

A look at the Vienna Mediation Rules

26/09/2016

Dispute Resolution analysis: The new mediation rules of the Vienna International Arbitration Centre (VIAC) took effect on 1 January 2016. VIAC is the international arbitration court of the Austrian chamber of commerce and is a leading arbitral institution in Central Europe. Ian Meredith and Hendrik Puschmann of K&L Gates reflect on the new rules.

Introduction

VIAC Mediation Rules

The new VIAC Mediation Rules replace the VIAC rules of conciliation and are an entirely new set of rules rather than a modification of existing ones. There is a transitional provision for conciliation agreements under the old VIAC conciliation rules, unless parties to such agreements expressly opt out, disputes to which such an agreement applies will now be automatically covered by the new mediation rules instead (VIAC Mediation Rules, art 14(2)).

The new mediation rules follow a comprehensive revision of VIAC's arbitration rules, which came into force on 1 January 2013 and were discussed in *Arbitration World* in March 2014.

The main provisions of the rules

The rules adopt a broad definition of mediation, they apply to any 'alternative dispute resolution method chosen by the parties' where 'one or more neutral persons [...] support the parties in the resolution of their dispute' (VIAC Mediation Rules, art 2).

The provisions for the procedure of the mediation conform to international standards and are uncontroversial:

- proceedings are commenced by filing a request for mediation (VIAC Mediation Rules, art 3), which is required to set out the parties' contact details, a short description of the matter, and any agreements or proposals as to the format (number of mediators, language etc) of the proceedings
- VIAC will assist the parties with identifying and appointing a mediator (VIAC Mediation Rules, art 7) or, if the parties fail to reach an agreement, will appoint the mediator for them
- once a mediator is in place, he or she takes over the conduct of the proceedings, though 'guided by the wishes of the parties' (VIAC Mediation Rules, art 9)
- the proceedings can be terminated by any party at any time, and the mediator can terminate them as well if, in his or her opinion, they will not resolve the dispute (VIAC Mediation Rules, art 11)

The mediator has a number of duties to the parties, including:

- full disclosure of any potential conflicts prior to his or her appointment (VIAC Mediation Rules, art 7(3))
- the duty to start his or her work promptly on being appointed (VIAC Mediation Rules, art 9(2))
- the duty to assist the parties in resolving their dispute (VIAC Mediation Rules, art 9(2))
- the duty to keep confidential any information received from one party vis-à-vis the other party or parties (VIAC Mediation Rules, art 9(6))—the rules moreover safeguard the confidential and privileged nature of the proceedings as a whole and any documents and information exchanged in their course (VIAC Mediation Rules, arts 9(5) and (12))

In terms of fees and costs, VIAC charges a registration fee of €1,500 (VIAC Mediation Rules, art 4). VIAC will then also handle the advance on the mediation costs and administer the costs aspects of the mediation throughout (VIAC Mediation Rules, art 8). In so doing, VIAC charges an administrative fee by reference to the value in dispute amounting to half of the fee that would be payable for a VIAC arbitration. VIAC will waive its registration fee for any ensuing VIAC arbitration, if commenced before, during or immediately after the mediation, and will also deduct any administrative fees charged for the mediation from its arbitration handling fees.

The mediator's fees are set by the VIAC secretariat in consultation with the mediator and parties (VIAC Mediation Rules, art 8(8)). A recent article by the deputy secretary-general of VIAC and a member of the working group charged with drawing up the mediation rules indicates that the secretariat will consider hourly fees between €300 and €500 as adequate.

Comments

With its old conciliation rules, in place since its foundation in 1975, VIAC was one of the first institutions to offer a 'one-stop shop' for both arbitration and alternative dispute resolution (ADR) proceedings. Since then, this has become a global trend. ADR—and mediation in particular—is an increasingly common step in the dispute resolution process. Parties to an arbitration agreement often prefer to attempt a conciliatory resolution of their dispute under the auspices of the same institution they have already chosen to administer any arbitration proceedings. Most of the major institutions—such as the International Court of Arbitration, the London Court of International Arbitration, the Hong Kong International Arbitration Centre, or the International Centre for Dispute Resolution—now have a set of mediation rules. This trend looks set to continue.

So VIAC's overhaul of its ADR framework is timely. The old conciliation rules had only changed minimally since coming into force. The new mediation rules are fully in line with current global best practices regarding mediation. They are fairly brief and light on detail, especially regarding procedure. They do not, for instance, set time limits or outline the required contents of any mediation statements or make any statements about settlement agreements, unlike some other sets of rules. Nor do they contain any provisions for challenging mediators. In light of the consensual nature of mediation proceedings (which any party can end at any time), this restraint is to be welcomed.

VIAC's mediation fees, moreover, are relatively modest. The fact that they can to some degree be set off against the fees in any subsequent VIAC arbitration is an innovative step. VIAC will also work towards keeping the mediator's fees at a reasonable level.

In line with its approach to arbitration, VIAC is likely to allow for maximum party autonomy in its administration of the rules. It is, however, capable of refusing to administer proceedings that are 'incompatible' with the mediation rules (see VIAC Mediation Rules, art. 1(2)). It remains to be seen what exactly this means. VIAC has already indicated, however, that parties should be particularly careful when agreeing derogations from 'core administrative provisions' such as the scope of the rules (VIAC Mediation Rules, arts 1 and 14), the commencement and termination of proceedings (VIAC Mediation Rules, arts 3 and 11) and costs (VIAC Mediation Rules, arts 4 and 8). VIAC maintains facilities in Vienna where proceedings can take place. It is not, however, limited to administering mediations taking place there (or indeed within Austria). The secretariat has made it known that it is available to assist the parties beyond

the mere administration of proceedings. In particular, the secretariat can provide assistance with drafting mediation agreements.

VIAC plans to publish a practitioners' handbook on the mediation rules, modelled along the line of its existing handbook of the VIAC arbitration rules, ie offering a detailed section-by-section commentary. Such commentaries are invariably a useful resource for both party representatives and arbitrators or mediators and are rarer when it comes to mediation rules, so this initiative is to be welcomed.

Ian Meredith is a partner of K&L Gates LLP and co-ordinates the firm's global arbitration practice. Based in London, Ian has some 30 years of experience in international commercial and investment disputes, having acted as both lead counsel and arbitrator in a large number of complex cases around the world.

Hendrik Puschmann is a senior associate with K&L Gates LLP, based in London and Frankfurt. He is also a fellow of Clare Hall in the University of Cambridge and visiting lecturer in international law and commerce at Johannes Kepler Universität Linz (Austria).

The authors publish regularly with LexisNexis on a wide range of dispute resolution topics.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.