2018 In Review: Recent Revisions of Institutional Rules in Europe – Where Do Europe's Arbitral Institutions Now Stand Against Global Competition?

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As worldwide competition amongst arbitral institutions continues, the Europe-based arbitral institutions have, thus far, been able to defend their strong market position. Currently, the International Chamber of Commerce (ICC), with its base in Paris, continues to stand out globally as the most preferred institution by a significant margin (77%). It is followed by the London Court of International Arbitration (LCIA) (51%), and thereafter by the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) by much smaller percentages of 36% and 27% respectively (see Queen Mary University of London, 2018 International Arbitration Survey 2018 for these statistics). In addition to the above, several Europe-based institutions, although not top-ranked, have established significant recognition and enjoy a relatively high number of submitted disputes, for example, the Stockholm Chamber of Commerce (SCC), the Swiss Chambers' Arbitration Institution (SCAI), the Vienna International Arbitral Centre (VIAC) and the German Institution of Arbitration (DIS). Despite this comparatively strong position of the European institutions, it must be noted that the strongest growth in recent years has been accomplished by the Asia-based institution SIAC.

In order to remain relevant, the Europe-based institutions have put significant effort into updating their respective arbitral rules. Especially seeing as users continue to evaluate the efficiency of arbitral rules, the key competitive concern for arbitral institutions has become to provide an increasingly time and cost-efficient body of rules.

Notably, 2018 saw the first full year where the new 2017 arbitration rules of the ICC had been in use. It was also the year in which several national European arbitral institutions, primarily the DIS in Germany and the VIAC in Austria, updated their arbitral rules. For potential parties to arbitration, it is, therefore, useful to consider the institutional changes that recently occurred.

2017 Revision of the ICC Rules

The new ICC Rules, in effect since 1 March 2017, encompassed a number of revisions. As a reaction to the revision of arbitration rules in the various Asian arbitration institutions, the ICC update was also a means to maintain its competitive edge. As such, it introduced measures to increase efficiency such as the reduction of time limits (e.g., Article 23(2) on the time within which to sign the terms of reference), and the new expedited procedure (Article 30).

Looking at the most recent statistics compiled and published by the ICC in their 2018 report, there was a general increase in the number of arbitral proceedings since the enforcement of the new rules. With a view to Europe, a 4.8% growth of North and West European parties to arbitration occurred from 2016 to 2017 occurred. In fact, the ICC set globally new statistical records in the year 2017, approving some 512 awards, appointing or confirming 1,488 arbitrators, and ruling on disputes referred by parties originating from 142 countries (ICC Dispute Resolution Bulletin, 2018 Issue 2).

Beyond this general success observed in the ICC, specific provisions introduced in the 2017 ICC Rules were also positively received. The significant addition of the expedited procedure provisions, for instance, has made way for 84 submissions requesting expedited procedures. Interestingly, although certain issues have been raised by the legal community about violations of party autonomy caused by inconsistencies with the number of arbitrators (see previously on Kluwer Arbitration Blog), this disadvantage appears to be outweighed by the positive factor of efficiency in the general opinion of the users of arbitration. The new ICC rules of 2017, therefore, appear to have added to the success the ICC enjoys as an institution in Europe. Furthermore, as the rules of different institutions have converged due to the competitiveness of the market and the fight for market share,[fn] Taddia, “Feature: International Court of Arbitration: World Service.” Law Society Gazette, 9 April 2018. [/fn] the constant pressure to improve and adapt is as persistent as ever. While the ICC may have been the only major institution with a presence in Europe to reform its arbitration rules in line with industry changes in 2017, other institutions were quick to catch up in 2018.

2018 Revisions of DIS and VIAC Rules

As changes occur within the industries that arbitral institutions deal with, the procedures and systems that the institutions deliver must be continually adapted and reformed in order to stay relevant, efficient and practicable. Therefore, in order to strengthen their market position within Europe, two major European arbitration institutions namely the VIAC (see previously on Kluwer Arbitration Blog) and the DIS (see previously on Kluwer Arbitration Blog) each introduced new rules of arbitration. The new VIAC and DIS Rules entered into force on 1 January 2018 and 1 March 2018 respectively. Although each of the rules and the revisions they make are not identical, they do share certain purposes: making the rules more accessible to a wider variety of potential parties to arbitration, aligning the rules with international standards and optimising efficiency.

More specifically, the new DIS Rules aim to provide a non-bureaucratically administered and flexible arbitration procedure that caters for a large degree of party autonomy. Rather than a simple revision of the existing regulations, the reformed DIS Rules constitute an entirely new set of regulations. To increase procedural efficiency in terms of lower time and cost expenditure, for instance, several

measures were taken. For example, the time limits for completion of certain procedures were shortened (Articles 7, 12, and 37), cost sanctions for delays were introduced (Articles 37 and 33), case management conferences were made mandatory (Articles 27 and Annex 3), and procedure rules regarding the optional expedited proceedings were optimised. Furthermore, taking into account the dangers of contrasting rulings from various tribunals or courts that parties face, the new DIS Rules aim to make the system more amenable to multi-party arbitration (Articles 17-20).

Generally, the new DIS Rules have been welcomed as having met the parties' increasing expectations to be cost and time efficient. However, it has been noted in response to the reform, that while the DIS has amended its rules in line with the international standards, it has maintained certain distinctive characteristics. For instance, the new DIS Rules encourage the arbitrators to promote amicable settlements (Articles 26, 27.4(iii) and 4). This mandate for the arbitrators was deliberately retained and even extended in comparison to the DIS Arbitration Rules of 1998 and reflects the traditional proactive role of domestic judges in jurisdictions like Germany, Switzerland and Austria. Furthermore, while including an expedited procedure like other institutions, under the DIS Rules it is optional and at the parties' disposal rather than being automatically applied with reference to a value threshold. Despite these modernisations, it remains to be seen if DIS is able to attract more international high-level arbitration cases in the future.

Similarly, the new VIAC Rules aim to increase the applicability and effectivity of the rules to modern cases by implementing cost-effective mechanisms. The new VIAC Rules are no longer limited to application in international cases, but are now also relevant to domestic cases, both in arbitration and mediation. Notably, Article 10 explicitly allows for the combination of arbitration and mediation proceedings. Beyond expanding the reach of the rules, other articles delineate time and cost-cutting measures. Articles 16 and 38, for instance, impose an obligation on the arbitrators, parties and party representatives to conduct proceedings in an efficient and cost-effective way. The VIAC Secretary General and arbitral tribunals may take non-compliance into account when making decisions on cost allocation to help to enforce this. Additionally, Article 44 provides that the VIAC Secretary General has the express authority to increase or decrease the arbitrators' fees depending on the facts of the case. To the same end, Annex 3 provides an amended fee schedule where registration and administrative fees were reduced for lower amounts in dispute and increased for high amounts in dispute.

Responses to the VIAC reform have also been generally positive. It has been said that the VIAC has succeeded in bringing its rules "*into line with other German-speaking arbitration institutions*" (see Corporate Disputes Magazine Oct-Dec 2018 issue), as well as with other institutions internationally. In doing so it has equally taken a positive step towards maintaining, or perhaps even increasing, its market share.

Continuous Adaptation and a View to the Future

As arbitration continues to be a dynamic field of law that experiences ongoing change, the institutional rules must, therefore, be continuously adjusted. The adaptability of institutional rules to the users' preferences is also key to the success of the arbitral seat since the conduct of arbitration is more determined by the agreed institutional rules which supersede the, otherwise applicable, national

arbitration law. According to the 2018 first statistics on the ICC's new rules of 2017, the ICC seems to have undergone a successful review of its system. The new VIAC and the DIS Rules were the next to update their systems in response to stay relevant as arbitral systems available in Europe, and their success will equally have to be assessed in the upcoming years.