

THE BVI IAC ARBITRATION RULES 2021 – “A STATEMENT OF INTENT FOR THE FUTURE”

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**Abstract**

*The British Virgin Islands [“the BVI”] is an asset holding jurisdiction for many international businesses. Companies incorporated in the BVI are often involved in international arbitrations administered by leading arbitral institutions. With the introduction of the BVI International Arbitration Centre [“BVI IAC”] and the BVI becoming a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [“New York Convention”] in 2013, it became possible to conduct arbitrations (involving BVI entities) with the seat in the BVI and under the governance of the BVI IAC Rules. The note provides an analytical review of the recently updated BVI IAC Arbitration Rules 2021[“Rules”]. In particular, the authors discuss the newly introduced procedure of the emergency arbitrator, expedited procedure, the joinder of third parties to an arbitration, procedures dealing with multiple arbitrations, introduction of the role of a tribunal secretary and other amendments. The comparative analysis of the Rules against the rules of other leading arbitration institutions will assist the readers in identifying the advantages of choosing the BVI IAC Arbitration Rules. The Rules have been characterised as “a statement of intent for the future”<sup>1</sup> due to the BVI IAC’s re-confirmed commitment to a transparent, timely, efficient, and fair resolution of complex cross-border disputes.*

**I. Introduction**

On November 16, 2021, the BVI IAC issued an updated set of arbitration rules which by default apply to all arbitrations commenced after that date, unless the parties have specifically agreed otherwise.<sup>2</sup> The Rules build on the earlier version of the BVI IAC Arbitration Rules, 2016 [“2016 Rules”], which were based on the 2010 United Nations Commission on International Trade Law Arbitration Rules with amendments. Amongst the distinguished features of the 2016 Rules, which continue to be maintained in the new Rules, are provisions for enhanced confidentiality of BVI IAC arbitrations and the express ability of a party to apply for interim measures to courts in support of arbitration without seeking permission from the arbitral tribunal (and thereby maintaining their ability to create an element of surprise in the proceedings).<sup>3</sup>

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<sup>1</sup> British Virgin Islands International Arbitration Centre (BVI IAC) Arbitration Rules, 2021, Foreword by John Beechey CBE [hereinafter “BVI IAC Rules”].

<sup>2</sup> *Id.* art. 1(2).

<sup>3</sup> *Id.* Preamble.

The Preamble of the Rules records the commitment of the BVI IAC to transparent governance and Greener Arbitration. With the BVI IAC proudly joining the list of signatories of the Green Pledge,<sup>4</sup> the Rules proclaim the BVI IAC's commitment to take responsibly its environmental impact and facilitate virtual hearings and meetings. In practice, this is implemented by introducing a requirement to submit electronic copies of documents, maintaining, and storing files in electronic form, introducing remote hearings and meetings as an alternative option to live arbitrations, and reducing paper document flow where possible.<sup>5</sup>

The 2016 Rules, initially comprising of the Arbitration Rules (including the Preamble) and Annexes, have been amended and supplemented by three new Appendices and one new Annex. The new Appendices deal with the procedure of the emergency arbitrator (Appendix 1), the expedited procedure (Appendix 2) and the tribunal secretaries (Appendix 3). The Annexes (which may be amended from time to time by the BVI IAC) have been updated and now include the BVI IAC Model Arbitration Clause and the Model Clause for Expedited Procedure (Annex A), the Model Statement of impartiality, independence and availability of the arbitrator, the emergency arbitrator and the tribunal secretary (Annex B), the Schedule of fees and costs (Annex C) and provisions about a newly established BVI IAC Arbitration Committee, whose main role is “*to oversee the consistent application of the Rules and to monitor their use in practice*” (Annex D).<sup>6</sup> The BVI IAC may supplement the Rules by issuing practice notes.<sup>7</sup>

This note discusses the major amendments, including the introduction of an emergency arbitrator procedure under Part II, expedited procedure under Part III and tribunal secretaries under Part IV, and joinder, consolidation, single arbitration with multiple contracts and concurrent arbitrations under Part V. Other notable amendments are discussed in Part VI before concluding with a finding regarding the benefits of this updating of the Rules.

## II. The Emergency Arbitrator

The introduction of an emergency arbitrator procedure is a welcome development and is in line with the introduction of such procedure by the arbitration rules of the leading arbitral institutions. It also fits well with the BVI's position as an asset holding jurisdiction, where urgent relief is often required, and where appropriate, granted. The emergency arbitrator procedure enables a party to seek urgent interim or conservatory measures before the formation of an arbitral tribunal without recourse to local courts and while maintaining confidentiality and privacy of the process. Provisions about the emergency arbitrator are consolidated in Appendix 1 and apply automatically if the arbitration agreement invoking the Rules was signed after the date when the Rules came into force unless the

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<sup>4</sup> The Green Pledge, CAMPAIGN FOR GREENER ARBITRATIONS, *available at* <https://www.greenerarbitrations.com/greenpledge>.

<sup>5</sup> *See, e.g.*, BVI IAC Rules, arts. 1(8)(a), 1(8)(h) & 1(8)(j).

<sup>6</sup> BVI IAC Rules, Foreword by John Beechey CBE.

<sup>7</sup> *Id.* Preamble. As of July 25, 2022, the BVI IAC has not yet issued any practice notes.

parties have opted out from Appendix 1. In all other circumstances, the parties may expressly agree to apply Appendix 1 to the arbitration agreement.<sup>8</sup>

Although the Rules do not expressly state whether the emergency arbitrator is an arbitrator and/or part of an arbitral tribunal, there is no provision in the Rules which would suggest that this is not the case. With this in mind, while the Rules do clearly state that the emergency arbitrator is appointed by the Chief Executive Officer [“CEO”] of the BVI IAC, the procedure that the CEO should follow when making the choice is not expressly set out.<sup>9</sup> Presumably, general provisions set out in Article 7 of the Rules about the appointment of an arbitrator would apply, and the emergency arbitrator would be appointed by the CEO upon recommendation of the Arbitration Committee and with the assistance of the Secretariat.<sup>10</sup> Although the BVI IAC does maintain a register of arbitrators as required by the BVI Arbitration Act, 2013 [“Act”],<sup>11</sup> the CEO is not obliged to choose the emergency arbitrator from the panel of arbitrators. Total flexibility is thereby maintained.

The Rules require that the appointment of the emergency arbitrator be made no later than two days from the receipt of the complete request for the emergency arbitrator.<sup>12</sup> The emergency arbitrator is then obliged to render a decision within 14 days from receipt of the file, unless the time is extended either by the parties’ agreement or by the Secretariat upon request of the emergency arbitrator.<sup>13</sup> Such commitment to a tight timetable puts the BVI IAC emergency arbitrator procedure in line with other leading arbitration rules.

The Rules expressly state that the emergency decision shall be made in the form of an order and contain provisions which discourage interpreting the emergency decision as being an arbitral award.<sup>14</sup> For example, while the Rules do require the emergency decision to provide reasons and prescribe that the decision shall be binding upon the parties,<sup>15</sup> there is no provision stating that the decision is final or that the emergency decision must indicate the seat of the emergency proceedings, both being immanent characteristics and requirements of an award.<sup>16</sup> The Rules expressly provide that the parties voluntarily undertake to comply with the emergency decision without delay suggesting that the nature of the emergency decision is contractual.<sup>17</sup> Lack of finality of the emergency decision is further reconfirmed by the provisions empowering the emergency arbitrator to revoke, modify or terminate the order upon a request by a party if there is a change in circumstances; the emergency decision may be revoked, modified or terminated by the arbitral tribunal and is not binding on the tribunal.<sup>18</sup> The

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<sup>8</sup> BVI IAC Rules, app. 1, art. 1.

<sup>9</sup> *Id.* app. 1, art 4.

<sup>10</sup> *Id.* art. 7(1).

<sup>11</sup> British Virgin Islands Arbitration Act, 2013, § 100(1).

<sup>12</sup> BVI IAC Rules, app. 1, art. 4(1).

<sup>13</sup> *Id.* app. 1, art. 7(1).

<sup>14</sup> *Id.* app. 1, art. 7(3).

<sup>15</sup> *Id.* app. 1, arts. 7(3) & 8(1).

<sup>16</sup> *Id.* arts. 39(2) & (6).

<sup>17</sup> *Id.* app. 1, art. 8(1).

<sup>18</sup> *Id.* app. 1, art. 8(5).

emergency decision automatically ceases to be binding if the notice of arbitration is not submitted 14 days after the request for the emergency decision was made.<sup>19</sup>

In some jurisdictions, such as Singapore and Hong Kong, the introduction of the emergency arbitrator was accompanied by statutory amendments of respective arbitration laws to provide a statutory footing to the procedure. In Singapore, the International Arbitration Act, 1994 was amended to expand the definition of an “*arbitral tribunal*” to cover the “*emergency arbitrator*”,<sup>20</sup> and in Hong Kong, the Arbitration Ordinance contains a specific regime for enforcement of the emergency arbitrator’s decision.<sup>21</sup> However, other jurisdictions, such as England, India and the United States, made no amendments giving way for precedents to shape the law. The question of the scope of applicability of the arbitration law to the emergency proceedings was recently considered by the Supreme Court of India and is far from theoretical because simply amending the definition of an arbitral tribunal may not be sufficient for the purposes of determining how (in scope) the arbitration law applies to the emergency proceedings.<sup>22</sup> It is yet to be seen whether the Act will be amended in due course to compliment the regime of the emergency arbitrator by extending the definition of the “*arbitral tribunal*” to the “*emergency arbitrator*”, and/or clarifying the scope of application of the BVI Arbitration Act to the emergency proceedings and/or introducing specific provisions to deal with enforcement of the emergency relief in the BVI.

Last, but not the least, the party invoking the emergency proceedings is obliged to pay a fee of USD 28,000 to cover the administrative and emergency arbitrator’s costs associated with the emergency arbitrator proceedings.<sup>23</sup>

### III. The Expedited Procedure

Another key development relates to the introduction of the expedited procedure. The expedited procedure may be invoked if the arbitration agreement was concluded after the Rules came into force and if the parties have not opted out of the expedited procedure.<sup>24</sup>

Unlike the emergency arbitrator procedure, where urgency is key and the emergency proceedings take place within a short space of time before the formation of an arbitral tribunal, the expedited procedure is designed to expedite the entire arbitration and affects every stage of arbitration starting with the composition of an arbitral tribunal and ending with the issue of the award. Having said that, the Secretariat is only entitled to abridge the time limits set by the Rules, but not the contractually agreed deadlines.<sup>25</sup> With regards to the latter, the parties by adopting the Rules, expressly agree that Appendix 2 and the expedited procedure (including any time limits set out therein) shall prevail over the

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<sup>19</sup> *Id.* app. 1, art. 8(3)(b).

<sup>20</sup> International Arbitration Act, 2020 Rev. Ed., § 2(1) (Sing.).

<sup>21</sup> Arbitration Ordinance, Cap. 609, Part 3A (H.K.).

<sup>22</sup> Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd., 2022 (1) SCC 209.

<sup>23</sup> BVI IAC Rules, app. 1, art. 10(1).

<sup>24</sup> *Id.* arts. 2(3)(a) & 2(3)(b).

<sup>25</sup> *Id.* app. 2, art. 4(1).

arbitration agreement.<sup>26</sup> However, this leaves the parties with a need to agree on any other time limits which might have been specifically agreed upon and not overridden by the Rules. Another important provision overriding the arbitration agreement relates to the composition of an arbitral tribunal. By default, the dispute shall be decided by a single arbitrator, unless the Arbitration Committee determines otherwise.<sup>27</sup> The long stop date provided in Appendix 2 for rendering the award is six months from the moment the Secretariat transmitted the arbitration file to the arbitral tribunal.

Under the terms of the Rules, the arbitration proceedings may be expedited only in a prescribed set of circumstances: (i) if the value of the arbitration (including claim, counter-claim and cross-claim) is less than USD 4.5 million, (ii) if the parties so agree or (iii) if there is an exceptional urgency as determined by the Arbitration Committee after considering the circumstances of the case and hearing the views of the parties.<sup>28</sup> The expedition of the arbitration procedure due to a reason of exceptional urgency is only available if the application is filed before the formation of an arbitral tribunal. In all circumstances described above and at any time of the proceedings the Arbitration Committee may decide that it is not appropriate to apply the expedited procedure.<sup>29</sup> It is not expressly stated in the Rules what test the Arbitration Committee shall apply, but most likely the Arbitration Committee shall be guided by the overriding objective of the expedited procedure, being the provision of a procedure that is “*timely, cost effective and fair, considering especially the amount in dispute and the complexity of the issues or facts involved*”.<sup>30</sup>

Appendix 2 sets out several important procedural measures guaranteeing that the proceedings shall proceed in a timely and efficient manner. For example, the parties are not allowed without the tribunal’s permission to submit new claim(s) or counterclaim(s).<sup>31</sup> The tribunal is expressly given the power to limit document production, length, scope and number of written submissions and witness and expert evidence.<sup>32</sup> Other powers of the sole arbitrator aimed at controlling the conduct of arbitration include the power to determine the dispute on paper without holding a hearing and based on documentary evidence without hearing from the witnesses and experts.<sup>33</sup> This is in stark difference from the usual position when the arbitral tribunal is obliged to hold a hearing at a request of a party.<sup>34</sup>

Finally, unlike the emergency proceedings which end up with an “*order*” which is as good as the parties’ voluntary compliance, the expedited proceedings are concluded by the issue of an arbitral award, which is as good as the final arbitral award, but which may be confined to summary reasons.<sup>35</sup>

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<sup>26</sup> *Id.* app. 2, art. 1(1).

<sup>27</sup> *Id.* app. 2, art. 3(1).

<sup>28</sup> *Id.* app. 2, art. 2(1).

<sup>29</sup> *Id.* app. 2, art. 2(4).

<sup>30</sup> *Id.* app. 2, art. 1(2).

<sup>31</sup> *Id.* app. 2, art. 4(2).

<sup>32</sup> *Id.* app. 2, art. 4(4).

<sup>33</sup> *Id.* app. 2, art. 4(5).

<sup>34</sup> *Id.* art. 18(4).

<sup>35</sup> *Id.* app. 2, art. 5(2).

#### IV. Tribunal Secretaries

The Rules formally introduce the role of a tribunal secretary, who in appropriate circumstances may be appointed at the discretion of an arbitral tribunal.<sup>36</sup> However, it is open for a party to object to the appointment of a tribunal secretary in which case the tribunal secretary shall not be appointed.<sup>37</sup>

The role of a tribunal secretary is confined to organisational, administrative and redactional tasks and under no circumstances the tribunal is permitted to delegate its decision-making functions to a tribunal secretary.<sup>38</sup> The tribunal secretary shall work under the tribunal's instructions and continuous supervision, it must submit a declaration of impartiality, independence and availability and comply with a duty of disclosure, which applies to the tribunal secretary as it applies to an arbitral tribunal.<sup>39</sup>

The tribunal secretary's remuneration is by default paid out of the tribunal's fees unless the parties agree otherwise. But in any event, the hourly rate charged by the tribunal secretary must not exceed USD 250 per hour.<sup>40</sup>

#### V. Joinder, Consolidation, Single Arbitration with Multiple Contracts and Concurrent Arbitrations

The Rules have been amended to allow, with all parties' consent, to join an additional third party to the arbitration proceedings, consolidate pending arbitration proceedings, submit a single notice of arbitration in respect of claims arising out of multiple contracts, and to conduct concurrent arbitral proceedings. This is an important and necessary development given that these questions are not regulated by the BVI Arbitration Act. While the Rules recognise and uphold the consensual theory for the joinder and various procedures dealing with multiple arbitrations, in certain circumstances, as provided in the Rules, upon recommendation of the Arbitration Committee or the arbitral tribunal (as the case may be) the steps can be taken without consent of all the parties involved.<sup>41</sup> The Rules provide that the parties waive, insofar as such waiver can be validly made, any right to object to the validity and/or enforcement of an arbitral award if such objection is made in relation to the use of any of the above procedures.<sup>42</sup>

Provisions relating to joinder and multiple arbitrations are of great use and assistance when disputes arise involving complex offshore structures with multiple companies undertaking and/or guaranteeing the performance of contracts. Especially, these procedures have proven to be of great importance in construction arbitrations where often the transactional relationship is structured in such a way that

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<sup>36</sup> *Id.* app. 3, art. 1(1).

<sup>37</sup> *Id.* app. 3, art. 1(2)(d).

<sup>38</sup> *Id.* app. 3, art. 3.

<sup>39</sup> *Id.* app. 3, arts. 1(2)(b), 2 & 3(1).

<sup>40</sup> *Id.* app. 3, art. 5(1).

<sup>41</sup> *Id.* arts. 32(8), 33(6), 34(3) & 35(2).

<sup>42</sup> *Id.* art. 37(2)

multiple companies perform different functions at different stages of complex large construction projects.

## VI. Other Notable Amendments

Having considered the major developments, the importance of other amendments should not be overlooked or underestimated, and hence these developments have been discussed below.

Importantly, the Rules now contain an express power of the BVI IAC to interpret “*all provisions of the Rules*” and grant the arbitral tribunal the power to interpret provisions relating to its powers and duties.<sup>43</sup> The Rules provide that the arbitral tribunal’s interpretation of its powers and duties shall prevail over the interpretation by the BVI IAC.<sup>44</sup>

Another important new provision relates to the effect of the decisions made by the BVI IAC in relation to administered arbitrations. The Rules state that the BVI IAC is not obliged to give reasons for its decisions and that such decisions are final, unless determined otherwise by the BVI IAC.<sup>45</sup> This provision, not being unique to arbitration rules in general,<sup>46</sup> brings into question the nature of the decisions of the BVI IAC and opens up a debate regarding whether or not the parties have mandated the BVI IAC to make any final decisions regarding any issues in dispute. The better view would be to treat such decisions of the BVI IAC as administrative by nature and not relating to the substance of the dispute, noting their finality as being an indication to the supervising court that decisions made by the BVI IAC and not taken lightly and should be respected by the court. It is yet to be seen whether such a view will be upheld by the courts in practice.

The Rules introduce a duty to disclose to the Secretariat, the arbitral tribunal (if constituted) and the opposing party (or other parties) the existence and identity of the third-party funder.<sup>47</sup>

The Rules contain an express waiver by the parties of “*their rights to any form of recourse or defence in respect of the setting-aside, enforcement and execution of any award, insofar as such waiver can validly be made*”.<sup>48</sup> However, the Rules do maintain that if a waiver of execution concerns a waiver of immunity, such waiver must be explicitly expressed.<sup>49</sup>

There is a helpful clarification in the Rules that a party which paid the other party’s share of the deposit may apply for an arbitral award seeking reimbursement of the respective share of the deposit.<sup>50</sup>

Finally, it is worthwhile repeating that the Rules establish the Arbitration Committee, which consists of a President, three Vice-Presidents and members and whose main role is to ensure consistent

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<sup>43</sup> *Id.* art. 1(5).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Id.* art. 1(6).

<sup>46</sup> *See, e.g.*, a similar provision in London Court of International Arbitration (LCIA), Arbitration Rules, 2020, art. 29.

<sup>47</sup> BVI IAC Rules, art. 5.

<sup>48</sup> *Id.* art. 37(3).

<sup>49</sup> *Id.* art. 1(7).

<sup>50</sup> *Id.* art. 46(4).

application of the Rules.<sup>51</sup> This mandate is implemented by the involvement of the Arbitration Committee in the composition of the arbitral tribunal, challenge of arbitrators, making a determination when joinder and procedure relating to multiple arbitrations cannot be agreed by all the parties, determination of the seat of the emergency proceedings if the parties are unable to agree, and deciding whether or not the exceptional urgency is made out if a party is applying for an expedited procedure. Importantly, the Arbitration Committee is not obliged to give reasons for its decisions, unless so required by the Rules, and its decisions are final.

## VII. Conclusion

The 2021 Rules introduce several procedures all of which aim to enhance the efficiency and transparency of the dispute resolution process and equip the parties with the necessary tools to resolve their disputes timely, cost-effectively, and fairly. Now the parties that have agreed to resolve a dispute under the BVI IAC Rules may apply for emergency measures before the constitution of an arbitral tribunal without compromising the confidentiality and privacy that arbitral procedure has to offer. The parties are free to agree to expedite the arbitral proceedings, and the Rules aim to fast-track certain types of proceedings that would benefit from the expedition. The amendments provide clear rules for joinder, consolidation, single, and concurrent arbitrations. Other amendments, such as the commitment of the BVI IAC to Greener Arbitration, the introduction of a role of a tribunal secretary, the establishment of the Arbitration Committee, and imposing a duty of disclosure of the third-party funder indicate the Centre's growth, and maturity to administer complex arbitrations with transparency and commitment to uphold modern values of efficient, cost-effective, and fair alternative dispute resolution mechanism.

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<sup>51</sup> *Id.* Annex D.