



## Enforcement of Arbitral Awards in the British Virgin Islands: Procedures and Options

One consistent message resounded throughout the third annual British Virgin Islands (BVI) International Arbitration Conference, which took place in November 2019: BVI courts take a pro-enforcement approach to arbitration awards and have no issue in exercising their broad powers to grant interim measures in support of arbitration proceedings. **Richard Evans** of **Conyers** presents his analysis

**As** a leading incorporation jurisdiction, with something in the region of 400,000 active registered companies holding many billions of dollars in assets, the ease with which arbitral awards may be enforced in the BVI can be a matter of vital importance to those engaged in dispute resolution.

### Overview

The BVI Arbitration Act 2013 came into force on 1 October 2014, following the BVI acceding to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The Act is modelled on the UNCITRAL Model Law on International

Commercial Arbitration (1985), with amendments as adopted in 2006, so arbitration practitioners will be familiar with the general principles of enforcement.

The BVI Commercial Court has to date adopted a pragmatic and pro-enforcement stance towards enforcement, while also fairly applying the established principles under the New York Convention. The beneficiary of a convention award may readily enforce it in the BVI applying the well-established passport principles of enforcement. Similarly, a respondent may avail themselves of standard convention defences to enforcement. Under the Arbitration Act, non-convention awards may also be enforced in the



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- ➔ BVI. Defences against enforcement are the same as those for convention awards, but additionally, the court may refuse enforcement on the broader ground that it considers it just.

### Procedure

Enforcement of arbitral awards in the BVI is generally swift and straightforward; they can be initiated on an *ex-parte* basis under the BVI Civil Procedure Rules (BVI CPR). This approach will give rise to issues of full and frank disclosure, and some applicants may prefer to make the application on at least some form of notice if practicable. The courts are prepared to relax formal rules in exceptional circumstances. For example, the BVI court recently held that the applicant's inability to supply the original or a certified copy of the arbitration agreement was no bar to enforcement of the award. The BVI CPR makes express provision for service out of the jurisdiction, if required, for the enforcement of arbitration awards.

It is worth noting that a party may skip the formal procedure for recognition and enforcement of an arbitral award (involving a sum of money) and appoint a liquidator based on an unpaid international arbitral award. Non-payment of the award (being an undisputed debt) provides a ground of deemed insolvency under the BVI Insolvency Act 2003. It is not necessary to take any steps otherwise to enforce the award (for example by commencement of enforcement proceedings under the Arbitration Act).

### Confidentiality

As a general rule all arbitration matters are heard in closed court proceedings and information

relating to the court proceedings cannot be published. The court will publish only judgments of major legal or public interest, and will accommodate a party's reasonable request for concealment of any matter.

## Mechanisms for enforcement

Once the award is recognised, it is treated as a judgment of the BVI court and all local enforcement measures against assets located in the BVI are available to the applicant. The BVI offers a wide range of enforcement mechanisms for its orders, including, in the case of money judgments, charging orders, garnishee orders, orders for the seizure and sale of goods and the appointment of a receiver.

Charging orders may be a particularly effective and efficient means of enforcement over the shares in a BVI target company. An *ex parte* application is made for a provisional charging order, following which the court will consider (a hearing on notice to the respondent) whether to make the provisional order final. It is sometimes possible to pursue an application for an order for sale at the same time as the hearing for the final order.

## Interim measures

Generally, the BVI Court has broad jurisdiction to grant interim measures in support of the arbitration proceedings. The power extends to existing or intended arbitration proceedings whether commenced inside or outside the BVI. While potentially wide-ranging in its scope, the court's powers are expressly circumscribed. Under the Act, the court may decline to grant an interim measure on the ground that the interim measure being sought is currently the subject of arbitral proceedings, and if the court considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal.

Moreover, in respect of overseas (actual or intended) arbitral proceedings, the BVI Court can only grant an interim measure if the arbitral proceedings are capable of giving rise to an arbitral award (interim or final) that may be enforced in the BVI and the interim measure sought is of a type or description that may be granted in the BVI by the court in relation to arbitral proceedings.

However, unlike in England where the court would only grant interim measures if the tribunal is powerless to act, or after the permission has been sought from the tribunal or with the other parties' consent, the Act has no equivalent limitations on the court's jurisdiction (*PT Ventures SGPS SA v Vidtel Ltd*). This opens the possibility of applying in the BVI for

an *ex-parte* injunction during the course of the arbitral proceedings, unless the parties' arbitration agreement provides otherwise. The distinctive powerful feature of the Act is that the BVI Court's order for interim measures is not subject to an appeal and can only be set aside at the return date. As things currently stand, relief under section 43 and 58 would not extend to third parties to arbitration and, therefore, the usual common law principles found in *Black Swan Investment ISA v Harvest Vie Limited and another* would apply.

## Disclosure

Often, when considering how best to enforce an arbitration award in the BVI, an early and essential issue is identification of likely targets and assets. Whilst share registers and information as to beneficial ownership of BVI companies are held centrally, they are not currently available publicly. However, in certain cases (principally those based on fraud, or other serious breach of duty, and where a lack of propriety is properly alleged, for example in the context of freezing order relief) it may be possible to use the long established *Norwich Pharmacal* jurisdiction to obtain disclosure orders against a target company's registered agent. The availability of such relief is to be determined very much on a case-by-case basis.

## Summary

The BVI has evolved a sophisticated and pragmatic regime for the enforcement of arbitration awards, well suited to the ever increasing use of arbitration in commercial disputes around the world. 



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