VIAC Rules of Investment Arbitration come into force; new rules regulate counterclaims, third-party funding, security for costs and expedited proceedings, and provide for limited transparency

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The Vienna International Arbitral Centre (VIAC) has adopted new arbitration rules tailored specifically to investment disputes.

The VIAC Rules of Investment Arbitration ("The Rules"), which entered into force on July 1, 2021, continue an increasing trend among arbitral institutions to offer separate regulation for investment arbitration proceedings. (For example, SIAC adopted such rules in 2017, the SCC Arbitration Rules contain a separate appendix applicable to investment-treaty arbitration, and the 2021 ICC Arbitration Rules include several provisions which only apply to treaty-based claims.)

Below, we highlight some of the most interesting features of The Rules, including:

- A clarification that consent to arbitration under the Rules implies a waiver of the state's jurisdictional immunity, but not of immunity from execution;
- An explicit provision on counterclaims;
- A rule imposing the disclosure of the existence and identity of a third-party funder (TPF);
- Explicit rules on joinder and consolidation of arbitration proceedings;
- A provision allowing the tribunal to decide whether *amicus curiae* submissions should be accepted, but granting non-disputing treaty parties a right to make similar submissions;
- Rules providing that all arbitrator challenges will be decided by the VIAC Board, while challenges to party-appointed experts will be decided by the tribunal;
- A provision allowing for expedited proceedings to address arguments that the claims are manifestly outside the tribunal's jurisdiction, manifestly inadmissible or manifestly without legal merit;
- Broad procedural powers for the arbitral tribunal, including the power to order interim measures and security for costs;
- Limited transparency provisions, preventing third-parties from attending hearings, and allowing VIAC to merely publish certain procedural details, as well as award excerpts; and
- Provisions allowing for expedited arbitration proceedings.

As VIAC has had some prior engagement with investment disputes – its experience having primarily been limited to administering contract-based disputes involving state entities and assisting *ad hoc* tribunals in investment disputes – The Rules signal an attempt by VIAC to further tap into the growing demand for an institution administering investment disputes with expertise in the CEE/SEE and CIS regions.

According to VIAC Board member Claudia Annacker (who led the working group in charge of the drafting process), The Rules "*feature a number of innovations and modifications to accommodate the fundamental differences between commercial and investment arbitration*" and are aimed at tackling "*two major concerns of users of investment arbitration, duration and cost*".

Simultaneously with the arbitration rules, VIAC also adopted rules for investment mediation ("The Mediation Rules"), which we also briefly discuss.

Rules have broad scope of application and provide for waiver of jurisdictional immunity

The introductory note accompanying The Rules provides that they are intended to apply to investment disputes involving a "State, a State-controlled entity or an intergovernmental organization". The Rules themselves, however, do not define what constitutes and investment dispute, but merely state that an agreement to apply The Rules may be expressed "in a contract, treaty, statute or other instrument" (or an offer contained therein that is later accepted by the other party).

While an agreement to apply The Rules implies that the parties agree to have the dispute administered by VIAC, under The Rules, the VIAC Board may refuse to administer the arbitration if the arbitration agreement "deviates fundamentally from and is incompatible with the Vienna Investment Arbitration Rules".

The Rules moreover provide that a party's agreement to The Rules is deemed to include a waiver from immunity from jurisdiction regarding proceedings relating to the arbitration. Waiver of immunity from enforcement of the award, however, must be expressed separately.

Counterclaims are allowed, but tribunal has some discretion

The Rules also explicitly provide for the possibility of raising counterclaims. However, the tribunal is authorized to decide that the counterclaim should be addressed in separate proceedings in case:

- the parties are not identical; or
- a counterclaim submitted after the answer to the statement of claim would cause substantial delays in the main proceedings.

Existence of TPF and funder identity are to be disclosed; tribunal may order further disclosures

The Rules explicitly regulate TPF, defining a third-party funding agreement as: "any agreement entered into with a natural or legal person who is not a party to the proceedings or a party representative (Article 13), to fund or provide any other material support to a party, directly or indirectly financing part or all of the costs of the proceedings either through a donation or a grant, or in exchange for remuneration or reimbursement that is wholly or partially dependent upon the outcome of the proceedings or in return for any premium payment".

(This provision appears to exclude funding received from a party's counsel. In contrast, ICSID's latest (and potentially last) working paper deleted a similar exclusion contained in previous drafts, thus putting funding counsel on the same footing as other third-party funders; see here.)

Under The Rules, parties are to disclose both the existence of funding and the identity of the funder either in their statement of claim, or in their answer to the statement of claim (or immediately after concluding the arrangement).

In addition, The Rules provide that the tribunal may, if it deems it necessary, order the disclosure of specific details relating to the funding arrangement, the funder's interest in the outcome of the proceedings, and/or whether the funder has committed to undertake adverse costs liability.

(The 2021 ICC Rules similarly provide for an obligation to disclose only the existence and the identity of the funder. In addition to these two obligations, ICSID's Working Paper includes an obligation to disclose

the funder's address, while the UNCITRAL Secretariat's Initial Draft on the Regulation of Third-Party Funding envisions even broader discloser obligations.)

The Rules allow for joinder and consolidation of proceedings

In contract-based proceedings, The Rules allow that a third party may be joined to the proceedings by a tribunal, upon hearing the parties and assessing all relevant circumstances.

The Rules likewise provide that two or more VIAC-administered proceedings can be consolidated if they have the same place of arbitration and:

- the parties agree to the consolidation; or
- the tribunals hearing the cases consist of the same arbitrator(s).

Non-disputing treaty parties have a right to make submissions, while non-disputing party submissions may be allowed

The Rules follow the increasing trend in investment arbitration of allowing submissions by non-disputing and non-disputing treaty parties.

In disputes that are based on treaties or statutes (but not in contract-based disputes), tribunals shall decide (and may also invite) requests by non-disputing parties "to make written submissions on a factual or legal issue within the scope of the dispute submitted to arbitration", after hearing all the parties and assessing all relevant circumstances.

In contrast, The Rules provide that a "non-disputing treaty party shall have the right to make written submissions on questions of the interpretation of a treaty at issue in the dispute and pursuant to which the dispute has been submitted to arbitration".

According to The Rules, the tribunal may grant the non-disputing party or non-disputing treaty party access to relevant submissions and documents from the proceedings.

(Provisions regulating the participation of non-disputing parties and non-disputing treaty parties also appear in the SIAC Investment Rules and Appendix III to the SCC Rules.)

Arbitrator challenges are to be decided by the VIAC Board

The Rules do not impose any requirements with respect to who may act as arbitrator, apart from the usual requirements of impartiality and independence (provided that the parties have not prescribed additional qualification requirements). However, unless the parties agree otherwise, the arbitrators are to have nationalities that are different from those of the parties. The arbitrators are also required to keep the information acquired in the exercise of their duty as confidential. Notably, The Rules do not contain a code that would regulate arbitrator conduct in greater detail. (Readers may recall that ICSID and UNCITRAL recently released an extensive Draft Code of Conduct for arbitrators.)

Absent the parties' agreement, cases will be heard by tribunals of three arbitrators. However, where the amount in dispute is less than 10 million EUR, the case "shall be decided by a sole arbitrator" (unless the VIAC Board deems that the complexity of the case requires a three-member tribunal).

Arbitrators may be challenged in case of justifiable doubts as to their independence or impartiality, or failure to meet the required qualifications. Challenges will be decided by the VIAC Board, rather than the co-arbitrators. Notably, the tribunal (including the challenged arbitrator) may continue the arbitration

while the challenge is pending, but may not issue an award before the challenge is decided.

Another interesting feature of The Rules is the possibility for the VIAC Board to remove arbitrators from office due to their incapacity or failure to perform their duties, either upon the request from a party, or at its own behest.

Tribunal-appointed experts can be challenged

The Rules also contain a provision explicitly allowing, by analogy to arbitrator challenges, for tribunal-appointed experts to be challenged. Challenges against experts are to be decided by the tribunal.

Rules allow for early dismissal of claims

Under The Rules, the tribunal's jurisdiction may be challenged no later than at the date of the time-limit set for the first pleading on the merits. While later objections are barred, they may be admitted if the tribunal deems the delay to be justified.

Notably, The Rules provide for the early dismissal of claims, counterclaims and defenses if they are:

- manifestly outside the tribunal's jurisdiction;
- manifestly inadmissible; or
- manifestly without legal merit.

(Early dismissal on essentially the same grounds is also envisioned in the SIAC Investment Rules.)

Applications for early dismissal are to be filed within forty five days of the tribunal's constitution or the submission of the answer to the statement of claim, whichever is earlier. It is within the tribunal's discretion to decide whether an application for early dismissal is to proceed; if the application is allowed to proceed, then the tribunal is to hand down its decision within sixty days of receiving the last written submission on the matter.

Tribunal is given hands-on role in conducting proceedings and seeking evidence

The Rules moreover explicitly provide for a more hands-on role for the tribunal, allowing the arbitrators to "collect evidence, question parties or witnesses, request the parties to submit evidence, and call experts" on their own initiative.

Tribunal may order interim measures and security for costs

The Rules further authorize the tribunal to order interim or conservatory measures (unless the parties have agreed otherwise). Such measures may be ordered after all the parties have been heard, and the tribunal may require a party to provide adequate security in relation to the ordered measure. Notably, under The Rules, this procedure does not prevent a party from seeking parallel measures from the competent national authorities in pursuit of interim or conservatory measures.

In addition, the tribunal may order that a party bringing a claim or counterclaim provide security for costs, provided that the party requesting such security demonstrates "cause that the recoverability of a potential claim for costs is, with a sufficient degree of probability, at risk". Failure to comply with the tribunal's order on security for costs may result in the suspension or termination of proceedings.

Hearings are to be closed to the public

Failing an agreement by the parties, The Rules designate that it is for the tribunal to decide if the proceedings will be conducted orally or in writing. However, if the parties have not explicitly excluded an oral hearing, then the tribunal is to hold a hearing (whether in person or by other means) if either party so requests.

Notably, hearings will not be open to the public. (A similar confidentiality-oriented approach has been adopted in the SIAC Investment Rules.)

The Rules allow for publication of limited information and anonymized awards

The Rules also provide for some limited transparency of arbitration proceedings.

The Rules state that, by choosing The Rules, the parties agree that VIAC may publish some information on the arbitration proceedings "in the public interest". However, the information that can be published is limited to "the nationality of the parties, the identity and nationality of the members of the arbitral tribunal, the date of commencement of the arbitration, the instrument under which the arbitration has been commenced, and whether the proceedings are pending or have been terminated".

Likewise, The Rules authorize VIAC to publish anonymized summaries or extracts of decisions and awards on its website, or in its own publication or legal journals.

(A comparable provision on the publication of certain information and redacted award summaries can also be found in the SIAC Investment Rules. In contrast, ICSID's latest working paper contains broader transparency provisions, stating that the parties to the arbitration are deemed to have consented to the publication by ICSID of arbitral awards, supplementary decisions, rectification, interpretation, revision and annulment decisions, and that procedural orders and decisions shall be published – after redactions.)

Parties may choose expedited proceedings

Finally, The Rules envision the possibility of expedited proceedings if the parties so agree "no later than the submission of the answer to the statement of claim".

Such expedited proceedings are to be conducted with stricter time limits, and they are to be heard by a sole arbitrator (unless otherwise agreed by the parties).

In expedited proceeding, the tribunal is to render the final award within six months after receiving the case file (as opposed to the usual deadline of six months after the last hearing or the filing of the last authorized submission, whichever comes later). To facilitate an expedient resolution of the dispute, The Rules provide for a number of adjustments to the usual process:

- only one further written submission shall be filed following the statement of claim and the answer to the statement of claim;
- all factual arguments are to be made in the written submissions with all written evidence attached to the submission;
- only one single hearing will be held, if requested by a party or deemed necessary by the tribunal;
- there will be no written submissions after the hearing.

Mediation Rules also come into force

The Rules were adopted hand in hand with The Mediation Rules, which likewise entered into force on July 1, 2021.

The Mediation Rules have a similar scope of application, and designate the procedure for conducting mediation of investment disputes under the auspices of VIAC.

Among other things, The Mediation Rules allow parties to commence or continue other legal or arbitral proceedings irrespective of the mediation process, and provide that the sessions with the mediator will not be public.

The Mediation Rules moreover oblige the individuals involved in the mediation process to treat the information they obtain as confidential and prohibit the use of documents obtained during the mediation process (that would not have otherwise been obtained) from being used in subsequent legal or arbitral proceedings. However, the very existence of proceedings pursuant to The Mediation Rules will not be treated as confidential.