requires a person approached in connection with his possible appointment as an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. This obligation continues after an appointment is made and an

arbitrator, from the time of his appointment and throughout the arbitral proceedings, must disclose any such circumstances to the parties without delay unless they have already been informed of them by him. The parties are free to agree that an arbitrator to be appointed by them shall have a particular qualification.

Are there any rules as to how many arbitrators may be appointed?

No. The parties are free to determine the number of arbitrators or to authorise a third party, including an institution, to make that determination. Unless the parties have expressly agreed in the Arbitration Agreement that any dispute between them is to be submitted to a sole arbitrator, where the parties fail to agree on the number of arbitrators, the number of arbitrators shall be either one or three as decided by the BVI International Arbitration Centre (“BVI IAC”) in the particular case.

Are there any rules which prescribe how or by whom an arbitrator is to be appointed?

The parties are free to agree on the process to be adopted for the appointment of the arbitrator or arbitrators.

Failing such agreement, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty 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 thirty days of their appointment, the appointment shall be made, upon request of a party, by the Court.

In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the Court. In an arbitration with an even number of arbitrators where the parties have not agreed on a procedure for appointing the arbitrators, each party is to appoint the same number of arbitrators and, in default, the BVI IAC shall make the necessary appointment upon request. In an arbitration with an uneven number of arbitrators greater than three where the parties have not agreed on a procedure for appointing the arbitrators, each party is to appoint the same number of arbitrators and, unless otherwise agreed by the parties, the BVI IAC shall appoint the remaining arbitrator or arbitrators.

Can the arbitrator’s appointment be challenged and, if so, how and to whom is such a challenge to be made?

Once he is appointed, an arbitrator in whose appointment he has participated may be challenged by a party only if he has become aware after the appointment was made that the arbitrator does not possess the qualification agreed to by the parties or circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

The parties are free to agree on a procedure for challenging an arbitrator. If the parties have not agreed a procedure for challenge, the Act requires a party who intends to challenge an arbitrator to send a written statement of the reasons for the challenge to the arbitral tribunal within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance giving rise to a grounds for challenge. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

Where a challenge, whether under an agreed procedure or under the default procedure, is not successful, the challenging party may apply to the High Court for a determination within thirty days after having received notice of the decision. The decision of the Court is not subject to appeal.

Are there any procedural rules governing arbitration in the BVI?

The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. If or to the extent that there is no agreement between the parties, the arbitral tribunal may conduct the arbitration in the manner that it considers appropriate.

Can the tribunal decide the dispute on paper, or does there have to be a hearing?

Subject to any agreement by the parties to the contrary, the arbitral tribunal will decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. Unless the parties have agreed that no hearings shall be held, any party may request that the arbitral tribunal hold such hearings and the tribunal must then do so at an appropriate stage.

Who decides whether or not the arbitral tribunal has jurisdiction in any particular case - the tribunal itself or the Court?

The arbitral tribunal may 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. It may rule on these issues either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may apply to the Court to determine the question of jurisdiction within thirty days after having received notice of the tribunal's ruling. The Court's decision on jurisdiction is final. A ruling made by the arbitral tribunal that it does not have jurisdiction to decide a dispute is not subject to appeal.

What rules of evidence apply to BVI arbitrations?

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.

Is there any limit on the remedy which may be afforded in an arbitration under the Act?

In deciding a dispute, 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 in the Court and, unless the parties otherwise agree, it may make an award at any time and may make more than one award at different times on different aspects of the matters to be determined. Unless the parties have otherwise agreed, the tribunal's power extends to making an order for specific performance of any contract other than a contract relating to land or any interests in land.

Can the arbitral tribunal grant interim relief?

Yes, in an appropriate case and unless the parties have otherwise agreed, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal may, at the request of a party, grant a temporary measure ordering a party

to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process 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.

Is interest available on a monetary award and, if so, what is the applicable rate?

Yes. Unless otherwise agreed by the parties, an arbitral tribunal may award simple or compound interest from the dates, at the rates, and with such rests that the tribunal considers appropriate, for any period ending not later than the date of payment on any sum of money which is (i) the subject of an award of the tribunal in the arbitral proceedings or (ii) claimed in, and outstanding at the commencement of, the arbitration but paid before the award is made, or on any costs awarded or ordered by the tribunal in the arbitral proceedings.

Are there any legal requirements which apply to the making of an award?

The award, which in arbitral proceedings with more than one arbitrator may be decided by a majority of all its members, unless otherwise agreed by the parties, 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.

Can a successful party to a BVI arbitration recover his costs and, if so, on what basis?

An arbitral tribunal may direct that costs, including the fees and expenses of the tribunal, be paid by one party to another and may itself assess the amount of costs to be awarded or ordered to be paid. It may only allow costs that are reasonable having regard to all the circumstances although it may, unless otherwise agreed by the

parties, allow costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration.

The parties may not exclude the jurisdiction of the tribunal with respect to costs by providing in their arbitration agreement that the parties, or any of the parties, must pay their own costs in respect of arbitral proceedings arising under the agreement and such a provision is void unless it is part of an agreement to submit to arbitration a dispute that had arisen before the agreement was made.

The parties may, however, include in their agreement a clause which provides for the costs of arbitral proceedings to be assessed by the Court and, following such assessment, the arbitral tribunal shall make an additional award of costs reflecting the result of such assessment.

Can information disclosed in arbitration proceedings in the BVI be relied on or referred to in subsequent proceedings?

Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to the arbitral proceedings or any award made in the arbitral proceedings.

However, this prohibition does not prevent the publication, disclosure or communication of information made to protect or pursue a legal right or interest of the party, or to enforce or challenge the award in legal proceedings before the Court or other judicial authority in or outside the Virgin Islands; to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or to a professional or any other adviser of any of the parties.

In what circumstances can a BVI arbitration award be challenged or appealed by the parties?

There is no general right of challenge or appeal 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
- (b) 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.

I have an award in my favour - how do I enforce it?

An award made in arbitral proceedings under the Act, whether made in or outside the Virgin Islands is, by leave of the Virgin Islands High Court, enforceable in the same manner as a judgment or order of the Court that has the same effect. Where the Court grants leave it may enter judgment in terms of the award.

On 25 May 2014, the BVI acceded to the New York Convention. This means that arbitral awards from the BVI will be recognised and enforced by the courts of the many other contracting states and vice versa.

For more information, please contact one of our lawyers.

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