HARNEYS

British Virgin Islands: International arbitration Q&A

This Q&A provides an overview of some of the key points of international arbitration in the British Virgin Islands.

Legal framework

What is the relevant legislation on arbitration in your jurisdiction? Are there any significant limitations on the scope of the statutory regime – for example, does it govern oral arbitration agreements?

The British Virgins Islands Arbitration Act 2013 governs international arbitration in the British Virgin Islands. The act came into force on 1 October 2014 and repealed the former Arbitration Act 1976. The act takes into account modern principles and practices of arbitration. It also established the BVI International Arbitration Centre (IAC). The BVI IAC has also issued its own rules. Applying Section 7 of the UNCITRAL Model Law, Section 17(2) provides that an arbitration agreement shall be in writing.

Does this legislation differentiate between domestic arbitration and international arbitration? If so, how is each defined?

There is no distinction between domestic and international arbitration, save in one respect. Section 90(2) of the Arbitration Act provides that 'domestic arbitration' means arbitration in relation to an arbitration agreement which does not provide expressly or by implication for arbitration in a jurisdiction other than the British Virgin Islands. This is relevant only for those arbitration agreements entered into prior to the entry into force of the act for the purposes of incorporating the opt-in provisions in Schedule 2 in relation to court supervision.

Is the arbitration legislation in your jurisdiction based on the UNCITRAL Model Law on International Commercial Arbitration?

Yes. It is based very closely on the UNCITRAL Model Law.

Are all provisions of the legislation in your jurisdiction mandatory?

No. Part XI of the Arbitration Act deals with mandatory and non-mandatory provisions. In particular, the parties may agree to opt in to the provisions contained in Schedule 2, which relates to court supervision.

Are there any current plans to amend the arbitration legislation in your jurisdiction?

The Arbitration (Amendment) Act 2020 was published on 28 July 2020, but is not yet in force. This amends Section 72 of the Arbitration Act by deleting the words "other than fees and expenses of the arbitrator".

Is your jurisdiction a signatory to the New York Convention? If so, have any reservations been made?

Yes. The United Kingdom extended the New York Convention to the British Virgin Islands on 24 February 2014, taking effect from 25 May 2014. While the United Kingdom extended the Convention to the British Virgin Islands, it appears that no reciprocity reservation was extended.

Is your jurisdiction a signatory to any other treaties relevant to arbitration?

The United Kingdom has also extended the Arbitration (International Investment Disputes) Act 1966 to the British Virgin Islands, which governs the registration of awards pursuant to the Convention on the Settlement

of Investment Disputes between States and Nationals of Other States, which was opened for signature in Washington on 18 March 1965.

Arbitrability and restrictions on arbitration

How is it determined whether a dispute is arbitrable in your jurisdiction?

The Arbitration Act does not expressly prescribe those matters which are arbitrable. The BVI courts will try to give effect to the parties' agreement to arbitrate unless there are policy reasons not to, such as where the subject matter is contrary to BVI public policy or subject to the exclusive jurisdiction of the court (eg, an order for winding up of a company).

The BVI courts confirmed that an arbitrator can grant relief in unfair prejudice proceedings in *Zanotti v Interlog Finance Corp* (BVIHC 2009/0394). On an application to appoint a liquidator, a party must show that there is a genuine dispute as to whether the debt is owed before the court will agree a stay in favour of arbitration (see *C-Mobile v Huawei*). This is at odds with the English approach in *Salford Estates*, which was rejected by the Court of Appeal in *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd*. However, see also *Re Lennox International Ltd* BVIHC (COM) 37 of 6 July 2020, *IS Investment Fund Segregated Portfolio Company v Fair Cheerful Ltd* BVIHC (COM) 34 of 16 July 2020 and *A Creditor v Anonymous Company Ltd* (28 January 2021).

Are there any restrictions on the choice of seat of arbitration for certain disputes?

No.

Arbitration agreement

What are the validity requirements for an arbitration agreement in your jurisdiction?

Section 17 of the Arbitration Act gives effect to Article 7 of the UNCITRAL Model Law, providing that an arbitration agreement must be in writing. It may be in the form of an arbitration clause in a contract or in a separate agreement. An 'arbitration agreement' is defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship. An arbitration agreement is in writing if:

- It is in a document, even if that document is not signed
- It is recorded by one of the parties although made otherwise than in writing

The arbitration agreement will be enforced unless it is found to be null, inoperative or incapable of being performed. Termination of the underlying contract does not render the arbitration clause inoperative. The arbitration clause survives termination.

Are there any provisions of legislation or any other legal sources in your jurisdiction concerning the separability of arbitration agreements?

Section 32 of the Arbitration Act incorporates Article 16 of the UNCITRAL Model Law, confirming that the rule of separability applies to arbitration clauses in the British Virgin Islands. For the purpose of ruling on its jurisdiction, an arbitral tribunal shall treat an arbitration agreement as an agreement independent of the other terms of the underlying contract in which it is contained. The act also confirms that a decision by the arbitral tribunal that the underlying contract is null and void shall not automatically invalidate the arbitration agreement. The section confirms that a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Are there provisions on the seat and/or language of the arbitration if there is no agreement between the parties?

Section 46 of the Arbitration Act adopts Section 20 of the UNCITRAL Model Law, providing that the parties are free to agree on the place of the arbitration. Failing such agreement, the tribunal shall determine the place of arbitration, having regard to the circumstances of the case, including the convenience of the parties.

Section 48 adopts Section 22 of the UNCITRAL Model Law, providing that, failing agreement between the parties, the tribunal shall determine the language or languages to be used.

Objections to jurisdiction

When must a party raise an objection to the jurisdiction of the tribunal and how can this objection be raised?

Pursuant to Section 32(1) of the Arbitration Act, a party can challenge the tribunal's jurisdiction at any time before submission of the statement of defence (although the tribunal can permit a challenge to be raised at a later stage if it considers the delay justified). The tribunal may rule on such a challenge either as preliminary issue or in an award on the merits of the dispute. If the tribunal rules on its jurisdiction as a preliminary issue, a party may challenge this ruling by applying to court within 30 days of receiving the tribunal's ruling.

Can a tribunal rule on its own jurisdiction?

Section 32 of the Arbitration Act, adopting Article 16 of the UNCITRAL Model Law, enshrines the principle of competence-competence in BVI law. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitral tribunal may rule on a challenge to its jurisdiction either as a preliminary question or in an award on the merits.

The power of the arbitral tribunal to rule on its own jurisdiction includes the power to decide whether the tribunal was properly constituted and what matters have been submitted to arbitration in accordance with the arbitration agreement.

Can a party apply to the courts of the seat for a ruling on the jurisdiction of the tribunal? In what circumstances?

Under Section 32(4) of the Arbitration Act, a ruling made by the arbitral tribunal that it does not have jurisdiction is not subject to appeal. Notwithstanding Section 18 (which provides for a mandatory stay in favour of arbitration), where the arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court will decide that dispute if it has jurisdiction.

If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days of receiving the ruling, that the court specified in Article 6 decide the matter. The decision shall not be subject to appeal. The tribunal may continue the proceedings and make an award while the decision is pending.

The parties

Are there any restrictions on who can be a party to an arbitration agreement?

No.

Are the parties under any duties in relation to the arbitration?

There are no specific provisions set out in the Arbitration Act and therefore the duties will be those governed by common law and professional ethics.

Are there any provisions of law which deal with multi-party disputes?

An arbitral tribunal cannot assume jurisdiction over anyone that is not a party to the arbitration agreement (whether domestic or foreign). If, in its award, the tribunal makes a decision affecting the rights of a third party, this could constitute grounds for the third party in question to challenge the award at the stage of enforcement. If the arbitral tribunal has determined that it has jurisdiction over a non-party, the courts at the enforcement stage will not question the tribunal's decision, provided that:

- The tribunal has properly considered and explained its reasoning in the award
- The non-signatory has been served properly and had an opportunity to participate in the arbitration

Similarly, the BVI International Arbitration Centre Rules permit the joinder only of third parties that are a party to the arbitration agreement.

Applicable law issues

How is the law of the arbitration agreement determined in your jurisdiction?

The law of the arbitration agreement will be determined by contractual construction. If there is no express

choice of law in the arbitration agreement itself, but there is an express choice of law governing the contract containing the arbitration agreement, it will be assumed that the arbitration agreement will be governed by the governing law of the contract. It is very likely that the tribunal would be guided by the decision of the Supreme Court of England and Wales in *Enka v Chubb* should this issue arise.

Will the tribunal uphold a party agreement as to the substantive law of the dispute? Where the substantive law is unclear, how will the tribunal determine what it should be?

Yes, the tribunal will uphold a party agreement as to the substantive law of the dispute. Where the substantive law is unclear, the tribunal will determine the substantive law based on the law with the closest connection to the performance of the agreement.

Consolidation and third parties

Does the law in your jurisdiction permit consolidation of separate arbitrations into a single arbitration proceeding? Are there any conditions which apply to consolidation?

If the parties have opted in to the powers contained under paragraph 2 of Schedule 2 of the Arbitration Act, the court may make an order consolidating two or more arbitral proceedings pursuant where:

- A common question of law or fact arises
- The rights to relief claimed in those arbitral proceedings are in respect of, or arise from, the same transactions or series of transactions
- It is desirable for any other reason to make such an order

This power can be exercised only by the court. These claims will also be subject to standard limitations on arbitrability of disputes in the British Virgin Islands.

Does the law in your jurisdiction permit the joinder of additional parties to an arbitration which has already commenced?

Yes – if the parties agree, additional parties may be joined to the arbitration on an *ad hoc* basis.

Does an arbitration agreement bind assignees or other third parties?

No, the arbitration agreement is binding only on the parties, subject to the wording of the arbitration agreement itself.

The tribunal

How is the tribunal appointed?

Section 22 of the Arbitration Act incorporates Article 11 of the UNCITRAL Model Law. There are no limits on the parties' selection of arbitrators, unless they fail:

- To agree on the number of arbitrators
- To act as required by the appointing procedure

In such cases, the court or another appointing authority will step in to assist under Section 22.

In line with the UNCITRAL Model Law, Section 22 provides that if the procedure for selecting the tribunal fails, the BVI International Arbitration Centre (***IAC***) or the court may step in to appoint the necessary number of arbitrators (depending on the circumstances).

The BVI IAC is the default appointing authority, which provides a quicker method of resolving this issue than having to apply to court.

Are there any requirements as to the number or qualification of arbitrators in your jurisdiction?

The parties are free to determine the number of arbitrators. Where they fail to agree, the number of arbitrators shall be either one or three, as decided by the BVI IAC, unless the parties have opted into paragraph 1 of Schedule 2 of the Arbitration Act, which provides that there will be a sole arbitrator.

Can an arbitrator be challenged in your jurisdiction? If so, on what basis? Are there any restrictions on the challenge of an arbitrator?

Yes. Sections 23 and 24 of the Arbitration Act govern the grounds and procedure for the challenge or removal of arbitrators. Under Section 23 adopting Article 12 of the UNCITRAL Model Law, an arbitrator can be challenged only if:

- Circumstances exist that give rise to justifiable doubts as to his or her impartiality and independence
- He or she does not possess the qualification agreed to by the parties

The BVI IAC Rules also provide in Article 12 for the challenge of arbitrators if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. Article 13 sets out the procedure and timelines for the challenge.

If a challenge is successful, how is the arbitrator replaced?

Section 26 adopts Article 15 of the UNCITRAL Model Law, which provides that if a challenge is successful, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

What duties are imposed on arbitrators? Are these all imposed by legislation?

The arbitrator's duties are set out in Section 44 of the Arbitration Act. This requires the arbitral tribunal:

- To be independent
- To act fairly and impartially between the parties, giving them an opportunity to present their cases and to deal with the cases of their opponents
- To use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate

An arbitrator is required from the moment that he or she is approached in relation to a potential appointment to disclose without delay any information likely to give rise to doubts in relation to his or her impartiality or independence. This is an ongoing duty of disclosure during his or her appointment. Given that bias is the main grounds for a challenge to an arbitrator, any failure to disclose conflicts of interest is likely to result in a successful challenge.

What powers does an arbitrator have in relation to:

Procedure, including evidence?

The Arbitration Act provides arbitrators with very wide powers, including the power to order preliminary relief, interim relief and security for costs. In the absence of agreement between the parties, arbitrators are also empowered to determine the procedure to be followed in the proceedings.

Under Section 45 of the act, the parties are free to decide on the procedure governing the arbitration. The exact procedure to be followed will usually be that agreed between the parties under Section 45. Where there is no agreement between the parties, the arbitral tribunal can conduct the arbitration in the manner it sees fit in accordance with the terms of the act and/or the applicable rules.

The arbitral tribunal is not bound by the rules of evidence when conducting the arbitration. It may receive any evidence it considers appropriate and will decide what weight to give that evidence.

The Arbitration Act gives the tribunal wide powers to decide matters relating to evidence, including whether there will be an oral hearing for the presentation of evidence (Section 50(1)). Under Section 54, the tribunal can also:

- Direct the discovery/disclosure of documents
- Direct the delivery of interrogatories
- Direct that evidence be given by affidavit
- Direct that a person attend before the tribunal in order to give evidence or produce documents
- Administer oaths or affirmations of witnesses and examine those witnesses

In most international arbitrations, the collection and submission of evidence will be roughly the same as in litigation. Typically, the parties will be required to disclose documents relevant to the dispute, file written statements and put witnesses up for cross-examination at the hearing of the dispute.

Interim relief?

Unless otherwise agreed by the parties, the arbitral tribunal is empowered to grant interim relief pursuant to Section 33 of the Arbitration Act (which adopts Article 17 of the UNCITRAL Model Law). Interim relief is binding and can be converted into an award which is enforceable at court.

The types of interim relief that can be ordered by an arbitral tribunal prior to the issuance of the award are temporary measures to:

- Maintain or restore the status quo pending determination of the dispute
- 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
- Provide a means of preserving assets out of which a subsequent award may be satisfied
- Preserve evidence that may be relevant and material to the resolution of the dispute

The Arbitration Act also adopts Articles 17B and 17C of the UNCITRAL Model Law, permitting a tribunal to make preliminary orders in support of interim relief (including on an *ex parte* basis).

Interim relief is binding and can be converted into an award which is enforceable at court. Preliminary orders, though binding on the parties, are not enforceable at court.

Parties which do not comply with its orders?

Section 51 of the Arbitration Act reproduces Article 25 of the UNCITRAL Model Law and provides that if a party fails to comply with any order or direction of the arbitral tribunal, the tribunal may make a peremptory order to the same effect prescribing the timeframe for compliance that it considers appropriate. If a party fails to comply with a peremptory order, the tribunal may:

- Direct that the party is not entitled to rely on any allegation or material which was the subject matter of the peremptory order
- Draw any adverse inferences from non-compliance that the circumstances may justify
- Make an award on the basis of the materials properly provided to it
- Make any order that it thinks fit as to payment of costs

Issuing partial final awards?

Under Section 69 of the Arbitration Act, an arbitral tribunal may make more than one award at different times on different aspects of the matters to be determined, unless otherwise agreed by the parties.

The remedies it can grant in a final award?

Under Section 68 of the Arbitration 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 subject of civil proceedings in the court. Unless otherwise agreed by the parties, an arbitral tribunal has the same power as the court to order specific performance of any contract, other than a contract relating to land or any interests in land.

Interest?

Pursuant to Section 78 of the Arbitration Act, unless otherwise stated, interest is payable on money awarded by the tribunal from the date of the award and order on costs. Interest is payable at the rate specified in Section 7 of the Judgments Act, which is 5 per cent per annum. The BVI IAC rules provides for pre and post-award compound interest if the parties agree.

How may a tribunal seated in your jurisdiction proceed if a party does not participate in the arbitration?

Pursuant to Section 51(1) of the Arbitration Act, if the claimant fails to communicate its statement of claim,

the tribunal will terminate the proceedings. If the respondent fails to communicate its statement of defence, the tribunal will continue the proceedings without treating such failure in itself as an admission of the claimant's allegations. If any party fails to appear at a hearing or produce documentary evidence, the tribunal may continue the proceedings and make an award on the evidence before it. The tribunal should be alert to potential challenges to the award by the non-participating party on the grounds of procedural unfairness or serious irregularity, and ensure that the non-participating party is informed and served with all documents.

Are arbitrators immune from liability?

Under Section 101 of the Arbitration Act, the arbitrators and employees or agents of the tribunal are not liable for an act or omission in relation to the exercise or performance of the tribunal's arbitral functions, unless it is proved that the act or omission was in bad faith. In determining liability, account shall be taken of whether the act or omission:

- Is of a material nature
- Has caused disadvantage to any of the parties to the arbitral proceedings

The role of the court during an arbitration

Will the court in your jurisdiction stay proceedings and refer parties to arbitration if there is an arbitration agreement?

Section 18 of the Arbitration Act provides for a mandatory stay of court proceedings (except applications to appoint a liquidator to an insolvent company) in support of arbitration, which must be granted unless the arbitration agreement is null, void or inoperable.

In line with the BVI courts' pro-arbitration stance, there is great reluctance to permit parties to litigate matters which are subject to an arbitration agreement.

Does the court in your jurisdiction have any powers in relation to an arbitration seated in your jurisdiction and/or seated outside your jurisdiction? What are these powers? Under what conditions are these powers exercised?

Section 53 of the Arbitration Act incorporates Article 27 of the UNCITRAL Model Law in relation to court assistance in the taking of evidence. The arbitral tribunal or a party with the approval of the tribunal may request assistance from a competent court. The court may order that a person attend before a tribunal to give evidence or produce documents or other evidence.

Can the parties exclude the court's powers by agreement?

The parties are free to agree on the extent of court assistance during the proceedings.

Costs

How will the tribunal approach the issue of costs?

Under Section 67 of the Arbitration Act, the tribunal may make an award of costs of the arbitral proceedings. It also has the power to review the award of costs within 30 days of the date of the award if, when making the award, it was not aware of any information relating to costs, including any offer of settlement, which it should have taken into account. Alternatively, the parties can agree for costs to be assessed by the court.

The BVI International Arbitration Centre Rules also empower the tribunal to award costs including pre and post-award simple or compound interest.

Are there any restrictions on what the parties can agree in terms of costs in an arbitration seated in your jurisdiction?

No, there are no restrictions on what the parties can agree.

Funding

Is third-party funding permitted for arbitrations seated in your jurisdiction?

In September 2020, Justice Jack approved a litigation funding agreement in the first written judgment of its

kind in the British Virgin Islands in *In the Matter of Exential Investments Inc (in Liquidation)*. Although the BVI courts had previously expressed support in general terms for third-party litigation funding, this is the first time that the BVI Commercial Court has issued a written judgment which can be relied on in other cases.

It is thus likely that third-party funding will be permitted for arbitrations seated in the British Virgin Islands.

Award

What procedural and substantive requirements must be met by an award?

Section 65 of the Arbitration Act adopts Article 31 of the UNCITRAL Model Law, requiring the award to be made in writing and to be signed by the arbitrator. The award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30. The award must state the date and the place of the arbitration, as determined in accordance with Article 20(1). After the award is made, a copy signed by the arbitrators in accordance with Article 20(1) shall be delivered to each party.

Must the award be produced within a certain timeframe?

No time limit is specified in the Arbitration Act.

Enforcement of awards

Are awards enforced in your jurisdiction? Under what procedure?

On 24 February 2014, the United Kingdom submitted a notification to the secretary general of the United Nations to extend the territorial application of the New York Convention to the British Virgin Islands with effect from 25 May 2014. The convention is set out in Part X of the Arbitration Act and, under Section 84 of the act, convention awards are enforceable in the territory in the same manner as they would be in any other convention country.

The process of recognition and enforcement of a New York Convention award under Sections 84 to 86 of the Arbitration Act is straightforward, very similar to the process under the English Arbitration Act 1996. The party seeking to enforce the award must produce:

- The original or a certified copy of the original award
- The original arbitration agreement or a certified copy of the original arbitration agreement
- If the award or arbitration agreement is not in English, a certified translation by an official translator

Under Section 85 of the Arbitration Act, permission to enforce a convention award will be granted on an application, which is usually without notice to the other party. The court does not have discretion to refuse permission to enforce and will issue an order confirming that the award will be recognised as a judgment or order of the court.

Under Section 81, a non-convention award may be enforced with permission of the court in the same manner and judgment as a judgment or order of the court that has the same effect.

With both New York Convention and non-New York Convention awards, it is for the party against which the award has been made to make representation to the court regarding a refusal to enforce. The court will refuse to enforce of its own volition only if the applicant fails to provide the original or certified copies of the arbitration agreement and the award. In *IPOC v LV Finance*, the Court of Appeal confirmed that the burden of proof rests with the party seeking to resist enforcement to prove one of the grounds for refusal in Section 34(2) (now Section 86(2) under the Arbitration Act 2013).

There are limited grounds on which the BVI courts can refuse to enforce an award. The BVI courts may refuse to enforce an award in any of the following circumstances:

- A party was under some incapacity
- The arbitration was not valid under the law to which the parties subjected it or under the law of the country in which the award was made

- The party against which the award was made was not given the proper notice of the appointment of the arbitrator or was unable to present its case
- The award deals with matters not falling within the terms of the submission to arbitration
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties
- The award has not yet become binding, or has been set aside or suspended by a competent authority of the country in which or under the law of which it is made
- The award is in respect of a matter that which is not capable of settlement under the laws of the British Virgin Islands
- It would be contrary to public policy to enforce the award
- The court considers it just to do so for any other reason (this is applied only in respect of a non-convention award)

Another option for enforcing an award in the British Virgin Islands is to show that the respondent company is unable to pay its debts as they fall due and appoint a liquidator under Section 162 of the Insolvency Act 2003. Although the liquidation process is a collective remedy for enforcing class rights, it can be an effective way of accessing a respondent's assets when it is refusing to pay a debt due under an award. Commencing liquidation proceedings can be a very effective way of putting pressure on a respondent to voluntarily comply with an award rather than engaging in an asset chase around the world. The decision whether to enforce or apply to the court to appoint liquidators is a tactical one, and caution should be taken with the liquidation approach, as it may be seen as an abuse of process in certain circumstances. The party seeking to appoint a liquidator will need to show that it has made demands for payment, but the respondent has failed to reply or comply.

Grounds for challenging an award

What are the grounds on which an award can be challenged, appealed or otherwise set aside in your jurisdiction?

A party may also apply to court to challenge an award under paragraph 4 of Schedule 2 of the Arbitration Act on the grounds of serious irregularity which has affected the tribunal, the proceedings or the award. 'Serious irregularity' has a wide definition and includes a failure:

- To treat the parties with equality
- To remain independent
- To act fairly and impartially as between the parties, giving them a reasonable opportunity to present their case
- To use procedures that are appropriate to the case, avoiding unnecessary delay and expense

If the parties have not opted into the option to a right of appeal in Schedule 2, then the only option open to them is to attempt to have the award set aside under Section 79 of the Arbitration Act.

The grounds for setting aside the award are similar to the grounds on which the BVI courts can refuse to enforce an award:

- A party was under some incapacity or the arbitration agreement was not valid under the law to which the parties subjected it or under the law of the country in which the award was made
- A party was not given the proper notice of the appointment of the arbitrator or was unable to present its case
- The award deals with matters not falling within the submission to arbitration
- The composition of the tribunal was not in accordance with the agreement of the parties
- The award is in respect of a matter that which is not capable of settlement under the laws of the British Virgin Islands

- It would be contrary to public policy to enforce the award

Are there are any time limits and/or other requirements to bring a challenge?

Yes, an application for setting aside under Section 79 of the Arbitration Act may not be brought once three months have elapsed from the date on which the party making that application received the award.

Are parties permitted to exclude any rights of challenge or appeal?

Yes, the parties have the options set out in Schedule 2 only if they have opted in.

Confidentiality

Is arbitration seated in your jurisdiction confidential? Is a duty of confidentiality found in the arbitration legislation?

BVI law has no statutory provisions relating to confidentiality in relation to arbitration proceedings. Accordingly, the matter is still regulated by the common law. The current position seems to be that both the arbitrator and the parties are bound by a general duty of confidentiality in relation to documents and information receiving during the proceedings (*Dolling-Baker v Merrett* [1990] 1 WLR 1205), although the scope of this duty of confidentiality has been questioned (*Esso Petroleum Resources Ltd v Plowman* (1994–1995) 183 CLR 10).

However, under Section 16 of the Arbitration Act, unless the parties agree, no party can disclose any information about the arbitral proceedings.

Typically, hearings in arbitration-related court proceedings conducted in accordance with the Arbitration Act are not held in open court, further safeguarding confidentiality.

Under Article 34 of the BVI International Arbitration Centre (IAC) Rules, the BVI IAC will not publish any award or part of an award without the prior written consent of all parties and the arbitral tribunal. However, an award may be made public with the consent of all parties or where and to the extent disclosure is required:

- Of a party by legal duty
- To protect or pursue a legal right
- In relation to legal proceedings before a court or other competent authority

Are there any exceptions to confidentiality?

The existence of the arbitral proceedings and the award can de disclosed:

- In enforcement proceedings
- Where required by law or to a professional
- To any other advisers of the party