

Snapshot: arbitration in the British Virgin Islands for Asia-based parties

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Introduction

The BVI is an increasingly popular arbitral seat supported by a modern pro-arbitration legal framework, modern arbitration facilities, and a world-class arbitration institution of its own in the form of the BVI International Arbitration Centre ("**BVIAC**"). The ready availability of BVI legal expertise for any such arbitration under the supervision of the well-respected BVI Courts provides added comfort for parties seeking a dispute resolution venue in a stable jurisdiction.

Asian companies, investors, and high net worth individuals have been among the most frequent users of the BVI Courts and BVI legal practitioners for many years. As a result, the BVIAC users can rest assured that they are dealing with a modern arbitral institution well-versed in the unique attributes of the Asian market and a supervisory court comprising judges who handle disputes with an Asia nexus on a regular basis.

A modern arbitration law

Arbitration in the BVI is governed by the Arbitration Act, 2013 (the "**Act**"). The Act applies the provisions of the UNCITRAL Model Law subject to the modifications stated in the Act. Key attributes of the legal framework for BVI arbitration which make it an attractive arbitral seat include the following:

1. Since 25 May 2014, the UK Government has extended application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") to the BVI. This means that BVI arbitral awards will be readily enforceable in the 168 countries that have acceded to the New York Convention
2. BVI arbitral tribunals have broad jurisdiction under the Act, including the ability to determine its own jurisdiction, to order interim measures, to make preliminary orders, and to make orders in relation to costs and interest as the tribunal deems fit

3. Recourse to the BVI Commercial Court to seek interim measures without requiring leave of the arbitral tribunal
4. Confidentiality. Unless the parties agree otherwise, information related to BVI arbitral proceedings or a BVI arbitral award cannot be published, disclosed, or communicated to third parties
5. In line with the UNCITRAL Model Law, the court's jurisdiction to set aside an arbitral award is very limited. Relevant grounds include:
 - a. the incapacity of one or more parties to the arbitration agreement;
 - b. lack of proper notice of the arbitration
 - c. the award dealing with matters outside the scope of the arbitration agreement
 - d. the composition of the arbitral tribunal or the arbitral procedure being contrary to the terms of the arbitration agreement or the Act;
 - e. non-arbitrability of the subject-matter under BVI law; or
 - f. public policy
6. BVI arbitral awards are final and unappealable unless the parties agree otherwise. Parties may choose to opt-in to certain provisions that permit the BVI Commercial Court to exercise additional supervisory jurisdiction over the conduct of an arbitration. These include the ability to apply to the court:
 - a. for an order to consolidate arbitrations
 - b. to determine of any question of law arising in the arbitration where doing so might result in substantial cost savings to the parties
 - c. to challenge the award on the ground of serious irregularity
 - d. to appeal on a question of law arising out of an award

The BVI Courts adopt a strong pro-arbitration approach and recognise the importance of respecting the parties' choice to refer disputes to arbitration in order to promote the BVI as an international arbitration hub.^[1]

BVI as the seat of arbitration

The BVIIAC is also responsible for administering the BVIIAC Rules. These are based on the UNCITRAL Arbitration Rules and therefore reflect international arbitration standards. Parties are free to incorporate the BVIIAC Rules into their arbitration agreements, but can also choose to adopt other institutional rules to govern a BVI arbitration if they so wish. Conversely, parties may adopt the BVIIAC Rules as part of their contracts whilst having the arbitration administered by other institutions, such as the Hong Kong International Arbitration Centre or the Singapore Arbitration

Centre. Article 18(2) of the BVIIAC Rules permits the arbitral tribunal to meet and deliberate in any location it deems appropriate, which means that meetings and hearings can be conducted in a place other than the BVI if a different location and time zone is more convenient for the parties, as may well be the case for Asian based users.

Unlike many other arbitral rules, Article 17(6) of the BVIIAC Rules creates a default presumption that all matters relating to the arbitration shall be confidential unless otherwise agreed by the parties. The scope of the confidentiality obligation includes documents produced by third parties that are not already in the public domain, which demonstrates the extent to which the BVIIAC Rules seek to uphold the confidentiality principle.

In the current climate of disrupted international travel due to the COVID-19 pandemic, the ability of an arbitral tribunal (much like the BVI Courts) to permit witnesses to attend hearings by videoconference or other means of telecommunication under Article 28(4) provides a helpful tool to ensure that BVI arbitrations progress with minimal disruption.

Additionally, the BVIIAC maintains a Panel of Arbitrations comprising over 190 leading arbitrators from around the world to enable parties to appoint arbitrators with the most appropriate expertise, including language proficiency and geographic location. The Panel currently includes 18 arbitrators who are based in the Asia-Pacific, which allows Asian arbitration users to select an arbitrator located close to the parties with an in-depth understanding of the Asian market.

Annex A to the BVIIAC Rules contains the BVIIAC Model Clause for parties wishing to embed BVI arbitration in the contracts. A copy of the Model Clause is reproduced below:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the BVI IAC Arbitration Rules."

"The number of arbitrators shall be... [one or three];

The place of arbitration shall be... [Road Town, Tortola, British Virgin Islands, unless the Parties agree otherwise];

The language to be used in the arbitral proceedings shall be... [language]."

Please reach out to your usual Ogier contacts for any BVI arbitration related queries you may have. We would be delighted to help.

[1] *L Capital KDT Ltd v Retribution Ltd* (BVIHC(COM) 89/2015, 25 January 2016, Farara J) at §44.

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