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VIAC Rules Revision 2021 Part II: The New VIAC Rules of Investment Arbitration and Mediation

Veronika Korom (ESSEC Business School, Paris; Queritius) · Wednesday, July 28th, 2021

The [Vienna International Arbitral Centre](#) (VIAC) has further strengthened its arbitration offering by adopting brand new, stand-alone investment arbitration and mediation rules, the VIAC Rules of Investment Arbitration and Mediation (VRI), which entered into force on 1 July 2021. The VRI apply to disputes involving a State, a State-controlled entity or an intergovernmental organization that arise under a contract, treaty, statute or other instrument. The VRI are based on the well-tryed Vienna Rules for commercial arbitration (which have been [revised](#) with effect of 1 July 2021), but contain certain adjustments to account for the unique features and needs of investment disputes involving the participation of sovereign parties and the consideration of public interest issues and matters of public policy. The VRI are a set of modern, flexible, cost-effective and efficient rules that address some of the major concerns expressed by States in the context of the ICSID Rules Amendment process and the [UNCITRAL Working Group III](#) discussions on ISDS reform. The working group that drafted the new Vienna Investment Rules was chaired by [Claudia Annacker](#) and consisted of representatives of the VIAC Board and Secretariat (in alphabetical order: [Alice Fremuth-Wolf](#), [Günther Horvath](#), [Johanna Kathan-Spath](#), [Dietmar Prager](#), [Lucia Raimanova](#), [Franz Schwarz](#) and [Nathalie Voser](#)).

Some of the key features of the new VRI are presented below:

Jurisdictional requirements (Article 1): Although the VRI are a separate and specialized set of investment arbitration rules similar to the ICSID Convention and Rules, they do not lay down any particular requirements for the submission of disputes for resolution pursuant to the VRI. It is up to the parties to decide whether the VRI are suitable for the resolution of their dispute and if so, to agree their use in a contract, treaty, statute or any other instrument. As a result, there should be less time and cost spent on jurisdictional battles than in the case of ICSID arbitrations.

Joinder and Consolidation (Articles 14 and 15): In the case of contract-based arbitrations, the VRI specifically allow for the joinder of third parties. Unlike other arbitration rules, the VRI do not lay down any particular conditions for or limitations on joinder, but leave it to the tribunal to decide, upon hearing all parties and considering all relevant circumstances, whether a joinder is warranted in a given case. The VRI further provide that the VIAC Board may consolidate two or more proceedings pending before VIAC – irrespective of whether they arise under a contract, treaty, statute or other instrument and whether they involve the same parties, the same legal

relationship or the same arbitration agreement – if the place of arbitration is the same and the parties agree to consolidation or the same arbitrator(s) were appointed. The VRI's provisions on joinder and consolidation thus give tribunals and VIAC the flexibility and discretion needed to resolve complex, multi-party disputes in a fair and (cost-) efficient manner, and offer a response to the concerns arising from multiple proceedings identified by States in the context of the UNCITRAL Working Group III [discussions](#).

Non-disputing party participation (Article 14a para. 1): In case of treaty and statute-based arbitrations, the VRI provide that the tribunal, after considering all relevant circumstances, may allow or invite submissions from non-disputing parties on factual or legal issues that are within the scope of the dispute submitted to arbitration.

Non-disputing treaty party participation (Article 14a para. 2): During the discussions in UNCITRAL Working Group III, States have expressed the need to enhance the consistency, coherence, predictability and correctness of ISDS awards inter alia by ensuring a better State [control](#) over the interpretation of investment treaties. In response, the VRI specifically allow, in cases where the dispute arises under a treaty, the non-disputing treaty party to make written submissions on the interpretation of the treaty. The tribunal may also invite such submissions on its own initiative. A similar provision is also being discussed as part of the ICSID Rules Amendment process.

Early dismissal of frivolous claims (Article 24a): To decrease the length and cost of the arbitration, the VRI allow for the dismissal of frivolous claims at an early stage of the proceedings in an expedited process. A party may apply for early dismissal of a claim, counterclaim, or defense on the grounds that it is manifestly outside the jurisdiction of the tribunal, manifestly inadmissible or manifestly without legal merit. The application must be filed no later than 45 days after the constitution of the tribunal or the respondent's first submission on the merits, whichever is earlier. The tribunal must rule on the application within 60 days of receiving the parties' last written submission on the application.

Third party funding (Article 13a): In the ICSID Rules Amendment process and the UNCITRAL Working Group III, States have identified third party funding (TPF) as a major concern that calls for reform inter alia to [address](#) conflicts of interest of arbitrators and security for costs. To meet these concerns and ensure the independence and impartiality of arbitrators, the VRI require early disclosure of the existence of TPF. In addition, the VRI explicitly provide that the tribunal may, if it deems it necessary, order the disclosure of specific details of the TPF funding arrangement, the TPF's interest in the outcome of the proceedings and whether the TPF has committed to undertake adverse costs liability. The VRI define TPF broadly to include any arrangement – whether for-profit or non-profit – to provide material support to a party to fund the costs of the proceedings, with the sole exception of contingency fee agreements with party representatives.

Efficient and speedy conduct of proceedings: Several provisions of the VRI aim to encourage the efficient and speedy resolution of the dispute. Thus, for example, under the VRI, jurisdictional objections must be raised no later than the first submission on the merits (Article 24(1)), disputes under 10 million EUR are to be decided by a sole arbitrator (Article 17(2)), hearings may be conducted other than in person (Article 30(1)), and the tribunal must render its award no later than 6 months after the last hearing or the last submission of the parties on the merits (Article 32(2)).

Costs and security for costs (Articles 42-44 and 33(6)-(7)): One of the main practical attractions

of arbitrating under the VRI are VIAC's very affordable costs, especially when compared with other arbitral institutions. According to VIAC's cost calculator, the fees charged for a 10 million EUR dispute with a panel of three arbitrators would be a maximum of 322.850,- EUR. Arbitration thus remains a viable option also for smaller investors and lower value disputes, which will likely be an important consideration particularly for parties from the CEE/CIS region. In addition, the VRI explicitly affirm the power of the tribunal to order security for costs. Contrary to tribunals sitting under other rules which have required the showing of exceptional circumstances amounting to bad faith or evidence of the investor's impecuniousness to grant an order for security for costs, a tribunal sitting under the VRI will only require a showing that the "recoverability of a potential claim for costs is, with a sufficient degree of probability, at risk" (NB TPF is not in itself sufficient for a security for costs order under the VIR). Furthermore, if a party fails to comply with a security for costs order, the tribunal may, upon request, suspend in whole or in part, or terminate the proceedings. From the States' perspective, the inability to recover awarded costs has been identified as an **important concern**, therefore, the security for costs provision of the VRI should provide comfort.

Transparency (Article 41): The VRI provide that VIAC may publish certain limited information on the arbitration proceedings as well as anonymized summaries or extracts of decisions and awards. The parties cannot opt out from this provision, but may agree on greater transparency for their proceedings, including by choosing to apply, in the case of treaty-based arbitrations, the UNCITRAL Transparency Rules.

Investment mediation: The VRI contain separate rules for the conduct of mediation of investment disputes as a flexible and cost-effective alternative to arbitration. Disputing parties may employ mediation independently from, or in conjunction with, arbitration. Where a mediation is followed by arbitration (or vica versa), VIAC will charge administrative fees only once. The VRI further provide that the tribunal may at any stage of the proceedings help the parties reach a settlement (Article 28(3)). The VRI thus service the need for effective dispute prevention and mitigation tools and alternative forms of dispute resolution solutions for investor-State disputes **expressed** by States in UNCITRAL Working Group III.

Conclusion:

The new VRI are a modern, cost-efficient alternative for States and State-controlled entities from the CEE/CIS region and elsewhere to resolve their investment disputes by way of arbitration and/or mediation. Some of the States in the region, such as Hungary, Belarus and Kyrgyzstan, have in recent years been rather active in concluding new BITs, and may well decide to include the VRI in their future treaties. The VRI are also a welcome new solution for SME investors and investors who seek to protect lower value investments, including investors from and in the CEE/CIS region.

With the adoption of the VRI, VIAC further strengthens its position as one of the favorite arbitral institutions for parties from the CEE/CIS region and beyond, and the VRI will no doubt quickly become a real competitor to the more traditional rules for the resolution of investment disputes.

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