

An arbitration paradise

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The British Virgin Islands (BVI) is a familiar jurisdiction to most professionals practising international commercial law. Stuart Cullen, counsel at Harneys, says a recent increase in dispute resolution instructions coming from Latin America is accompanying the jurisdiction's increasing profile in international arbitration too.

The BVI – a self-governing overseas territory of the United Kingdom located about 60 miles east of Puerto Rico – is a popular jurisdiction for Latin American clients. Many turn here for estate and inheritance planning, while BVI is widely used to provide tax-neutral inward investment vehicles to raise capital for Latin American businesses.

BVI is also an appropriate, neutral venue for arbitration, both for Latin American businesses and their North American, British or EU counterparties or investors. In recent years, the jurisdiction has taken a number of significant steps in its development as an international arbitration venue.

In 2014 the BVI's Arbitration Act came into force. Influenced by the UK's arbitration legislation, the act is also attractive to non-English common law lawyers as it incorporates the UNCITRAL model law on international commercial arbitration. It also legislates for the enforcement of awards under the New York convention on recognition and enforcement of foreign arbitral awards, to which the BVI became a participant in 2014.

The act preceded the opening of a state of the art International Arbitration Centre, the first of its kind in the Caribbean, in Tortola in 2016.

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Prioritising flexibility

One of the most modern arbitration statutes in any major commercial jurisdiction, its flexibility and opt-ins, which enable parties to arbitration agreements to tailor certain aspects of its applicability to their needs, are perhaps what make the Arbitration Act most appealing to Latin American lawyers.

The Arbitration Act expressly provides the ability for parties to an arbitration agreement to opt-in or opt-out of certain provisions.

The most fundamental of these options are probably those which allow the parties to choose whether or not a court is to have jurisdiction to consider an appeal against an award, a challenge against an award on the grounds of serious irregularity, or to determine a point of law arising in the arbitration.

Other opt-ins include providing the tribunal with the power to consolidate arbitrations and limiting the tribunal to a single member.

BVI allows parties to an arbitration agreement to choose a governing law that is distinct from the seat of arbitration. It also recognises that the hearing venue, applicable rules, and the courts in which applications in aid of the arbitration may be brought are just some of the other matters that may relate to separate jurisdictions.

This flexibility can be particularly useful for the enforcement of arbitral awards. BVI is a party to the New York convention, as are certain Latin American jurisdictions, including Brazil. But Brazil's process for the enforcement of awards in foreign arbitrations takes much longer and is potentially more problematic than the process for enforcement of domestic arbitrations. Here BVI's flexibility comes into play.

BVI provides foreign parties contracting with a Brazilian party the opportunity to choose Brazil as the seat of arbitration, the law of a third-party jurisdiction as the governing law of the contract, but for the arbitration to be heard in BVI, and for the BVI courts to have exclusive jurisdiction in aid of the arbitration.

This example would provide a neutral venue and an experienced commercial court to assist with interim matters in aid of the arbitration, yet would result in an award that would be quickly and easily enforceable in Brazil.

The BVI has scope to assist in a wide range of circumstances. The Arbitration Act gives the BVI court jurisdiction to consider applications for interim measures in aid of arbitrations that have been (or are about to be) commenced outside BVI – as long as the arbitration is capable of giving rise to an award, interim or final, which is capable of being enforced in BVI and the interim measure sought is capable of being granted by the BVI court in relation to arbitrations. This scope allows the BVI court to assist even if the arbitration itself has little or no connection to BVI, and even potentially in arbitrations where the award would not be enforceable under the New York convention.

As BVI has only recently started to establish itself as an arbitration venue, there is little binding BVI authority on arbitration, and the new act has not been extensively tested in the courts. But this is not as much of a problem as it might initially seem. The Arbitration Act was drafted with careful consideration of the pros and cons of legislation in other English common law jurisdictions and the UNCITRAL model law. As a British Overseas Territory, English legal precedents, while not binding, are considered strongly persuasive in BVI.

Parties to arbitration agreements obviously have a wide range of jurisdictions to choose from. But in light of the increased instructions from Latin American that we are seeing in BVI – and the recent developments that have made BVI a jurisdiction that is both friendly and flexible for arbitration – we are confident that Latin American legal markets are likely to see the increased involvement of BVI in international arbitration over the coming years.

Practice area : Arbitration

Country : International