Speed and cost to the fore for VIAC and DIS

Naomi Jeffreys - 17 May, 2018

This year's updates to the rules of the Vienna International Arbitration Centre and the German Arbitration Institute reflect the changing priorities of arbitral institutions.

Earlier this year, the **Vienna International Arbitration Centre** (VIAC) and the **German Arbitration Institute** (DIS) joined leading arbitral institutions, including the **ICC International Court of Arbitration** (ICC), the **Arbitration Institute of the Stockholm Chamber of Commerce** (SCC), the **London Court of International Arbitration** (LCIA), and others, by updating their arbitral rules.

International arbitration has been evolving, with a particular focus on making it more appealing to clients, something that was reflected on by lawyers from **Clyde & Co**, **Norton Rose Fulbright**, **King & Wood Mallesons** and **Wilmer Cutler Pickering Hale & Dorr** when they provided an update on key trends at last month's *CDR* Spring Arbitration Symposium.

VIAC'S NEW RULES

On 1 January a new version of the VIAC Rules of Arbitration and Mediation entered into force, following approval from the Extended Presiding Committee of the Austrian Federal Economic Chamber in November 2017.

Some important new features include that the institution will also administer purely domestic cases, case management of all new proceedings will be administered electronically and a specific requirement that arbitrators, parties, and their representatives shall conduct proceedings in an efficient and cost-effective manner.

Perhaps unsurprisingly, gender diversity is also tackled in the new rules at VIAC, which states that although the rules refer only to one gender, in practice they should be applied in a gender-specific manner.

Inken Knief, a partner at **Hogan Lovells** in Germany, tells *CDR*: "It is a positive step but in itself not sufficient to increase the number of female arbitrators in VIAC arbitrations. This will require a bigger cultural change. However, already at this stage, there is a whole number of leading female practitioners involved in VIAC arbitrations and in the VIAC administration."

She adds: "I also very much welcome the fact that institutions like the VIAC and the LCIA provide detailed information on their appointees including their gender."

Franz Schwarz, vice chair of WilmerHale's international arbitration practice group in Germany and vice president of the VIAC board, notes: "Maximising diversity in arbitral appointments is a top policy priority for the VIAC. In 2017, some 50% of all institutional appointments made by the VIAC board were women arbitrators, a much higher percentage than other

leading arbitral institutions and unfortunately a much higher percentage than nominations put forward by the parties themselves. We have also taken significant transparency measures in this regard by publishing the identity of all arbitrators serving under the VIAC Rules and by publishing extensive statistics in our annual report."

Schwarz explains that with the retirement of **Manfred Heider** at the end of 2017, the VIAC's operations are now run by **Alice Fremuth-Wolf** as secretary general, and **Elisabeth Metzler** as deputy secretary general. He adds: "Alice is one of the steering committee members of the Pledge and involved in this initiative from the very first moment."

Gender diversity in arbitral appointments is an ongoing issue and has spawned the creation of ArbitralWomen's Equal Representation Arbitration Pledge, launched two years ago, in a bid to improve "the profile and representation of women in arbitration" and "to appoint women as arbitrators on an equal opportunity basis".

In a similar vein to ArbitralWomen, The Alliance for Equality in Dispute Resolution, which launched in January this year, encourages the inclusion of mediators, arbitrators, experts and lawyers in arbitral tribunal appointments. **Rashda Rana SC**, an independent arbitrator and senior counsel, told *CDR* at the time: "There is an interconnected web in dispute resolution and we need to make the most of it."

Indeed, in **White & Case** and Queen Mary, University of London's *2018 International Arbitration Survey: The Evolution of International Arbitration*, which was published last week, 60% of respondents believed that inroads had been made on addressing the gender balance of those being appointed to arbitral tribunals.

LET'S TALK MONEY

VIAC's new rules also state that respondents now have the possibility of requesting security for costs, if the respondent shows that the recoverability of a potential claim for costs is, with a sufficient degree of profitability, at risk.

The move has been touted by some practitioners as a significant step forward for the institution, and that it may become relevant when third-party funders are involved.

As for determining arbitrators' fees, the VIAC secretary general has more flexibility to increase the fees on a case-by-case basis, by a maximum of 40%, or to decrease the fees where appropriate.

Similarly, the schedule of fees has also been revised – the registration and administrative fees for low disputes amounts have been staggered and reduced and the fees for very high amounts have slightly increased.

Analysing the rules, Knief notes that "overall, I think the revision of the VIAC Rules is a moderate revision, maintaining the rules' simple and flexible character", and that one of the key changes is certainly the focus on increasing procedural efficiency.

As to whether the rules could affect the outcome of disputes at VIAC, Schwarz notes that the Vienna Rules are intended to give the parties all the tools to customise the best arbitration procedure for their individual case – "the hallmarks of VIAC arbitration are therefore a maximum of party autonomy and arbitrator discretion, grounded in a safe, reliable, tried and tested institutional platform".

"In that sense, the latest revision enlarged the tool kit, without disrupting the continuity that users have come to expect from the VIAC as an institution," he adds.

DIS UPDATES ARBITRAL RULES

VIAC's Central and Eastern Europe region competitor, DIS, also updated its arbitral rules this year, effective on 1 March, replacing the previous 1998 iteration.

At the time, **Heiko Haller** of **Baker McKenzie** told *CDR* that the revision "makes it easier for the tribunal, parties and counsel to have a quick resolution of the dispute" and praised the new rules for still allowing tribunals "certain discretion to how the proceedings can be run".

Robert Hunter, senior counsel at **Osborne Clarke** in Germany, states that DIS' new provisions are "one of the most substantial provisions I've encountered. So it's not just an update of the rules, it really transforms the role of the institution in the administration of DIS proceedings to at least the kind of equivalence of LCIA level".

Among the new provisions is that DIS has established a new body – the Arbitration Council – which ensures arbitration transparency and integrity, decides arbitrator challenges, the number of arbitrators if the parties have not agreed, dispute amount reconsideration requests and the fixing and possible reduction of the arbitrators' fees if the arbitrator has been terminated before making an award.

Referencing the Arbitration Council arbitrator challenges provision, Hunter says that this is "just one of quite a large number of examples where the institution now is taking a much bigger role, which is more in line of what you'd expect [from] a modern arbitration institution".

Time and cost-efficiency by parties and the arbitral tribunal in proceedings is another important focus for the institution, whereby the deadlines for selecting the president and nominating a co-arbitrator have decreased from 30 to 21 days, respondents must file an answer to the request for arbitration within 45 days and the arbitral tribunal must hold a case management conference within 21 days.

Afterwards, the arbitral tribunal must make an award within three months of the last hearing or authorised submission. If this is not met, the fees of one or more arbitrators may be reduced, while alternative dispute resolution methods, such as mediation, will also be discussed between the arbitral tribunal and the parties.

THREE'S NOT A CROWD

Among the new provisions is the inclusion of multi-contract and multi-party arbitration, where claims arising from multiple contracts may be decided in a single arbitration, and claims between two or more parties may also be decided in a single arbitration.

Thomas Lennarz, a partner at **CMS** in Germany, explains that "this is a very difficult concept in international arbitration everywhere, because you normally need the consent of the third parties or of all parties that there is an inclusion or a joinder of a third party".

He adds that DIS is taking "an active approach in conducting the proceedings" by handling many tasks that have previously been given to the tribunal.

It is clear that the overarching themes of VIAC's and DIS' new rules are speed and cost-efficiency – two topics which have been the subject of debate for practitioners globally, and a focus of improvement for the leading arbitral institutions.