Kluwer Arbitration Blog

Interviews with Our Editors: A Viennese Flavor for Arbitration with Alice Fremuth-Wolf, Secretary General at VIAC

Kiran Nasir Gore (Associate Editor) (The George Washington University Law School) and Patricia Živkovi? (University of Aberdeen) · Tuesday, April 23rd, 2019

Ms. Fremuth-Wolf, thank you for joining us on the Kluwer Arbitration Blog! We know that spring is a busy time for the arbitration community in Vienna and we are grateful to have the opportunity to share your unique perspective with our readers, particularly as Vienna International Arbitral Centre (VIAC) undertakes important steps to establish itself as a leader for best practices both regionally and globally.

1. ***To start, can you briefly introduce yourself and describe your role and focus at VIAC?***

In 2018, I was appointed Secretary General of VIAC. My current role is to oversee the case management, to represent VIAC at conferences and promote arbitration and mediation as a peaceful means for the resolution of international disputes. One of my personal goals is to promote diversity in arbitration and break-up old structures (if you want to read more on my personal drivers, please see my contribution in Women Pioneers in Arbitration, 2nd ed, p. 65 *et seq*.)

I originally joined VIAC as Deputy Secretary General back in 2012. Prior to that (between 2005 and 2011) I was teaching at the Vienna University, coaching the Viennese Team for the Vis Moot – this was the period when my 3 kids were born, in 2005, 2007 and 2010. Before that, I had been working with major law firms in the field of international arbitration after having passed my bar exam in 2001 and having completed my law studies at the University of Vienna, where I also obtained my JD, and at the London School of Economics, where I earned my LL.M.

2. ***Can you tell us more about VIAC as an institution – what kind of disputes do you most frequently encounter? What industries and sectors are prevailingly covered in VIAC cases? In your opinion, is there certain preference towards regional arbitration institutions when it comes to the nature of the dispute submitted to arbitration?***

VIAC is the premier international arbitration institution in Central and Eastern Europe with a long-standing tradition. It was established by the Austrian Federal Economic Chamber (AFEC) in 1975, and has celebrated its 40th birthday in 2015. Initially, its main purpose was to facilitate trade

between the former Eastern bloc and the West, as a neutral forum for the settlement of disputes arising out of East-West trade.

Since then it has a steadily-increasing caseload from a diverse range of parties with a strong focus on the CEE/SEE-region (a third of our parties stem from this region), but also from Western Europe, the Americas and Asia. We are thus not focusing on a particular type of dispute but rather on a particular region. The disputes handled by us involve a broad variety of topics, post M&A, Energy, commercial contracts, construction etc. (see our statistics for further details).

3. ***Last year VIAC launched new Arbitration and Mediation Rules. What are some of the important new features of the rules and how are these features responsive to your users' needs? In relation specifically to mediation, are there any known efforts in Austria to secure a more efficient enforcement of parties' settlements?***

The VIAC Rules 2018 have three parts: Rules of Arbitration (part I), Rules of Mediation (part II) and Annexes (part III); this means that arbitration and mediation now are on equal footing and we have foreseen incentives for parties to combine proceedings.

The following new features are worth mentioning:

- VIAC now also administers purely domestic cases, implementing the amendment of Section 139 WKG (Article 1 VR and Article 1 VMR). This change was driven by a call from our (Austrian) users to unify all disputes within VIAC and dissolve the Arbitration Courts of the Regional Economic Chambers previously responsible for domestic disputes.
- In the interest of gender diversity, it is explicitly defined that, in practice, the terms in the Rules shall be used in a gender-specific manner (Article 6 VR and Article 2 VMR). This is due to VIAC's commitment to support the ERA Pledge.
- Since 1 January 2018, all new proceedings are administered by VIAC through an electronic case management system; provisions on submission of Statement of Claims and service have been adapted accordingly (Articles 7, 12 and 36 VR and Articles 1 and 3 VMR). This is a move towards completely paperless administration of our disputes.
- Arbitrators and parties, as well as their representatives, shall conduct the proceedings in an efficient and cost-effective manner; this may also be taken into account in determining the arbitrators' fees/costs (Article 16 para 6, Article 28 para 1, Article 38 para 2 VR). This is to increase and enhance efficiency and cost sensitivity in arbitration.
- For the first time, Respondents now have the possibility to request security for costs under certain circumstances (Article 33 paras 6 and 7 VR). This was introduced in order to create clarity on that issue.
- In determining arbitrators' fees, the VIAC Secretary General is more flexible to increase the fees on a case-by-case basis by a maximum total of 40% or, conversely, to decrease the fees where appropriate (Article 44 para 7 and 10 VR). This is to enhance efficiency and to take action where necessary.
- The Model Arbitration Clause and the Model Mediation Clauses have been revised and adapted to new wording (Annex 1) in order to provide our users with a variety of options and escalated dispute resolution clauses.
- Revision of the schedule of fees to take into account the administration of purely domestic disputes: The Registration and Administrative Fees for lower amounts in dispute were staggered

and reduced. At the same time, Administrative Fees for very high amounts in dispute have been slightly increased; still, they remain very moderate in comparison to other institutions.

With respect to mediation, settlement agreements reached in the course of mediation in Austria or within the European Union may be rendered enforceable in the following ways: creation of an enforceable notarial deed or the conclusion of a mediation settlement in court according to Section 433a *ZPO* and/or acc. to Regulation (EC) No 805/2004. These instruments are enforceable not only under the Austrian enforcement act (*EO*), but also in member states of the EU.

Another option is the conduct of Arb-Med-Arb proceedings under the VIAC Rules and to obtain an award on agreed terms to ensure enforceability under the New York Convention.

The new Singapore Convention that regulates the enforcement of international mediation agreements will be signed in August 2019. It will be seen how it will change the game and when Austria will accede to this convention. Settlement agreements that have been recorded and are enforceable as an arbitral award/award on agreed terms will be excluded from the scope of application of the Convention (Art 1 para 3 lit b); for these the New York Convention will remain applicable.

4. ***For decades VIAC (and Vienna by association) has been one of the global centers of arbitration. What are the top three distinguishing features that set it apart from other options for arbitration around the globe, in particular with so many other competing institutions in the region?***

We are a boutique arbitration centre with personable conduct. Namely:

- Flexible & lean rules (no compulsory ToR, scrutiny of award) that allow parties and arbitrators to tailor the proceedings according to their needs;
- Flexible joinder of third parties which makes such joinder possible at any stage of proceedings and in any form (as party, third-party intervener, amicus curiae), to be decided by the arbitral tribunal after hearing all persons involved (Article 14); and
- Conscious decision against emergency arbitration.

5. ***We understand that in Germany there was recently a complaint that some areas of law (namely M&A disputes) are effectively monopolised by arbitration (see, for example, the discussion in this August 2018 interview with Dr. Klaus Peter Berger). Do you think that the popularity of arbitration for dispute resolution has a negative impact on the development of national law and jurisprudence?***

The reasons why parties have turned their backs on state court litigation and resorted to arbitration in some areas (such as M&A) are three-fold: (1) selection of the arbitrators with specialized persons dealing with the disputes; (2) confidential nature of the proceedings; and (3) flexibility of the proceedings including language.

To my opinion, in civil law countries, the law should not be made by judges, but by the parliament. Even if no binding case law exists, Supreme Court judgments still serve as an important guide, as

they are publicly available. So if this is missing because parties shy away from state court litigation, a solution for this dilemma could be that more arbitral awards in this area are made available to the public (see below my response to your Question 7).

6. ***Another pervasive criticism of commercial arbitration involves a perceived lack of transparency because so many parties invoke their right to confidentiality of proceedings and resulting arbitral awards. Do you think there is a clear contradiction? How has VIAC worked to strike a balance between increasing transparency for the arbitration community as a whole, while securing confidentiality and privacy for specific users and their disputes?***

There seems to be an intrinsic tension between transparency and confidentiality. One of the main advantages of commercial arbitration has always been its confidential nature with disputes being settled in a private arena. However, especially in the case of investment arbitration where decisions are being rendered that impact the fate not only of the parties involved but of a larger group of people or even nations, transparency is needed. In commercial arbitration, there is no such subordinate public interest that requires private disputes to be publicly debated. The VIAC Rules contain strict confidentiality provisions for arbitrators, Board members and VIAC's members of the Secretariat ensuring that all information acquired in the course of their duties is kept confidential, while parties are recommended to conclude an explicit confidentiality agreement, either in a separate document or as part of the arbitration agreement.

Following the call for more transparency in the appointment process of institutional arbitration, VIAC has decided to publish the names of arbitrators ("VIAC Arbitral Tribunals"). The list is updated regularly. It provides information on the appointment method, i.e. if the arbitrator has been appointed by the VIAC-Board or nominated by the parties/co-arbitrators and the date when the case file was handed over to the respective arbitrator.

7. ***Is the fact that too few arbitral awards are published a "lack of transparency" problem? Does the process of anonymisation before publication resolve that problem? Are there any "best practices" in this regard?***

Another field of tension between transparency and confidentiality is surely the publication of decisions rendered by arbitral tribunals. In my opinion, the publication of awards in anonymized form resolves that problem as the need of the public is met to be informed on the (legal) outcome of a dispute providing a summary of legally relevant and interesting details while cutting out confidential data and information that are of no avail.

According to the Vienna Rules (Art 41) anonymized summaries or extracts of awards may be published in legal journals or VIAC's own publication unless a party has objected to the publication within 30 days upon service of the award. When VIAC for the first time published its "Selected Arbitral Awards, Vol 1" in 2015, we prepared abstracts for each case reported. Still, as a matter of courtesy, we sought permission from the parties beforehand and were prepared to amend the drafts in accordance with the parties when they felt that the information disclosed could infringe their rights or lead to identify the parties. With this procedure, albeit cumbersome, we ensured that parties felt safe while at the same time nursing the appetite of practitioners to get insights into decided cases and their reasons. This publication is now available on Kluwer

Arbitration. We are planning to publish a second volume in 2020.

Thank you for your time and perspective – we wish you and VIAC continued success!

This interview is part of Kluwer Arbitration Blog's "Interviews with Our Editors" series. Past interviews are available here.

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