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Golden jubilee of VIAC: amendments to the Vienna Rules, reaction to the OGH case law, statistics and arbitration trends

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Introduction

The year 2025 will be a milestone for the Austrian arbitration community as the leading arbitration institution in Austria, the Vienna International Arbitration Centre (hereinafter VIAC), celebrates its 50th anniversary.

It is highly symbolic that exactly this year the new version of the Vienna Rules of Arbitration (hereinafter Vienna Rules) and the Vienna Rules of Mediation (hereinafter Vienna Mediation Rules) entered into force on January 1, and shall apply to all proceedings commenced after December 31, 2024.

In this article, we will address the key amendments to the Vienna Rules, evaluate current caseload trends and statistics from VIAC Annual Report 2024, and highlight the recent decisions of the Austrian Supreme Court (hereinafter OGH) regarding commercial arbitration.

Amendments to the Vienna Rules

Supplementary Rules on Corporate Disputes as the Swarovski case aftermath

On April 3, 2024, the OGH rendered a milestone decision **No. 18 OCg 3/22y** (hereinafter Swarovski case), which addressed concerns of arbitrability of shareholders disputes related to defects in resolutions of partnerships in the light of sufficient participation and involvement of all partners. The OGH declared that such disputes are not objectively arbitrable if, in the arbitration agreement (or

arbitration clause incorporated into the partnership agreement), the involvement of all partners in arising disputes is not expressly proclaimed.[1]

More to the point, minimum requirements for arbitrability of aforementioned disputes include that every shareholder must be part of the arbitration agreement, be informed of the initiation and progress of the arbitration proceedings, and thus be enabled to join them at least as a co-intervenor. All shareholders must be able to participate in the selection and appointment of the arbitrators unless a neutral body makes the selection. If these conditions are not met, the award will be set aside.[2]

In response to Swarovski case, VIAC established a working group to amend the Vienna Rules and the Vienna Mediation Rules, which were last updated in 2021.[3] Amendments came to the effect on January 1, 2025.

One of the substantial changes in the new version of the Vienna Rules was the introduction of Annex **7 Supplementary Rules on Corporate Disputes** (hereinafter Annex 7) as a reaction to the aforementioned decision of the OGH.

Supplementary Rules on Corporate Disputes aim to secure the enforceability of an arbitral award by guaranteeing the participation of all parties concerned in arbitration related to corporate disputes by an arbitration clause that can be incorporated into a company's articles of association.

For instance, according to Article 2 (1) Annex 7 of the Vienna Rules, the statement of claim should mention all affected entities to whom the binding effects of the arbitral award shall extend by virtue of the nature of the legal relationship in dispute or under statutory provisions.

Pursuant to Article 4 (2) Annex 7 of the Vienna Rules, affected entities can submit declaration of join within 30 days of receipt of the statement of claim and may join the proceeding as a party on the side of the claimant or the respondent. If a named affected entity does not submit its declaration to join within the set time period, it is deemed to have waived the right to participate in the constitution of the arbitral tribunal.

However, the named affected entity retains the option to join the proceeding as an intervening party in accordance with Article 5 Annex 7 of the Vienna Rules. In case of disputes with a sole arbitrator, the parties and the joined affected entities shall jointly nominate a sole arbitrator within 30 days after receiving the Secretary General's request. If such nomination is not made within this time period, the sole arbitrator shall be appointed by the Board. If the dispute must be resolved by a panel of arbitrators, the parties and the joined affected entities on claimant's and respondent's side shall each jointly nominate an arbitrator. The Secretary General shall request parties concerned to jointly nominate an arbitrator within 30 days after receiving the request. If a joint arbitrator is not nominated within this time period the Board shall appoint the arbitrator for the defaulting party/parties in accordance with Article 18 para. 4 of the Vienna Rules.

The Supplementary Rules on Corporate Disputes allow proceedings to be concentrated through consolidation. As an example, according to Article 7 Annex 7 of the Vienna Rules, two or more proceedings concerning the same resolution shall be consolidated by the Board at the request of a party, a joined affected entity or at the proposal of the Secretary General, applying Article 15 of the Vienna Rules mutatis mutandis. The consolidation is also admissible even if not all parties and joined affected entities agree.

Another vital feature of Annex 7 of the Vienna Rules is the notification procedure. As the OGH stated that all shareholders should be informed about arbitral proceedings, Article 8 Annex 7 of the Vienna Rules explicitly regulates the notification procedure about the status of the arbitral proceedings. For instance, according to Article 8 (1) Annex 7 of the Vienna Rules, the arbitral tribunal has a duty to inform the named affected entities about the status of the proceeding by transmitting the parties' submissions as well as the arbitral tribunals' decisions and orders. Furthermore, the arbitral tribunal may inform affected entities about other aspects of the case file if they have filed such a request and if the arbitral tribunal considers that this information may be relevant for the affected entities to exercise their right to participate in the proceedings as intervening parties

Finally, the Vienna Rules also provide the new text of the model arbitration clause in Annex 1 that parties could incorporate into their articles of association. The fundamental element of this model clause is that the binding effect of the arbitral award must be extended to all shareholders or the company itself, even if they are not named as parties to the arbitral proceedings.

In essence, by adopting amendments to its rules, VIAC demonstrates a rapid and distinguished reaction to the recent decision of the OGH in the Swarovski case, which significantly changed the landscape of arbitration agreements for shareholder disputes in Austria.

Revisions of the Vienna Mediation Rules

Interaction between mediation proceedings and arbitration proceedings has always been a matter of controversy. As an illustration, some multi-tiered dispute resolution (MTDR) clauses can

be drafted by the parties in such a vagueness way that the issue of non-compliance with prerequisites such as negotiation, conciliation, or mediation procedures before initiation of arbitral proceedings or legal action in state courts may arise and lead in some cases at least to the inadmissibility of the claim.
The consequences of non-compliance with condition precedent expressed in MTDR clauses vary widely in different arbitral tribunals awards and national court judgments.[4] Illustratively, the OGH expresses its position regarding the conciliation clause in recent decision **No. 4 Ob 33/24**.[5] The OGH stated that reference to the conciliation procedure in the arbitration agreement or dispute resolution clause does not prescribe a mandatory attempt at conciliation procedure, which would be a prerequisite for the admissibility of claim.

To provide certainty to the parties of the disputes, VIAC amends the Vienna Mediation Rules regarding parallel mediation and arbitration proceedings and modernizes its model dispute resolution clauses.

The main amendment in the new version of the Vienna Mediation Rules is the detailed regulation of the parties' right to initiate arbitration or any other proceedings regarding the same dispute in which a mediation procedure has been initiated or is ongoing. The previous version of Article 10 of the Vienna Mediation Rules gave the parties an unconditional right to initiate arbitration, legal, or any other proceedings regardless of ongoing mediation under the Vienna Mediation Rules.

The new version of Article 10 adds the clause "In the absence of a deviating agreement between the parties" meaning that the parties may waive their right to resort to arbitration or national courts in favor of mediation. However, this waiver is not total and is limited by

two conditions outlined in Article 10 (2) 2.5 of the Vienna Mediation Rules:

- time limit of three months during which the mediation has not brought the parties to an amicable resolution of the dispute;
- termination of the mediation agreement.

Moreover, the text of the mediation clauses was simplified. Currently, VIAC offers two mediation clauses: the first option for the incorporation into a contract and the second option for the ongoing dispute. Notably, VIAC creates detailed supplementary terms for the mediation clauses that the parties can adopt and specify the number of arbitrators, location of the mediation sessions, language of mediation, appointment procedure of mediation, qualifications of mediator, reference to the final solution of the dispute in arbitration and exclusion clause of the parallel proceedings for the specific period of time.

Thus, it is evident that VIAC enhances its mediation rules to avoid uncertainty when mediation proceedings intersect with arbitration proceedings and to increase the popularity of mediation in general.

New fees structure to promote cost efficiency

The previous version of Annex 3 of the Vienna Rules does not contain a specific fee structure for mediation proceedings. The schedule of fees was applied for both arbitral and mediation proceedings. In the new version of the Vienna Rules 2025, the schedule of fees is split between mediation and arbitral proceedings.

Firstly, VIAC reduced the registration fee for mediation proceedings from € 1500 to a fixed rate of € 500

Secondly, VIAC substantially lowers its administrative fees regarding mediation proceedings, setting a maximum amount of fees no more than € 10 000. Currently, for a dispute equal to € 500 000, the administrative fee will cost € 2 000, for a dispute equal from € 500 001 to € 5 000 000, the administrative fee will cost € 5 000, and for a dispute over € 5 000 001, the administrative fee will cost € 10 000, which is the maximum.

Additionally, in the amended version of the Vienna Mediation Rules under Article 8 (5), the Secretary General may deviate from the parties' determination in fixing the amount in dispute if the parties have clearly undervalued it or assigned no value to it.

VIAC's new fee structure will probably increase the popularity of mediation proceedings in Austria under VIAC administration.

Key trends of the commercial arbitration in Austria

The OGH case law in arbitration-related disputes

During the previous year, the OGH rendered several notable decisions (in addition to the already aforementioned cases) in the context of commercial arbitration that should be addressed in detail.

In decision **No. 4 Ob 46/24d** dated June 25, 2024, the OGH expressed its position on the possibility of the state court declaring the arbitration agreement valid.[6] The OGH decided to hear the case because, since the entry into force of the Austrian Arbitration Act, there had been no case law on the level of the Supreme Court on the

question of whether an action could be brought before the ordinary courts to determine the existence or non-existence of a valid arbitration agreement.

Despite the claimant's arguments, the OGH strictly stated that the legislature's intention back in time was to abolish state courts' declaratory actions regarding the validity of arbitration agreements. Furthermore, this approach was approved in legal doctrine. Due to these facts, an action to declare the existence or non-existence of an arbitration agreement is inadmissible before state court.

In another milestone decision **No. 18 ONc 1/24b** dated August 6, 2024, the OGH provided legal assessment on the interpretation of the arbitration agreement concluded between shareholders of the limited liability company.[7] This dispute concerns repayment claims of financial contributions, compensation for the value of shares, payment of management fees, and compensation for the retained profit derived from the claimants' decision to leave the limited liability company. According to the arbitration clause, potential disputes should be resolved by an ad-hoc arbitration tribunal consisting of three adjudicators. The claimants decided to initiate arbitral proceedings, appoint an arbitrator, and request respondents to act accordingly. Nevertheless, respondents rejected the request to nominate an arbitrator and stated that an existing arbitration clause would not cover the dispute.

The OGH ruled that unclear provisions or provisions that allow for multiple interpretations should be interpreted reasonably and equitably so that their application in the individual case produces useful and reasonable results. If the wording of the clause allows for two equivalent interpretations, preference shall be given to the interpretation that ensures the arbitration clause's validity. Finally, the OGH declared that these particular claims should be covered by

the arbitration clause even if they were not expressly stated in the wording of the clause.

Finally, in decision **No. 18 OCg 1/24g** dated October 17, 2024, the OGH rejected an application of the claimant for setting aside an arbitral award, but provided a comprehensive overview of the setting aside procedure under section 611 of the Austrian Code of Civil Procedure (hereinafter ACCP) and yet again confirmed the very high threshold for annulment of the arbitral award on the grounds of violation of "substantive" public policy (section 611 (2) 8 ACCP), "procedural" public policy (section 611 (2) 5 ACCP), and right to be heard (section 611 (2) 2 ACCP), which was not fulfilled in this case.[8]

In a nutshell, the increase of arbitration-related decisions rendered by the OGH in 2024 and the content of these decisions undoubtedly enhance Austria's position as a pro-arbitration forum.

VIAC Annual Report 2024: caseload statistics and trends

In accordance with VIAC Annual Report 2024, the following caseload statistics and trends in commercial arbitration in Austria should be noted:

- the number of pending cases (71) remained high and did not decrease in comparison with
- approximately 50% of the disputes ranging from € 14 000 to € 500 000, while the highest amount of a single dispute is equal to € 40 000 000;
- 41% of all parties came from the CEE and SEE region, while the percentage of parties from Austria amounted to 23%;

- approximately 40 % of arbitrators are Austrian citizens, while 38% of arbitrators are nationals from CEE/SEE countries;
- Austrian law is designated as the governing law in 40% of arbitration agreements, while the English language remains dominant in 67% of cases;
- the average duration of proceedings in cases closed in 2024 is equal to 12 months.[9]

However, VIAC has observed a decline in expedited proceedings over the past years. As of 31 December 2024, only 10% of VIAC cases were conducted as expedited proceedings.

Furthermore, pursuant to the VIAC Annual Report 2024, the most common category of disputes was engineering and technology (33%), followed by investments (11%) and wholesale and retail trade (11%), while energy and resources accounted for 9%, construction and infrastructure represented 7% and property and real estate 4% of cases.

Aforementioned statistics proved that VIAC remained the leading international arbitration institution in the CEE/SEE region, which is constantly evolving and growing.

Conclusion

The VIAC's golden jubilee in 2025 will be an outstanding experience for the arbitration community. Amendments to the Vienna Rules and the OGH case law will strengthen Austria position as an arbitration-friendly jurisdiction. At the same time, notable events such as the VIAC CAN Congress, Vienna Arbitration Days, VIAC and GAR Live in

Vienna will make this year special for international arbitration practitioners.

Ressources

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2. See para. 78 of the OGH Docket No. 18 OCg 3/22y, April 3, 2024.
3. See VIAC statement on the OGH Docket No. 18 OCg 3/22y, April 3, 2024 Available at: https://www.viac.eu/de/news/austrian-supreme-court-decision-prompts-viac-to-amend-vienna-rules-for-arbitration-agreements
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8. The OGH Docket No.18 OCg 1/24g dated October 17, 2024 Full text in German Available at: https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20241017_OGH0002_018OCG00001_24G0000_000/JJT_20241017_OGH0002_018OCG00001_24G0000_000.pdf
9. For a more detailed assessment of the VIAC statistics see, VIAC Annual Report 2024. Available at: www.viac.eu/images/documents/VIAC_Annual_Report_2024-komprimiert.pdf

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